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Media Law & Ethics Course Reader 2010-2011

US First Amendment and Free Speech

1. US Supreme Court Ruling in United States v Stevens, 20th April 2010. Congressional statute banning 'commercial creation, sale, or possession of certain depictions of animal cruelty' ruled unconstitutional in relation to First Amendment: 'Held: Section §48 is substantially overbroad, and therefore invalid under the First Amendment.' Pages 1 to 28. Public Domain.

Privacy

2. Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions, Gavin Phillipson, [2009] 1 *Journal of Media Law* 73–96, Oxford: Hart Publishing. 24 pages.

3. Ruling by Mr Justice Bean at the Central Criminal Court on restrictions relating to trial of Jon Venables for child pornography offences. 30th July 2010. Pages 1 to 12. Public Domain.

4. Maxine Carr v news Group Newspapers Limited & Others, Judgment of Mr. Justice Eady, [2005] EWHC 971 (QB) Smith Bernal Wordwave Ltd, London EC4A 2AG, Pages 1-3

5. 'Divisional Court; Press Freedom, Injunctions Binding the World' by Paul Dougan, *Journal of Criminal Law*, 2005, Volume 69, August, JoCL 69 (287) (4) Pages 1-3

6. 'The Defence of Public Interest and the Intrusion of Privacy: Journalists and the Public', by David E. Morrison and Michael Svennevig, *Journalism*, Sage Publications, Vol. 8(1): 44-65 DOI: 10.11.77/1464884907072420, Pages 44-65.

Protection of Sources

7. 'Is Your Source Ever Really Safe?' by Tim Crook, *British Journalism Review*, Vol. 14, No. 4, 2003, pages 7-12, Pages in Reader 1-4

8. 'When A Journalist Must Tell' by Nick Martin-Clark, *British Journalism Review*, Vol. 14, No. 2, 2003, Pages 35-39

9. 'Protection of Journalists' Sources by Tim Gopsill, National Union of Journalists, May 2003, Pages 1-4

10. 'Journalists and Their Sources: Lesson from Anthropology' by Isobel Awad, *Journalism Studies*, Vol. 7, No 6, 2006, Taylor & Francis, Pages 922-939

Media, War and Human Rights

11. 'War, "incendiary media" and international human rights law by John Nguyet Erni
Media Culture Society © 2009 SAGE Publications (Los Angeles, London, New Delhi and Singapore), Vol. 31(6): 867–886 [ISSN: 0163-4437 DOI: 10.1177/0163443709343792]

12. 'Human writes: The Media Role in War Propaganda' by Liz Harrop, *Ethical Space, The International Journal of Communication Ethics*, Vo. 2, No.3, 2005, Pages 15-21.

Media Regulation

13. Jon Guant and Liberty v Ofcom. High Court ruling 13th July 2010. 14 pages. Public Domain.

14. 'Media Self-regulation' by Geoffrey Robertson & Andrew Nicol in *Media Law* (5th Revised Edition, 2008) Harmondsworth: Penguin, Pages 757-796.

15. 'The Press Complaints Commission: A Study of ten years of adjudications on press complaints' by Chris Frost, *Journalism Studies*, Volume 5, Number 1, Taylor & Francis, 2004, Pages 101-114

Free Press/Fair Trials

16. U.S. Supreme Court, *Sheppard v. Maxwell*, 384 U.S. 333 (1966), Justice Clarke, Public Domain source, www.learn.gold.ac.uk, Pages 44-65

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* STEVENS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08–769. Argued October 6, 2009—Decided April 20, 2010

Congress enacted 18 U. S. C. §48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute addresses only *portrayals* of harmful acts, not the underlying conduct. It applies to any visual or auditory depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place," §48(c)(1). Another clause exempts depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." §48(b). The legislative background of §48 focused primarily on "crush videos," which feature the torture and killing of helpless animals and are said to appeal to persons with a specific sexual fetish. Respondent Stevens was indicted under §48 for selling videos depicting dogfighting. He moved to dismiss, arguing that §48 is facially invalid under the First Amendment. The District Court denied his motion, and Stevens was convicted. The Third Circuit vacated the conviction and declared §48 facially unconstitutional as a content-based regulation of protected speech.

Held: Section §48 is substantially overbroad, and therefore invalid under the First Amendment. Pp. 5–20.

(a) Depictions of animal cruelty are not, as a class, categorically unprotected by the First Amendment. Because §48 explicitly regulates expression based on content, it is " 'presumptively invalid,' . . . and the Government bears the burden to rebut that presumption." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817. Since its enactment, the First Amendment has permitted restrictions on a few historic categories of speech—including obscenity, defamation, fraud, incitement, and speech integral to criminal con-

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duct—that "have never been thought to raise any Constitutional problem," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572. Depictions of animal cruelty should not be added to that list. While the prohibition of animal cruelty has a long history in American law, there is no evidence of a similar tradition prohibiting *depictions* of such cruelty. The Government's proposed test would broadly balance the value of the speech against its societal costs to determine whether the First Amendment even applies. But the First Amendment's free speech guarantee does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. *New York* v. *Ferber*, 458 U. S. 747, distinguished. Pp. 5–9.

(b) Stevens's facial challenge succeeds under existing doctrine. Pp. 9–20.

(1) In the First Amendment context, a law may be invalidated as overbroad if "a 'substantial number' of its applications are unconstitutional, '"judged in relation to the statute's plainly legitimate sweep."'" *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449, n. 6. Stevens claims that common depictions of ordinary and lawful activities constitute the vast majority of materials subject to §48. The Government does not defend such applications, but contends that the statute is narrowly limited to specific types of extreme material. Section 48's constitutionality thus turns on how broadly it is construed. Pp. 9–10.

(2) Section 48 creates a criminal prohibition of alarming breadth. The statute's definition of a "depiction of animal cruelty" does not even require that the depicted conduct be cruel. While the words "maimed, mutilated, [and] tortured" convey cruelty, "wounded" and "killed" do not. Those words have little ambiguity and should be read according to their ordinary meaning. Section 48 does require that the depicted conduct be "illegal," but many federal and state laws concerning the proper treatment of animals are not designed to guard against animal cruelty. For example, endangered species protections restrict even the humane wounding or killing of animals. The statute draws no distinction based on the reason the conduct is made illegal.

Moreover, §48 applies to any depiction of conduct that is illegal in the State in which the depiction is created, sold, or possessed, "regardless of whether the . . . wounding . . . or killing took place" there, §48(c)(1). Depictions of entirely lawful conduct may run afoul of the ban if those depictions later find their way into States where the same conduct is unlawful. This greatly expands §48's scope, because views about animal cruelty and regulations having no connection to

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cruelty vary widely from place to place. Hunting is unlawful in the District of Columbia, for example, but there is an enormous national market for hunting-related depictions, greatly exceeding the demand for crush videos or animal fighting depictions. Because the statute allows each jurisdiction to export its laws to the rest of the country, §48(a) applies to any magazine or video depicting lawful hunting that is sold in the Nation's Capital. Those seeking to comply with the law face a bewildering maze of regulations from at least 56 separate jurisdictions. Pp. 11–15.

(3) Limiting §48's reach to crush videos and depictions of animal fighting or other extreme cruelty, as the Government suggests, requires an unrealistically broad reading of the statute's exceptions clause. The statute only exempts material with "serious" value, and "serious" must be taken seriously. The excepted speech must also fall within one of §48(b)'s enumerated categories. Much speech does not. For example, most hunting depictions are not obviously instructional in nature. The exceptions clause simply has no adequate reading that results in the statute's banning only the depictions the Government would like to ban.

Although the language of §48(b) is drawn from the Court's decision in *Miller* v. *California*, 413 U. S. 15, the exceptions clause does not answer every First Amendment objection. Under *Miller*, "serious" value shields depictions of sex from regulation as obscenity. But *Miller* did not determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. Even "'wholly neutral futilities . . . come under the protection of free speech.'" *Cohen* v. *California*, 403 U. S. 15, 25. The First Amendment presumptively extends to many forms of speech that do not qualify for §48(b)'s serious-value exception, but nonetheless fall within §48(c)'s broad reach. Pp. 15–17.

(4) Despite the Government's assurance that it will apply §48 to reach only "extreme" cruelty, this Court will not uphold an unconstitutional statute merely because the Government promises to use it responsibly. Nor can the Court construe this statutory language to avoid constitutional doubt. A limiting construction can be imposed only if the statute "is 'readily susceptible' to such a construction," *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 884. To read §48 as the Government desires requires rewriting, not just reinterpretation. Pp. 18–19.

(5) This construction of §48 decides the constitutional question. The Government makes no effort to defend §48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the

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ban on such speech would satisfy the proper level of scrutiny. But the Government nowhere extends these arguments to other depictions, such as hunting magazines and videos, that are presumptively protected by the First Amendment but that remain subject to §48. Nor does the Government seriously contest that these presumptively impermissible applications of §48 far outnumber any permissible ones. The Court therefore does not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. Section 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment. Pp. 19–20.

533 F. 3d 218, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 08–769

UNITED STATES, PETITIONER *v.* ROBERT J. STEVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[April 20, 2010]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress enacted 18 U. S. C. §48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.

I

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty," if done "for commercial gain" in interstate or foreign commerce. §48(a).[1] A depiction of "animal cruelty" is defined as one

[1] The statute reads in full:

"§48. Depiction of animal cruelty

"(a) CREATION, SALE, OR POSSESSION.—Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5

"in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." §48(c)(1). In what is referred to as the "exceptions clause," the law exempts from prohibition any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." §48(b).

The legislative background of §48 focused primarily on the interstate market for "crush videos." According to the House Committee Report on the bill, such videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. H. R. Rep. No. 106–397, p. 2 (1999) (hereinafter H. R. Rep.). Crush videos often depict women slowly crushing animals to death "with their bare feet or while wearing high heeled shoes," sometimes while "talking to the animals in a kind of dominatrix patter" over "[t]he cries and squeals of the animals, obviously in great pain." *Ibid.* Apparently these depictions "appeal to persons with a very specific sexual

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years, or both.

"(b) EXCEPTION.—Subsection (a) does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.

"(c) DEFINITIONS.—In this section—

"(1) the term 'depiction of animal cruelty' means any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State; and

"(2) the term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States."

fetish who find them sexually arousing or otherwise exciting." *Id.*, at 2–3. The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. See Brief for United States 25, n. 7 (listing statutes). But crush videos rarely disclose the participants' identities, inhibiting prosecution of the underlying conduct. See H. R. Rep., at 3; accord, Brief for State of Florida et al. as *Amici Curiae* 11.

This case, however, involves an application of §48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, see Brief for United States 26, n. 8 (listing statutes), and has been restricted by federal law since 1976. Animal Welfare Act Amendments of 1976, §17, 90 Stat. 421, 7 U. S. C. §2156. Respondent Robert J. Stevens ran a business, "Dogs of Velvet and Steel," and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960's and 1970's.[2] A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a "gruesome" scene of a pit bull attacking a domestic farm pig. 533 F. 3d 218, 221 (CA3 2008) (en banc). On the basis of these videos, Stevens was indicted on three counts of violating §48.

Stevens moved to dismiss the indictment, arguing that §48 is facially invalid under the First Amendment. The

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[2]The Government contends that these dogfights were unlawful at the time they occurred, while Stevens disputes the assertion. Reply Brief for United States 25, n. 14 (hereinafter Reply Brief); Brief for Respondent 44, n. 18.

District Court denied the motion. It held that the depictions subject to §48, like obscenity or child pornography, are categorically unprotected by the First Amendment. 2:04–cr–00051–ANB (WD Pa., Nov. 10, 2004), App. to Pet. for Cert. 65a–71a. It went on to hold that §48 is not substantially overbroad, because the exceptions clause sufficiently narrows the statute to constitutional applications. *Id.*, at 71a–75a. The jury convicted Stevens on all counts, and the District Court sentenced him to three concurrent sentences of 37 months' imprisonment, followed by three years of supervised release. App. 37.

The en banc Third Circuit, over a three-judge dissent, declared §48 facially unconstitutional and vacated Stevens's conviction. 533 F. 3d 218. The Court of Appeals first held that §48 regulates speech that is protected by the First Amendment. The Court declined to recognize a new category of unprotected speech for depictions of animal cruelty, *id.*, at 224, and n. 6, and rejected the Government's analogy between animal cruelty depictions and child pornography, *id.*, at 224–232.

The Court of Appeals then held that §48 could not survive strict scrutiny as a content-based regulation of protected speech. *Id.*, at 232. It found that the statute lacked a compelling government interest and was neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so. *Id.*, at 232–235. It therefore held §48 facially invalid.

In an extended footnote, the Third Circuit noted that §48 "might also be unconstitutionally overbroad," because it "potentially covers a great deal of constitutionally protected speech" and "sweeps [too] widely" to be limited only by prosecutorial discretion. *Id.*, at 235, n. 16. But the Court of Appeals declined to rest its analysis on this ground.

We granted certiorari. 556 U. S. ___ (2009).

II

The Government's primary submission is that §48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (internal quotation marks omitted). Section 48 explicitly regulates expression based on content: The statute restricts "visual [and] auditory depiction[s]," such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, §48 is "'presumptively invalid,' and the Government bears the burden to rebut that presumption." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817 (2000) (quoting *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992); citation omitted).

"From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *Id.*, at 382–383. These "historic and traditional categories long familiar to the bar," *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 127 (1991) (KENNEDY, J., concurring in judgment)—including obscenity, *Roth* v. *United States*, 354 U. S. 476, 483 (1957), defamation, *Beauharnais* v. *Illinois*, 343 U. S. 250, 254–255 (1952), fraud, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976), incitement, *Brandenburg* v. *Ohio*, 395 U. S. 444, 447–449

(1969) (*per curiam*), and speech integral to criminal conduct, *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949)—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942).

The Government argues that "depictions of animal cruelty" should be added to the list. It contends that depictions of "illegal acts of animal cruelty" that are "made, sold, or possessed for commercial gain" necessarily "lack expressive value," and may accordingly "be regulated as *unprotected* speech." Brief for United States 10 (emphasis added). The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether—that they fall into a "'First Amendment Free Zone.'" *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 574 (1987).

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. Reply Brief 12, n. 8; see, *e.g.*, The Body of Liberties §92 (Mass. Bay Colony 1641), reprinted in American Historical Documents 1000–1904, 43 Harvard Classics 66, 79 (C. Eliot ed. 1910) ("No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use"). But we are unaware of any similar tradition excluding *depictions* of animal cruelty from "the freedom of speech" codified in the First Amendment, and the Government points us to none.

The Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," Reply Brief 12, n. 8, and that categories of speech may be exempted from

the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's "'legislative judgment that . . . depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection,'" Brief for United States 23 (quoting 533 F. 3d, at 243 (Cowen, J., dissenting)), and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Brief for United States 8; see also *id.*, at 12.

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure." *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803).

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being "'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.'" *R. A. V.*, *supra*, at 383 (quoting *Chaplinsky*, *supra*, at 572). In *New York* v. *Ferber*, 458 U. S.

747 (1982), we noted that within these categories of unprotected speech, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required," because "the balance of competing interests is clearly struck," *id.*, at 763–764. The Government derives its proposed test from these descriptions in our precedents. See Brief for United States 12–13.

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category, 458 U. S., at 763. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these works (as opposed to simulated conduct or adult actors) was *de minimis*. *Id.*, at 756–757, 762. But our decision did not rest on this "balance of competing interests" alone. *Id.*, at 764. We made clear that *Ferber* presented a special case: The market for child pornography was "intrinsically related" to the underlying abuse, and was therefore "an integral part of the production of such materials, an activity illegal throughout the Nation." *Id.*, at 759, 761. As we noted, "'[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" *Id.*, at 761–762 (quoting *Giboney*, *supra*, at 498). *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech,

and our subsequent decisions have shared this understanding. See *Osborne* v. *Ohio*, 495 U. S. 103, 110 (1990) (describing *Ferber* as finding "persuasive" the argument that the advertising and sale of child pornography was "an integral part" of its unlawful production (internal quotation marks omitted)); *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 249–250 (2002) (noting that distribution and sale "were intrinsically related to the sexual abuse of children," giving the speech at issue "a proximate link to the crime from which it came" (internal quotation marks omitted)).

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that "depictions of animal cruelty" is among them. We need not foreclose the future recognition of such additional categories to reject the Government's highly manipulable balancing test as a means of identifying them.

III

Because we decline to carve out from the First Amendment any novel exception for §48, we review Stevens's First Amendment challenge under our existing doctrine.

A

Stevens challenged §48 on its face, arguing that any conviction secured under the statute would be unconstitutional. The court below decided the case on that basis, 533 F. 3d, at 231, n. 13, and we granted the Solicitor General's petition for certiorari to determine "whether 18 U. S. C. 48 is facially invalid under the Free Speech Clause of the First Amendment," Pet. for Cert. i.

To succeed in a typical facial attack, Stevens would have to establish "that no set of circumstances exists under which [§48] would be valid," *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep," *Washington* v. *Glucksberg*, 521 U. S. 702, 740, n. 7 (1997) (STEVENS, J., concurring in judgments) (internal quotation marks omitted). Which standard applies in a typical case is a matter of dispute that we need not and do not address, and neither *Salerno* nor *Glucksberg* is a speech case. Here the Government asserts that Stevens cannot prevail because §48 is plainly legitimate as applied to crush videos and animal fighting depictions. Deciding this case through a traditional facial analysis would require us to resolve whether these applications of §48 are in fact consistent with the Constitution.

In the First Amendment context, however, this Court recognizes "a second type of facial challenge," whereby a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange* v. *Washington State Republican Party*, 552 U. S. 442, 449, n. 6 (2008) (internal quotation marks omitted). Stevens argues that §48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. Brief for Respondent 22–25. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of §48 rests on interpreting the statute as narrowly limited to specific types of "extreme" material. Brief for United States 8. As the parties have presented the issue, therefore, the constitutionality of §48 hinges on how broadly it is construed. It is to that question that we now turn.[3]

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[3]The dissent contends that because there has not been a ruling on

B

As we explained two Terms ago, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States* v. *Williams*, 553 U. S. 285, 293 (2008). Because §48 is a federal statute, there is no need to defer to a state court's authority to interpret its own law.

We read §48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. That text applies to "any . . . depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." §48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation.

The Government contends that the terms in the definition should be read to require the additional element of "accompanying acts of cruelty." Reply Brief 6; see also Tr. of Oral Arg. 17–19. (The dissent hinges on the same

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the validity of the statute as applied to Stevens, our consideration of his facial overbreadth claim is premature. *Post*, at 1, and n. 1, 2–3 (opinion of ALITO, J.). Whether or not that conclusion follows, here no as-applied claim has been preserved. Neither court below construed Stevens's briefs as adequately developing a separate attack on a defined subset of the statute's applications (say, dogfighting videos). See 533 F. 3d 218, 231, n. 13 (CA3 2008) (en banc) ("Stevens brings a facial challenge to the statute"); App. to Pet. for Cert. 65a, 74a. Neither did the Government, see Brief for United States in No. 05–2497 (CA3), p. 28 (opposing "the appellant's facial challenge"); accord, Brief for United States 4. The sentence in Stevens's appellate brief mentioning his unrelated sufficiency-of-the-evidence challenge hardly developed a First Amendment as-applied claim. See *post*, at 1, n. 1. Stevens's constitutional argument is a general one. And unlike the challengers in *Washington State Grange*, Stevens does not "rest on factual assumptions . . . that can be evaluated only in the context of an as-applied challenge." 552 U. S., at 444.

assumption. See *post,* at 6, 9.) The Government bases this argument on the definiendum, "depiction of animal cruelty," cf. *Leocal* v. *Ashcroft*, 543 U. S. 1, 11 (2004), and on "'the commonsense canon of *noscitur a sociis*.'" Reply Brief 7 (quoting *Williams*, 553 U. S., at 294). As that canon recognizes, an ambiguous term may be "given more precise content by the neighboring words with which it is associated." *Ibid.* Likewise, an unclear definitional phrase may take meaning from the term to be defined, see *Leocal*, *supra,* at 11 (interpreting a "'substantial risk'" of the "us[e]" of "physical force" as part of the definition of "'crime of violence'").

But the phrase "wounded . . . or killed" at issue here contains little ambiguity. The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to "'kill' is 'to deprive of life.'" Brief for United States 14 (quoting Webster's Third New International Dictionary 1242 (1993)). We agree that "wounded" and "killed" should be read according to their ordinary meaning. Cf. *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U. S. 246, 252 (2004). Nothing about that meaning requires cruelty.

While not requiring cruelty, §48 does require that the depicted conduct be "illegal." But this requirement does not limit §48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane "wound[ing] or kill[ing]" of "living animal[s]." §48(c)(1). Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of §48(c) draws no distinction based on the reason the intentional killing of an

animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.[4]

What is more, the application of §48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in "the State in which the creation, sale, or possession takes place, regardless of whether the ... wounding ... or killing took place in [that] State." A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of §48, because although there may be "a broad societal consensus" against cruelty to animals, Brief for United States 2, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

In the District of Columbia, for example, all hunting is unlawful. D. C. Munic. Regs., tit. 19, §1560 (2009). Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, see Mediaweek, Sept. 29, 2008, p. 28, and hunting television programs, videos, and Web sites are equally popular, see Brief for Professional Outdoor Media

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[4] The citations in the dissent's appendix are beside the point. The cited statutes stand for the proposition that hunting is not covered by animal cruelty laws. But the reach of §48 is, as we have explained, not restricted to depictions of conduct that violates a law specifically directed at animal cruelty. It simply requires that the depicted conduct be "illegal." §48(c)(1). The Government implicitly admits as much, arguing that "instructional videos for hunting" are saved by the statute's exceptions clause, not that they fall outside the prohibition in the first place. Reply Brief 6.

Association et al. as *Amici Curiae* 9–10. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Compare *ibid.* and Brief for National Rifle Association of America, Inc., as *Amicus Curiae* 12 (hereinafter NRA Brief) (estimating that hunting magazines alone account for $135 million in annual retail sales) with Brief for United States 43–44, 46 (suggesting $1 million in crush video sales per year, and noting that Stevens earned $57,000 from his videos). Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, §48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.

Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions. Some States permit hunting with crossbows, Ga. Code Ann. §27–3–4(1) (2007); Va. Code Ann. §29.1–519(A)(6) (Lexis 2008 Cum. Supp.), while others forbid it, Ore. Admin. Reg. 635–065–0725 (2009), or restrict it only to the disabled, N. Y. Envir. Conserv. Law Ann. §11–0901(16) (West 2005). Missouri allows the "canned" hunting of ungulates held in captivity, Mo. Code Regs. Ann., tit. 3, 10–9.560(1), but Montana restricts such hunting to certain bird species, Mont. Admin. Rule 12.6.1202(1) (2007). The sharp-tailed grouse may be hunted in Idaho, but not in Washington. Compare Idaho Admin. Code §13.01.09.606 (2009) with Wash. Admin. Code §232–28–342 (2009).

The disagreements among the States—and the "commonwealth[s], territor[ies], or possession[s] of the United States," 18 U. S. C. §48(c)(2)—extend well beyond hunting. State agricultural regulations permit different methods of livestock slaughter in different places or as applied to different animals. Compare, *e.g.*, Fla. Stat. §828.23(5) (2007) (excluding poultry from humane slaughter requirements)

with Cal. Food & Agric. Code Ann. §19501(b) (West 2001) (including some poultry). California has recently banned cutting or "docking" the tails of dairy cattle, which other States permit. 2009 Cal. Legis. Serv. Ch. 344 (S. B. 135) (West). Even cockfighting, long considered immoral in much of America, see *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560, 575 (1991) (SCALIA, J., concurring in judgment), is legal in Puerto Rico, see 15 Laws P. R. Ann. §301 (Supp. 2008); *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 342 (1986), and was legal in Louisiana until 2008, see La. Stat. Ann. §14:102.23 (West) (effective Aug. 15, 2008). An otherwise-lawful image of any of these practices, if sold or possessed for commercial gain within a State that happens to forbid the practice, falls within the prohibition of §48(a).

C

The only thing standing between defendants who sell such depictions and five years in federal prison—other than the mercy of a prosecutor—is the statute's exceptions clause. Subsection (b) exempts from prohibition "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." The Government argues that this clause substantially narrows the statute's reach: News reports about animal cruelty have "journalistic" value; pictures of bullfights in Spain have "historical" value; and instructional hunting videos have "educational" value. Reply Brief 6. Thus, the Government argues, §48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting, see Brief for United States 47–48), and perhaps other depictions of "extreme acts of animal cruelty." *Id.*, at 41.

The Government's attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with "redeeming societal value," *id.*, at 9, 16,

23, "'at least some minimal value,'" Reply Brief 6 (quoting H. R. Rep., at 4), or anything more than "scant social value," Reply Brief 11, is excluded under §48(b). But the text says "serious" value, and "serious" should be taken seriously. We decline the Government's invitation—advanced for the first time in this Court—to regard as "serious" anything that is not "scant." (Or, as the dissent puts it, "'trifling.'" *Post*, at 6.) As the Government recognized below, "serious" ordinarily means a good bit more. The District Court's jury instructions required value that is "significant and of great import," App. 132, and the Government defended these instructions as properly relying on "a commonly accepted meaning of the word 'serious,'" Brief for United States in No. 05–2497 (CA3), p. 50.

Quite apart from the requirement of "serious" value in §48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen's Foundation, many popular videos "have primarily entertainment value" and are designed to "entertai[n] the viewer, marke[t] hunting equipment, or increas[e] the hunting community." Brief for Safari Club International et al. as *Amici Curiae* 12. The National Rifle Association agrees that "much of the content of hunting media . . . is merely *recreational* in nature." NRA Brief 28. The Government offers no principled explanation why these depictions of hunting or depictions of Spanish bullfights would be *inherently* valuable while those of Japanese dogfights are not. The dissent contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. *Post*, at 6–8. But §48(b) addresses the value of the *depictions*, not of the underlying activity. There is simply no

adequate reading of the exceptions clause that results in the statute's banning only the depictions the Government would like to ban.

The Government explains that the language of §48(b) was largely drawn from our opinion in *Miller* v. *California*, 413 U. S. 15 (1973), which excepted from its definition of obscenity any material with "serious literary, artistic, political, or scientific value," *id.*, at 24. See Reply Brief 8, 9, and n. 5. According to the Government, this incorporation of the *Miller* standard into §48 is therefore surely enough to answer any First Amendment objection. Reply Brief 8–9.

In *Miller* we held that "serious" value shields depictions of sex from regulation as obscenity. 413 U. S., at 24–25. Limiting *Miller*'s exception to "serious" value ensured that "'[a] quotation from Voltaire in the flyleaf of a book [would] not constitutionally redeem an otherwise obscene publication.'" *Id.*, at 25, n. 7 (quoting *Kois* v. *Wisconsin*, 408 U. S. 229, 231 (1972) (*per curiam*)). We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "'[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" *Cohen* v. *California*, 403 U. S. 15, 25 (1971) (quoting *Winters* v. *New York*, 333 U. S. 507, 528 (1948) (Frankfurter, J., dissenting); alteration in original).

Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of §48(b), but nonetheless fall within the broad reach of §48(c).

D

Not to worry, the Government says: The Executive Branch construes §48 to reach only "extreme" cruelty, Brief for United States 8, and it "neither has brought nor will bring a prosecution for anything less," Reply Brief 6–7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See *id.*, at 6–7, 10, and n. 6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. Cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 473 (2001).

This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret §48 as covering only depictions "of wanton cruelty to animals designed to appeal to a prurient interest in sex." See Statement by President William J. Clinton upon Signing H. R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999). No one suggests that the videos in this case fit that description. The Government's assurance that it will apply §48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." *FCC* v. *Fox Television Stations, Inc.*, 556 U. S. ___, ___ (2009) (slip op., at 12). "[T]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 884 (1997). We "'will not rewrite a . . . law to conform it to constitutional requirements,'" *id.*, at 884–885 (quot-

ing *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 397 (1988); omission in original), for doing so would constitute a "serious invasion of the legislative domain," *United States* v. *Treasury Employees*, 513 U. S. 454, 479, n. 26 (1995), and sharply diminish Congress's "incentive to draft a narrowly tailored law in the first place," *Osborne*, 495 U. S., at 121. To read §48 as the Government desires requires rewriting, not just reinterpretation.

* * *

Our construction of §48 decides the constitutional question; the Government makes no effort to defend the constitutionality of §48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of §48.

Nor does the Government seriously contest that the presumptively impermissible applications of §48 (properly construed) far outnumber any permissible ones. However "growing" and "lucrative" the markets for crush videos and dogfighting depictions might be, see Brief for United States 43, 46 (internal quotation marks omitted), they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of §48. See *supra*, at 13–14. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that §48 is

not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 08–769

UNITED STATES, PETITIONER *v.* ROBERT J. STEVENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[April 20, 2010]

JUSTICE ALITO, dissenting.

The Court strikes down in its entirety a valuable statute, 18 U. S. C. §48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty—in particular, the creation and commercial exploitation of "crush videos," a form of depraved entertainment that has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under §48 for selling videos depicting dogfights. On appeal, he argued, among other things, that §48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention.[1] The Court of

[1] Respondent argued at length that the evidence was insufficient to prove that the particular videos he sold lacked any serious scientific, educational, or historical value and thus fell outside the exception in §48(b). See Brief for Appellant in No. 05–2497 (CA3), pp. 72–79. He added that, if the evidence in this case was held to be sufficient to take his videos outside the scope of the exception, then "this case presents . . . a situation" in which "a constitutional violation occurs." *Id.*, at 71. See also *id.*, at 47 ("The applicability of 18 U. S. C. §48 to speech which is not a crush video or an appeal to some prurient sexual interest constitutes a restriction of protected speech, and an unwarranted violation of the First Amendment's free speech guarantee"); Brief for

Appeals—incorrectly, in my view—declined to decide whether §48 is unconstitutional as applied to respondent's videos and instead reached out to hold that the statute is facially invalid. Today's decision does not endorse the Court of Appeals' reasoning, but it nevertheless strikes down §48 using what has been aptly termed the "strong medicine" of the overbreadth doctrine, *United States* v. *Williams*, 553 U. S. 285, 293 (2008) (internal quotation marks omitted), a potion that generally should be administered only as "a last resort." *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 39 (1999) (internal quotation marks omitted).

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court's conclusion that §48 bans a substantial quantity of protected speech.

I

A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights. *New York* v. *Ferber*, 458 U. S. 747, 767 (1982). The First Amendment overbreadth doctrine carves out a narrow exception to that general rule. See *id.*, at 768; *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–612 (1973). Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows

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Respondent 55 ("Stevens' speech does not fit within any existing category of unprotected, prosecutable speech"); *id.*, at 57 ("[T]he record as a whole demonstrates that Stevens' speech cannot constitutionally be punished"). Contrary to the Court, *ante*, at 10–11, n. 3 (citing 533 F. 3d 218, 231, n. 13 (CA3 2008) (en banc)), I see no suggestion in the opinion of the Court of Appeals that respondent did not preserve an as-applied challenge.

a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others. See, *e.g.*, *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469, 483 (1989) ("Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*"); see also *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 462, n. 20 (1978) (describing the doctrine as one "under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him").

The "strong medicine" of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court. As we said in *Fox*, *supra*, at 484–485, "[i]t is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied." Accord, *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 11 (1988); see also *Broadrick*, *supra*, at 613; *United Reporting Publishing Corp.*, *supra*, at 45 (STEVENS, J., dissenting).

I see no reason to depart here from the generally preferred procedure of considering the question of overbreadth only as a last resort.[2] Because the Court has addressed the overbreadth question, however, I will explain why I do not think that the record supports the conclusion that §48, when properly interpreted, is overly broad.

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[2] For the reasons set forth below, this is not a case in which the challenged statute is unconstitutional in all or almost all of its applications.

II

The overbreadth doctrine "strike[s] a balance between competing social costs." *Williams*, 553 U. S., at 292. Specifically, the doctrine seeks to balance the "harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional" against the possibility that "the threat of enforcement of an overbroad law [will] dete[r] people from engaging in constitutionally protected speech." *Ibid.* "In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Ibid.*

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals. See, *e.g.*, *id.*, at 301–302; see also *Ferber*, *supra*, at 773; *Houston* v. *Hill*, 482 U. S. 451, 466–467 (1987). Accordingly, we have repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, "from the text of [the law] *and from actual fact*," that substantial overbreadth exists. *Virginia* v. *Hicks*, 539 U. S. 113, 122 (2003) (quoting *New York State Club Assn.*, *supra*, at 14; emphasis added; internal quotation marks omitted; alteration in original). Similarly, "there must be a *realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 801 (1984) (emphasis added).

III

In holding that §48 violates the overbreadth rule, the Court declines to decide whether, as the Government maintains, §48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush

videos and depictions of deadly animal fights. See *ante*, at 10, 19. Instead, the Court tacitly assumes for the sake of argument that §48 is valid as applied to these depictions, but the Court concludes that §48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food. I address the Court's examples below.

A

I turn first to depictions of hunting. As the Court notes, photographs and videos of hunters shooting game are common. See *ante*, at 13–14. But hunting is legal in all 50 States, and §48 applies only to a depiction of conduct that is illegal in the jurisdiction in which the depiction is created, sold, or possessed. §§48(a), (c). Therefore, in all 50 States, the creation, sale, or possession for sale of the vast majority of hunting depictions indisputably falls outside §48's reach.

Straining to find overbreadth, the Court suggests that §48 prohibits the sale or possession in the District of Columbia of any depiction of hunting because the District—undoubtedly because of its urban character—does not permit hunting within its boundaries. *Ante*, at 13. The Court also suggests that, because some States prohibit a particular type of hunting (*e.g.*, hunting with a crossbow or "canned" hunting) or the hunting of a particular animal (*e.g.*, the "sharp-tailed grouse"), §48 makes it illegal for persons in such States to sell or possess for sale a depiction of hunting that was perfectly legal in the State in which the hunting took place. See *ante*, at 12–14.

The Court's interpretation is seriously flawed. "When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *Ferber*, 458 U. S., at 769,

n. 24. See also *Williams*, *supra*, at 307 (STEVENS, J., concurring) ("[T]o the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters").

Applying this canon, I would hold that §48 does not apply to depictions of hunting. First, because §48 targets depictions of "animal cruelty," I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions of acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. See *ante*, at 12–13 (interpreting "[t]he text of §48(c)" to ban a depiction of "the humane slaughter of a stolen cow"). Virtually all state laws prohibiting animal cruelty either expressly define the term "animal" to exclude wildlife or else specifically exempt lawful hunting activities,[3] so the statutory prohibition set forth in §48(a) may reasonably be interpreted not to reach most if not all hunting depictions.

Second, even if the hunting of wild animals were otherwise covered by §48(a), I would hold that hunting depictions fall within the exception in §48(b) for depictions that have "serious" (*i.e.*, not "trifling"[4]) "scientific," "educa-

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[3]See Appendix, *infra* (citing statutes); B. Wagman, S. Waisman, & P. Frasch, Animal Law: Cases and Materials 92 (4th ed. 2010) ("Most anti-cruelty laws also include one or more exemptions," which often "exclud[e] from coverage (1) whole classes of animals, such as wildlife or farm animals, or (2) specific activities, such as hunting"); Note, Economics and Ethics in the Genetic Engineering of Animals, 19 Harv. J. L. & Tech. 413, 432 (2006) ("Not surprisingly, state laws relating to the humane treatment of wildlife, including deer, elk, and waterfowl, are virtually non-existent").

[4]Webster's Third New International Dictionary 2073 (1976); Random House Dictionary of the English Language 1303 (1966). While the term "serious" may also mean "weighty" or "important," *ibid.*, we should adopt the former definition if necessary to avoid unconstitutionality.

tional," or "historical" value. While there are certainly those who find hunting objectionable, the predominant view in this country has long been that hunting serves many important values, and it is clear that Congress shares that view. Since 1972, when Congress called upon the President to designate a National Hunting and Fishing Day, see S. J. Res. 117, 92d Cong., 2d Sess. (1972), 86 Stat. 133, Presidents have regularly issued proclamations extolling the values served by hunting. See Presidential Proclamation No. 8421, 74 Fed. Reg. 49305 (Pres. Obama 2009) (hunting and fishing are "ageless pursuits" that promote "the conservation and restoration of numerous species and their natural habitats"); Presidential Proclamation No. 8295, 73 Fed. Reg. 57233 (Pres. Bush 2008) (hunters and anglers "add to our heritage and keep our wildlife populations healthy and strong," and "are among our foremost conservationists"); Presidential Proclamation No. 7822, 69 Fed. Reg. 59539 (Pres. Bush 2004) (hunting and fishing are "an important part of our Nation's heritage," and "America's hunters and anglers represent the great spirit of our country"); Presidential Proclamation No. 4682, 44 Fed. Reg. 53149 (Pres. Carter 1979) (hunting promotes conservation and an appreciation of "healthy recreation, peaceful solitude and closeness to nature"); Presidential Proclamation No. 4318, 39 Fed. Reg. 35315 (Pres. Ford 1974) (hunting furthers "appreciation and respect for nature" and preservation of the environment). Thus, it is widely thought that hunting has "scientific" value in that it promotes conservation, "historical" value in that it provides a link to past times when hunting played a critical role in daily life, and "educational" value in that it furthers the understanding and appreciation of nature and our country's past and instills valuable character traits. And if hunting itself is widely thought to serve these values, then it takes but a small additional step to conclude that depictions of hunting make a non-trivial

contribution to the exchange of ideas. Accordingly, I would hold that hunting depictions fall comfortably within the exception set out in §48(b).

I do not have the slightest doubt that Congress, in enacting §48, had no intention of restricting the creation, sale, or possession of depictions of hunting. Proponents of the law made this point clearly. See H. R. Rep. No. 106–397, p. 8 (1999) (hereinafter H. R. Rep.) ("[D]epictions of ordinary hunting and fishing activities do not fall within the scope of the statute"); 145 Cong. Rec. 25894 (Oct. 19, 1999) (Rep. McCollum) ("[T]he sale of depictions of legal activities, such as hunting and fishing, would not be illegal under this bill"); *id.*, at 25895 (Rep. Smith) ("[L]et us be clear as to what this legislation will not do. It will in no way prohibit hunting, fishing, or wildlife videos"). Indeed, even *opponents* acknowledged that §48 was not intended to reach ordinary hunting depictions. See *ibid.* (Rep. Scott); *id.*, at 25897 (Rep. Paul).

For these reasons, I am convinced that §48 has no application to depictions of hunting. But even if §48 did impermissibly reach the sale or possession of depictions of hunting in a few unusual situations (for example, the sale in Oregon of a depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho, see *ante*, at 14), those isolated applications would hardly show that §48 bans a substantial amount of protected speech.

B

Although the Court's overbreadth analysis rests primarily on the proposition that §48 substantially restricts the sale and possession of hunting depictions, the Court cites a few additional examples, including depictions of methods of slaughter and the docking of the tails of dairy cows. See *ante*, at 14–15.

Such examples do not show that the statute is substan-

tially overbroad, for two reasons. First, as explained above, §48 can reasonably be construed to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, and anti-cruelty laws do not ban the sorts of acts depicted in the Court's hypotheticals. See, *e.g.*, Idaho Code §25–3514 (Lexis 2000) ("No part of this chapter [prohibiting cruelty to animals] shall be construed as interfering with or allowing interference with . . . [t]he humane slaughter of any animal normally and commonly raised as food or for production of fiber . . . [or] [n]ormal or accepted practices of . . . animal husbandry"); Kan. Stat. Ann. § 21–4310(b) (2007) ("The provisions of this section shall not apply to . . . with respect to farm animals, normal or accepted practices of animal husbandry, including the normal and accepted practices for the slaughter of such animals"); Md. Crim. Law Code Ann. §10–603 (Lexis 2002) (sections prohibiting animal cruelty "do not apply to . . . customary and normal veterinary and agricultural husbandry practices, including dehorning, castration, tail docking, and limit feeding").

Second, nothing in the record suggests that any one has ever created, sold, or possessed for sale a depiction of the slaughter of food animals or of the docking of the tails of dairy cows that would not easily qualify under the exception set out in §48(b). Depictions created to show proper methods of slaughter or tail-docking would presumably have serious "educational" value, and depictions created to focus attention on methods thought to be inhumane or otherwise objectionable would presumably have either serious "educational" or "journalistic" value or both. In short, the Court's examples of depictions involving the docking of tails and humane slaughter do not show that §48 suffers from any overbreadth, much less substantial overbreadth.

The Court notes, finally, that cockfighting, which is illegal in all States, is still legal in Puerto Rico, *ante*, at 15,

and I take the Court's point to be that it would be impermissible to ban the creation, sale, or possession in Puerto Rico of a depiction of a cockfight that was legally staged in Puerto Rico.[5] But assuming for the sake of argument that this is correct, this veritable sliver of unconstitutionality would not be enough to justify striking down §48 *in toto*.

In sum, we have a duty to interpret §48 so as to avoid serious constitutional concerns, and §48 may reasonably be construed not to reach almost all, if not all, of the depictions that the Court finds constitutionally protected. Thus, §48 does not appear to have a large number of unconstitutional applications. Invalidation for overbreadth is appropriate only if the challenged statute suffers from *substantial* overbreadth—judged not just in absolute terms, but in relation to the statute's "plainly legitimate sweep." *Williams*, 553 U. S., at 292. As I explain in the following Part, §48 has a substantial core of constitutionally permissible applications.

IV

A

1

As the Court of Appeals recognized, "the primary conduct that Congress sought to address through its passage [of §48] was the creation, sale, or possession of 'crush videos.'" 533 F. 3d 218, 222 (CA3 2008) (en banc). A sample crush video, which has been lodged with the Clerk, records the following event:

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[5] Since the Court has taken pains not to decide whether §48 would be unconstitutional as applied to graphic dogfight videos, including those depicting fights occurring in countries where dogfighting is legal, I take it that the Court does not intend for its passing reference to cockfights to mean either that all depictions of cockfights, whether legal or illegal under local law, are protected by the First Amendment or that it is impermissible to ban the sale or possession in the States of a depiction of a legal cockfight in Puerto Rico.

> "[A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead in a moist pile of blood-soaked hair and bone." Brief for Humane Society of United States as *Amicus Curiae* 2 (hereinafter Humane Society Brief).

It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty. See 533 F. 3d, at 223, and n. 4 (citing statutes); H. R. Rep., at 3. But before the enactment of §48, the underlying conduct depicted in crush videos was nearly impossible to prosecute. These videos, which "often appeal to persons with a very specific sexual fetish," *id.*, at 2, were made in secret, generally without a live audience, and "the faces of the women inflicting the torture in the material often were not shown, nor could the location of the place where the cruelty was being inflicted or the date of the activity be ascertained from the depiction." *Id.*, at 3. Thus, law enforcement authorities often were not able to identify the parties responsible for the torture. See Punishing Depictions of Animal Cruelty and the Federal Prisoner Health Care Co-Payment Act of 1999: Hearing before the Subcommittee on Crime of the House Committee on the Judiciary, 106th Cong., 1st Sess., p. 1 (1999) (hereinafter Hearing on Depictions of Animal Cruelty). In the rare instances in which it was possible to identify and find the perpetrators, they "often were able to successfully assert as a defense that the State could not prove its jurisdiction over the place where the act occurred or that the actions depicted took place within the time specified in

the State statute of limitations." H. R. Rep., at 3; see also 145 Cong. Rec. 25896 (Rep. Gallegly) ("[I]t is the prosecutors from around this country, Federal prosecutors as well as State prosecutors, that have made an appeal to us for this"); Hearing on Depictions of Animal Cruelty 21 ("If the production of the video is not discovered during the actual filming, then prosecution for the offense is virtually impossible without a cooperative eyewitness to the filming or an undercover police operation"); *id.*, at 34–35 (discussing example of case in which state prosecutor "had the defendant telling us he produced these videos," but where prosecution was not possible because the State could not prove where or when the tape was made).

In light of the practical problems thwarting the prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only effective way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct. And Congress' strategy appears to have been vindicated. We are told that "[b]y 2007, sponsors of §48 declared the crush video industry dead. Even overseas Websites shut down in the wake of §48. Now, after the Third Circuit's decision [facially invalidating the statute], crush videos are already back online." Humane Society Brief 5 (citations omitted).

2

The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence

that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.

The most relevant of our prior decisions is *Ferber*, 458 U. S. 747, which concerned child pornography. The Court there held that child pornography is not protected speech, and I believe that *Ferber*'s reasoning dictates a similar conclusion here.

In *Ferber*, an important factor—I would say the most important factor—was that child pornography involves the commission of a crime that inflicts severe personal injury to the "children who are made to engage in sexual conduct for commercial purposes.'" *Id.*, at 753 (internal quotation marks omitted). The *Ferber* Court repeatedly described the production of child pornography as child "abuse," "molestation," or "exploitation." See, *e.g.*, *id.*, at 749 ("In recent years, the exploitive use of children in the production of pornography has become a serious national problem"); *id.*, at 758, n. 9 ("Sexual molestation by adults is often involved in the production of child sexual performances"). As later noted in *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 249 (2002), in *Ferber* "[t]he production of the work, not its content, was the target of the statute." See also 535 U.S., at 250 (*Ferber* involved "speech that itself is the record of sexual abuse").

Second, *Ferber* emphasized the fact that these underlying crimes could not be effectively combated without targeting the distribution of child pornography. As the Court put it, "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." 458 U. S., at 759. The Court added:

"[T]here is no serious contention that the legislature

> was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. . . . The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.*, at 759–760.

See also *id.*, at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials").

Third, the *Ferber* Court noted that the value of child pornography "is exceedingly modest, if not *de minimis,*" and that any such value was "overwhelmingly outweigh[ed]" by "the evil to be restricted." *Id.*, at 762–763.

All three of these characteristics are shared by §48, as applied to crush videos. First, the conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess them with the intent to make a profit may be similarly culpable. (For example, in some cases, crush videos were commissioned by purchasers who specified the details of the acts that they wanted to see performed. See H. R. Rep., at 3; Hearing on Depictions of Animal Cruelty 27). To the extent that §48 reaches such persons, it surely does not violate the First Amendment.

Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by §48—the creation, sale, and possession for sale of depic-

tions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record. Faced with this evidence, Congress reasonably chose to target the lucrative crush video market.

Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And, unlike the child pornography statute in *Ferber* or its federal counterpart, 18 U. S. C. §2252, §48(b) provides an exception for depictions having any "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

It must be acknowledged that §48 differs from a child pornography law in an important respect: preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. It was largely for this reason that the Court of Appeals concluded that *Ferber* did not support the constitutionality of §48. 533 F. 3d, at 228 ("Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm"). But while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos.

The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country. In *Ferber*, the Court noted that "virtually all of the States and the United States have passed legislation

proscribing the production of or otherwise combating 'child pornography,'" and the Court declined to "second-guess [that] legislative judgment."[6] 458 U. S., at 758. Here, likewise, the Court of Appeals erred in second-guessing the legislative judgment about the importance of preventing cruelty to animals.

Section 48's ban on trafficking in crush videos also helps to enforce the criminal laws and to ensure that criminals do not profit from their crimes. See 145 Cong. Rec. 25897 (Oct. 19, 1999) (Rep. Gallegly) ("The state has an interest in enforcing its existing laws. Right now, the laws are not only being violated, but people are making huge profits from promoting the violations"); *id.*, at 10685 (May 24, 1999) (Rep. Gallegly) (explaining that he introduced the House version of the bill because "criminals should not profit from [their] illegal acts"). We have already judged that taking the profit out of crime is a compelling interest. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 119 (1991).

In short, *Ferber* is the case that sheds the most light on the constitutionality of Congress' effort to halt the production of crush videos. Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment.

B

Application of the *Ferber* framework also supports the

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[6] In other cases, we have regarded evidence of a national consensus as proof that a particular government interest is compelling. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 118 (1991) (State's compelling interest "in ensuring that victims of crime are compensated by those who harm them" evidenced by fact that "[e]very State has a body of tort law serving exactly this interest"); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 624–625 (1984) (citing state laws prohibiting discrimination in public accommodations as evidence of the compelling governmental interest in ensuring equal access).

constitutionality of §48 as applied to depictions of brutal animal fights. (For convenience, I will focus on videos of dogfights, which appear to be the most common type of animal fight videos.)

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia, Brief for United States 26–27, and n. 8 (citing statutes), and under federal law constitute a felony punishable by imprisonment for up to five years, 7 U. S. C. §2156 *et seq.* (2006 ed. and Supp. II), 18 U. S. C. §49 (2006 ed., Supp. II).

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be effectively controlled without targeting the videos. Like crush videos and child pornography, dogfight videos are very often produced as part of a "low-profile, clandestine industry," and "the need to market the resulting products requires a visible apparatus of distribution." *Ferber,* 458 U. S., at 760. In such circumstances, Congress had reasonable grounds for concluding that it would be "difficult, if not impossible, to halt" the underlying exploitation of dogs by pursuing only those who stage the fights. *Id.*, at 759–760; see 533 F. 3d, at 246 (Cowen, J., dissenting) (citing evidence establishing "the existence of a lucrative market for depictions of animal cruelty," including videos of dogfights, "which in turn provides a powerful incentive to individuals to create [such] videos").

The commercial trade in videos of dogfights is "an integral part of the production of such materials," *Ferber, supra,* at 761. As the Humane Society explains, "[v]ideotapes memorializing dogfights are integral to the success of this criminal industry" for a variety of reasons. Humane Society Brief 5. For one thing, some dogfighting videos are made "solely for the purpose of selling the video (and not for a live audience)." *Id.*, at 9. In addition, those

who stage dogfights profit not just from the sale of the videos themselves, but from the gambling revenue they take in from the fights; the videos "encourage [such] gambling activity because they allow those reluctant to attend actual fights for fear of prosecution to still bet on the outcome." *Ibid.;* accord, Brief for Center on the Administration of Criminal Law as *Amicus Curiae* 12 ("Selling videos of dogfights effectively abets the underlying crimes by providing a market for dogfighting while allowing actual dogfights to remain underground"); *ibid.* ("These videos are part of a 'lucrative market' where videos are produced by a 'bare-boned, clandestine staff' in order to permit the actual location of dogfights and the perpetrators of these underlying criminal activities to go undetected" (citations omitted)). Moreover, "[v]ideo documentation is vital to the criminal enterprise because it provides *proof* of a dog's fighting prowess—proof demanded by potential buyers and critical to the underground market." Humane Society Brief 9. Such recordings may also serve as "'training' videos for other fight organizers." *Ibid.* In short, because videos depicting live dogfights are essential to the success of the criminal dogfighting subculture, the commercial sale of such videos helps to fuel the market for, and thus to perpetuate the perpetration of, the criminal conduct depicted in them.

Third, depictions of dogfights that fall within §48's reach have by definition no appreciable social value. As noted, §48(b) exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute.

Finally, the harm caused by the underlying criminal acts greatly outweighs any trifling value that the depictions might be thought to possess. As the Humane Society explains:

> "The abused dogs used in fights endure physical torture and emotional manipulation throughout their lives to predispose them to violence; common tactics include feeding the animals hot peppers and gunpowder, prodding them with sticks, and electrocution. Dogs are conditioned never to give up a fight, even if they will be gravely hurt or killed. As a result, dogfights inflict horrific injuries on the participating animals, including lacerations, ripped ears, puncture wounds and broken bones. Losing dogs are routinely refused treatment, beaten further as 'punishment' for the loss, and executed by drowning, hanging, or incineration." *Id.*, at 5–6 (footnotes omitted).

For these dogs, unlike the animals killed in crush videos, the suffering lasts for years rather than minutes. As with crush videos, moreover, the statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities. See *Ferber*, *supra*, at 757–758; *Simon & Schuster*, 502 U. S., at 119.

In sum, §48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, for the reasons set forth above, the record does not show that §48, properly interpreted, bans a substantial amount of protected speech in absolute terms. *A fortiori*, respondent has not met his burden of demonstrating that any impermissible applications of the statute are "substantial" in relation to its "plainly legitimate sweep." *Williams*, 553 U. S., at 292. Accordingly, I would reject respondent's claim that §48 is facially unconstitutional under the overbreadth doctrine.

* * *

For these reasons, I respectfully dissent.

APPENDIX

As the following chart makes clear, virtually all state laws prohibiting animal cruelty either expressly define the term "animal" to exclude wildlife or else specifically exempt lawful hunting activities.

Alaska	Alaska Stat. §11.61.140(c)(4) (2008) ("It is a defense to a prosecution under this section that the conduct of the defendant . . . was necessarily incidental to lawful fishing, hunting or trapping activities")
Arizona	Ariz. Rev. Stat. Ann. §§13–2910(C)(1), (3) (West Supp. 2009) ("This section does not prohibit or restrict . . . [t]he taking of wildlife or other activities permitted by or pursuant to title 17 . . . [or] [a]ctivities regulated by the Arizona game and fish department or the Arizona department of agriculture")
Arkansas	Ark. Code Ann. §5–62–105(a) (Supp. 2009) ("This subchapter does not prohibit any of the following activities: . . . (9) Engaging in the taking of game or fish through hunting, trapping, or fishing, or engaging in any other activity authorized by Arkansas Constitution, Amendment 35, by §15–41–101 et seq., or by any Arkansas State Game and Fish Commission regulation promulgated under either Arkansas Constitution, Amendment 35, or statute")
California	Cal. Penal Code Ann. §599c (West 1999) ("No part of this title shall be construed as interfering with any of the laws of this state known as the 'game laws,' . . . or to interfere with the right to kill all animals used for food")
Colorado	Colo. Rev. Stat. Ann. §18–9–201.5(2) (2009) ("In case of any conflict between this part 2 [prohibiting cruelty to animals] or section 35–43–126, [Colo. Rev. Stat.], and the wildlife statutes of

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	the state, said wildlife statutes shall control"), §18–9–202(3) ("Nothing in this part 2 shall be construed to amend or in any manner change the authority of the wildlife commission, as established in title 33, [Colo. Rev. Stat.], or to prohibit any conduct therein authorized or permitted")
Connecticut	Conn. Gen. Stat. §53–247(b) (2009) ("Any person who maliciously and intentionally maims, mutilates, tortures, wounds or kills an animal shall be fined not more than five thousand dollars or imprisoned not more than five years or both. The provisions of this subsection shall not apply to . . . any person . . . while lawfully engaged in the taking of wildlife")
Delaware	Del. Code Ann., Tit. 11, §1325(f) (2007) ("This section shall not apply to the lawful hunting or trapping of animals as provided by law")
Florida	Fla. Stat. §828.122(9)(b) (2007) ("This section shall not apply to . . . [a]ny person using animals to pursue or take wildlife or to participate in any hunting regulated or subject to being regulated by the rules and regulations of the Fish and Wildlife Conservation Commission")
Georgia	Ga. Code Ann. §16–12–4(e) (2007) ("The provisions of this Code section shall not be construed as prohibiting conduct which is otherwise permitted under the laws of this state or of the United States, including, but not limited to . . . hunting, trapping, fishing, [or] wildlife management")
Hawaii	Haw. Rev. Stat. §711–1108.5(1) (2008 Cum. Supp.) ("A person commits the offense of cruelty to animals in the first degree if the person intentionally or knowingly tortures, mutilates, or poisons or causes the torture, mutilation, or poisoning of any pet animal or equine animal resulting in serious bodily injury or death of the pet animal or equine animal")

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Idaho	Idaho Code §25–3515 (Lexis 2000) ("No part of this chapter shall be construed as interfering with, negating or preempting any of the laws or rules of the department of fish and game of this state . . . or to interfere with the right to kill, slaughter, bag or take all animals used for food")
Illinois	Ill. Comp. Stat., ch. 510, §70/13 (West 2006) ("In case of any alleged conflict between this Act . . . and the 'Wildlife Code of Illinois' or 'An Act to define and require the use of humane methods in the handling, preparation for slaughter, and slaughter of livestock for meat or meat products to be offered for sale', . . . the provisions of those Acts shall prevail"), §70/3.03(b)(1) ("For the purposes of this Section, 'animal torture' does not include any death, harm, or injury caused to any animal by . . . any hunting, fishing, trapping, or other activity allowed under the Wildlife Code, the Wildlife Habitat Management Areas Act, or the Fish and Aquatic Life Code" (footnotes omitted))
Indiana	Ind. Code §35–46–3–5(a) (West 2004) (subject to certain exceptions not relevant here, "this chapter [prohibiting "Offenses Relating to Animals"] does not apply to . . . [f]ishing, hunting, trapping, or other conduct authorized under [Ind. Code §]14–22")
Iowa	Iowa Code §717B.2(5) (2009) ("This section [banning "animal abuse"] shall not apply to . . . [a] person taking, hunting, trapping, or fishing for a wild animal as provided in chapter 481A"), §717B.3A(2)(e) ("This section [banning "animal torture"] shall not apply to . . . [a] person taking, hunting, trapping, or fishing for a wild animal as provided in chapter 481A")
Kansas	Kan. Stat. Ann. §21–4310(b)(3) (2007) ("The provisions of this section shall not apply to . . . killing, attempting to kill, trapping, catching or taking of any animal in accordance with the

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	provisions of chapter 32 [Wildlife, Parks and Recreation] or chapter 47 [Livestock and Domestic Animals] of the Kansas Statutes Annotated")
Kentucky	Ky. Rev. Stat. Ann. §§525.130(2)(a), (e) (Lexis 2008) ("Nothing in this section shall apply to the killing of animals . . . [p]ursuant to a license to hunt, fish, or trap . . . [or] [f]or purposes relating to sporting activities"), §525.130(3) ("Activities of animals engaged in hunting, field trials, dog training other than training a dog to fight for pleasure or profit, and other activities authorized either by a hunting license or by the Department of Fish and Wildlife shall not constitute a violation of this section")
Louisiana	La. Rev. Stat. Ann. §14:102.1(C)(1) (West Supp. 2010) ("This Section shall not apply to . . . [t]he lawful hunting or trapping of wildlife as provided by law")
Maine	Me. Rev. Stat. Ann., Tit. 17, §1031(1)(G) (West Supp. 2009) (providing that hunting and trapping an animal is not a form of prohibited animal cruelty if "permitted pursuant to" parts of state code regulating the shooting of large game, inland fisheries, and wildlife)
Maryland	Md. Crim. Law Code Ann. §10–603(3) (Lexis 2002) ("Sections 10–601 through 10–608 of this subtitle do not apply to . . . an activity that may cause unavoidable physical pain to an animal, including . . . hunting, if the person performing the activity uses the most humane method reasonably available")
Michigan	Mich. Comp. Laws Ann. §§750.50(11)(a), (b) (West Supp. 2009) ("This section does not prohibit the lawful killing or other use of an animal, including . . . [f]ishing . . . [h]unting, [or] trapping [as regulated by state law]"), §750.50b(9)(a), (b) ("This section does not prohibit the lawful killing or other use of an ani-

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	mal, including . . . [f]ishing . . . [h]unting, [or] trapping [as regulated by state law]")
Missouri	Mo. Rev. Stat. §578.007(3) (2000) ("The provisions of sections 578.005 to 578.023 shall not apply to . . . [h]unting, fishing, or trapping as allowed by" state law)
Montana	Mont. Code Ann. §45–8–211(4)(d) (2009) ("This section does not prohibit . . . lawful fishing, hunting, and trapping activities")
Nebraska	Neb. Rev. Stat. §28–1013(4) (2008) (exempting "[c]ommonly accepted practices of hunting, fishing, or trapping")
Nevada	Nev. Rev. Stat. §§574.200(1), (3) (2007) (provisions of Nevada law banning animal cruelty "do not . . . [i]nterfere with any of the fish and game laws . . . [or] the right to kill all animals and fowl used for food")
New Hampshire	N. H. Rev. Stat. Ann. §644:8(II) (West Supp. 2009) ("In this section, 'animal' means a domestic animal, a household pet or a wild animal in captivity")
New Jersey	N. J. Stat. Ann. §4:22–16(c) (West 1998) ("Nothing contained in this article shall be construed to prohibit or interfere with . . . [t]he shooting or taking of game or game fish in such manner and at such times as is allowed or provided by the laws of this State")
New Mexico	N. M. Stat. Ann. §30–18–1(I)(1) (Supp. 2009) ("The provisions of this section do not apply to . . . fishing, hunting, falconry, taking and trapping")
New York	N. Y. Agric. & Mkts. Law Ann. §353–a(2) (West 2004) ("Nothing contained in this section shall be construed to prohibit or interfere in any way with anyone lawfully engaged in hunting, trapping, or fishing")
North Carolina	N. C. Gen. Stat. Ann. §14–360(c)(1) (Lexis 2009) ("[T]his section shall not apply to . . . [t]he lawful taking of animals under the jurisdiction

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	and regulation of the Wildlife Resources Commission . . .")
North Dakota	N. D. Cent. Code Ann. §36–21.1–01(5)(a) (Lexis Supp. 2009) (" 'Cruelty' or 'torture' . . . does not include . . . [a]ny activity that requires a license or permit under chapter 20.1–03 [which governs gaming and other licenses]")
Oregon	Ore. Rev. Stat. §167.335 (2007) ("Unless gross negligence can be shown, the provisions of [certain statutes prohibiting animal cruelty] do not apply to . . . (7) [l]awful fishing, hunting and trapping activities")
Pennsylvania	18 Pa. Cons. Stat. §5511(a)(3)(ii) (2008) ("This subsection [banning killing, maiming, or poisoning of domestic animals or zoo animals] shall not apply to . . . the killing of any animal or fowl pursuant to . . . The Game Law"), §5511(c)(1) ("A person commits an offense if he wantonly or cruelly illtreats, overloads, beats, otherwise abuses any animal, or neglects any animal as to which he has a duty of care")
Rhode Island	R. I. Gen. Laws §4–1–3(a) (Lexis 1998) (prohibiting "[e]very owner, possessor, or person having the charge or custody of any animal" from engaging in certain acts of unnecessary cruelty), §§4–1–5(a), (b) (prohibiting only "[m]alicious" injury to or killing of animals and further providing that "[t]his section shall not apply to licensed hunters during hunting season or a licensed business killing animals for human consumption")
South Carolina	S. C. Code Ann. §47–1–40(C) (Supp. 2009) ("This section does not apply to . . . activity authorized by Title 50 [consisting of laws on Fish, Game, and Watercraft]")
South Dakota	S. D. Codified Laws §40–1–17 (2004) ("The acts and conduct of persons who are lawfully engaged in any of the activities authorized by Title 41 [Game, Fish, Parks and Forestry] . . . and

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	persons who properly kill any animal used for food and sport hunting, trapping, and fishing as authorized by the South Dakota Department of Game, Fish and Parks, are exempt from the provisions of this chapter")
Tennessee	Tenn. Code Ann. §39–14–201(1) (2010 Supp.) (" 'Animal' means a domesticated living creature or a wild creature previously captured"), §39–14–201(4) ("[N]othing in this part shall be construed as prohibiting the shooting of birds or game for the purpose of human food or the use of animate targets by incorporated gun clubs")
Texas	Tex. Penal Code Ann. §42.092(a)(2) (West Supp. 2009) (" 'Animal' means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal"), §42.092(f)(1)(A) ("It is an exception to the application of this section that the conduct engaged in by the actor is a generally accepted and otherwise lawful . . . form of conduct occurring solely for the purpose of or in support of . . . fishing, hunting, or trapping")
Utah	Utah Code Ann. §76–9–301(1)(b)(ii)(D) (Lexis 2008) (" 'Animal' does not include . . . wildlife, as defined in Section 23–13–2, including protected and unprotected wildlife, if the conduct toward the wildlife is in accordance with lawful hunting, fishing, or trapping practices or other lawful practices"), §76–9–301(9)(C) ("This section does not affect or prohibit . . . the lawful hunting of, fishing for, or trapping of, wildlife")
Vermont	Vt. Stat. Ann., Tit. 13, §351b(1) (2009) ("This subchapter shall not apply to . . . activities regulated by the department of fish and wildlife pursuant to Part 4 of Title 10")
Virginia	Va. Code Ann. §3.2–6570D (Lexis 2008) ("This section shall not prohibit authorized wildlife

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	management activities or hunting, fishing or trapping [as regulated by state law]")
Washington	Wash. Rev. Code §16.52.180 (2008) ("No part of this chapter shall be deemed to interfere with any of the laws of this state known as the 'game laws' . . . or to interfere with the right to kill animals to be used for food")
West Virginia	W. Va. Code Ann. §61–8–19(f) (Lexis Supp. 2009) ("The provisions of this section do not apply to lawful acts of hunting, fishing, [or] trapping")
Wisconsin	Wis. Stat. §951.015(1) (2007–2008) ("This chapter may not be interpreted as controverting any law regulating wild animals that are subject to regulation under ch. 169 [regulating, among other things, hunting], [or] the taking of wild animals")
Wyoming	Wyo. Stat. Ann. §6–3–203(m)(iv) (2009) ("Nothing in subsection (a), (b) or (n) of this section shall be construed to prohibit . . . [t]he hunting, capture or destruction of any predatory animal or other wildlife in any manner not otherwise prohibited by law")

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Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions

Gavin Phillipson*

INTRODUCTION

Lawyers acting for Max Mosley, following his victory in the High Court in London, have lodged an application at Strasbourg. They argue that English law is in violation of Article 8 of the Convention because it gives newspaper editors complete discretion as to whether to contact potential claimants before stories invading their private lives are run. When editors choose not to notify such claimants, the effect is usually to deprive them of any opportunity to apply for an interim injunction to prevent publication. The basic argument is therefore that, in order to ensure effective protection of Article 8 rights, UK law needs in some way to provide that newspaper editors, before publishing such stories, should contact their subject (I shall refer to this as the 'notification requirement'). At the time of writing, the Select Committee on Culture, Media and Sport[1] is conducting an enquiry into privacy and libel laws, including consideration of the desirability of a notification requirement. It is also of course possible that, in a suitable case, a domestic court will be invited to rule on the point, given that it is unlikely that Strasbourg will consider the *Mosley* case in the near future. This article considers the merits of the arguments for a notification requirement.

The facts of the *Mosley* case are well known: in March and April 2008, the *News of the World* published a series of articles revealing that Max Mosley, President of the Fédération Internationale de l'Automobile (F1), had engaged in group sex sessions, of a sado-masochistic nature, with five prostitutes, in a private residential property. The information for the story had been obtained from one of the prostitutes hired to take part in the sessions, who had used a hidden camera to make a video recording of the sexual

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1 Hereafter, in the text, 'The Select Committee' and in footnotes, 'SCCMS'.

activity.[2] The video accompanied the story, which was headlined 'F1 boss has sick Nazi orgy with 5 hookers' and contained explicit detail of the sexual activity, as well as numerous still photographs. The story alleged that the sexual role-play had Nazi overtones, an allegation that was found to be false at trial—a major reason why the judge concluded that the story had no public interest value. The litigation was in two stages: in the first, Mosley sought an interim injunction against further publication of the story and an order that the video be removed from the *News of the World*'s website; this application was refused.[3] At the trial of the action, however, the judge found in favour of Mosley's claim for infringement of his privacy,[4] awarding an unprecedented £60,000 in damages.

IS AN INTERIM INJUNCTION GENERALLY THE ONLY EFFECTIVE REMEDY IN PRIVACY CASES?

Academic and Judicial Opinion

The first stage in the argument is to ascertain whether interim relief, in the form of an injunction, is of particular importance as a remedy in cases concerning private and/or confidential information. After all, the settled rule in the related field of defamation is that injunctions are *not* available where the defendant intends to plead justification (truth), and the Court of Appeal recently ruled that this remains the position following the Human Rights Act.[5] However, it is immediately obvious that, as the author has previously argued,[6] obtaining such injunctions is critical in privacy cases, far more so than in defamation. This is because damage done to reputation by initial publication can subsequently be restored by a public finding that the allegation was false. An example is the recent Rushdie case:[7] the well-known author won a libel case in August 2008 in respect of various allegations made about him by one of his former police bodyguards. Rushdie, recognising the ability of a definitive court statement setting out the erroneous nature of the allegations to restore his reputation, decided not to claim any damages: he was content with a declaration of falsity. Since the essence of a libel claim is that the allegations were

2 [2008] EWHC 687 (QB) (hereafter *Mosley I*) [5]. As described by the judge, the footage contained 'shots of Mr Mosley taking part in sexual activities with five prostitutes ... The session seems to have been devoted mainly to activities which were conveniently described as "S and M".'

3 *Mosley I*.

4 [2008] EWHC 1777 (QB); [2008] EMLR 20 (hereafter *Mosley II*). For comment see K Hughes, 'Horizontal Privacy' (Case Comment) (2009) 125 *Law Quarterly Review* 244.

5 *Greene v Associated Newspapers* [2005] QB 972.

6 'Breach of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63 *Modern Law Review* 660, 691.

7 'Rushdie Wins Apology—and Spurns Cash—in Libel Case' *The Guardian*, 27 August 2008.

untrue, the authoritative finding by a court of their falsity largely restores a damaged reputation. In contrast, if private information is made public in a newspaper article, the law can seek to compensate for this harm at final trial by awarding damages, but it cannot in any way cure the invasion of privacy: it cannot erase the information revealed from people's memories. The outcome of court cases cannot *restore* privacy in the way that it can restore reputation. As Professors Leigh and Lustgarten have commented: 'the interim stage is the critical one. It is effectively the disposition of the matter.'[8] This is practically so also because, if an injunction is refused, and the information enters the public domain, many claimants will take the view that it is futile to continue with the litigation. Thus, as two media lawyers put it: 'In breach of confidence ... the critical stage is usually the application for an interim injunction ... If the publisher is able to publish ... the action will often evaporate ...'[9]

There is overwhelming agreement on this point, not only from leading academic authorities in the field of privacy but also from UK courts and other jurisdictions. Professor Barendt, author of the seminal comparative study *Freedom of Speech*, has argued that:

> If the publication disclosed material which an applicant was entitled and wanted to keep fully confidential or private ... an injunction would then be *the only effective remedy.*[10]

The same point is made by one of the leading authorities on privacy, Professor Raymond Wacks. He comments on this point:

> In many cases, in exercising its discretion not to grant the plaintiff interim relief, the court is effectively deciding the substantive issue. This is particularly so in personal information actions ... Because the plaintiff's only concern is usually to prevent the information from being disclosed at all, the plaintiff will rarely proceed to trial after failing to gain interlocutory relief.[11]

This was recognised by Eady J in the *Mosley* case itself:

> Whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action. Claimants with the degree of resolve (and financial resources) of Mr Max Mosley are likely to be few and far between. Thus, if journalists successfully avoid the grant of an interlocutory injunction, they can usually relax in the

8 I Leigh and L Lustgarten, 'Making Rights Real: The Courts, Remedies, and the Human Rights Act' (1999) 55(3) *Cambridge Law Journal* 509, 533 (referring to the granting of interim injunctions generally); see also 551.

9 G Robertson and A Nicol, *Media Law* (Penguin, 3rd edn 1992) 190.

10 E Barendt, *Freedom of Speech* (Oxford University Press, 3rd edn 2006) 137 (emphasis added).

11 *Privacy and Press Freedom* (Blackstone Press, 1995) 156.

> knowledge that intrusive coverage of someone's sex life will carry no adverse consequences for them ...[12]

As Mosley himself has put it:

> [I]f you go to court, [even if] you win ... you are going to have the entire matter debated in public ... That which was private that you did not want published, will be published all over again in more detail with [the newspaper] able in court to make any allegation they like about you because ... their witnesses [are covered by] absolute privilege ...[13]

Sir Christopher Myers, Chair of the Press Complaints Commission, made the same point, although in this case he was using it to argue for the superiority of the PCC route over a trial for damages:

> The great deterrent on [taking] a privacy case into the courts is because if you are concerned that some intimate detail of your private life has been exposed ... the very sin of which you were complaining ... is then thrown into open court where every nook and cranny and crevice—almost literally in Mr Mosley's case—is then exposed to the public gaze over and over as prosecution [*sic*] and defence throw the shaved buttocks backwards and forwards across the courtroom.[14]

Numerous other judicial decisions have recognised the point that 'an injunction is the primary remedy for a claimant who wishes to protect privacy'.[15] The Court of Appeal has recently noted that '[c]onfidentiality ... will be lost completely if an injunction against disclosure is not granted when appropriate',[16] while the House of Lords' leading judgment on interim injunctions under the Human Rights Act has noted that '[c]onfidentiality, once breached, is lost for ever'.[17] In an important decision on privacy under the Human Rights Act, the Court of Appeal recognised that, 'if the injunction is not granted, the claimant may be deprived of the only remedy that is of any value'.[18] Indeed, '[i]f an interim injunction is to be granted, it is essential that it is granted promptly because otherwise the newspaper will be published and then, from the claimant's point of view, the damage will have been done'.[19]

The second Court of Appeal judgment in the well-known *Douglas v Hello!* litigation[20] also affirmed this point:

12 *Mosley II* [230].
13 SCCMS, Oral evidence, HC 275-i, Q 122 (2008–9). Absolute privilege is afforded to fair and accurate reportage of court proceedings: Defamation Act 1996, s 14.
14 SCCMS, Oral evidence, HC 275-v, Q 346 (2008–9).
15 Matrix Media and Information Group, *Privacy and the Media—The Developing Law* (2002) 52.
16 *Greene v Associated Newspapers* [2005] QB 972, [78].
17 *Cream Holdings Limited v Banerjee* [2004] 3 WLR 918.
18 [2002] 3 WLR 542, [11](ii).
19 *Ibid*, [7].
20 *Douglas v Hello! Ltd (No 3)* [2006] QB 125.

> Damages, particularly [a modest] sum, cannot fairly be regarded as an adequate remedy ... Particularly in the light of the state of competition in the newspaper and magazine industry, the refusal of an interlocutory injunction in a case such as this represents a strong potential disincentive to respect for aspects of private life, which the Convention intends should be respected.[21]

It concluded: 'Only by the grant of an interlocutory injunction could the Douglases' rights have been satisfactorily protected.'[22]

This fundamental point as to the particular importance of injunctive relief to the protection of privacy has also been appreciated elsewhere in Europe. Professor Barendt notes that in many jurisdictions, 'courts may grant injunctions to stop the issue of publications which, it is argued, would amount to a breach of confidence [or] infringe personal privacy'.[23] This is the case, for example, in France and Germany. As one commentator on French law points out, 'Article 9 of the Code Civil allows an efficient protection, ie the seizure of the contested publication, for "unbearable breaches" of private life or for breaches of the "intimate private life"'.[24] She goes on to note:

> In most cases, plaintiffs prefer to prevent or to stop a breach to their 'intimate private life' happening. As a result, this emergency remedy has become the general remedy for the protection of private life, as opposed to normal procedures where judges award damages after the breach has happened.[25]

The authors of a recent leading work on civil law protection for privacy and personality remark that:

> The efficiency of the protection depends here, more than in other fields, on rapid judicial intervention, especially when the alleged violation of the right to ... one's private life occurs in a transitory publication such as a newspaper or magazine. After a few days the violation is complete and measures aimed at preventing the publication would no longer make any sense.[26]

They go on to cite a French commentator, who notes that injunctive relief is necessary in cases of disclosure of intimate personal information, since 'the later award of damages cannot adequately redress this kind of harm'.[27] Similarly in German law, interim injunctions may be obtained to prevent publications interfering with rights of personality.

21 *Ibid*, [257].

22 *Ibid*, [259].

23 *Freedom of Speech* (n 10) 117.

24 C Dupré, 'The Protection of Private Life against Freedom of Expression in French Law' (2000) 6 *European Human Rights Law Review* 627, 649.

25 *Ibid*, 642 (emphasis added).

26 H Beverly-Smith, A Ohly and A Lucas-Schloetter, *Privacy, Property and Personality* (Cambridge University Press, 2005) 182.

27 J Ravanas, *La protection des personnes contre la réalisation et la publication de leur image* (LGDJ, 1978) 459. See also E Derieux, 'Référé et liberté d'expression' (1997) I, No 6 *La Semaine Juridique: Juris Classeur Periodique*, 40533.

Professor Barendt notes that, while censorship is prohibited by Article 5(1) of the Grundgesetz (Basic Law), this 'has never been applied to preclude the granting of a temporary judicial order (*einstweilige Verfügung*) to prevent a publication'.[28] Injunctions may therefore be granted if the applicant's claim appears to be 'well-founded' and where interim relief 'is necessary in order to prevent a significant detriment'.[29]

The European Court of Human Rights itself recognised the particular importance of injunctive relief in this area in the well-known *Spycatcher* case,[30] which concerned a challenge to the compatibility of interim injunctions made by UK courts to prevent publication of the book *Spycatcher*. The initial injunctions, which prevented publication of extracts from the book in UK newspapers for over a year, were found not to violate Article 10: they were held to be justified on the basis that they had the aim of maintaining the Attorney General's ability to bring a case claiming permanent injunctions. As the Court said, the UK courts granted these injunctions because:

> to refuse interlocutory injunctions would mean that [the newspaper] would be free to publish that material immediately and before the substantive trial; this would effectively deprive the Attorney General, if successful on the merits, of his right to be granted a permanent injunction, thereby irrevocably destroying the substance of his actions.[31]

It was on this basis that the Court found no violation of Article 10 in relation to the temporary injunctions up to 30 July 1987 (after which the secrecy of the information was lost by publication abroad). It may be argued that the same considerations do not always apply with information relating to private life, as opposed to state secrets—with which *Spycatcher* was of course concerned. As noted below,[32] English courts now seem to take the view that prior publication may not destroy a claimant's claim for permanent injunctions in relation to personal information, particularly if the case concerns photographs. If this rule becomes firmly established in English law, it will render the Strasbourg reasoning in *Spycatcher* less applicable to such cases, but it is submitted that this is not yet the case—as the failure of Mosley's attempt to procure the removal of the video from the *News of the World* website vividly demonstrates.[33]

28 *Freedom of Speech* (n 10) 125.

29 If there has not yet been any publication, 'the claimant must show that an imminent danger of a violation exists': n 26 above, 139.

30 *Observer and Guardian v UK* (1991) 14 EHRR 153.

31 *Ibid*, [62].

32 See 87–88.

33 See below, text to n 48 *et seq*.

DOES STRASBOURG *REQUIRE* INJUNCTIVE RELIEF FOR THE PROTECTION OF ARTICLE 8 RIGHTS?

Until Max Mosley's case is heard, we will not of course know for certain whether Strasbourg requires effective access to a preventative remedy in cases concerning media publication of private information. Many Convention lawyers might well seek to refute the argument that the Convention could impose any such specific requirements: it would be pointed out that when considering the state's positive obligations to ensure respect for private life in the context of regulating relations between private individuals, the effect of the wide margin of appreciation that the Court applies in such cases is that the *means* of securing such 'respect' are left within the discretion of the state. As the Strasbourg Court has remarked on a number of occasions:

> ... as regards such positive obligations, the notion of 'respect' is not clear-cut. In view of the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, account being taken of the needs and resources of the community and of individuals.[34]

Therefore, the argument would go, states *cannot* be required by Article 8 to provide for any particular remedy in national law. Such an argument, however, is now out of date. First of all, the recent decision in *Armonas v Lithuania*[35] indicates clearly that the Court *is* now prepared to stipulate as to the remedy required to protect Article 8 rights against the media. The applicant's husband had brought a successful action for invasion of privacy against a newspaper that had revealed his HIV status. National law limited the maximum award for non-pecuniary loss to €2,896. The applicant applied to Strasbourg, alleging that this limit on recovery of damages to such a small sum had deprived her husband of an effective remedy. The Court agreed, finding a breach of Article 8. The state party argued that, 'The State enjoys a wide margin of appreciation in determining the measures required for the better implementation of [the] obligation [to respect private life]'. The Court 'reiterated' the broad principle set out above, but went on:

> The Court nonetheless recalls that Article 8, like any other provision of the Convention ... must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[36]

Thus, 'the State had an obligation to ensure that the husband was able *effectively* to enforce [his Article rights] against the press'.[37] The Court went on to find that while reasonable

34 *Armonas v Lithuania* (App no 36919/02) 25 November 2008, [38]; *Johnston v Ireland* (1986) 9 EHRR 203, [55].

35 (App no 36919/02) 25 November 2008.

36 *Ibid*, citing *Shevanova v Latvia* (App no 58822/00) 2006, [69].

37 *Ibid*, [43] (emphasis added).

limits to the award of damages would of course be permissible, 'such limits must not be such as to deprive the individual of his or her privacy *and thereby empty the right of its effective content*'.[38] The Court found that the severe limit placed upon the quantum of damages was such that the state 'failed to provide the applicant with the protection that could have legitimately been expected under Article 8'.

It is particularly noteworthy that the Court did not even find it necessary to invoke the Article 13 right to an effective remedy[39] in this case. The applicant argued a breach of that provision, but the Court said simply that in its view 'the complaint under Article 13 as to the absence of an effective domestic remedy is subsidiary to the complaint under Article 8'.[40] In other words, the low level of damages awarded did not just mean that there was no effective remedy: rather Article 8 itself was breached thereby. The Court thus held that the state's positive obligation to show respect for private life *in itself* requires a certain kind of remedy—a striking example of just how interventionist the Court has become in this area. More practically, this point is of great interest to English lawyers: since the Human Rights Act does not of course incorporate Article 13 into domestic law, this decision allows arguments about remedies for Article 8 to be made in domestic courts purely under Article 8; the non-applicability of Article 13 in domestic law will not be a handicap.

Armonas thus disposes of the view that the state's positive obligations under Article 8 cannot impose a requirement for any particular remedy. But more striking still—and of particular relevance to the argument of this paper—is the recent decision in *I v Finland*.[41] In this case, the Court addressed the issue of effective protection for sensitive personal information, in the context of an application alleging a violation of Article 8 in respect of disclosures of the applicant's HIV status from an insecure medical records database. Finding for the applicant, the Court found:

> ... the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is *practical and effective protection to exclude any possibility of unauthorised access occurring in the first place.* Such protection was not given here [and] the Court cannot but conclude that at the relevant time the State failed in its positive obligation under Article 8 § 1 ...[42]

The Court thus plainly recognised that the absence of effective *prospective* means of ensuring the security of personal information against unauthorised disclosure may itself amount to a breach of Article 8, despite the availability of *ex post facto* compensatory

38 *Ibid*, [46] (emphasis added).

39 Article 13 provides: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ...'

40 n 38 above, [23].

41 20511/03 (17 July 2008).

42 *Ibid*, [47]–[48] (emphasis added).

damages. Once again, the finding was made without the need to rely on Article 13. While this case concerned a breach by a state-run hospital, the same principles would doubtless apply in the context of media intrusion, since as decisions such as *Armonas* and *Von Hannover v Germany*[43] make abundantly clear, states owe a positive obligation to their citizens to ensure effective protection of Article 8 against private media bodies also.

THE CENTRAL ARGUMENT: CLAIMANT NOTIFICATION ESSENTIAL TO EFFECTIVE ARTICLE 8 PROTECTION

There is thus more or less universal agreement that in most cases involving unauthorised disclosure of sensitive personal information, an injunction is the only effective remedy. The Strasbourg Court also appears to have accepted that, at least in serious cases, only a method by which such disclosure may be *prevented* can satisfy Article 8. Once this is accepted, it then becomes very hard to regard the current situation, in which newspapers may in effect deny a claimant the right to apply for such an injunction through non-notification, as one that assures the 'practical and effective' protection for Article 8 that Strasbourg requires.

This is particularly so since it appears that tabloid newspapers often do not give notice, seemingly with the deliberate intention of avoiding the possibility of an injunction.[44] Giving evidence to the Select Committee enquiry, Mark Thomson of Carter Ruck, a leading claimant firm, said: 'It used to be when I started in practice the media would notify. Nowadays generally the tabloid media do not.'[45] There is indeed evidence that, in order to avoid the possibility of an injunction being obtained late on Saturday night, Sunday newspapers—the first editions of which are available at about 10 pm on Saturday night in central London—sometimes run what is termed a 'spoof' first edition, in which the contentious story does not appear; it is included in the second edition, which goes out in the middle of the night, making it impossible to stop the story.[46] Essentially,

43 (2004) 40 EHRR 1.

44 No notice was given, for example, in *Mosley* itself, nor in the recent case concerning the international chef, Gordon Ramsay, in which the *News of the World* revealed that he was having an extra-marital affair and gave details of recent sexual encounters with this alleged mistress (www.newsoftheworld.co.uk/news/article83126.ece), and none was given in the singer Madonna's recent case against the *Daily Mail* in relation to unauthorised use of photographs of her wedding ('Madonna Claims £5 Million for "Stolen" Wedding Photographs' *The Daily Telegraph*, 8 December 2008).

45 SCCMS, Oral evidence, HC 275-i, Q107 (2008–9). The Memorandum by Schillings' solicitors stated: 'The *News of the World* admitted in the Burrell case above that they did not give Mr Burrell notice because they were concerned that he might have obtained an "unmeritorious" injunction. Colin Myler also admitted the same in the course of the Mosley ... privacy trial.' (SCCMS, Memoranda: Press Standards, Privacy and Libel (2008–9)).

46 *Ibid*, Oral evidence of Max Mosley, Q 130: Mosley stated that this occurred in relation to both his and the Gordon Ramsay story.

unless the subject of the story happens to have been tipped off in advance by a rumour, the opportunity to apply for the all-important injunctive remedy is granted or withheld solely at the discretion of a newspaper editor. It may even be said that *in practice* at least the availability of this remedy is not 'in accordance with the law' as Article 8(2) requires, since the law in no way governs or even influences whether an applicant has the opportunity to obtain this remedy.

This situation is made all the worse because of the fact that newspaper editors, in deciding whether to notify the potential claimant before publication, have a clear commercial inducement *not* to do so: editors know that once they have got a story published, not only are any eventual damages likely to be modest, but most claimants are unlikely to bother to take legal proceedings, being fully aware that their privacy has already been irreparably damaged, and that litigation will only aggravate this fact by hugely adding to the publicity given to the original revelations. It is submitted therefore that effective protection for privacy cannot, consistently with the UK's duty to uphold it, be left in the hands of the very persons—newspaper editors—who have least reason to uphold it. Mr Mosley has expressed the point with some eloquence himself:

> The moment you say that it should not be obligatory to give the individual an opportunity to take the matter before a judge, what you are really saying is that in carrying out this sometimes very delicate weighing balance between Article 8 of the Convention and Article 10 the best and most qualified person to carry out that delicate weighing up ... is not a High Court judge but the editor of a tabloid, and not just [any] editor ... but the editor ... who is dying to publish the very story which is the subject matter of this weighing ... To say [this] is so manifestly absurd that I do not think any rational person could support that argument.[47]

The effect of denying the applicant the opportunity to apply for a pre-publication injunction is well illustrated by the fate of Mr Mosley's application for an injunction to remove the video from the *News of the World* website, which, it will be recalled, showed intimate details of sexual activity, surreptitiously recorded on private property.[48] Mr Mosley, not having been notified before the story broke and the video posted on the website, was naturally anxious that at least the video be removed as soon as he became aware of it, pending the trial of his case. However, by the time the interim application was heard, it was found as a fact that the footage 'had been viewed about 1,424,959 times'.[49] This was partly because, as is likely to happen with the internet, the video had been copied onto other websites, as the judge found:

47 SCCMS, Oral evidence, HC 275-I, Q 130 (2008–9).

48 *Mosley I*, [4]: 'The very brief extracts which I was shown seemed to consist mainly of people spanking each other's bottoms. There were discreet blocks ... to make sure that no private parts were on display (or ... the prostitutes' faces).'

49 *Ibid*, [7].

> [T]he footage could have been accessed via the Internet by users who were visiting other websites in which the footage had been 'embedded'. It was also made available on the Internet by other websites which had copied it while still available on the *News of the World* website. It follows that there are a number of websites (not possible to quantify accurately) where the footage has been available continuously, notwithstanding its removal from the *News of the World* website.[50]

In determining whether to order the removal of the video, despite its massive exposure to the public, Eady J took fully into account the principle enunciated in a number of previous judgments that in relation to the effect of prior publicity, information relating to private life, particularly visual images, should be treated differently from other kinds of confidential information. Whereas it is generally accepted that once confidential information has been publicised, no purpose will be served by granting an injunction, on the basis that the information's confidential quality has been irretrievably lost, photographs of private occasions may be treated differently. As the Court of Appeal observed in the *Douglas* case:

> Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it.[51]

Similar comments have been made in another decision.[52] It would thus have been theoretically possible for Eady J to order an injunction in this case. Of course, even if he had felt able to do so, the video footage of the S/M activities would have been watched by over a million people and Mr Mosley's sexual life thus comprehensively laid bare to the public. However, in the event, even this unsatisfactory remedy was withheld. The decisive factor was that the footage had by then been copied onto other websites, as the judge found. Thus, even had an order been made that the *News of the World* should remove it from its website, this would not have prevented the footage being accessed from other websites, some of which may have been in other jurisdictions and beyond the reach of UK courts. Eady J therefore took the view that to grant an injunction would have been a futile act:

> The Court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose ... I have, with some reluctance, come to the conclusion that although this material is intrusive and demeaning, and despite the fact that there is no legitimate public

50 *Ibid*, [7], [8]. The video had been voluntarily withdrawn pending the outcome of the application for the injunction: following the decision not to grant one, it was restored to the *News of the World* website.

51 *Douglas v Hello! Ltd (No 3)* [2006] QB 125, 162, [105].

52 *D v L* [2004] EMLR 1, [23].

> interest in its further publication, the granting of an order ... at the present juncture would merely be a futile gesture. Anyone who wishes to access the footage can easily do so, and there is no point in barring the *News of the World* from showing what is already available.[53]

The outcome of this case was therefore as follows: by the simple expedient of not notifying Mr Mosley before the story was broken, the *News of the World* effectively denied him any chance of preventing well over a million people from seeing explicit images of the most intimate sexual activity, secretly recorded on private property—images that the judge eventually found to be grossly invasive of his privacy and attracting no legitimate public interest. As the judge noted in his final judgment, 'no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined.'[54] Mr Mosley himself has said of the effect of such revelations:

> It is the most terrible thing you can imagine ... It is like taking all your goods, taking all your money; in fact it is worse because if someone took your goods and your money you have some chance of replacing it—even if you are not insured you can work—but if somebody takes away your dignity, for want of a better word, you can never replace it. No matter how long I live, no matter what part of the world I go to, people will know about it.[55]

The position in the related field of the law of defamation is strikingly different. Even though it is widely accepted that the primary remedy for defamatory allegations is damages, English law already lays a strong legal incentive upon media bodies to notify the subject of a story in advance, to give them a chance to comment on it and ensure that the account published contains their side of the story. This is because newspapers must generally ensure that they engage in prior claimant notification if they wish to be able to avail themselves of the public interest defence to defamation set out in *Reynolds v Times Newspapers Ltd*:[56] under *Reynolds* privilege, journalists may escape liability for defamation where the matter published was of serious public concern and they took reasonable care as journalists to verify the accuracy of the story and act responsibly. One of the matters that a court is specifically required to consider under the well-known '10-point checklist' is 'whether comment had been sought from the plaintiff in advance of publication'. A failure to do so can be fatal to a claim for public interest privilege.[57] In this respect, *Reynolds* is clearly reflective of the Strasbourg notion that journalism is to be exercised responsibly and with due consideration for the rights of others, a notion based partly on the wording of Article 10, that the exercise of free speech rights 'carries with it duties and responsibilities'; hence the oft-repeated warning that 'the press must not overstep the

53 *Mosley I*, [34], [36].

54 *Mosley II*, [236].

55 SCCMS, Oral evidence, HC 275-I, Q127 (2008–9).

56 [1999] 3 WLR 1010; [1999] 4 All ER 609, 626.

57 On this, see *Jameel (Mohammed) v Wall Street Journal Europe* [2004] EMLR 11 (QB); [2005] EWCA Civ 74 (CA); [2007] 1 AC 359 (HL).

bounds set, *inter alia*, for the protection of the reputation of others'.[58] Decisions such as *Pedersen & Baadsgaard*,[59] *Barford*[60] and *Radio France*[61] all illustrate this principle well. In *Bladet Tromsø* the Court said that the press should be protected, provided that 'they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism'.[62] In the admissibility decision of *Times Newspapers v UK*,[63] which concerned the *Louthansky*[64] libel case, the Strasbourg Court noted, as one reason for finding reasonable the High Court's assessment that *Reynolds* privilege was not made out, the fact that '[t]he story was not particularly urgent and Mr Loutchansky had not even been contacted or given the opportunity to defend himself prior to publication'.[65] The proposed notification requirement is thus soundly rooted in Strasbourg jurisprudence, as simply another aspect of the general principle of journalistic responsibility.

Findings made by Strasbourg in the context of Article 13, the right to an effective remedy for violations of Convention rights, are also illuminating. The Court has said that:

> while Contracting States are afforded some discretion as to the manner in which they conform to their obligations under [Art 13] ... *the remedy must be effective in practice as well as in law.*[66]

This is precisely in line with the argument advanced in this paper: whilst a satisfactory remedy in the form of an injunction is available in theory, it is 'not effective in practice' if it can be—and is—denied at the discretion of newspaper editors. A leading text on the Convention notes that a wholly discretionary remedy will generally not be an effective one.[67] Moreover, the remedy-granting body must be 'sufficiently independent' of the rights-violating body.[68] The precise objection to English law granting newspapers complete discretion as to whether to notify claimants before publication is that the decision whether to effectively deny the only effective remedy for invasion of privacy is made by a body that far from being 'independent' of the rights-violator is the violator itself—a body with a clear vested interest in denying the claimant the possibility of seeking

58 [2002] 3 WLR 542, [41].

59 49017/99 (17 December 2004).

60 *Barford v Denmark* (1989) 11 EHRR 493.

61 53984/00 (30 March 2004).

62 *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [65].

63 *Times Newspapers Ltd v UK* (App nos 23676/03 and 3002/03) 2005.

64 *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EMLR 36 (QB); [2002] QB 783, CA; [2002] EWHC 2490 (QB).

65 Above, n 63, under 3(c). For comment, see R Dunlop, 'Article 10, the *Reynolds* Test and the Rule in the *Duke of Brunswick's case*—the Decision in *Times Newspapers Ltd v UK*' (2006) 3 *European Human Rights Law Review* 327.

66 *Rotaru v Romania*, 28341/95 (2000-V) GC, [67] (emphasis added).

67 D Harris, M O'Boyle, E Bates and C Buckley, *Harris O Boyle and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press, 2nd edn 2009) 565.

68 *Ibid*, citing *Silver v UK* (1991) 13 EHRR 582, [116].

that remedy. This is not of course the same position as if the newspaper had the *legal* power to grant or withhold an injunction—an obviously unreal possibility—but it is argued that to allow newspapers this power *in practice* must also be seen as a violation of the Convention.[69]

Buttressing the Notification Argument: Newspaper Stories that Pose a Real Threat to Life and Limb

There is a further consideration which, it is submitted, provides substantial support to the basic argument outlined above. It derives from cases in which courts have made orders against the media to protect the identity of persons seeking rehabilitation in society after serving sentences for crimes that have attracted such notoriety that there appeared to be a well-founded fear that were their identity and whereabouts to be revealed, they would be subject to harassment and possibly vigilante attacks involving serious violence. For example, in *Venables v News Group Newspapers,*[70] Butler Sloss P granted unprecedented injunctions against the whole world preventing publication of any material which might reveal the identity and whereabouts of Venables and Thompson, who many years previously, as juveniles, had murdered the child James Bulger.[71] Such was the degree of public hostility towards the two applicants that there was convincing evidence before the court that a failure to protect their anonymity could leave the court accused of failing to secure their rights under Articles 2 and 3 of the Convention, in addition to their right to privacy under Article 8. An order was made in similar circumstances in *X (A woman formerly known as Mary Bell) v O'Brien,*[72] 'to protect the Article 8 rights of the applicant and her daughter, who had on five occasions been forced to move home following the discovery of their whereabouts and harassment by the press'.[73] A similar injunction was granted in *Carr v News Group Newspapers,*[74] to protect a woman convicted of perverting the course of justice for providing a false alibi for her partner who had killed two children in 2002, in a case that had attracted massive publicity. In each case, the court was able to hear an application before any disclosure was made, but without a claimant notification requirement, this is by no means guaranteed in future similar cases.

Less extreme, but still indicative of the attitude of the press, is the well-known case of *Re S.*[75] This case arose in the course of a murder trial that had attracted great publicity,

69 Article 13, although not applicable under the HRA, is binding on the UK at Strasbourg; moreover, as noted above (text to n 39), the notion of an effective remedy appears to have been subsumed recently by the Strasbourg Court into Article 8 itself.

70 *Venables v News Group Newspapers* [2001] 1 All ER 908.

71 *X (A woman formerly known as Mary Bell) v SO* [2003] EWHC 1101.

72 [2003] EWHC 1101; [2003] EMLR 37.

73 I Leigh and R Masterman, *Making Rights Real* (Hart Publishing, 2008) 284.

74 *Carr v News Group Newspapers* [2005] EWHC 971 (QB).

75 [2005] 1 AC 593.

in which a mother was accused of murdering one of her children. The guardian of the brother of the murdered child sought an injunction preventing the press from revealing information that would identify him. This was on the basis that there was expert evidence to the effect that revelation of the child's identity, exposing him to publicity and to probable bullying and harassment at school, would be likely to cause him significant psychological harm and impair his recovery from the terrible experience he had been through:[76] he was already the subject of care proceedings and in a profoundly traumatised state. Nevertheless, three national newspapers intervened in the case, in order to argue that the order should be lifted, allowing them to reveal the mother's, and thus the boy's, identity.[77]

All these cases show that newspapers are quite prepared to publish information even where there is clear evidence that doing so may lead to a serious risk to a person's physical safety or their mental health, even (as in *Re S*) where that person is a wholly innocent and vulnerable child. A notification requirement in English law would help to ensure that the vital interests of such people, including their Convention rights to life and freedom from inhuman treatment, could be protected by a court by injunction, if it seemed necessary. The absence of any such requirement not only allows newspaper editors unilaterally to strip people of effective protection of their Article 8 rights, but also leaves them free to put people's very lives at risk.

Buttressing the Notification Argument: Journalistic Contempt for Article 8 and the Judiciary

As noted above, the Strasbourg Court has repeatedly held that journalists are bound by the Convention to accept certain responsibilities, including a proper level of respect and consideration for the rights of others, in particular their rights to reputation and privacy, guaranteed by the Convention itself. However, it is painfully apparent that many prominent UK tabloid journalists are openly hostile, not only to the notion of the protection of privacy, but also to the very judges who are seeking to ensure balanced protection for Article 8 under the UK's Human Rights Act. This is relevant not only because it tends to negate any argument that the press can be relied upon itself to notify claimants in advance of stories, as an aspect of responsible journalism, but also because recent statements emanating from the tabloid media make plain that newspapers openly support their right to invade the privacy of others in order to ensure their economic survival. Paul Dacre is not only the editor of the best-selling middle market tabloid newspaper, *The Daily Mail*, he is also Chair of the Editors' Code Committee of the Press

76 See Baroness Hale in *Campbell* [2004] 2 WLR 1232, [142].

77 The intervention was successful in the Lords, which lifted the injunction, in a controversial decision: for critical comment, see H Fenwick, 'Judicial Reasoning in Clashing Rights Cases' in H Fenwick, G Phillipson and R Masterman (eds), *Judicial Reasoning under the Human Rights Act* (Cambridge University Press, 2007).

Complaints Commission, which has the role of setting standards for the print media on the obtaining and publishing of private information by newspapers and adjudicating upon complaints. Mr Dacre's attitude towards privacy is therefore of considerable importance. In a recent public lecture,[78] which attracted much publicity, he launched an outspoken and highly personal attack not only upon the development of a right to privacy in English law, but upon one particular High Court judge, Eady J, who has delivered more judgments in this area than any other. His central (inaccurate) charge was that Eady J was single-handedly imposing upon the media a 'back door' law of privacy. It is not proposed here to point out the obvious, numerous flaws in Dacre's argument,[79] but simply to highlight the relevance of his attack for the present discussion.

The speech is revealing firstly for the sheer animosity it displays on the part of sections of the press towards the judges who are doing nothing more than developing a law of privacy in line with the jurisprudence of the Strasbourg Court, as the Human Rights Act envisages. Mr Dacre said: 'This law is not coming from Parliament ... but from the arrogant and amoral judgements—words I use very deliberately—of one man'—Eady J, whom he described as a 'judge with a subjective and highly relativist moral sense'. He added: 'The freedom of the press ... is far too important to be left to the somewhat desiccated values of a single judge, who clearly has an animus against the popular press and the right of people to freedom of expression', and he lamented the effect of the 'wretched' Human Rights Act. Mr Dacre's views have been supported by other prominent tabloid editors: Rebekka Wade, editor of the best-selling *Sun* newspaper, said: 'As a paper we agree with everything [Dacre] said. It is long overdue ...'[80] The *News of the World* itself responded to the *Mosley* judgment by claiming that the British media 'is being strangled by stealth' as a result of judges following 'guidance from judges in Strasbourg who are unfriendly to freedom of expression'.[81]

Of direct relevance to the argument of this paper is the fact that Mr Dacre openly takes the view that it is for the press—not the courts—to decide when a person's private life should be laid bare to the public, on the basis that some might take the view that what he or she had done, while perfectly legal, was contrary to their own standards of morality. Thus Mr Dacre argues:

> From time immemorial public shaming has been a vital element in defending the parameters of what are considered acceptable standards of social behaviour, helping ensure that citizens ... adhere to them for the good of the greater community. For hundreds of years, the press has played a vital role in that process. It has the freedom to identify those who have offended public standards of decency ... and hold the transgressors up to public condemnation.

78 Speech by Paul Dacre at the Society of Editors Conference, 9 November 2008, http://image.guardian.co.uk/sys-files/Media/documents/2008/11/07/DacreSpeech.pdf.

79 See eg the comments of the Campaign for Press and Broadcasting Freedom in their Memorandum, [4.1]: SCCMS, Memoranda: Press Standards, Privacy and Libel (2008–9).

80 www.guardian.co.uk/media/2008/nov/11/paul-dacre-daily-mail-privacy.

81 See *Press Gazette*, 24 July 2008: www.pressgazette.co.uk/story.asp?storycode=41787.

Since it is clear that in modern pluralistic societies there is huge variation in terms of moral standards on intimate matters of judgment such as sexual conduct, what the editor is asserting in effect is a right for newspaper editors to decide for themselves what conduct is immoral and should therefore be revealed to the public. Mr Dacre remarked that 'most people would consider [the sexual activities of Mosley] to be perverted, depraved, the very abrogation of civilised behaviour of which the law is supposed to be the safeguard'.[82] The point he misses, of course, is that it is precisely in order to *avoid* the courts, as representatives of the state, having to make moral judgments about the private sexual behaviour of individuals that judges such as Eady J have begun to adopt a stance of moral neutrality in such cases (except of course in instances in which behaviour is revealed that might genuinely be thought to pertain to the public conduct of an important public servant).[83] Mr Dacre's comments are revealing because they evince clearly his belief that privacy protection should be subject to the judgment of newspaper editors as to what is and is not immoral. Those holding such views are highly unlikely to give the subjects of their stories any chance to prevent them running: indeed they evidently regard themselves, rather than the courts, as being the proper judges of the boundary between private life and public scandal.

Finally, there is a very clear admission in Mr Dacre's speech that in his view, an important reason why newspapers should be free to cover sexual scandal is that such stories help to sell newspapers—and that, particularly in difficult economic times, newspapers need to be able to make money by selling the private lives of others. Thus Mr Dacre commented:

> if mass-circulation newspapers, which, of course, also devote considerable space to reporting and analysis of public affairs, don't have the freedom to write about scandal, I doubt whether they will retain their mass circulations, with the obvious worrying implications for the democratic process.

Earlier in his speech, he referred to privacy law as 'undermining the ability of mass circulation newspapers to sell newspapers in an ever more difficult market'. These comments amount to a perhaps surprising admission that newspapers are directly motivated by commercial considerations when running stories concerning intimate aspects of private lives: once again this suggests that editors are prepared to make the calculation that non-notification of a story, precluding any possibility of an injunction,

82 *Ibid.* While many would consider the use of prostitutes immoral, there was no evidence in this case that the prostitutes in question were exploited—in the sense of being forced in some way to carry out their occupation because of the need to pay for drug addiction, or a violent pimp. The evidence from the prostitutes themselves was that they regarded Mr Mosley as to an extent a friend and a fellow participant in the S&M 'scene', that money was not always involved, and that they had planned to offer Mosley a free 'session' by way of a birthday present: *Mosley II*, [107].

83 Eg where it was alleged that he or she had promoted or otherwise improperly favoured a person with whom they were having a sexual relationship.

is the best way to serve those commercial interests. It is true of course that newspapers are commercial entities and need to make a profit.[84] However, the Strasbourg jurisprudence envisages that journalists should carry on their vital role in society both with respect for the rights of others, including their rights to privacy, *and* with respect for the framework of law, particularly human rights law, within which they must carry on their business. Were this to represent the reality of the UK tabloid media, the notification requirement argued for here might not be necessary: what is striking about Mr Dacre's comments is that they indicate an outright rejection of respect for both the right to privacy and the courts. In such a climate, it is evident that the law must do more to compel such respect.

Objections to the Notification Requirement: A Risk of Stifling the Press?

Interim Injunctions and Freedom of Speech: General Considerations

In the author's view, the only real argument against some kind of 'notification requirement' is the fear that such a requirement would lead to interim injunctions being routinely deployed to stifle serious journalism, with courts unable properly to consider genuine public interest arguments advanced by the media in such cases. While it is accepted that this fear may have been justified prior to the inception of the Human Rights Act 1998, it is submitted that the particular provisions relevant to interim relief introduced in that legislation, namely section 12, lay that fear to rest. The best known *dicta* from the Strasbourg Court on interim injunctions is its observation that

> the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.[85]

It may be noted first of all that the 'perishablility' argument would not apply on facts like those in *Mosley*—a delay of a few months on such a story would not have made any difference to its newsworthiness. Indeed it should be noted that the argument is not a normative proposition but amounts only to a rather large generalisation about factual phenomena—that delay will often deprive a story of its value; as such it should generally be treated with caution and not assumed to apply in every case. Moreover, the Court has used the same language—stressing the need for 'careful scrutiny'—about any measures or sanctions 'capable of discouraging the participation of the press in debates on matters of legitimate public concern'.[86]

84 Indeed, Mr Dacre referred to judicial *dicta* which might be seen as supporting his argument on this point, namely the heavily criticised comments of Lord Woolf in *A v B plc* [2002] 3 WLR 542, [11 (xii)], and *dicta* of Baroness Hale in *Campbell* (n 76) [143].

85 *Observer and Guardian v UK* (1991) 14 EHRR 153, [60].

86 *Times Newspapers Ltd v UK (Nos 1 & 2)* (App nos 3002/03 and 23676/03) 10 March 2009, [41].

There are, of course, further arguments of principle against the use of prior restraints, mainly originating from the United States, in which they are presumptively unconstitutional. Barendt quotes Alexander Bickel's well-known adage, '[A] criminal statute chills, prior restraint freezes',[87] noting that 'an order not to publish material means that it can never legally see the light of day, while a publisher faced only by the prospect of a criminal prosecution may decide to take the risk and release the work'.[88] Or as the US Supreme Court has put it: 'A prior restraint has an immediate and irreversible sanction.'[89] It is argued, in other words, that a prior restraint definitely punishes both author (by preventing her from speaking) and audience (by depriving them of the material in question). This analysis has been subject to sustained criticism,[90] in particular based on the lack of attention traditional US constitutional doctrine pays to the difference between a temporary judicial order and a system of censorship or perpetual restraints. This is not the place to re-rehearse these arguments. Rather, it may simply be noted that the above points apply only weakly to interim injunctions—the subject of this paper. If the newspaper wins at final trial then the material *will* be published and the speech rights of both audience and publisher will have been not denied but only delayed—perhaps only for a few months.[91] Indeed a delay in publishing a story such as Mosley's would hurt a publisher less than a large award of damages and, more importantly, in some ways, a huge costs order. Media organisations have voiced great concern to the Select Committee inquiry as to the effect of Conditional Fee Arrangements on costs orders made against media parties, and alleged concomitant pressure to settle cases considered legally defensible, due to the fear of massive liability in costs should the case be lost.[92] As one of the claimant lawyers pointed out to the Committee in oral evidence:

> I think [a notification requirement] would also make an enormous difference in terms of the amount of follow-on litigation. All the lawyers here will make most of their money from litigating [after publication] ... We do not make as much money from dealing with a story prior to publication ...[93]

In other words, settling the issue at the interim stage is both quicker and far cheaper than proceeding to final trial to decide the issue in terms of damages. However, this argument of course depends upon how satisfactory the test adopted at that stage is.

87 *The Morality of Consent* (Yale University Press, 1975) 61.

88 Barendt (n 10) 119.

89 *Nebraska Press Association v Stuart* 427 US 539, 559 (1976).

90 See Barendt (n 10) and JC Jeffries, 'Rethinking Prior Restraint' (1983) 92 *Yale Law Journal* 409, 429 and his conclusion, 433: 'In my view, a rule of special hostility to administrative pre-clearance is justified, but a rule of special hostility to injunctive relief is not.'

91 In their Memorandum (n 45), Schillings contended that, with appropriate arrangements, 'in many cases, a trial could be arranged to take place within a month or two of the initial injunction being granted. In many cases, the process could be even quicker.'

92 See eg the memo by Foot Anstey Solicitors (n 79).

93 SCCMS HC 275-i, Q 84 (2008–9).

Interim Injunctions: The Effect of Section 12 HRA

The test for injunctive relief in cases affecting freedom of expression contained in section 12(1)–(3) HRA precisely requires that 'careful scrutiny' be afforded by the courts. As is well known, those provisions both ensure that injunctions against publication cannot generally be granted unless the media party has been contacted and given the chance to contest them and then go on to set out the substantive test in section 12(3):

> No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

This replaced the old *American Cyanamid* test, which was that the applicant had, as a threshold test, to show that he or she had a 'real prospect of success' at final trial. If so, the court would consider where the 'balance of convenience' lay[94] between the case for granting an injunction and that of leaving the applicant to his or her remedy in damages. As Lord Nicholls observed in *Cream Holdings v Banerjee*,[95] under this approach:

> Orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8.[96]

In other words, the danger to the press under this test was that, once the applicant had made out an arguable case for confidentiality, the court was generally inclined to grant an interim injunction on the basis that if the story were to be published, the information would lose its confidential character, and there would be nothing to have a final trial about.[97] This consideration could be outweighed by the public interest defence at this stage, provided that the defence was supported by evidence and had a credible chance of success at final trial.[98] However, the pre-HRA test was considered potentially unfavourable to the media because in balancing the rights of the two parties, courts tended to take the view that while the plaintiff's right to confidentiality would be wholly defeated by publication, the press could always still publish the story if they won at final trial; they were thus inclined toward protecting the more fragile right of the plaintiff;[99] the risk thus was that the publication of important stories could be delayed even where the story was of serious public importance. As Lord Nicholls observed, 'Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage.'

94 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

95 [2004] 3 WLR 918. This is the leading authority on s 12 HRA.

96 *Ibid*, [15].

97 See *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109; *Francome v Mirror Group Newspapers* [1984] 1 WLR 892, 900; *Lion Laboratories v Evans* [1984] 1 QB 530, 551.

98 See *Lion Laboratories, ibid*, 538, 548, 553; see also *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, where the public interest argument prevented the award of an injunction.

99 See *Attorney General v Guardian Newspapers* [1987] 1 WLR 1248, 1292 and 1305.

Lord Nicholls went on to confirm that section 12(3) had replaced the old approach with a much more demanding standard:

> the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied that the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case ... [T]he general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial.[100]

Thus, aside from exceptional cases, where 'a lesser degree of likelihood may suffice as a prerequisite',[101] it is clear that the Human Rights Act has afforded the press a significant degree of extra protection from interim injunctions. In order to decide whether the claimant is 'likely to succeed' at trial, at the interim stage the court must take a view of the merits, paying 'particular regard' to the freedom of expression of the newspaper and any public interest value of the particular publication.[102] Thus, 'the court should not grant an injunction against a defendant who raises a defence of public interest that has a real prospect of success'.[103] As the Court of Appeal has remarked, 'a claimant seeking an interlocutory injunction restraining publication [now] has to satisfy a particularly high threshold test'.[104] Leigh and Masterman agree: 'the *American Cyanamid* test has been replaced by [a] more exacting standard.'[105] Some of course will still contend that despite section 12, the courts will sometimes get it wrong and injunct a story that should be published. This possibility must be conceded. Very recently, for example, in *Barclays Bank plc v Guardian News and Media Ltd*[106] Blake J continued emergency injunctions against *The Guardian* preventing it from publishing confidential documents alleged to show an elaborate tax avoidance scheme by Barclays Bank at a time when such schemes were a matter of intense public debate. It is not possible to comment in detail on the judgment here,[107] but the decision clearly raises concerns about the use of interim injunctions to restrain publication of documents of serious public interest. There were no competing Article 8 rights at stake and the documents plainly made a significant contribution to a very important story; moreover it was not clear that any real commercial damage would be done to Barclays through their publication. Nevertheless, it is submitted that if there

100 *Cream Holdings Limited v Banerjee* [2004] 3 WLR 918, [22].

101 Those in which it is necessary to make an interim order for a few days 'to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal'; also in instances where the injunction was sought to prevent a disclosure that could endanger the safety of the claimant (*ibid*).

102 s 12(4) HRA.

103 n 15, 55–56.

104 *Douglas v Hello! Ltd* (No 3) [2006] QB 125, [258].

105 Leigh and Masterman (n 73) 288.

106 [2009] EWHC 591 (QB).

107 At the time of writing, the judgment is not available.

is concern about courts being over-ready to use injunctions in such cases, the way to tackle this is not by allowing newspapers simply to bypass this possibility but to concentrate attention on improving judicial reasoning at the interim stage. It cannot be satisfactory that those who would plainly be entitled to an injunction to prevent a gross invasion of private life with little or no public interest justification should be denied the right even to *seek* such relief, because of a fear that sometimes the judges get it wrong. That would be the most imperfect kind of solution to the problem of the few doubtfully decided cases.

In addition to the specific provisions of the HRA, *Spycatcher* of course makes clear as a general principle that restrictions on freedom of expression must be necessary and proportionate. Since 'even if a court is satisfied that victory for the claimant is likely, it still retains a discretion as to whether or not to order an injunction',[108] courts must, in exercising that discretion, consider whether granting an injunction is truly necessary. Thus courts will *always* consider whether the plaintiff can be adequately compensated through damages instead. While in cases concerning the revelation of private information, this is unlikely to be so, it allows a judge to examine carefully whether the plaintiff's claim really does require an injunction. For example, it may be suggested that where the objection to a photograph is not that it reveals information of an intimate character, but rather that it simply constitutes unwanted attention, albeit on an innocuous occasion—as in the JK Rowling litigation currently before the courts[109]—damages, rather than an injunction, may be considered an adequate remedy. This discretionary element is thus a further safeguard against the over-ready granting of injunctions.

PRACTICAL OBJECTIONS

When confronted with the argument for a notification requirement, newspaper lawyers giving evidence to the Select Committee raised only the minor objection that it might sometimes be difficult to contact the subject of a story.[110] Plainly this should be recognised in any notification requirement introduced, such that only reasonable attempts at contact would be required: persons who make themselves deliberately un-contactable by the media should not be able to complain about a failure to contact them. But perhaps more important concerns are raised by the possibility of future developments in the area of 'misuse of private information'. It is well known that, on one view of the Strasbourg decision in *Von Hannover*, the publication of any unauthorised photograph of any individual in any location, other than of someone plainly going about public business

108 n 15, 56.

109 See *David Murray v Express Newspapers* [2007] EWHC 1908 (Ch) and [2008] EWCA Civ 446.

110 SCCMS, Oral evidence, HC 275-v, Q 336 (2008–9), Jeff Edwards, Chair of the Crime Reporters Association.

(such as speaking at a press conference), gives rise to a *prima facie* claim under Article 8,[111] even if there is no harassment, humiliation or revelation of sensitive information. English law has not yet gone as far as this: no decision has yet imposed liability for the publication of such innocuous photographs: some well-known *dicta* in *Campbell*[112] appeared to rule out liability in English law on such occasions, and Elton John failed when he brought such a claim.[113] The decision of the Court of Appeal in the JK Rowling case[114] comes closest to embracing such a position, but this was only a decision to allow the case to go to trial, and the court's reasoning seemed to turn mainly on the fact that a young child was involved. Nevertheless, the issue remains: should English law ever fully embrace the 'absolutist' *Von Hannover* position, then the notification requirement could become onerous indeed: every time it was proposed to publish a photograph of an individual without consent (other than the narrow exception of their being on 'public business'), the person would have to be contacted in advance of publication, giving them sufficient time to apply for an injunction. Were this situation to be reached, it might be necessary to adapt the notification requirement so that it did not apply in every case, but only where the material would be seriously invasive of privacy, in the sense of revealing intimate or sensitive personal information about an individual (which could include publishing photographs of them in a nude or semi-nude state). It is in these kinds of situations that publication represents the kind of irreversible loss of privacy that this paper has been discussing. At present, the revelation of information of this sort appears to be where English law sets the threshold for Article 8 to become engaged for domestic purposes.[115] In contrast, publication of an anodyne photograph of a person in a public place does not constitute such an irreversible loss; as suggested above, damages would be an adequate remedy and therefore notification in such cases should not be required. Thus, if English law *does* move to full acceptance of what has been described as *Von Hannover* in its 'most absolutist form',[116] then a distinction of this sort might have to be introduced in relation to the notification requirement.

111 For full analysis of the Strasbourg decision in this respect see H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006) 677–83.

112 *Campbell v MGN Ltd* [2004] 2 AC 457, [154] (Baroness Hale) and [73] (Lord Hoffmann).

113 Elton John applied unsuccessfully for an injunction restraining the *Daily Mail* from publishing a photograph of the applicant which showed him standing in a London street, outside the gate to his home: *John v Associated Newspapers Ltd* [2006] EWHC 1611 (QB); [2006] EMLR 27.

114 [2008] EWCA Civ 446.

115 See eg the decision in *McKennit v Ash* [2006] EMLR 10; [2005] EWHC 3003 (QB); approved by the Court of Appeal [2006] EWCA Civ 1714; [2007] EMLR 113, in which liability only for particularly sensitive revelations was imposed, while more mundane or anodyne revelations were seen as falling outside the scope of liability—see eg [139]. For discussion, see G Phillipson, 'The Common Law, Privacy and the Convention' in Fenwick *et al* (n 77) 240–4.

116 The phrase used by Platten J, quoting an unpublished conference paper of the author, in *Murray* [2007] EWHC 1908 (Ch), [64].

Finally, there is the practical issue of how a notification rule could be introduced and enforced. This issue is for another day, but possibilities include an amendment to section 12(3) HRA, placing a duty upon editors to contact potential claimants prior to publication, or the introduction of such a provision into the Press Complaints Commission Code—which must be taken into account by the courts under section 12 HRA. Alternatively, it could be judicially introduced as a rule of common law. As for enforcement, one possibility would be a judicial ruling that the absence of such notification could, in appropriate circumstances, ground a right to exemplary damages, although this would require departure from the finding in *Mosley* that such damages are not available in privacy cases.[117] Non-notification could alternatively be seen as a factor giving rise to increased aggravated damages, or perhaps simply to enhanced compensatory damages—although courts would have to be prepared to make major awards if such a rule was to have any deterrent effect. Alternatively, a failure to notify could be punished by the awarding of indemnity costs.[118]

CONCLUSION

This paper has argued that, given the very broad consensus that an interim injunction will usually be the only satisfactory legal means of protecting privacy, it cannot be right that at present newspaper editors are in a position to deny the effective application of Article 8 at will, particularly when some of them are so plainly contemptuous of the values it protects and the judges who are seeking to apply it. It is not argued that such protection is required throughout Europe: in jurisdictions in which interim injunctions are too readily forthcoming, such a position might place press freedom in jeopardy. Conversely, in states in which the media show a greater sense of responsibility in exercising their Article 10 rights, and greater respect for Article 8, such a rule might not be necessary. The UK now has a secure system under the Human Rights Act for ensuring that interim injunctions are only issued where they are a necessary restriction upon press freedom; unfortunately, it also has a tabloid press that openly declares its hostility to the European Convention and judicial protection of privacy and exhibits a very clear pattern of publishing grossly invasive stories. In such circumstances, it seems clear that the UK must provide a means whereby the protection provided by injunctions is, as a matter of practical reality, 'prescribed by law' and thus forestall the decisions of newspapers deliberately to strip from individuals the protection the Convention seeks to give them. The aim would be to provide for UK citizens the possibility of the *effective* protection of their private life that was so plainly denied to Max Mosley.

117 See *Mosley II*, [172]–[211].
118 As suggested by Schillings (n 79).

Case No: HQ0004737 & HQ0004986

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Central Criminal Court
Old Bailey, London, EC4M 7EH

Date: 30/07/2010

Before :

MR. JUSTICE BEAN

Between :

JON VENABLES	**1st Claimant**
-and -	
ROBERT THOMPSON	**2nd Claimant**
- and -	
News Group Papers Limited and others	**Defendants**

JUDGMENT

Edward Fitzgeralf QC and Phillipa Kaufmann (instructed by **Irwin Mitchell LLP**) for the **Claimant Venables**
Anthony Hudson (instructed by **Pia Sarma, Times Newspapers Ltd**) for the **Media**
James Eadie QC (instructed by **the Treasury Solicitor**) for the **Attorney General**

Mr. Justice Bean :

1. Last Friday, 23rd July 2010, Jon Venables pleaded guilty to three offences concerning child pornography on his computer. The prosecution had been launched on 21st May 2010 by the unusual, though entirely proper, procedure of an application to me by counsel on behalf of the DPP for consent to prefer a voluntary bill of indictment. This originally contained two counts; a third was added by amendment two days before arraignment.

2. Also on 21st May, the DPP applied to me for an order of the Crown Court under the Contempt of Court Act 1981 prohibiting the reporting of the existence of the prosecution, which at that stage was brought against Mr. Venables in his new name. The purpose of that order was to attempt to ensure the fairness of the trial in the event of Mr Venables contesting the charges before a jury. The need for it came to an end with the pleas of guilty and I accordingly discharged that order last week.

3. There is, however, an injunction of much longer standing affecting this case. It was granted on 8th January 2001 by Dame Elizabeth Butler-Sloss (as she then was: now Baroness Butler-Sloss) prohibiting the solicitation or publication of any information as to the physical appearance, whereabouts or movements or new identities upon release from custody of Mr Venables or his co-claimant Robert Thompson, who had both been sentenced to detention at Her Majesty's Pleasure in 1993 for the murder of James Bulger. As granted by Lady Butler-Sloss, this injunction had a proviso excepting information relating to any proceedings in open court.

4. Mr. Venables was given a new identity on his release from custody in 2001 which he has maintained to the present day. When the prosecution was launched in May 2010

he was originally indicted in the new name. When it became clear that he would plead guilty the indictment was amended so as to give the name of Jon Venables.

5. By an order of 21st June 2010, made on the application of counsel for Mr. Venables, I amended Lady Butler-Sloss' injunction so that the proviso permitting publication of information relating to proceedings in open court would itself be subject to an exception for:

> "such information as is likely to lead to the identification of (a) the first claimant's [ie Venables'] current name, (b) the address at which he was living immediately before his recall to prison in February 2010, (c) the location at which he is currently held in custody or (d) his current appearance."

6. I directed that this amendment was to expire at 18:00 on 23rd July unless a further order was made. Edward Fitzgerald QC, on behalf of Venables, applied to me to renew this provision indefinitely. The Attorney General sought leave, which I granted, to intervene in the civil proceedings, to which the DPP is not a party, and James Eadie QC, instructed by the Attorney, broadly supported Mr. Fitzgerald.

7. Anthony Hudson appeared on behalf of a number of media organisations. News Group (publishers of the *Sun*) and Mirror Group Newspapers opposed the continued prohibition on publication of Mr Venables' new name. The BBC and ITN and Associated (publishers of the *Daily Mail* and *Mail on Sunday*), Guardian, Independent, Telegraph and Times Newspapers were neutral on this issue.

8. Associated, Guardian and Times Newspapers sought variation of the injunction so that the county in which the Claimant was living before his recall to custody could be identified, which in turn would identify the relevant police force and the probation service involved in his supervision. I granted that application. The county concerned was Cheshire.

9. I also received written representations from solicitors on behalf of James Bulger's mother Denise Fergus, opposing renewal of the injunction. Their letter included the submission, which I accept, that "the injunction should only be renewed if the court is satisfied on an evidential basis that Venables would be at risk of serious harm if his new identity were revealed".

10. The purpose of Lady Butler-Sloss' injunction was quite different from that of the temporary order which I granted on 21st May. It dealt not with the fairness of the criminal trial process but with threats to the Claimants' safety, whether in custody or at liberty. She said ([2001] Fam 430 at paragraphs [90-94]):

> **[90]** The evidence which I have set out above demonstrates to me the huge and intense media interest in this case, to an almost unparalleled extent, not only over the time of the murder, during the trial and subsequent litigation, but also that media attention remains intense seven years later. Not only is the media interest intense, it also demonstrates continued hostility towards the claimants. I am satisfied from the extracts from the newspapers: (a) that the press have accurately reported the horror, moral outrage and indignation still felt by many members of the public; (b) that there are members of the public, other than the family of the murdered boy, who continue to feel such hatred and revulsion at the shocking crime and a desire for revenge that some at least of them might well engage in vigilante or revenge attacks if they knew where either claimant was living and could identify him. .....The response of some members of the public to emotive newspaper reporting has created highly emotional and potentially dangerous situations. The misidentification of a female member of the public, thought erroneously to be the mother of one of the claimants, was potentially very dangerous and demonstrates the probable reaction of members of the public to the knowledge that one of the claimants and his family were living nearby..... I also bear in mind that the media coverage has been international as well as national. The information might be gathered from elsewhere and presented to an English national or local newspaper. Once in the public domain, it is a real possibility, almost a probability, that there would be widespread reporting by the press. If photographs are taken, and they would be likely to be taken, the claimants would find it difficult to settle anywhere safely, at least within the United Kingdom.....
>
> **[91]** The evidence provided by the Home Secretary supported and affirmed much of the reporting in the press. It is most significant that this is only the second time ever that the Home Office has

thought it necessary to provide a new identity for child murderers when they leave detention, the other being Mary Bell in 1980. This is a clear indication of the seriousness with which the authorities view the possibility that either claimant may be recognised with the consequences that they fear.

[92] The Attorney General and the Official Solicitor both submitted that there is a high risk of serious physical harm and the real possibility that a claimant might be killed if identified. Morland J and Pill LJ felt it necessary to grant injunctions to protect the children during their detention in secure accommodation. In 1993 Morland J considered that there was a very real risk of revenge attacks upon them from others. Lord Woolf CJ in his statement on the tariff in October 2000 (*In re Thompson (Tariff Recommendations)* [2001] 1 All ER 737) confirmed, from the information presented to him on the tariff, that that remained the situation. I heard evidence, in chambers, which supported the conclusion to which Lord Woolf CJ came, that there are solid grounds for concern that, if their identities were revealed on release, there might well be an attack or attacks on the claimants, and that such an attack or attacks might well be murderous.

[93] At the moment, the claimants are not at risk. First, the injunctions are still in force. Second, there is no current photograph of either claimant, or any current description of the appearance of either in the public domain. The photographs that are available were taken when they were children and they are now adults. When they are released from detention with new names, so long as they are not identified, they will be living in the community, under life-long supervision, but with the opportunity for rehabilitation and reintegration.

[94] I consider it is a real possibility that someone, journalist or other, will, almost certainly, seek them out, and if they are found, as they may well be found, the media would, in the absence of injunctions, be likely to reveal that information in the newspapers and on television, radio, etc. If the identities of the claimants were revealed, journalists and photographers would be likely to descend upon them in droves, foreign as well as national and local, and there would be widespread dissemination of the new names, addresses and appearance of the claimants. From all the evidence provided to me, I have come to the clear conclusion that if the new identity of these claimants became public knowledge it would have disastrous consequences for the claimants, not only from intrusion and harassment but, far more important, the real possibility of serious physical harm and possible death.....If their new identities were discovered, I am satisfied that neither of them would have any chance of a normal life and that there is a real and strong possibility that their lives would be at risk.

11. One would have thought that with the passage of 17 years since the murder and 9 years since Lady Butler-Sloss' judgment the threat from members of the public would have diminished. But there is clear evidence that it has not. In his witness statement for the injunction application the Claimant's solicitor, John Dickinson, writes:

> "The level of animosity felt towards, and the risks faced by Jon Venables can be seen in the public attitude towards Mr. David Calvert formerly of Fleetwood, Lancashire who was mistaken for Jon Venables. Mr. Calvert was first mistaken for Jon Venables five years ago and he and his family have moved on a number of occasions, having been 'forced to flee for our lives'. On a night out in a pub he was warned by a friend that he must leave immediately as he was going to be stabbed in the toilets. Police concern for his safety led to the installation of a panic button in his home. Since the Claimant's return to prison more than 2000 people have joined a Facebook group claiming that Mr. Calvert is Jon Venables. The group's members have vowed to track him down and wreak revenge for the murder of James Bulger. The Daily Mail agreed not to report the latest whereabouts of Mr. Calvert, to protect his safety."

12. In addition Mr Dickinson refers to a large number of Facebook sites in which contributors actively canvass vigilante action to bring about Mr Venables' death. In the last three days (since I granted the application to renew the injunction) a national newspaper has reported that "Merseyside crime lords" have offered a reward of £100,000 to anyone killing him in prison. I have no way of knowing whether this is true, but it would be at least consistent with the earlier evidence.

13. On behalf of the *Sun* and the Mirror Group, Mr Hudson relied on two issues: public protection and open justice. As to the first, he argued that the Claimant is a

paedophile who has committed what I described in my sentencing remarks as a form of child abuse. At some stage he will be released. That will be on licence: but, says Mr Hudson, he was on licence when these offences were committed, and that fact did not prevent their commission. The public where he lives should know that their new neighbour has been convicted of these crimes.

14. There was no evidence before me in the criminal proceedings that the Claimant had been grooming children for sex or physically abusing them himself. The abused children whose images he downloaded or exchanged with the paedophile Blanchard may have had no connection with the neighbourhood in which the Claimant was living. A measure of public protection is provided, not only by the life licence deriving from the murder conviction, but also by the requirement for the Claimant to notify his identity and whereabouts to the police for ten years for the purposes of what is generally known as the sex offenders register pursuant to the Sexual Offences Act 2003.

15. Mr Hudson's main argument was based on the principle of open justice. There are many judicial statements of high authority emphasising the general rule that court proceedings should be conducted in public and fully and freely reported. The cases include *Scott v Scott* [1913] A.C. 417 and *A-G v Leveller Magazine* [1979] A.C. 440. In *ex p Kaim Todner* [1999] Q.B. 966 at 977, Lord Woolf MR said that:

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason why it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing."

16. *In Re S (a child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 considered whether an injunction should be granted prohibiting publication of the name of a woman on trial for the murder of one of her children on the grounds that this would lead to the identification of a surviving brother of the victim, then aged five and thus interfere with his right to respect for his private and family life. The House of Lords affirmed decisions of the lower Courts refusing such an injunction. Lord Steyn said (at paragraph 30):-

> "A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process... Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law."

17. Similarly, in *Re Trinity Mirror Plc* [2008] QB 770 at paragraph 32 Sir Igor Judge P (as he then was), delivering the judgment of a five-member Court of Appeal, said:-

> "In our judgment it is impossible to over-emphasise the importance to be attached to the ability of the media to report criminal trials. In simple terms this represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. Uncomfortable though it may frequently be for the defendant, that is a normal consequence of his crime... From time to time occasions will arise where restrictions on this principle

are considered appropriate, but they depend on express legislation, and, where the Court is vested with a discretion to exercise such powers on the absolute necessity for doing so in the individual case."

18. On this basis, the Court of Appeal refused anonymity to a defendant who had pleaded guilty to child pornography offences, similar to those committed by Mr. Venables, which had been sought on the grounds of protecting the rights and interests of his children.

19. Mr. Eadie QC drew my attention to three recent decisions of the Supreme Court. *In Re British Broadcasting Corporation* [2010] 1 AC 145 involved an application by the BBC to discharge an anonymity order made in respect of an individual who had been tried and acquitted on a charge of rape. The BBC wished to produce a programme naming the individual and suggesting that his case should be reconsidered under the new statutory regime permitting retrials of acquitted Defendants in certain circumstances. The Supreme Court discharged the anonymity order. Similarly, in *Re Guardian News and Media Ltd* [2010] 2 WLR 325 the Supreme Court discharged anonymity orders protecting the identities of individuals subjected to the statutory regime permitting the Treasury to freeze the assets of persons suspected of involvement in terrorism.

20. These two decisions are to be contrasted with *Secretary of State for the Home Department v AP* (No, 2) [2010] 1 WLR 1652. In that case AP had been subject to a control order under the Prevention of Terrorism Act 2005. After holding that the residence requirement of that order had been rightly quashed the Supreme Court went on to consider whether AP should continue to have anonymity. The Court noted that they had not had submissions on behalf of the media. Nevertheless it is significant to

note the decision they reached, which was that both AP's identity and the town where he was required to live should not be revealed, and their reasons for that decision. They found that if AP were revealed to be someone who was formerly subject to a control order and was now subject to deportation proceedings for alleged matters relating to terrorism, he would be at real risk not only of racist and other extremist abuse, but of physical violence. In other words, said Lord Rodger, there was at least a risk that his Article 3 Convention rights would be infringed. The court was:

> "unable to discount the risk that AP might indeed be subject to violence if his identity were revealed. The court also has regard to the potential impact on his private life. For all these reasons the court has concluded that in this particular case the public interest in publishing a full report of the proceedings and judgment which identifies AP has to give way to the need to protect AP from the risk of violence."

21. In the *BBC* and *Guardian* cases the Supreme Court was balancing an individual's Article 8 rights with the Article 10 principles of freedom of expression and public debate. In each of the two cases Article 10 prevailed and anonymity was lifted. In the *AP* case, by contrast, Article 3 was in play as well. It will be seen from the passages I have cited that the evidence of risk of physical violence to AP was considerably less strong than the evidence of the risk to Mr Venables in the present case. Nevertheless the Supreme Court granted anonymity.

22. The principle of open justice resoundingly affirmed by the Court of Appeal in the *Trinity Mirror* case was why, as soon as counsel indicated that Mr Venables intended to plead guilty, I allowed the fact of the prosecution to be made public, and why last Friday's proceedings took place in open court with a large number of media

representatives present. However, I consider that Lady Butler-Sloss' injunction prohibiting publication of Mr Venables' new name should continue notwithstanding that it was referred to in open court in the criminal prosecution: and likewise his address before arrest (which was also referred to) as well as, for the avoidance of doubt, his location in custody and his appearance (which were not).

23. There is understandable and legitimate public interest in the fact that one of James Bulger's killers has now been convicted of child pornography offences. That fact and the details of those offences can now be (and have been since last Friday) freely reported. But there is no legitimate public interest in knowing his appearance, his location in custody; or the exact location at which he was arrested and to which he might return in the event of being released; or, if there is, it is of marginal significance when set against the compelling evidence of a clear and present danger to his physical safety and indeed his life if these facts are made public.

24. As for his new name, my original view was that if he were to be tried and convicted by a jury in that name, it would then inevitably become a matter of public record, and the Claimant would have brought that on himself. But now that he has been convicted on his own pleas of guilty entered in the name of Venables, there is no reason why his new name should be made public. The effect of doing so would simply be to assist those who seek to track him down. The fact of public interest, as I have already said, is that the man formerly known as Jon Venables has been convicted. His new name is entirely immaterial.

25. I do not think it makes any difference whether the case is put on the basis of Mr. Venables' right to life under Article 2 of the ECHR or on the basis of domestic law. Even if the Human Rights Act 1998 had never been enacted I would reach the same

conclusion as a matter of domestic law. It is a fundamental duty of the State to ensure that suspects, defendants and prisoners are protected from violence and not subjected to retribution or punishment except in accordance with the sentence of a Court. That principle applies just as much to unpopular defendants as to anyone else.

26. For these reasons I allowed Mr Fitzgerald's application to make permanent the amendment to Lady Butler-Sloss' injunction prohibiting the publication of information about Mr Venables' new name, appearance, location in custody or location prior to being recalled to custody, other than that it was in Cheshire, and declined to discharge Lady Butler-Sloss' injunction in respect of the Claimant generally. It was for the same reasons that before the plea and sentencing hearing in the Crown Court I directed that Mr Venables was to be permitted to appear by livelink, and that he would be visible only to me. That was a very unusual procedure. But this has been a very unusual case.

HF/04/987

Neutral Citation Number: [2005] EWHC 971 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
The Strand
London WC2A

Thursday 24th February 2005

Before:

MAXINE CARR

CLAIMANT

- v -

NEWS GROUP NEWSPAPERS LIMITED & OTHERS

DEFENDANTS

Tape Transcript of Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr Edward Fitzgerald QC appeared on behalf of the Claimant

Ms Dinah Rose appeared on behalf of the Home Office

Mr Anthony Hayden QC appeared on behalf of the Probation Service

The Defendants did not attend and were not represented

JUDGMENT
(Approved by the Court)

MR JUSTICE EADY:

1. The applicant, Maxine Carr, seeks an injunction, as it called, *contra mundum*; that is to say, of general effect and binding upon anyone who knows of the order. The objective is to protect her new identity and to restrict information about her present and future whereabouts reaching the public domain. The terms of the order now sought are similar to those which have been in force since 13 May 2004 and the claim is founded upon the confidential nature of that information. In that application, she is supported by the probation service, by the Home Office and by the relevant police authority.

2. The starting point is that the court has a duty under section 6 of the Human Rights Act to take reasonable measures for the protection of any citizen against threat and violation of the fundamental and non-derogable rights under articles 2 and 3 of the European Convention on Human Rights and Fundamental Freedoms. That obligation of the state, in this instance to be exercised by way of its judicial powers, is unchallengeable and rock solid: see, e.g., Venables and Thompson v. NewsGroup Newspapers [2001] Fam. 430, and X and Y v. O'Brien [2003] EWHC 1101 (QB).

3. Of course the applicant's rights under article 8 of the Convention are also engaged. Those relate to privacy, which is a concept wide enough to include a person's physical and psychological integrity. The preservation of mental stability is recognised as being a necessary precondition for the exercise of rights under article 8: see, e.g. Bensaid v.United Kingdom (2001) 33 EHRR 10.

4. There is before the court a wealth of evidence of a continuing danger of serious physical and psychological harm to the applicant. There is also evidence which demonstrates convincingly that the subsistence of the injunctions since last May has been very effective in reducing those risks and in permitting the police, the Home Office and the probation service to carry out their responsibilities of protection, treatment and rehabilitation.

5. There is a good deal of evidence before me which shows that there has been a continuing interest in the subject of the applicant and the circumstances in which she is now living. If the injunction were to be refused, the task of the police and the probation service would become much more difficult, if not impossible. There is evidence from the claimant herself, from her solicitor, from a senior police officer, from a senior officer of the probation service and from a psychiatrist. For what, I hope, are obvious reasons, I do not propose to go into that evidence. To do so would jeopardise the very object of this application.

6. It goes without saying that where any order is contemplated which would have the effect of restricting the rights of the media or, indeed, of anyone else under article 10 of the European Convention, the court must approach its task with circumspection and ensure that any such restriction goes no further than is necessary and proportionate.

7. No one suggests that there are not a number of issues of legitimate public interest connected to this applicant. For example (to state two of the more obvious ones), there is a legitimate interest in general terms in the cost to the public purse of protecting and rehabilitating her and, again, in the circumstances of the tragic events in Soham and any lessons that can be learned for child protection in the future by way of record keeping or scrutiny of prospective employees likely to come into contact with children. However, for free and open debate to take place on those and other subjects, there is no need in my judgment for the applicant's whereabouts to be revealed or her identity, with all the risks that are plainly inherent in that.

8. The media defendants in these proceedings have made it clear for some time that they do not propose to attend and make submissions on the present application. They do not, of course, consent. One could hardly expect them to do that. On the other hand, they have taken a reasoned decision not to contest the order. That is not a reason for granting it, or letting it go by on the nod. Most certainly not. The court never grants an injunction restraining freedom of the media unless it is truly necessary and proportionate to the need to protect a countervailing interest. What, however, the lack of contest tends to show is that the media do not believe that there has been, over the last nine months, since the injunctions were first granted, any significant inhibition on the legitimate exercise of their rights and duties to inform the public and to debate before the public the issues which really matter.

9. Past experience shows that, if an editor or proprietor believes that there is any real inhibition on their functions, the opposition will be immediate and vigorous. To an extent, therefore, this inactivity in the present proceedings fortifies my own strong impression that the media are not going to be truly inhibited in any of their legitimate activities. I am satisfied that the only effective means open to the court to discharge its protective duty is to grant the injunction in the terms of the draft order, which Mr Fitzgerald has just summarised. It is necessary to protect life and limb and psychological health. In so far as there will be restrictions on freedom of expression those are proportionate to the very real physical dangers to which the applicant remains exposed. It is right to emphasise, as Mr Fitzgerald emphasised earlier, that there is always a right should circumstances change for the media or any interested party to apply to the court on short notice for the discharge or variation of the injunction. That is provided for in the order proposed.

10. Against that background, therefore, I make the order sought.

Journal of Criminal Law/2005, Volume 69/August/Case Notes/Divisional Court: Press Freedom: Injunctions Binding the World - JoCL 69 (287) (4)

Journal of Criminal Law

JoCL 69 (287) (4)

1 August 2005

Divisional Court: Press Freedom: Injunctions Binding the World

Paul Dougan

Carr v News Group Newspapers Ltd, 24 February 2005, WL 401741, unreported

The applicant was an individual seeking indefinite continuation of a temporary injunction *contra mundum* granted in May 2004 following her release on probation after serving half of a 42-month sentence for perverting the course of justice. The application was backed by the Home Office, the Probation Service and Humberside Police. Both the Attorney-General and the media were notified of the nature of the injunction and did not seek to oppose it.

The application was made on the basis that there was a real and significant risk of injury or death to the applicant and that failure to protect her from that risk would amount to a breach of Article 2 of the European Convention on Human Rights (protection of right to life). The evidence adduced in support of the application was persuasive: a persistent threat from a specific source, actual incidents of harassment and expressions of intention by the public to attack or kill the applicant, and attacks on innocent members of the public by individuals who thought their victims bore resemblance to her. It was also claimed that there was a real risk to her already fragile psychological health and failure to protect her against that risk would amount to a breach of her rights under Article 8 of the Convention. This claim was supported by evidence from a psychiatrist.

Held, granting the application, the injunction *contra mundum* should be continued since it was the only effective means available to the court to protect the life and limb and psychological health of the applicant. The limitation on the media's exercise of its rights under Article 10 of the Convention was required in the circumstances and went only so far as was necessary to protect the applicant in those regards.

Commentary

The making of a *contra mundum* injunction on 24 February 2005 in the **Maxine Carr** case signifies a potential broadening in the criteria considered apposite to the granting of such anonymity orders and may prove to be a benchmark for similar cases brought before the courts in future.

The High Court injunction is wide-ranging, and bans publication of information leading to Carr's identification and location and will apply until it is varied or discharged by a subsequent court order. The prohibited information extends to her new name, address or any details of her whereabouts, any photograph or picture of any place she attends or any details of her psychiatric care or treatment. Soliciting this information and even asking questions with regard to it is also banned and the penalties for breaching the order are considerable, namely imprisonment or sequestration of assets.

The order is by no means a new creation, but it is nonetheless unique in a number of ways: first, it is unprecedented insofar as Carr is an adult offender not convicted of a serious offence; secondly, the judgment emphasised the importance of her perceived fragile psychological state, which is a new criterion; and thirdly, the application was *not* contested by the media.

The legal basis of the injunction follows a line of authority developed in the cases of *Venables and Thompson v News Group Newspapers Ltd* [2001] 2 WLR 1038 and *X (a woman formerly know as Mary Bell) v O'Brien* [2003] EWHC 1101, [2003] EMLR 37. Orders in these cases were made under the UK law of breach of confidence, rather than any freestanding cause of action under the European Convention on Human Rights. However, in deciding whether to grant the domestic remedy, the court, as a public authority under s. 6(3) of the Human Rights Act 1998, is required to act compatibly with the European Convention on Human Rights having regard to the 'horizontality' of the Convention in private law cases, thus applying the jurisprudence of *Glaser v United Kingdom* [2000] 2 FCR 193 and the UK decisions in *Douglas v Hello! Ltd (No. 1)* [2001] QB 967 and *Theakston v MGN Ltd* [2002] EMLR 22.

In deciding whether to grant injunctive relief to the applicant the court seeks to balance the media's freedom of expression and the public's right to know against a number of other rights enshrined within the European Convention. In 'mere privacy' cases, such as *A v B Plc* [2002] EWCA Civ 337, it is likely that the media will justify publication, but where Article 2 (right to life) must also be considered, such as in the instant case, the remedies sought will generally be granted. Recognition of the Article 2 right requires strong evidence of a serious 'threat to life and limb', evidence that was clearly available in the case of **Maxine Carr**. Persistent threats had emanated from a party the authorities considered to be 'forensically aware' and there had been incidents involving people mistaken for the applicant, who had been abused and attacked by members of the public. The court additionally placed considerable weight upon medical reports concluding that, in the absence of the injunction, the risks to the applicant's fragile mental state were very high.

Imagery and stories concerning criminals such as **Maxine Carr** continue to be profitable trade for the UK media, with articles vilifying criminals a marketable commodity within the political climate of 'punitive populism'. Notorious criminals have long had to assert their legal rights against the mass media to defend themselves against damage to their reputation as well as against threats to life and limb, for example, in *R v Press Complaints Commission, ex p. Stewart-Brady* [1997] EMLR 185, a case brought by the Moors Murderer, Ian Brady. The motivation in retaining **Maxine Carr** in the public consciousness as a hate figure is therefore clear and her demonisation is symptomatic of the prejudice levelled in general against women associated with violent acts.

Problems exist, however, with the nature and scope of the judgment in the present case. What is manifest are the differences between the requirements for granting of the injunctions in *Thompson and Venables* compared with those in this case, the latest and most far-reaching in the series. The *Thompson and Venables* injunctions were granted to two child killers upon reaching maturity under a simple rationale: they were first given protection as juveniles and removing the order when they reached 18 would potentially expose them suddenly to serious harm and destroy the benefit of their rehabilitation while incarcerated. However, the offence committed by *Thompson and Venables* was the most heinous on the criminal scale, whilst Carr's offence of providing a false alibi for her boyfriend, Ian Huntley, was, by comparison, relatively minor.

Similarly, in the Mary Bell case, the injunctions were granted to protect the privacy of Bell's daughter, whose life could have been destroyed by her mother's exposure as a child killer. At the time many considered this a broadening of the facts material to the court's deliberations and the present judgment broadens matters still further. It therefore marks a further step towards what is popularly described as a 'privacy law by stealth' that seeks to protect the identities of notorious criminals. For the first time, a convicted adult who has not committed a serious criminal offence has won an indefinite anonymity order barring any media comment on her identity, whereabouts, care or treatment, and the ambit of media censorship has increased a little further.

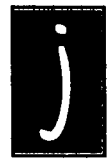
Of course, further curtailment of media freedom in this way does not give effect to Parliament's stated intention of protecting the freedom of expression of the UK media under Article 10 of the European Convention. Section 12 of the Human Rights Act 1998 makes special provision for this with s. 12(3)-(4) raising the threshold test for orders imposing injunctions, placing Article 10(1) 'rights' centre stage and replacing the old test in *American Cyanamid Company v Ethicon Ltd* [1975] AC 396. However, Article 10(2) speaks of 'qualifications' to those rights, requiring a 'strong and pressing need' that the claimant's confidentiality be preserved and the satisfaction of the court that the granting of the injunction requested is 'proportionate to the legitimate aim pursued'. In *Thompson and Venables*, the judge gave the 'restriction' on the 'right' to freedom of expression the same weight as the right itself thus diluting the intended effect of s. 12. The decision in the present case could signify further dilution of s. 12, in spite of the recent judgment in

Cream Holdings Ltd v Banerjee [2004] UKHL 44, [2005] 1 AC 253 which appeared to be, in part, reversing the trend.

One must question why Maxine Carr's application for the anonymity order was not challenged by the UK media. It is certainly true that much of the popular press held out no hope in successfully opposing the application and it must be borne in mind that there is always a right for the media to apply to the court for a discharge or variation of the order. However, this lack of opposition to the granting of the order may have led to some misconceived justifications for the injunction on the part of the court. In the judgment, the absence of opposition has been taken to imply that the media did not believe the injunction meant a significant erosion of their Article 10 rights. However, if this were the case, then why has the reaction of the press been so vitriolic, with the *Daily Express* calling the ruling 'an abominable crime' and the *Daily Mirror* calling it 'a sorry day for the freedom of the public to receive information'?

Only an energetic opposition by the media toward injunctions of this kind and judicial rigour in avoiding the inexorable relaxation in the grounds of application will allow us to avoid a legal position under the UK common law that is manifestly out of step not only with the position under the European Convention on Human Rights, but also with the intentions of the UK Parliament. The UK media certainly have the resources for such a fight, but whether they have the appetite for such complex legal challenges in a marketplace where the shelf life of news is becoming increasingly ephemeral, remains to be seen.

Journalism



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ARTICLE

The defence of public interest and the intrusion of privacy

Journalists and the public

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ABSTRACT

The article examines the relationship between the public interest and the right to privacy, with the focus on journalistic practice and new values, and the general growth of social surveillance. The article then draws on a series of in-depth interviews with UK media regulators and media interest groups. These were in turn followed by a series of focus groups, leading to the development of a UK national sample survey. The research offers the basis for a more complex analysis of the factors involved in judging the relative rights of the media to intrude and individuals' rights to be protected from intrusion. Central to this analysis is the development of a new concept – 'social importance'. Unlike the established concept of 'public interest', social importance is readily operationizable, scalable in terms of intensity, in its potential applications.

KEY WORDS ▪ intrusion ▪ media regulation ▪ news values ▪ privacy ▪ public interest ▪ social importance ▪ surveillance

One of the enduring features of the complex relationships between the various media, the public and the legal and regulatory spheres is the tension between the right to privacy and the right to be made aware of events. The central question to be addressed is the distinction that has to be made between that which is in the public interest and that which the public is interested *in*. At the same time, what cannot be avoided is the issue of news values. These are rarely given attention when discussing the issue of privacy. However, there is relatively little research-based evidence as to what the key elements of this relationship are and how the issue is seen from within and without the media industries.

In a previous study (Kieran et al., 1997, 2000), we examined the issue of privacy from the perspective of the status of those involved. That research

examined the issues around who could expect to have their privacy safeguarded as a direct function of their position in society, and as dependent upon their actions. Our conclusion drawn from the empirical findings was that 'so far as the public is concerned, there is no universal right to know, and that journalists ought to understand, in each case of reporting, the emergent "status rules" that govern audience response to the news' (Kieran et al., 2000: 145). What we did not do in that study was to go on to examine what defence might be mounted by journalists for the intrusion of privacy. In many ways, therefore, the research reported here leads on from where the previous study ended.

The findings reported here are drawn from a second study[1] involving 13 interviews conducted in the UK with key figures within radio, television, newspapers and the internet, in media regulation, and from media pressure groups, trade bodies and media law. These were followed by eight focus groups and then a nationally representative survey of 1039 adults.[2] During the fieldwork, the September 11 New York World Trade Center attack occurred. This unhappy event allowed participants in some of the groups to focus on the rights of individuals to privacy at a point when there was massive interest from the public in the events in America.

The public interest

The preparatory stage of the research examined codes of practice of regulatory bodies and journalists' associations, guilds, professional bodies and so on, both nationally and internationally. The defences offered for the intrusion of privacy almost invariably included the statement that to intrude into the private lives of individuals was legitimate if to do so was in the public interest. Nowhere, however, did we find any recognizable *definition* of public interest. What we did find were *examples* of where public interest might be held to operate, for example, in areas such as public health, safety, military security and so on.

The key point to stress is that what is considered to be in the public interest represents a document of the values of any particular society. The public interest, constructed from the values people hold and wish to be upheld, means that the intrusion of privacy is not always authorized on what might be considered 'technical' considerations of material damage to the community, but rather, in a Durkheimian sense of social solidarity, on the moral implications of acts. Almost any story, whether deliberately so or not, tells a moral tale – equally, stories that we do not tell are also in a sense moral tales, in that they signify that which we do *not* consider worth recounting.

Intrusion by the media

From the survey stage of the research it was abundantly clear that the tabloid daily newspaper the *Sun* and its Sunday sister paper, the *News of the World*, were almost universally singled out as the papers that are most likely to intrude into people's privacy (Table 1).[3]

The other media were also regarded as being intrusive, but to a markedly lesser degree. For example, while 68 percent of adults thought popular daily

Table 1 Media intrusion by the press

Is there any one particular daily newspaper which is more likely to be intrusive?	
No, no specific daily newspaper	20
The Sun	61
The *Daily Star*	7
The *Daily Mirror/Daily Record*	5
The *Daily Mail*	2
Daily evening paper	2
The *Daily Express*	*
The *Guardian*	*
The *Daily Telegraph*	*
The Times	*
The Independent	*
The *Financial Times*	0
Daily local/regional paper	0
Another daily paper	1
Base: All saying daily newspapers very/fairly likely to intrude (93% of total sample)	
Is there any one particular Sunday newspaper which is more likely to be intrusive?	
No, no specific Sunday newspaper	21
The *News of the World*	62
The *Sunday Mirror/ Record*	7
The *People*	5
The *Mail on Sunday*	1
The *Sunday Express*	1
The Observer	*
The *Sunday Telegraph*	1
The Sunday Times	1
Sunday local/regional paper	*
The Independent on Sunday	0
Another Sunday paper	2
Base: All saying Sunday newspapers very/fairly likely to intrude (91% of total sample)	

newspapers were very likely to intrude, only 34 percent felt that TV news was equally likely to do this.

Both types of newspaper rely heavily on reporting gossip and exposing 'wrong-doings', often of a sexual nature. Erring figures of authority – priests, teachers, politicians, lawyers – are a particular favourite, especially if they 'run off' with another person or 'abandon' someone, accompanied often by the sobriquet 'love cheat', and any new place of residence is frequently referred to as a 'love nest'. Such stories are meat and drink to the UK tabloids, but they do raise cries that privacy has been intruded upon in an unwarranted manner – they are what the public may be interested in, but are not in the public interest. Yet, following Durkheim's position that social solidarity is ensured by moral appeal to collective agreement on ways to live, and that punishment is as much about the affirmation of values as it is about retribution or the correction of the recalcitrant individual, then to expose 'love cheats' is, from a functionalist perspective, to enshrine ideals, and acts as a statement on values. While such stories might be read for amusement, even out of prurience, the fact is that the defence of 'in the public interest', following the above reasoning, can be advanced when intruding into the private lives of individuals. The *News of the World* interviewee followed this line of reasoning:

> What passes through my mind all the time is that in society some years ago, before the mass media came on the scene, people knew what their neighbours were doing, they knew what they got up to, and it was probably a more healthy society than now, because people are in their little cells and they don't know what others are up to. Part of our role is to tell people how people do behave – what the norm is, what abnormal is.

A leading figure from the moral pressure group Media Watch, formerly the National Viewers' and Listeners' Association, offered a similar perspective to the above, although there can be little doubt that its members would take little pleasure in reading some of the more salacious stories offered by the *News of the World* (see Tracey and Morrison, 1979).

> We are a community of people who are concerned about broadcasting standards and the influence that has on society as a whole. So one could say that our interest is not being served by the majority of contemporary programming which conveys a very immoral lifestyle, which we suggest is undermining the cohesion and well-being of society.

In terms of privacy, this moral approach to what are often seen as merely technical questions provides a framework for enquiry that does not easily separate off the private from the public. The idea of public interest is extended to include private behaviour. For example, the representative from Media Watch was asked if it would be right for the media to enquire into the private life of the Director

General of the BBC. He replied: 'Yes, I think that is a legitimate course of enquiry. I think in terms of public interest the phrase "right to know" is an important qualification.' The question is, however, right to know what? 'I think in that particular case you do have a right to know because you can't separate your private life from your public life.' In other words, morality lies at the core of society, and it is the core of an individual – the two come together in an indivisible whole.

A problem of definition

The interviewee from Presswise, an NGO press watchdog, argued that the lack of definition as to the meaning of public interest was for 'a very good reason'. Namely, he considered that it suited newspaper editors to have some looseness attached to the term so that it could readily be brought into play as a justification for intrusion:

> This is quite deliberate. As a newspaper editor . . . if I had the opportunity of defining and redefining public interest in the way that justifies anything that I publish then I am going to do so because my job is to justify anything that is published which is going to sell newspapers.

It is a cynical but perhaps not unreasonable view given the behaviour of some of the English tabloid press. However, this is not to overlook the fact that genuine difficulties do exist in coming to a definition of public interest, in a not too dissimilar way to defining 'national interest'. Often, what is mooted as being in the national interest is value laden and as often as not dependent upon political position and structural location. It is deeply ideological. It assumes a consensus view, where no consensus may exist.

Frequently in the interviews, both with media personnel and the public, the term 'community of interest' would also be substituted for public interest. But here one can see the complexity and confusion by the use of interchangeable terms. Although, in recent philosophy, the idea of 'moral community' (see, for example, Rorty, 1989, or Scruton, 1984) to resolve problems of ethical absolutes may do the work attributed to it, it is far from clear that such communities, especially in the developed West, empirically exist. What, in other words, are we referring to by appeal to a community of interests?

The whole question of public interest was taken up from a BBC radio management interviewee. He compared the vagueness of the term to that of national interest:

> I think national interest is now a ludicrous concept. National interest these days can mean whatever the government wants it to mean. Public interest, by the

> same token, could easily mean whatever the editor of a newspaper wants it to mean. I'm taking public here to mean a collection of individuals, and you would say – in general in the public interest. The problem with national interest is that many things are brought to light, which in the short term are certainly not in the national interest. Anything that involves the Foreign Secretary being corrupt etc. . . . is it all hugely in the national interest to reveal that just before they go to a summit meeting? It's very, very complex indeed.

The point he is making is that something might ostensibly be in the public interest, in that the public could with reason have an expectation to know about something, but the consequences of releasing information has of itself an adverse effect on the public. Therefore, in a functional sense, it is not unequivocally in the public interest. One might counter-claim, however, that it would be in the public interest to know, since such a release demonstrates a commitment to open government, no matter what the short-term consequences, and hence serves the purpose of the higher order ideal of the right of inspection of public figures as part of due liberal democratic process.

News values and taste and decency

News values, following the now classic explication of Galtung and Ruge (1965) in the area of foreign news, are basically those topics, issues and concerns which the public are interested in, and not in principle tied to that which is in the public interest. In terms of simple logic then that which the public is interested in forms news value, but not all news values are in the public interest and that which is in the public interest, whilst perhaps having news value attached to it, is not necessarily material which the public is interested in.

In short, a news value is a defence for popularity, but not, as such, a defence for the intrusion of privacy. Yet, it was obvious from the interviews with journalists, and indeed, some regulators, that some news stories possessed such high-level news values, namely the dramatic, that they came to possess attributes of being in the public interest, rather than something that the public would merely be interested in.

A particular case in point that arose in the course of the research was the collapse of a dance floor at a wedding party in Jerusalem. Guests, happy and dancing one moment, and plunging to their deaths the next, were caught by the camcorder of a fellow guest, and shown on all channels in the news. Here is an official from the ITC speaking:

> Well, I suppose the public interest there works on a number of levels. One is that the public would have an interest in the scale of the loss of life and why, at the point which the story was first carried, because it subsequently was revealed to be

> the fault of inadequate building. You haven't got that degree of justification, just in terms of the scale and unusualness and tragic juxtaposition of people at the height of the happiest occasion falling prey to who knew what. But that's why I think it is worth testing and asking broadcasters who showed that material what they thought it gave, the minute those pictures came in, in a very competitive broadcasting world now. The temptation gets even bigger to just put those pictures to air.

This shows a belief that the pictures were in the public interest based on the interest to viewers in 'the scale of loss of life'. But then an awareness enters that such arguing looks more like the defence of a news value, along with recognition that in an increasingly competitive broadcasting world the pressure to use attention-seeking devices, such as showing the dramatic, are likely to be high. Indeed, when analysed, the suggestion that the broadcasting of footage of the dance floor collapse was in the public interest, based on the reasoning that such material offered a lesson in what can happen as a result of 'jerry-building', is difficult to sustain. This was not Britain, though; it was Israel. Unless the argument is put forward that it is in the public interest for people to realize that if buildings are constructed badly there is a danger that they will collapse and kill people, it is hard to say where the defence of public interest enters. This is something that people need to know, certainly, but probably not something that people are particularly unaware of. To know the construction practices of the UK could reasonably be held to be in the public interest, but it is unlikely that many people would agree that knowing about the construction practices of Israel, or any other country, is of equal importance to them.

What we can say here is that it is difficult at times to separate what the public is interested in from that which is in the public interest, in an operational sense for those working in news rooms, when the drama presented is of such intensity that it gives the appearance of importance to humanity, when really it is little more than the observation of tragedy. A BBC programme-maker, who had used the footage, said:

> I think the view throughout the media was that it was worth showing, and I think we would defend ourselves by saying it was in the public interest because there was something clearly wrong with this building and it may be a much wider spread issue. However, we may be kidding ourselves in that because it was hugely dramatic and it would have been very difficult not to use it.

The suggestion that it 'would have been very difficult not to use it' can be taken to refer to the competitive nature of the industry, but is really a reference to a set of occupational norms that sees news in a particular way, the unusual or out of the ordinary. The fact is, however, that more such footage is now available than ever before. Any air-show crash is now likely to be caught by camcorder from those watching the acrobatic displays. As the same BBC interviewee commented when attempting to define the term 'in the public interest':

> I think it would be rather difficult to define. I think that's the problem because the goal posts move all the time and the reason we are discussing the collapse of the floor is that firstly, the chance of anyone filming that fifteen years ago are pretty slight . . . The technology allows you very often to get stuff that you wouldn't have before, so there are more decisions to make.

To view people falling to their death without the defence of such images being in the public interest is clearly a wrongful intrusion of privacy, and of questionable taste. Indeed, at times it is difficult to distinguish where the wrongful intrusion of privacy becomes enmeshed with questions of taste and decency.

Some way into the research, the September 11 attack on the WTC Twin Towers occurred. The opportunity presented by this tragedy was used to explore a whole range of questions relating to privacy and public interest. In the survey stage of the study, a minority, 20 percent of the sample, considered that the media coverage of September 11 had contained items which they felt were not in the public interest. Among these, leaving aside the catch-all category of 'other types of coverage', the most often-mentioned specific element of coverage felt to be inappropriate was 'pictures of people jumping out of the buildings', closely followed by 'phone calls from the victims to their families'. We do not know from the survey itself precisely why such images were not in the public interest, only that they were considered not to be. The focus groups, however, do shed some light on this.

Two of the focus groups for the study were, by chance, scheduled for 12 September. We specifically asked whether the falling bodies of those jumping from the Twin Towers should have been shown. A range of responses was given by one of the London groups[4] of African-Caribbean women aged 50–60.

> Yes it could be shown because it shows the horror of the situation.

> Unlike the other pictures (people running from the scene) these people are faceless, but it's still an intrusion on that person's privacy, but I don't see it a problem in that respect.

> I think it's painting the horror isn't it. I just think oh my God, it's a good job you can't see their faces because you can imagine if their families were watching.

We then asked if to capture the full horror of the event it might have been permissible 'to show more close ups'. The response was:

> No that wouldn't have been right at all, that would have been totally unnecessary because it's bad enough that you see this happening, but to actually have this picture of their faces as these people are dying, there is no need for that.

The conclusion to be drawn was that although privacy had been intruded upon, showing people falling or jumping from the stricken building was justifiable: it had a purpose, namely to convey the full dimensions of the drama taking

place, but, one must add, not in the sense of dramatic effect of the Israeli pictures of wedding guests plunging to their deaths. Showing close-up pictures so that those falling to their death were capable of being recognized, would, as far as this group were concerned, not merely amplify the intrusion of privacy, but would turn intrusion from the acceptable into the unacceptable, since to do so was in bad taste: 'I think looking at the faces close-up when we've already got pictures like that I think we're coming into decency really.' We pressed the point by asking whether this was a matter of privacy or taste and decency. The response was: 'I think both.' Others agreed: 'Yes, privacy and decency, I think both, yes.'

The relaying of the last-minute mobile phone messages from those on the doomed hijacked aircraft came in for similar consideration. In the London male 30–40 group, one member set out the situation and the possible media dilemma very concisely: 'If you can identify individuals then that shouldn't be published, but as an illustration it certainly brings home the horror of the situation.'

The voice left on the answerphone was not an unidentified individual, but had a name attached and often a biography. These were real people, not unseen people trapped in aircraft or bodies falling from a building, that 'stood in', so to speak, for the horror of what was happening to all the victims. We must also ask, would the person on the aircraft have granted permission for their last words to be made public?

For the London African-Caribbean women this relaying of such messages also appeared to be in poor taste, but they also raised the issue of emotional competence to give rights to publication. One woman pointed out that the interviewee must have sought the interview herself:

> It was her son. Her son rang her [from the doomed aircraft] . . . When you are in a situation like that maybe you are not thinking straight, but if the person consented . . . I think that's fine. [. . .] She obviously relayed that [phone message] to someone and told them what it was about – that's the assumption I am making, she had a choice. I don't know.

This is not an easy question to resolve, clearly shown by her agreement that the mother had a choice and so it was correct to broadcast the interview and message, but then she adds 'I don't know'. The difficulty is what, in the context of receiving a phone call from a son who is about to die, does choice mean? Choice suggests a rational decision-making process. Some members of this group called into question whether in such a situation the person granting an interview or releasing information could be said to be sufficiently in control of their emotions for it to be said that consent had genuinely been given:

> They [journalists] are sort of getting you at the moment when you are not thinking straight, they are catching you when you're at your very lowest ebb and sometimes

you just want to talk and maybe months after this she might be thinking, 'Oh my God, why did I ever do that . . .'

We talk about not intruding into private grief, and this is, on that score, if not on other counts, an intrusion of privacy. Yet, consent alters that, although it is not clear what consent actually means in such an anguished situation. The feeling gained was that the broadcasting of such messages involved questions of taste and decency as much as it did the intrusion of privacy. Indeed, as in the instance of privacy interacting with news values, here we have privacy intermeshed with taste and decency.

The defence of 'in the public interest' for the intrusion of privacy in the context of September 11 can be raised in two ways. First, this was a news event that was in the interest of all to know about. It offered repercussions of major importance and, therefore, it was essential to get the story across in the fullest possible manner as to what had happened, and to some extent this was achieved by homing in on individuals caught up in the tragedy. But then, as we have seen, the question arises of how much information of a personalized nature was required to substantively tell the story.

The second argument for it being in the 'public interest' to intrude into the private moment before death is the overtly propagandist one of fuelling anger at those who committed the atrocity. Here we move into a situation where the media are not simply conduits of what we might term news as events, but news as propaganda, at least in a functional if not intentional sense. Raising the temperature of anger by showing private moments, one can assume, reasonably enough, to have assisted in the Bush administration's militarization of politics. But not all within America agreed to such a development. Thus if one was against such militarization then to amplify anger by such broadcasting would not be seen to be in the public interest, and vice versa. Public interest and national interest here become coterminous, yet, as stated earlier, this presents problems of deciding what is in the national interest as indeed it does for determining what might be in the public interest. Both take as given, as does community of interest, that there is an empirical state of absolute agreement of what 'interest' is taken to be. The whole point of raising this question is to show that it is difficult, when referring to public interest, to assess just what interest and whose interest is being referred to.

Privacy

Modern complex societies can rightfully be referred to as surveillance societies, from the collection of visual images of individuals, to the electronic storage of

data on the individual, especially financial data. Although the focus groups had some reservations, especially relating to the collection of financial data without an individual's permission, surveillance, if it led to increased personal security, was by and large welcomed. In the survey stage, 90 percent of the survey sample agreed that 'security cameras in public places are a good idea' and 78 percent agreed that 'it is a good idea for everyone in the country to have identity cards'. The idea of privacy has changed over time. The nature of intimacy has also changed, even, by the accounts given us, in the recent past (see Giddens, 1991, 1992).

What became clear was that privacy was not an absolute right, but something one had a right to as a dependent of occupied space. Thus it seemed, rather than talk about rights to privacy, it was more fruitful to talk about expectations of privacy in terms of degrees of self-monitoring that varied as a consequence of types of inhabited space. To self-monitor is to be aware of the self as actor (see Goffman, 1959) and it became quite clear that the group members considered that as actors they had a duty of care when their behaviour was open to the gaze of others. In the home, for example, the degree of self-monitoring was at a minimum, whereas in public space self-monitoring was high. We distinguished, therefore, three types of space: *closed public space, restricted public space* and *open public space*.

The first, closed public space, was that bounded by the home, and in that sense not public at all under most circumstances. The second, restricted public space included the neighbourhood where they lived, the office or workspace and areas such as secluded beaches or sheltered picnic spots. The third, open public space, included town centres, shopping precincts and exposed beaches.

The expectation of intrusion was inversely related to the degree of openness. Thus there was an absolute expectation that individuals' activities or 'performances' in the home would not be open to inspection by others, through to open public space where a similar firm expectation existed that performance would be open to inspection. This division of space into expectations of surveillance must, as it relates to the intrusion of privacy, take into account people's expectations of publication, or rather, the nature of publication. Being captured in open public space by CCTV cameras was of no concern whatsoever – it was closed and not open publication. Nor did being caught in open public space by a television camera or photographer matter provided one did not have an individual biographical presence: being on camera as a tiny part of a crowd was of no concern, but being an identifiable face in the crowd was.

Defining the public interest

Professional guidelines for journalists and regulators single out the public interest as justification for intruding into privacy, but no rigorous definition is provided, merely areas of operation where public interest might be considered to rest. Throughout the research, in interviews with media personnel and regulators, in the focus groups and the national survey results, it was clear that a clear and generally shared definition of the term 'public interest' does not exist. Nevertheless, there were clear ways in which the principles involved were seen to work in practice.

In both the focus groups and the survey, we asked people to describe in their own words what they understood by the term 'the public interest'. Over 90 percent of the survey sample offered definitions of the term, demonstrating that the broad term at least is recognized, even if it is not necessarily clearly articulated.

The 900-plus verbatim replies were inspected and content-analysed into broad categories. The categorization focused upon the underlying rationale of the definitions given by the sample, and up to two different categories were coded for each. There was no clear shared majority definition to be found in the sample's definitions. Rather, there were disparate categories of themes, shown in Tables 1 and 2, together with examples of each category.

The largest proportion of the replies (34% of the sample) fell into the category we have called 'public rights'. A defining feature of this category is the use of 'imperative' terms – *needs, rights, should,* and so on – used in support of the principle of public, democratic rights to information.

The next largest category of definitions – 'public effects' – centres around the issue of effects and impacts. Essentially, the argument is that large-scale effects on the public at large are a priori a matter of concern.

A second grouping of replies (Table 2b) illustrates clear confusion for some people between the more abstract concept of the public interest as a form of public good and the specific interests of members of the public, either en masse or as individuals. These replies hinge around public interest being defined by the opinions and interests of the media consumer, rather than taking the more abstract form demonstrated by the replies in Table 2a. Within this broad grouping of interest-led definitions are three distinct divisions into the *public, personal* and *community* levels.

A further set of definitions (Table 2c) again reflects a different style of understanding of the public interest concept. These are basically formulated as observations of media practice, rather than reflections upon what form the ideal might take. Two of the categories are unreservedly critical: the media intrude for the 'wrong' reasons (unwarranted intrusion); and 'public interest' is simply

Table 2a Public interest definitions given by survey

Sometimes the media argue that intrusions into privacy are justified because they are in the public interest. What do you understand by this term – 'the public interest'?

Category	Examples of verbatim replies
Public rights 34%	It's information that the public has the right to know.
	Something going on needs to be brought to the public's notice.
	Government officials should be accountable for their mistakes – the public should be aware of this. There are certain issues that the public should be made aware of – this is what 'public interest' means.
	That it's important for people to know about what's going on in the world and for them to make informed decisions and opinions.
	To make things common knowledge.
Public effects 28%	Issues that affect ordinary people directly.
	Something affecting others rather than just that person.
	If it's important to other people and it is likely to affect or harm other people.
	If it would affect you as a member of the public; like war, disasters or floods.
	Where the issue has a direct effect on people's lives.
National interest 3%	If it's to do with the security of the country – deviousness by politicians – that sort of thing.
	Something basically important – in the national interest or the people at large.
	General public as a whole, all 60 million of us.
	In case of danger to the public or the country and national security.
	What it means is security of the country. If *[popular singer]* is wearing pink knickers that's not important to the country, but if she was a spy, that is in public interest, national security.

a convenient cover term used by the media for the media simply doing whatever they want (media excuse).

A third subset of these replies (warranted intrusion) show that media intrusion can be part of the public interest, though again defining the concept more by actions rather than principles.

What these verbatim definitions clearly show is the lack of a common, shared definitional base for the term 'public interest'. This conclusion is reinforced by considering the fact that this question was preceded by others

Table 2b Public interest definitions given by survey

Sometimes the media argue that intrusions into privacy are justified because they are in the public interest. What do you understand by this term – 'the public interest'?

Category	Examples of verbatim replies
Interests of the public 15%	Some news like war news and New York towers information is interesting. Good for people to know and we can discuss it with friends.
	Things that the public would be interested in hearing about, celebrities' and politicians' private lives.
	Anything the public would be interested in reading about.
	Kind of what people are interested in reading about, what people want to see or read.
	Giving the public what they want.
Personal interests 7%	[Public interest] is not easy to define, some subjects may be of interest to some members of the public and others may be not.
	Something that is going to interest you or benefit you.
	Only way would be a paedophile situation because that would affect me, it would be in my interest to know as I have children.
	If it doesn't affect us we don't need to know.
	If it's going to affect you.
Local/community interest 2%	Nowadays people often don't know their neighbour, so they need to know what is going on in their neighbourhood to protect themselves. The local papers, news etc. does this, this is 'public interest'.
	Relevant to particular sections of society.
	If there is a local crime or paedophile in the area, anything like that.
	What is happening within your local area.
	The people in the community should know what's going on if it affects them.

which did raise the general issues of public interest – these replies were not given in vacuo.

Nevertheless, in deciding whether or not the media had a right to intrude upon privacy, notions came to the fore that do approximate to what regulators mean by public interest. Both in the focus groups and the survey, the idea of the generalized self is there, as also is the idea that for something to be in the public interest it has to involve the well-being of a collection of people. In short, the importance of collective well-being outstripped any expectations on the part of an individual, organization or agency that their lives or performances were

Table 2c Public interest definitions given by survey

Sometimes the media argue that intrusions into privacy are justified because they are in the public interest. What do you understand by this term – 'the public interest'?

Category	Examples of verbatim replies
Unwarranted intrusion 16%	Just like to be nosy. Not always in public interest. Good reporting shouldn't be intrusive.
	I think they want to be nosy – delve into people's private lives.
	Anything you think of, there is anything in public interest. I think due to public interest, newspapers take advantage to expose privacy of the person.
	Public interest means that some of the things that come out will be detrimental to the people involved. Sometimes they don't have the facts right.
	It's just gossip, and telling people what they think they want to hear.
Media excuse 12%	Statement media use to absolve them of all sin. Carte blanche because they say it's public interest.
	They are still just trying to sell their newspapers saying it's public interest.
	Public interest is just a way of broadcasting what media want.
	It's a catch-all term that gives the media carte blanche to do what it likes.
	Public interest is when they get a story and make some money out of it.
Warranted intrusion 5%	Anything that people are interested in, particularly in other people's lives, particularly celebrities and such like, just human instinct to be nosy, particularly if it is not good.
	If the matter of the subject transcends or supersedes the individual's right to privacy.
	I think, have a right to know what famous people get up to as people i.e. children look up to them. The politician found out doing dodgy deals etc., the public have a right to know.
	You know the full character of the person involved, whether they're entirely honest and reliable.

of their concern only. People other than themselves had good reason to know what they were doing, or had done.

Each group worked through a series of different scenarios designed to explore which elements contributed to a story being in the public interest, and, equally important, to determine what methods of intrusion could justifiably be employed by a journalist in pursuit of the story – these ranged from

National Health Service doctors withholding expensive cancer drugs to the old, to the case of a school teacher leaking exam questions to pupils in order to advance his or her career by gaining high pass rates, and another case of a teacher doing the same because the pupils in their charge had disadvantaged backgrounds, to a story about a terminally ill television personality who was on holiday. Each allowed possible 'trade-offs' to be explored: for example, what circumstances and conditions would allow individual rights be subjugated to the greater good or public benefit?

The responses to the scenarios suggested the idea of social importance as a defining characteristic of public interest. For intrusion to be justified it had to expose something that had importance for a collective – it could not be justified on grounds of personal interest, or even the interests of many if the knowledge provided did not impact in some collective manner. These scenarios were followed by asking members of the focus groups directly, 'What do you understand by the term in the public interest?' To give a few examples:

Q: Journalists, they actually say, it is in the public interest. What to you does that phrase mean, if it is 'in the public interest'?

London, 30–45-year-old men:

> Something that belongs to the public we should know about. Is it in the public interest for someone to say there is a bomb heading for London right at this moment and everyone panics?

London, young women, aged 18–25:

> Newspapers treat it as anything basically that we are interested in and we want to read, but if someone said to me 'it's in the public interest', then I would think that it is something that helps the public.
>
> Or the public needs to know, like there is a paedophile living next door.
>
> You need to know so that you can protect your kids from it you know, but the fact that Victoria Beckham bought a new pair of shoes and a matching hand-bag . . . OK interesting, but it's not very in the public interest to know it, you know. It isn't going to make a difference to their life, it's not important.
>
> Yeah, something that makes a difference to the public's life.

Similar comment was made by the Leeds 50–60-year-old men:

> It's such an individual sort of thing. What I might think is the best for the 'public interest' might be different to what you might think. So whatever the paper might say is going to generate an interest in some people and not others. Which is bound to be the case. So the public interest must be everything. There must be nothing that isn't in the public interest. It's very difficult to try and define it isn't it. I wouldn't like to try and define it.
>
> It's public benefit or when they say interest, is it a benefit?

Leeds, 30–45-year-old women:

> If it's going to affect you personally.
>
> Yes, if it's going to affect everybody.
>
> It's about things that happen to change your life.
>
> Yes, in general.
>
> It's got to affect a good proportion of the population, hasn't it?

Yet, this idea of something that affected people in general took a different turn when someone entered the casual comment: 'People wouldn't read papers if they weren't curious'.

We then gave the example of a male TV celebrity under police investigation and asked whether this case was a matter of public interest.

> He's a public figure isn't he because he's on television?
>
> He's courted the publicity.
>
> But it doesn't affect us though does it really.
>
> Yes, we're interested in it.
>
> It's not just what affects you, it's curiosity.

The 18–25-year-old men from Leeds gave similar definitions of 'the public interest':

> Not just affecting a single person, a single life.

These examples, as in the survey, show just how elusive the term 'the public interest' can be, or perhaps, more accurately, the confusion that it causes. At some points the term refers to something that has an impact *on* large numbers of people, and equally, at other times it refers to material the public is interested *in*. It is undeniable, however, that amidst the statements concerning the nature of public interest there does rest a sense of public interest referring to matters that cannot simply be of personal interest, or, where it is of personal interest, it must also be not only of interest to others, but also in their overall interest. Equally, a 'public interest' story could exist that hardly anyone was personally interested in, but, nevertheless, the information given was in their interest. This, however, seems somewhat optimistic when set against news values: it is difficult to imagine a news organization, at least with any frequency, publishing material that its readers, viewers or listeners were not interested in, even though it was in their interest.

Public and interest

What is evident, both from the survey data and the focus groups, is that something that affects numbers of people is construed as being sufficiently important for intrusion, of some degree, to be warranted. This judgement of when privacy can be intruded upon could justifiably be called public interest. But, equally, what cannot be avoided is the conclusion that confusion over the term itself does exist. In light of this, it is our considered opinion that some new term might be more appropriate in clarifying the defence of intrusion, or at least form the basis for future discussion.

A new term: social importance

The term 'social importance' appears to us to capture all that 'in the public interest' refers to without the associated operational difficulties of the latter. At a stroke, it gets rid of the troublesome referent, *the public*, and the cognitively bothersome word, *interest*. The term 'social importance' opens judgement of intrusion to reason in a way that is not so readily the case with the term 'in the public interest'. What, for example, is the social importance of a picture of a female newsreader sunbathing on a holiday beach? In other words, in what way can it be said that not to see such a picture, not to possess such 'knowledge', would have repercussions on how we negotiate our lives? Furthermore, the term 'social importance' can be scaled for use in survey and other large-scale research in a way that is not very meaningful to do in the case of public interest. The term 'the public interest' has a gravitas attached that makes it too severe a test for intrusion of privacy – it has little sensitivity. Social importance can be scaled from very high social importance to very low social importance. Once the level of social importance is understood, it then follows that the degree of intrusion considered to be appropriate is dependent upon that importance; it is almost arithmetic. The flexibility of the term as an operationalizable concept means that it can handle the different types of performance expected from different types of media. The notion can take account of the logic of media performances in a way that the more legalistic concept, the public interest, cannot.

Social importance as social solidarity

The notion of social importance draws at the empirical level on the ways that issues of privacy were discussed in the focus groups. To quote from the

30–45-year-old women in one of the Leeds focus groups discussing public interest:

> If it's going to affect you personally.
>
> Yes, if it's going to affect everybody.
>
> It's about things that happen to change your life.
>
> It's got to affect a good proportion of the population, hasn't it?

Even where it was mentioned that for something to be in the public interest it had to affect you personally, it transpired that the personal included the generalized other, that is, that what was personal to her, because of shared similar conditions, would be important to others also. The above operates as a distillation of comments, and much confusion was apparent in giving definitions to the public interest. But the idea of the social was paramount over the individual, and so also was the idea of importance – 'things that happen to change your life'. Yet, things might be of importance that are not of such gravity as to be life changing, and not all media content is constructed from such material.

Although the idea of social importance as a test for rightfulness of the intrusion of privacy was in part generated empirically, especially the term social, the element of *importance* was created from ideas of 19th- and early 20th-century social thought, namely, social solidarity. Central to notions of social solidarity are values. Social cohesion can only be attained by the common holding to of agreed values, and that which threatens to undermine the agreed moral framework poses a threat to the continuation of existing social association. Social solidarity is assured by moral rules, but moral rules are made manifest in acts. Hence the courts in their sentencing procedures enshrine the moral rules. In the focus groups, judgements on the right of intrusion and the degree to which privacy could be intruded upon and by what methods appeared to be determined by the degree to which they saw behaviour as a threat to social association. These judgements were based on whether or not some act or another went against cardinal values upon which our society was structured. This was manifested in a range of examples of wrongdoing – each was in effect graded in terms of the threat that it posed to social organization, although not expressed precisely in those terms. Furthermore, the notion of social importance, drawn from ideas of social solidarity, offers the great benefit over public interest that it is based on moral judgement and as such offers the possibility of handling moral outrage in a way that public interest cannot so readily achieve. This brings the beliefs of others into the fold of intruding into privacy on the grounds that those beliefs might constitute a threat to social solidarity.

The idea of social importance as a defence for the intrusion of privacy, and the ability to grade the degree of social importance, cuts away at the specious

reasoning that is often presented as a justification for intruding into privacy. It can also handle what we might wish to know, but do not necessarily need to know. Social solidarity is assisted, to a degree, by the circulation of information that gives a feeling of belonging, of attachment to the world of others, and acting as conversational points between people. The documentation of the lives of celebrities does just that. However, such documentation would have to ensure that the degree of intrusion into someone's private life against their wishes would be minimal: to establish a public interest for such intrusion is to suggest importance where no importance seriously exists. The concept of the public interest is both too clumsy and too grand to capture the operations of the media, and fails to defend itself by any appeal to what precisely it refers to.

However, given that the term 'in the public interest' is well established and of long use as the operating defence for the intrusion of privacy it would be foolish of us, in a policy sense, to expect that the term will be replaced and substituted by the term 'social importance'. 'Public interest' is simply too entrenched in the journalistic repertoire to be replaced, despite the lack of definition as to its meaning. We would propose, therefore, based on the research, that the term 'social importance', or rather the idea of social importance, should be used as a test of public interest. By doing so, much of the confusion that exists, especially the difference between that which the public is interested in and what is in the public interest, will disappear.

Notes

1 The study was undertaken in late 2001 and was funded by a consortium of UK broadcasting and regulatory bodies: the Broadcasting Standards Commission, Independent Television Commission and Radio Authority (all three now succeeded by the single communications regulator Ofcom); the BBC; the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS); and the Institute for Public Policy Research (IPPR). A detailed report of the study findings is given in Morrison and Svennevig (2002).
2 See Appendix for survey details.
3 The *Sun* and *The News of the World* are also the two best-selling newspapers in the UK. They invariably focus on the more salacious aspects of human behaviour.
4 See Appendix for details of the focus groups.

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Biographical notes

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Technical Appendix
Focus Groups Composition

Place	Sex	Age	Social grade	Other recruitment criteria
Leeds	M	18–25	C1/C2	Asian, TV user
Leeds	F	18–25	C1/C2	Internet user and/or with multichannel/digital TV, TV user
Leeds	F	30–45	C1/C2	Read a daily paper, TV user
Leeds	M	50–60	C1/C2	Read a daily paper, TV user
London	F	18–24	C1/C2	Internet user and/or with multichannel/digital TV, TV user
London	M	30—45	C1/C2	Read a daily paper, TV user
London	F	50-60	C1/C2	Read a daily paper, TV user
London	F	50–60	C1/C2	African/Caribbean, TV user

Survey Details
A sample of 1049 adults (aged 16+) were interviewed for the study. Fieldwork was conducted by NOP Research Limited. The survey quota sample was designed to be representative of adults (aged 16 or older) in mainland Great Britain. A total of 1049 individuals were interviewed in the last 2 weeks of October 2001. The interviews lasted an average of 29 minutes.

'Is Your Source Ever Really Safe? By Tim Crook British Journalism Review

Tim Crook

Is your source ever really safe?

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Doctor David Kelly told the House of Commons Foreign Affairs Select Committee that one lesson he had learned was never to talk to journalists. Despite the valiant attempts by Andrew Gilligan, the BBC and Susan Watts, the confidentiality he had hoped for as an anonymous, non-attributable source had crumbled. Susan Watts had tried to conceal the identity of her source from the curiosity and demands of her employer; it is also likely that the Government, through intelligence voice-pattern analysis of published quotations and other forms of surveillance, would have had a good idea that Kelly had been the person voicing criticism to Gilligan and other journalists. The political violence of the battle between the Government and the BBC forced Kelly to surrender the confidentiality he had hoped for.

In the Commons committee room, Kelly struggled to throw the politicians off the scent. Just as the BBC was happy for the Government to be given the impression that Gilligan's single source had been in the intelligence services, Dr Kelly was happy for the politicians to think that he could not have been the source for the 'sexed up' charge. He did not want to be unmasked as the person who had produced the name 'Campbell' and indicted a personalised culture of propaganda and exaggeration that politically distorted intelligence in the run-up to war.

This has been a bloody affair for journalism and governance. The ethics of media and politics have been subjected to a forensic trial never seen before. The Hutton inquiry has been primarily about issues of right and wrong and not law. Hutton will be pronouncing on what ought to have been done according to good conscience and moral standards, rather than what had to be done according to the law.

The British media has also been subjecting itself to an agonising ritual of soul-searching and bitter recrimination. Andrew Gilligan and the BBC, to their credit, have shown humility in admitting their mistakes ' Gilligan confessed he was not thinking straight when he admitted to politicians on the Commons' Foreign Affairs Select committee that he believed Dr Kelly had been the source for Susan Watts's *Newsnight* report. Their regret has been coloured with the gloom of hindsight. There has been no rectitude or justice to be won in this wretched affair.

The actions and words of journalists, civil servants and politicians destroyed the self-esteem of one of the world's foremost experts on weapons of mass destruction. Dr Kelly was a vital asset for the United Kingdom. He was trashed, and driven to take his own life when he was trying to tell the truth about the unreliability of the claim that Iraq could launch weapons of mass destruction within 45 minutes.

A basic principle in law has been in the background to this affair. Scribbled in a Downing Street minute when politicians and civil servants scrambled to deal with the implications of Dr Kelly's death was the expression 'duty of care'. Had Government properly executed its duty of care to Dr Kelly? Had journalism fulfilled its duty of care to the scientist who had been prepared to speak out and whistle-blow on the misuse of intelligence? Again, with the benefit of hindsight, could the practice of journalism have done more to protect Dr Kelly? Is confidentiality so absolute an obligation that

journalists should not surrender that confidentiality to their editors and proprietors? And does confidentiality extend beyond the grave?

The codes of journalism appear to be very clear. The UK National Union of Journalists took the initiative in drawing up a code of ethics in 1936 and it is the bedrock of the language of the code of practice set down by the Press Complaints Commission. Article 7 of the NUJ rulebook states: 'A journalist shall protect confidential sources of information.' The obligation brooks no qualification. The duty is deontological. In philosophical terms this means that not protecting the source is *always* wrong.

The PCC code is also categorical. Article 15 on confidential sources states: 'Journalists have a moral obligation to protect confidential sources of information.' As with the First Amendment of the U.S. constitution, the confidentiality rule does not explain how it should be applied in different contexts. Nor does it allow any public interest exception to its clause on confidentiality. The NUJ code permits transgressions on the basis of the public interest. This includes 'preventing the public from being misled by some statement or action of an individual or organisation' and 'exposing hypocritical behaviour by those holding high office'.

British law on journalists' sources is teleological or morally consequentialist. In other words, the absolute rule is compromised, and as a result journalism is vulnerable to the attentions of the judicial balancing exercise. Section 10 of the 1981 Contempt of Court Act states: 'No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that it is necessary in the interests of justice or national security or for the prevention of disorder or crime.'

The *Guardian*'s then editor Peter Preston paid a heavy price for thinking in 1984 that this would be legal protection for the story his paper had published on the arrival of Cruise missiles at Greenham Common. The source had been civil servant Sarah Tisdall, who had anonymously leaked a document. The codes did not provide specific guidance on the obligation to unknown sources for sensitive documents. But British journalism learned a horrible lesson.

Avoiding the martyrs

In post-industrial capitalist societies the judiciary enforcing the will of the executive tends to avoid making martyrs out of journalists and editors, and will attempt to 'sequestrate the assets' of the employing media corporation. This takes the decision of protecting sources out of the hands of the journalists and into the control of business managers and directors. Decisions will be based on the grounds of commercial reality rather than journalistic principle. The hyper and postmodernist state controls journalism economically through debt and market economic forces. The penalties for journalists through the ages have moved from tongue removal, branding, nose and ear slitting, hanging, and imprisonment to the economic and social annihilation of financial disablement and unemployment.

There is no need to lose the moral high ground by forcing journalists to pack their toothbrushes and enjoy the hospitality of prison board and lodgings. The State realised its mistake in 1963 when the *Daily Mail*'s Brendan Mulholland received six months and the *Daily Sketch*'s Reg Foster four months for refusing to disclose sources to the Radcliffe Inquiry into the Vassall sex and spy scandal. A rather tawdry affair was immediately transformed into a crusade for press freedom and journalistic martyrdom.

'Is Your Source Ever Really Safe? By Tim Crook British Journalism Review

To discourage whistle-blowers the State has only to demonstrate that journalistic confidentiality is a worthless pledge made to those tempted to inform. This is why public servants who speak out have to be exposed, humiliated and jailed. The Appeal Court ordered *The Guardian* to give up Sarah Tisdall's document or be sequestrated, and Sarah went to prison. Former MI5 officer David Shayler had to be jailed. Everything was done to embarrass and legally and financially harass the journalists who dealt with him. A secret court order was obtained to discover all the telephone calls and credit card transactions made by Steve Panter of the *Manchester Evening News* when he investigated the failure to prosecute the prime suspect for the IRA's destruction of Manchester's city centre.

The pattern of law-making in relation to journalists' sources has served only to weaken the reputation and integrity of journalism. Journalists are entitled to some protection against police powers of search and seizure, but this is severely limited. Under the Police and Criminal Evidence Act 1984, 'excluded material' includes 'journalistic material acquired or created for the purposes of journalism'. Excluded material is information and writing (notebooks or computerised information) that is held in confidence. Journalistic material not held in confidence is also protected in that the police have to use a special procedure to obtain it. But in practice, circuit judges more often than not give the police permission to seize such material through a court application. Most photographic and film material acquired through reporting requires special procedure if the police wish to seize it.

But the police more often than not override these shields when investigating any kind of crime; not just the serious and dramatic criminal offences of murder, terrorism and espionage. (The Terrorism Act 2000 and Anti-Terrorism, Crime and Security Act 2001 have created new offences of 'withholding information on suspected terrorist offences'. Journalists face prosecution if, during the course of their work, there is a failure to report the discovery of information about terrorism that might be of material assistance to the police.)

The Data Protection Acts 1988 and 1998 serve only to control journalists who set up and maintain structured systems of storing personal information about people. The exemptions for journalistic purposes are not absolute ' they are not exempt from the requirement to register or give notification if they operate personal data systems. For the everyday reporter this is a bureaucratic and cumbersome law that most journalists can avoid only by not setting up or maintaining huge filing systems on individuals.

The Official Secrets Act 1989 was designed to stop 'crown servants' from disclosing to journalists classified and sensitive information. There is no public interest defence for them and the British judiciary was not prepared to create one for David Shayler in the light of the Human Rights Act.

Journalists are an irrelevance if the State can terrify its employees into remaining silent. Journalists can be prosecuted only if they try to publish information they know to be damaging to national security and other sensitive categories of information. It is clear that the State is much more likely to prosecute civil servants, police officers and spies rather than journalists, because there is a greater likelihood of obtaining a conviction.

The civil law on confidentiality is frequently used to prevent publication based on leaked documents and information from whistle-blowers. A public interest defence should be possible to defeat injunctions based on confidentiality, but journalism has to be much more defensive and protective of its sources and the degree to which it openly co-operates with judicial and police inquiries. The tactics of journalism and the process of protecting sources therefore need to move to a more stringent and

deontological methodology. This is a key lesson to be learned from what emerged during the Hutton enquiry. Where possible, steps must be taken to place the story into the 'privilege shields' of a press conference, public or council meeting, or better still in Parliament, so that it is fully propelled into the public domain and protected from libel litigation.

Steps for protection

If a document is relied on to support a potentially defamatory report, the original or a copy should be retained for any future justification defence. Everything must be done to avoid tipping off the people or organisation being investigated. If the document supports a sensitive national security issue, some consideration should be given to returning the document to the source. Accurate notes should be made from it. If a media organisation is unlucky enough to be served with an injunction which demands the source document, it is obvious there will be characteristics that would identify who provided it.

If the confidentiality of a source has been guaranteed, steps should be taken to protect the source by using a code of identification in all the notes and records of meetings and conversations. Credit cards, mobile phones, swipe cards and the attention of CCTV cameras should all be avoided during meetings so that the source cannot be geographically triangulated to journalistic encounters. The use of computers and e-mails in relation to all dealings with the source should be avoided as their secrets are easily yielded. Every effort should be made to disguise the style of style of language and syntax the source uses to make it impossible to secure identification through voice pattern and text analysis. Confidential sources should certainly be informed if they are being recorded ' it is obvious that such recordings could incriminate the source in the future.

The nature of the contract of confidentiality should be made clear. Dishonesty and misrepresentation on the part of the source will end the agreement. The nature of the guarantee should be clear. The source should know if the journalist might have to disclose the confidence to the editor or proprietor. The question of whether the confidence will endure beyond death should also be cleared up.

Whatever the outcome of the Hutton Inquiry, the BBC, Andrew Gilligan, Susan Watts and other journalists clearly did all they thought they could do to protect Dr David Kelly as a source. But the fact remains that they did not do enough to prevent him from being bullied by the Government into giving himself up and then being abandoned in a virtual no-man's land of media and political frenzy.

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When a journalist must tell

Nick Martin-Clark

There can be few worse nightmares for a journalist than to appear in the witness box giving evidence against a former source for having committed a brutal murder. But that was the position I found myself in earlier this year when Clifford George McKeown, a notorious loyalist with a long history of involvement in Northern Ireland terrorism, came up for the murder of 37-year-old Michael McGoldrick, a part-time Catholic taxi-driver from Lurgan, Co. Armagh. On the night of 7 July 1996 McKeown had pumped five bullets into the back of McGoldrick's head from close range in a professional paramilitary killing. Three years later I had gone to see him in Maghaberry Prison about other matters. After swearing me to silence about the killing, he then boasted about it to me. It would have been easier to keep his secret because my life has been disrupted – we have had to move house and I am now on a witness protection programme for the rest of my life. But despite the difficulty of going against a source this was a promise I eventually felt, after some agonising, that I could not keep.

McKeown was no stranger either to killing or to getting away with talking about it. He was by his own admission one of a handful of "trigger-men" in mid-Ulster, and experienced enough to be able to pick and choose his weaponry. The small-calibre .22 pistol he had used for this killing was "ideal if you could get up close", he had told me, as the small bullets did not exit the skull but ricocheted around inside, ensuring death. And as one of the original "supergrasses" from the trials of the early 1980s he had already told all once and then just walked away from it when, amid dramatic scenes in the courtroom, he recanted his evidence. Again, when I met him he was serving a lengthy prison sentence for several armed robberies after having talked freely about his actions to police. A few months later, however, he was released on appeal when it was held that he had not been under proper

caution when he had made his admissions. He walked again. This time though he was to go down. Earlier this year he was sentenced to a stipulated minimum of 24 years imprisonment.

For Michael McGoldrick's widow, Sadie, who had been pregnant with their second child at the time of the killing, his death left a scar that would never entirely heal. Poignantly, he had graduated only days before as a mature student from Queen's University Belfast and was well on his way to his goal of becoming a teacher. For his parents, too, the shock marked a turning point. They publicly forgave their son's killers at his funeral and turned their grief away from seeking justice and into sustained efforts for charity.

For the local community, the unsolved murder reinforced their sense of vulnerability and the conviction that the police were incapable of making a difference. To add insult to injury, the killing of McGoldrick, the first carried out by the Loyalist Volunteer Force (LVF), had prompted a U-turn on the part of the then Chief Constable, Sir Hugh Annesley, who allowed a contentious Orange march in neighbouring Portadown down the largely Catholic Garvaghy Road after banning it a few days previously, citing the risk of further violence as his reason. The tactic chosen by renegade loyalist Billy Wright of spreading terror by randomly choosing a victim had paid off.

Wright's close associate, McKeown was always the prime suspect but I and another journalist had gone to see him, not to ask about the McGoldrick murder but because we had heard that he was seriously ill and we hoped that, as a talker, he might give us information more generally, especially about collusion. My colleague backed out after the first interview but I was to see him a total of five times between June and October that year, and he came to trust me. Towards the end of our third meeting he sidled into the topic of the McGoldrick murder by telling me that it had been a birthday present for Billy Wright, whose birthday was indeed 7 July. This was a shocking secret and he had sworn me to confidence before revealing it. After further probing and a reiteration of my promise, he confessed to having carried out the murder. Later I got the full story from him, and even though the piece by me that appeared in *The Sunday Times* in December that year kept back some crucial forensic detail, it got the full attention of the police.

The case set a precedent in that it was the first to hinge upon a confession made to a journalist as opposed to a policeman or prison cellmate. Journalists are no strangers to courts of course. Take Donal

McIntyre for example. For him court cases seem to be practically part of the editing process. But I broke an undertaking I had given as a journalist, as opposed to being a journalist who gave a perfidious undertaking while pretending to be someone else. The effect on public confidence is thus arguably not the same. Equally, journalists often end up in court for refusing to divulge their sources. I, however, appeared against my source after having given an undertaking of confidentiality. Understandably therefore there was an outcry in some quarters after the verdict.

My actions have been contrasted unfavourably, especially in Northern Ireland, with Ed Moloney's decade-long keeping of his promise to the loyalist police-informer William Stobie. In fact Moloney not only advised me against publication when I consulted him in late 1999 but has since contacted me to tell me he thought what I did was "despicable". But Moloney's case was very different from mine. Stobie's role in the murder of Pat Finucane was limited to supplying weaponry, whereas Clifford McKeown had personally fired five bullets into Michael McGoldrick's head. Further, Stobie had given the police sufficient information, and sufficiently early, for them to have prevented the crime. There was, however, no suspicion of police foul play in the murder of Michael McGoldrick.

McKeown broke off contact with me, while Stobie maintained it with Moloney. McKeown was happy at the notoriety he won through publication of his story, while for Stobie publication would have meant disaster. Moloney, moreover, sought Stobie's confidence in the full knowledge of what he was about to hear, having had the story first from his original source, Neil Mulholland. I was landed with something I didn't fully expect, even though I knew McKeown was the prime suspect, and I had only a split second in which to take a decision or perhaps forever lose the opportunity. Stobie was a classic whistle-blower potentially lifting the lid on matters of urgent public interest. McKeown was a boastful murderer whose protection would have served no public interest after he had broken an understanding that he would provide me with further information about collusion and the LVF. There was a clear public interest in solving a murder.

An absolutist stance on confidentiality is akin to total pacifism or to not telling a lie even to save a life. It is an eccentricity that has little to offer real-world journalism. What if someone told you about a murder he or she was going to commit? What if an egregious paedophile revealed all? Odd then to find absolutism championed in Northern Ireland, where the journalism is often as messy as the politics. But it is not just in Northern Ireland that the

chimera of neutrality is cruelly exposed. The embeds in Iraq similarly compromised some of their independence in return for privileged access. The answer is not to take a black and white view, but to face up to the difficult balances we have to strike as journalists with values, and be prepared to defend those values. In exceptional cases, and this was one, striking the right balance can involve over riding the principle of extending confidentiality to sources. After all, how often do hardened killers simply tell all to journalists? And, as I said at the trial, I felt McKeown had calculated that he would be untouchable even if the story did come out.

The principle of confidentiality, important though it is, is not an end in itself but ultimately a means to disclosure which must remain for journalists – as Liam Clarke of *The Sunday Times* has argued – our primary purpose. This was the thrust of advice given to me by Chris Frost, chair of the NUJ Ethics Committee, when he told me in a pre-publication consultation that it was sometimes permissible to "act as a citizen". For me, much more difficult than breaking the original story or agreeing to help the police was the dilemma I faced mid-trial when I was told it would simply collapse unless I agreed to full disclosure of all the journalistic material I had on Northern Ireland, all my notes and tapes, even completely irrelevant ones.

It was put very acutely by Martin O'Hagan, one of my closest contacts until he became the first journalist to be killed in the troubles when he was murdered 18 months ago by the same LVF that killed McGoldrick. He said McKeown did not deserve ethical niceties, but that he would never speak to me again if I handed over notes of our conversations. Journalistic privileges not being legal privileges, the defence was able to force full disclosure by maintaining that I had concocted the confession in an abortive attempt to extort information about collusion from McKeown in order to help another contact of mine who was embroiled in a substantial libel case at the time. There was not a shred of evidence for this and it may be relevant that there was a history of litigation between that contact and McKeown's solicitor. On the strength of an unsupported allegation by McKeown, my Northern Ireland material was carted off wholesale by the police. Needless to say this has had consequences and I have already received death threats from a former source who has been hit by the fall-out.

Had I been a psychiatrist, this would have been unthinkable. If the defence had alleged that I had concocted the notes of one patient in order to help another they would hardly have been given the run of my entire

patient-list in an attempt to bolster their theory. Not if all they had was an allegation plucked out of thin air. But that is effectively what happened to me. McKeown never even took the stand to back up his accusation. He did not utter a syllable throughout the entire proceedings.

For this reason I could not recommend to any other journalist that they should go down the path I did without a change in the law. Had I known that the legal system was going to treat confidentiality in such a cavalier manner, I doubt whether I would ever have undertaken to help the police. In some ways I was on trial as much as McKeown. Had my evidence been thrown out there would have been a life-long question mark over my credibility. During a gruelling four weeks, the legal process stripped me of my quality as a journalist and failed to protect me from protracted and unnecessary questioning despite my poor health (I have ME) and the obvious strain it placed me under. Until now I would have jumped on the liberal bandwagon of supporting the "human rights" of defendants, but it is sobering to see the impact those rights have on the rights of witnesses. It no longer surprises me in the slightest that witnesses fail to appear in court or to come forward in the first place.

Still, I do not regret continuing with the trial. Someone who might well have killed again will now almost certainly never have the chance to do so, and the public appreciation expressed by Sadie McGoldrick for my role makes all the difference to me. My only regret is that Martin O'Hagan is no longer around to hang up the phone on me. McKeown's gang, the LVF, had shown it was prepared to kill reporters by murdering him. How can I not be glad I helped put him in jail?

Nick Martin-Clark is a freelance researcher and journalist specialising in Northern Ireland. He has written for Irish newspapers, including the Sunday Business Post, Ireland on Sunday *and* Republican News*; for the* Irish Echo *in America, and in the UK for the* Sunday World, Prospect *and* The Sunday Times.

PROTECTION OF JOURNALISTS' SOURCES

The NUJ Code of Conduct Clause 7 says: "A journalist shall protect confidential sources of information." This is one of the few professional matters on which all UK journalists, in whatever job for whatever employer, will agree. When confronted with on order to hand over information, they will always refuse, with a moral rectitude that is not always apparent in their work. It is always the NUJ that backs them up, legally, politically, and morally.

But the issue is badly understood outside the profession, and legal protection for it is inadequate.

THE LEGAL POSITION

There is some protection for journalists, in two laws:

Police and Criminal Evidence Act 1984 (PACE). Section 11 says that for police to be able to seize journalists' material they must get an order from a Crown Court judge. This means the issue is defendable, and media companies will always contest police applications. Generally judges will grant an order, and at that point the individual journalist concerned will need protection from the union, since the publishers may decide to comply.

Contempt of Court Act 1981. Section 10 says that journalists cannot be forced to divulge confidential information save for three reasons

the protection of national security

the detection or prevention of crime

the interests of justice.

In practice the judges usually allow one of more of these exceptions to apply. The reform of s10 is the most urgent matter, and it is not just journalists who say so. It is a requirement on the UK government since it lost the milestone Goodwin case at the European Court of Human Rights in 1996.

THE GOODWIN CASE

This NUJ-backed case has become the European case law standard. Bill Goodwin was a reporter on The Engineer who in 1991 received a leak of a financial report produced by a computer software company, Tetra. When he made enquiries of the company they secured an injunction preventing publication of the story, which may have been commercially damaging, and an order to disclose the identity of the source. Bill Goodwin refused and his employer, Morgan Grampian Magazines (part of United News and media) supported him.

The case went to the House of Lords (the highest UK court) with Bill Goodwin losing at every stage. He refused to comply throughout. He was eventually fined £5,000; not a high figure in comparison with other cases. The judges, we believe, were fairly sympathetic to him.

Tetra was claiming that the leak was theft and they therefore needed the identity to trace the culprit. (In fact this was not true, the informant being a person lawfully holding the document, though Bill Goodwin could of course never disclose that.) The courts accepted the company's argument and found that the "interest of justice" exception overruled the journalist's right to confidentiality.

Following the ECHR judgement, the UK government should have amended the 1981 Act to strengthen the protection of journalists, but successive governments have failed to do so.

LESSONS FROM RECENT CASES

Cases of journalists facing legal action over confidential information crop up two or three times a year. Those occurring in the last four years have included:

1. Campaign vigorously

A. ED MOLONEY, Belfast editor of the Dublin-based Sunday Tribune, He refused to comply with order to hand over notes of an interview with a man accused of murder in Northern Ireland. After a vigorous campaign the application was dropped.

There were heavy security angles to the story: the killing had been one of the most controversial in the Northern Ireland war. This made the campaign politically sensitive but also helped generate publicity. The union mounted pickets outside court hearings and lobbied politicians until it became politically impossible to proceed with the order and it was quashed.

B. MARTIN BRIGHT, home affairs editor of the Observer, a national Sunday paper, was subject to an application for a police order to hand over material relating to the paper's contacts with David Shayler, a former secret service agent. Again there was a vigorous campaign and the High Court threw out the application.

C. ALEX THOMPSON and LENA FERGUSON, ITN Channel 4 News journalists still defying orders to identify Paratroop Regiment soldiers who spoke anonymously to a programme about the Bloody Sunday massacre on 1972. They have been declared in contempt of the Tribunal investigating the massacre but proceedings have yet to begin. Alex Thomson in particular has declared publicly that he will never comply and is campaigning publicly.

D. STEVE PANTER, crime reporter of the Manchester Evening News, was threatened with prosecution for contempt after refusing to identify an informant when a witness in the trial of a Manchester detective charged with leaking information to him. The officer was acquitted. Again there was a Northern Ireland angle: the story named a man alleged to an IRA bomber of Manchester city centre. The union organised members writing to the government in protest and the case was formally dropped.

ALL THESE stories had security angles and could have been politically difficult. The lesson is to use publicity to embarrass the security services. In the UK secrecy of official information is endemic, and those guarding it are terrified of light being cast on them. Their instinct, facing the spotlight, is to hide. Journalists can make use of this.

2. Don't trust employers. Represent members yourself

A. ROBIN ACKROYD was unnamed as the freelance author of a story in the Daily Mirror, a leading national tabloid, on the hunger strike of Britain's most notorious child murderer in a secure mental hospital. Applications by the health authority to order the Mirror to disclose its informant were upheld by the courts, right up to House of Lords, after which the Mirror said it would identify Robin Ackroyd. He therefore "came out" himself. The courts then applied the order to him. The NUJ gave him full legal and political backing and last week, after three months of hearings, he won the right to defend himself against the order. The case will continue.

B. INTERBREW, the Belgian brewing combine, secured orders against five UK publishers over stories based on the leak of a financial report into a potential take-over. The case had similarities to the Goodwin case, in that Interbrew claimed a crime had been committed through the leak (still unproven) and the Financial Services Authority has launched an investigation. This is still ongoing, though Interbrew has not proceeded with orders to have the publishers summoned for contempt, due largely to a public campaign that embarrassed the company. The publishers have launched an appeal to the ECHR, which is certain to succeed.
Some of the publishers (three national papers, the leading financial weekly and Reuters news agency) supported their journalists who had done the stories, but some did not. They indicated they would be prepared to pass over the document they had received and the cases against them were withdrawn.
C. ADRIAN GALVIN was a reporter on a regional evening paper that faced a PACE order to identify a police officer who leaked a story. His paper's lawyers resisted the application for the order but indicated they would comply if the order was made. The editor instructed Adrian Galvin to hand over his notebooks. He contacted the union, which told him not to do so, and despite employer pressure he refused. The union took possession of his notebooks and arranged separate legal representation for him, and the court refused the order.

3. The principle covers material as well as sources
A. FOUR PHOTOGRAPHERS were subjected to PACE orders to hand over complete rolls of negatives of images of a series of violent demonstrations outside a newspaper office and printworks. They all refused and were summoned for contempt. The union said the issues were the same as for confidential sources. Before the summons was issued all four had given their negs to the NUJ, signing a letter stating they were relinquishing ownership and control. The NUJ gave them to the IFJ on the same terms, and they were taken to Brussels, outside the jurisdiction of the courts.
When the case came to the High Court the NUJ and IFJ General Secretaries gave evidence that they would not return the negatives to the photographers and the NUJ respectively even if asked to. The court had no choice but to declare through clenched teeth that the photographers were unable to comply with the order and it was quashed.
Thus the NUJ inaugurated its "Brussels Run", through which a number of photographers have despatched their images to safety. Under the PACE this must be done before the first request is made by police. To destroy or otherwise dispose of material after a request is made is an offence.
B. ED MOLONEY (1A above). His case did not involve confidentiality because the source was public and well known (Billy Stobie, a loyalist terrorist in Northern Ireland). He confessed to Ed Moloney in 1991 that he was involved in the notorious assassination of a leading republican lawyer, and Ed Moloney had published this at the time, but no prosecution was brought. Eight years later after a prolonged investigation Billy Stobie was charged and Ed Moloney was ordered to supply his notebooks to the prosecution. He refused. Ed Moloney is a celebrated journalist and there was such a public commotion over the case that his appeal against it was allowed by the High Court.
The arguments were similar last year's case of Jonathan Randall and the War Crimes Tribunal, where again the source was publicly known. The NUJ considers that the clauses of ethical codes that require the protection of confidential sources could be expanded to confidential material.

4. Allow no exceptions

A. NICK MARTIN CLARKE is a freelance who gained an interview in prison with another notorious loyalist terrorist in Northern Ireland. In the interview the man confessed to another notorious murder. Nick Martin Clarke had just joined the NUJ and sought advice as to whether he should inform the police. He apparently spoke to several union sources and the advice was conflicting, for he did go to the police, he gave evidence and the man was convicted, on Nick Martin-Clarke's evidence alone. In giving evidence he said he had been advised by the NUJ that he could act from personal conscience and inform on a murderer. Nick Martin-Clarke had obtained his interview with the prisoner by surreptitious means, posing as a Parliamentary researcher. He resigned from the union shortly after.

There was considerable disquiet at this among journalists in Northern Ireland. They worried that if it was believed by some of the more violent elements that journalists were likely to go to the authorities, their lives would be in danger, and they have reason. The NUJ had a member shot dead by loyalists two years ago and at least seven others are currently under threat.

The issue has been discussed widely in the union and in April the National Executive Council declared Nick Martin-Clarke "not a fit and proper person" for membership; in other words, were he to apply for membership again, he would be refused, for breach of the Code of Conduct.

Tim Gopsill
National Union of Journalists of Britain and Ireland
May 2003

JOURNALISTS AND THEIR SOURCES
Lessons from anthropology

Isabel Awad

While anthropology and journalism use similar methods and, many times, produce a similar kind of knowledge, the two professions have significantly different views of their sources. Like all social sciences, anthropology is subject to federal regulation for research with human subjects. This regulation requires the assessment of costs and benefits, the informed consent of informants, and, in general, researchers' protective and responsible attitude towards them. Citing the First Amendment and arguing that news is non-generalizable knowledge, journalism exempts itself from this regulation. This paper shows that both arguments for exemption are unsustainable and analyzes three other possible incompatibilities between journalism and federal regulation: the watchdog role of the press, the apparent conflict between confidentiality and credibility, and journalists' reluctance to take responsibility for the consequences of what they publish. It concludes that news professionals' understanding of truth in terms of facticity and of their job as the transmission of such truths impairs their sense of ethical responsibility.

KEYWORDS anthropology; ethics; human subjects; informed consent; journalism; sources

Introduction

In journalism, maltreatment of sources seems to be part and parcel of the job. In the name of the "public's right to know," the professional reporter[1] may deceive the sources and represent them in ways in which they do not want to see themselves represented and which can harm them. These downsides of news reporting tend to be interpreted as signs of professional integrity: they demonstrate that journalists are so committed to "the truth" that they are independent of all other interests, including the interests of the source.

The manipulative nature of reporters' relationship with sources remains mostly uncontested in journalistic textbooks and professional codes of ethics.[2] Discussions about the treatment of sources are generally reduced to a question of strategies to resist sources' self-serving intentions so that the information that the public needs can be obtained. Some of those strategies are basic norms in the profession: checking the accuracy of sources' statements carefully; rejecting presents and other forms of bribes and never paying the sources because they would end up inventing stories; establishing detached, though cordial relationships with them; and granting them anonymity only as a last resource. Furthermore, journalism's ethics usually fails to acknowledge sources' diversity and the diversity of situations in which they become newsworthy. Recommendations to "[u]se special sensitivity when dealing with children or inexperienced sources or subjects" and "show compassion for those who may be affected adversely by news coverage" (Society of Professional Journalists, 1996) are not only vague, but may be overridden by the public's need to know (e.g., Hulteng, 1976, pp. 51–65).

Janet Malcolm's *The Journalist and the Murderer* (1990) is a provocative illustration of how this works. The protagonists of what Malcolm describes as "a grotesquely magnified

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version of the normal journalistic encounter" (1990, p. 20) are Joe McGinniss, the journalist, and Jeffrey MacDonald, the murderer. The first betrays the latter by following a common journalistic practice: He uses his sympathy to gain MacDonald's trust and ends up publishing what he considers to be true, that MacDonald had actually killed his wife and two daughters. The example may be extreme, but the situation is not unknown to journalists.[3] As Malcolm, herself a journalist, explains,

> Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man, preying on people's vanity, ignorance, or loneliness, gaining their trust and betraying them without remorse. (1990, p. 3)

Sometimes the mistreatment is mutual, that is, journalists may also be used by sources, but that does not absolve them from guilt, according to Malcolm. Despite the strength of her critique, she does not offer a way out of "journalistic solecism" (1990, p. 163). For her, the relationship with sources is "invariably and inescapably lopsided" (1990, p. 162).

This paper argues that the assumption that mistreating sources is an inevitable cost of newsmaking precludes a debate about journalists' moral responsibilities. To question that assumption and advance such a debate, the discussion that follows compares journalism with the other disciplines dedicated to studying and reporting the social, that is, with social sciences. Specifically, journalism's main counterpoint here is anthropology. There are two main reasons for this. First, the kind of knowledge that anthropologists produce and the methods they use place their practices very close to those of journalists.[4] Second, the critical reflexivity with which anthropologists continuously interrogate their responsibility toward their study subjects distinguishes anthropology from journalism. In sum, because journalism and anthropology face similar ethical challenges, but respond to them differently, the comparison may offer journalism new insights into what the profession usually takes for granted.[5]

Like all biomedical and behavioral sciences, anthropology is subject to the federal regulation for research with human subjects. The first section of this paper describes this regulation and the specific challenges that it presents for social researchers. The second section focuses on anthropology. It looks at the effervescent debate that has shaped anthropologists' view of their responsibility toward informants and the role that the federal regulation has played in triggering much of that debate. The third section analyzes how journalism has lost such an opportunity for ethical reflection by failing to consider the human subjects regulation seriously. The fourth section advances such discussion by highlighting potential incompatibilities between newsmaking and a protective treatment of sources. Throughout the paper, anthropology is used to disrupt journalism's common sense and open new possibilities through which the profession can rethink itself.

The Common Rule in Social Sciences

Social scientists' relationship with sources is based on the principle of *informed consent*: researchers must inform their subjects or informants of the purposes of their study, its possible risks and benefits (to the subjects and to others), and whether the records will be kept confidential. Subjects are free to accept or refuse to participate, as well as to suspend their participation at any moment.

Informed consent is legally enforced through a federal policy, the "Common Rule for the Protection of Human Subjects" (abbreviated to the Common Rule). The Common Rule formally applies to research eligible for federal funding, but has been broadly adopted by most US universities. The origins of this policy are in the Nuremberg Code of 1947, which condemned Nazi experiments in concentration camps and established basic guidelines for human experimentation. Though the initial concerns mainly focused on biomedicine, they quickly spread to all types of research with human subjects. In the United States, two milestones in this direction were the controversies over Stanley Milgram's social psychology experiments in the 1960s to test people's obedience to authority and sociologist Laud Humphreys's undercover observations of homosexuals in public restrooms in 1970. The main ethical accusations against Milgram and Humphreys were that they deceived their participants and put them under significant risk.

Today's Common Rule was preceded by the National Research Act of 1974, which created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The commission's Belmont Report, submitted in 1978, provides the foundations for the current legislation. First, it defines research as "an activity designed to test a hypothesis, permit conclusions to be drawn, and thereby to develop or contribute to generalizable knowledge" (1978, p. 3). Second, it states that all research must follow three ethical principles: respect of persons, beneficence, and justice.

The Common Rule issued in 1991, following the guidelines of the Belmont Report, understands "research" as "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge" (Common Rule, 1991, §102.d). Some categories of research, however, are exempted from this policy: educational tests, evaluation of public programs, consumer research, studies based on publicly available data where subjects remain unidentifiable, and those in which "the human subjects are elected or appointed public officials or candidates for public office" (Common Rule, 1991, §101.b).

The Common Rule requires researchers to submit a "human subjects protocol" of their research to a corresponding Institutional Review Board (IRB). The IRB, constituted by at least five members from diverse disciplines, has to approve the research projects before they can be executed. If the research qualifies as of "minimal risk" the revision may be "expedited," that is, it may involve only the IRB chairperson or a designed member (Common Rule, 1991, §110).[6] One of the main functions of IRBs is to ensure that the requirement of inform consent is fulfilled properly. According to the general norm, "informed consent shall be documented by the use of a written consent form approved by the IRB and signed by the subject or the subject's legally authorized representative" (Common Rule, 1991, §117.a). Under certain circumstances, however, the consent may be oral or even waived. The oral consent is mostly for subjects who cannot read. A petition to waive the formal consent must argue that either (1) the research is of minimal risk, or (2) the signed form itself may be harmful to the subjects by linking their identities with the study and its results. The latter is an extreme provision for particularly risky cases, usually related to illegal activities. By default, however, IRBs tend to request the protection of subjects' confidentiality.[7]

In general, social scientists agree on the importance of the protection of human subjects and, more specifically, on the Belmont principles of respect, benefice, and justice. There have been, however, recurrent debates related to the codification of these principles. The federal policy constrains professional autonomy and imposes a costly

burden on research: scientists not only have to spend time going through the IRB procedure, but they also have to obey decisions that may go as far as forbidding their study. Yet, what has been more problematic for social researchers since the initial discussions toward a Common Rule is that the regulation is modeled according to the logic and procedures of biomedical experimentation. It may fit psychological experiments, but does not take sufficiently into account the particularities of other social research methodologies (Cassell, 1978; Fluehr-Lobban, 2003; Olesen, 1979; Wax, 1980).

A 2000 report prepared by the American Association of University Professors (AAUP) and representatives from the main national associations of historians, anthropologists, and political scientists exemplifies some of social scientists' objections. Historians argue against IRBs' requests "to submit detailed questionnaires prior to conducting any interviews; to maintain narrator anonymity both on tape and in their published work; and to either destroy their tapes or retain them in their private possession after their research project is completed" (AAUP, 2000). The generalized complaint among anthropologists is that "[t]he risks and benefits to the people [that anthropologists study] are very different from those faced by subjects of biomedical research" (AAUP, 2000).

The case of anthropology is particularly interesting here, given the blurring boundaries between its practices and those of journalism. In terms of data gathering, it may be even impossible to set the limits between ethnographic methods and news reporting. To take an extreme, though realistic example, how is the work of the anthropologist who does fieldwork "at home," a kind of research of increasing relevance in this discipline, different from the one of the investigative or enterprise reporter? The first question then is: How do anthropologists, given their journalist-like practices, reconcile their work with the federal regulations on how to treat informants?

Anthropologists and Their Informants

Discussions about ethics in anthropology are linked to the history of the profession. A letter from Franz Boas, founder of the American Anthropological Association (AAA), triggered the first major ethical discussion in the field. Boas's condemnation of the covert wartime social science research for the government in a letter published in *The Nation* in 1919 is situated at the beginning of "the era of the emergence of 'professional' fieldwork" in anthropology, one that goes from the mid-1920s to the 1960s (Pels, 1999, p. 107). In the 1960s there was a revival of Boas's concerns, when anthropology was shocked by notorious cases of anthropologists involved in counterinsurgency for the government in Latin America, known as project Camelot, and, some years later, in Vietnam.

The discussion generated by the exposé of project Camelot led to the 1967 *Statement on Problems of Anthropology*, which defended freedom of research as a condition for the protection of the research subjects. Four years later, and after a new debate triggered by anthropologists' role in Vietnam, AAA issued its first code of ethics, the "Principles of Professional Responsibility" (PPR). Principle number one refers to the relationship with sources. It states: "anthropologists' paramount responsibility is to those they study" (AAA, 1986 [1971]). This responsibility implies that sources must be well informed about the purpose of the research, its possible consequences, and of their right to anonymity. Moreover, the anthropologist has an "obligation to reflect on the foreseeable repercussions of research and publication on the general population being studied" (AAA, 1986 [1971]).

Also in 1971, Joseph Jorgensen, member of the AAA ethics committee, proposed a more complex formulation of informed consent:

> [C]onsent should be gained before and during the course of research. As goals change in the course of fieldwork, consent for new inquiry must be obtained. Consent applies to the purposes specified, not to other purposes. The individuals being studied should be allowed to choose for themselves the time and circumstances under which, and the extent to which, their attitudes, beliefs, behaviors, opinions, and personal histories, including jobs, income, and information of scores on other topics, are to be shared with, or withheld from, others. (1971, p. 330)

Jorgensen's view was broadly shared among anthropologists by the end of the 1970s, when the new federal regulations for social research stirred up another wave of ethical debates in the profession. In principle, the Common Rule's emphasis on informed consent seemed appropriate. However, the specific ways in which it was enforced—as a form to be signed *a priori* by subjects—reduced it to something very different from the process described by Jorgensen. Anthropologists argued that the legal procedure suits biomedical or psychological experiments, usually based on a single and brief interaction between experimenter and subject and where the data is anonymous, but not ethnography (see, e.g., du Toit, 1980; Wax, 1980).

A first problem of the consent requirement in fieldwork is that some subjects cannot read or, more importantly, could be put in danger by a signed form. This, however, is not a problem of the Common Rule itself—as explained above, the Common Rule accepts the possibility of either oral consent or waiver of consent—but of its interpretation by the IRBs. A more complicated issue is the definition of "informed:" What kind of "information" is contained in the formula of *informed* consent? As Jorgensen sustains, the goals of the research may change during its course and may, thus, be unforeseeable at the moment of the legal consent. There are possible effects or benefits which do not derive from the research itself, but from the application of its results. Indeed, the main risk of anthropological research lies in its publication, many anthropologists argue. "The extent of possible harm to a research participant resulting from the disclosure of information could range from embarrassment to an adverse administrative action or, in some cases, even criminal prosecution" (Bond, 1978, p. 144, see also Cassell, 1978, 1980; Johnson, 1982).

The most recent AAA Code of Ethics (1998) deals with most of these issues by reconciling the *legal* with the *ethical* standards of the profession. It makes explicit, for example, that "researchers should obtain in advance the informed consent of persons being studied," but that it does not need to be written or signed. "It is the quality of the consent, not the format, that is relevant" (AAA, 1998). That quality is based on the understanding that "the informed consent process is dynamic and continuous; the process should be initiated in the project design and continue through implementation by way of dialogue and negotiation with those studied" (AAA, 1998).

It is important to understand anthropology's persistent disagreements with the codification of informed consent (see, e.g., Fluer-Lobban, 2003; Miller and Bell, 2002). More important, however, is to realize that these disagreements have nurtured some of the most productive ethical discussions in the discipline. As Mills puts it, the regulations

> ...provide an opportunity for anthropologists to redefine, debate and develop disciplinary methodologies. One can make a strong case for a genre of ethnographic

> research and writing that does not reduce the complexity of the research relationship to the extraction of information from research "subjects". But it is a case that does need to be made. (2003, p. 52)

Unfortunately, the Common Rule has not been translated into a similar opportunity for journalism. As the next section argues, the regulations' effect on news professionals has been rather the opposite. Reporters' almost natural exemption goes hand-in-hand with the lack of a serious consideration of their "human subjects" responsibilities.

Journalism's Pleas for Exemption

The First Amendment and the People's Right to Know

The possibility of human subjects' protocols for reporters is hardly discussed among journalism educators. What is more, these discussions are uncritical. They end where inquiry should begin—in the assumption that the First Amendment necessarily forbids a human subject regulation for the press and that, in any case, the regulation does not apply because news is non-generalizable knowledge. The fact that each of these two arguments operates as the backup plan of the other already suggests the uncertainty on which they are grounded. A clear illustration of this comes from a listserv discussion about journalism education posted on October 2001, under the subject "Institutional Review Board for Reporting?" A journalism professor, apparently worried that his students could have to go through IRB procedures in their reporting assignments, asked advice from his colleagues. One of them suggested:

> To make life simple, I'd just tell them [IRBs] that reporting students doing standard interviews are protected by the First Amendment and dare them to take it from there. I once asked our human subject person about this and she just laughed at the thought of reporting classes coming under IRB jurisdiction.

As straightforward as this response may seem, it is unclear whether appealing to the First Amendment is a matter of justice or merely a way to simplify life. As philosopher Sissela Bok (1989) contends, one should be skeptical about blind appeals to the First Amendment. These appeals are based on an all-encompassing notion of the public's right to know. Such right to know, Bok argues, does not exist, first, for an epistemological reason: "How can one lay claims to a right to *know the truth* when even partial knowledge is out of reach concerning most human affairs, and when bias and rationalization and denial skew and limit knowledge still further?" (1989, p. 254, emphasis in the original). By taking knowledge as a given, the claim of people's right to know conceals the actual process through which knowledge is produced. Moreover, from a moral perspective, not all knowledge is publishable; there is no public right to know about everyone's private life and intimate relationships, for example. Journalists are aware of all this; their daily work confronts them with the decisions and limitations that shape the knowledge they publish. "So patently inadequate is the rationale of the public's right to know as a justification for all that reporters probe and expose, that although some still intone it ritualistically at the slightest provocation, most now refer to it with tired irony" (Bok, 1989, p. 254).

It would be difficult to classify the listserv recommendation quoted above as either ritualistic or ironic. Nonetheless, "just telling them" that journalistic interviews are constitutionally protected has little strength as an ethical argument. It is a commonsensi-

cal reaction consistent with the dominant libertarian view of the First Amendment, which interprets freedom of the press as "a protection for self-expression" instead of as an instrument for "collective self-determination" (Fiss, 1996, p. 3). "From this perspective, the First Amendment serves not only as a shield journalists can use to deflect meddlesome agents of the state but as a rhetorical device that journalists can deploy to ward off critics, who, technically, pose no constitutional challenge to a free press" (Glasser and Gunther, 2005, p. 388).

The libertarian view privileges a negative freedom—freedom *from*—over a positive one—freedom *for*. A social responsibility theory of freedom of the press, in contrast, understands that the press must be free *from* external pressures in order to "be free for making its contribution to the maintenance and development of society" (Leigh, 1947, p. 18). The issue, then, is whether journalism's exemption from the Common Rule contributes not simply to a freedom of the press from regulations, but, more importantly, to a freedom for publishing the news that the community needs for its maintenance and development. Put in these terms, the Common Rule challenges journalists, with two simple questions. First, what are the news stories that the community actually needs? Second, in which way do these stories conflict with sources' informed consent, the protection of their identities, the consideration of risks and benefits, and other stipulations of the federal rule?

In analyzing the limits and conditions of the freedom of the press, journalists should also differentiate freedom of speech and thought from freedom of action. Bok (1982) points to this distinction in an analysis of the ethics of social research. Free science, she argues, involves both kinds of freedom. But while the goals of science may guarantee a special protection for freedom of thought and of speech, it does not justify a privilege for action. "[T]o the extent that scientific inquiry also involves actions and direct risks, it has to be judged by standards common to other undertakings" (Bok, 1982, p. 179). Many of the risks involved in the actions of social researchers would apply to those of news reporting. In the case of questionnaires, for example,

> ... inquiry can be improper. The questioning can be intrusive and bruising; the information gained can be misused and exploited. Political surveys, questions asked of the vulnerable and the powerless: these can turn inquiries into inquisitions. (Bok, 1982, p. 169)

Journalists may insist that, despite the similarities between their work and that of social scientists, the First Amendment sets a clear distinction between the two. This, however, cannot be taken for granted. In 1979, for example, during the outburst of anthropologists' reactions to the federal rule, two of AAA's most active members in ethical issues at the time argued that "[f]ieldwork often generates the news behind the news, and often presents critical information about the nature of the political and social world" (Wax and Cassell, 1979, p. 95). On the basis of this journalistic character of ethnographic research (or the ethnographic character of journalism, one could say), Wax and Cassell questioned the validity of regulations that would include one and exclude the other. This led them to ask "whether the First Amendment protects the institutional 'press' ... or the activity of publishing" in which case it would also protect social researchers (Wax and Cassell, 1979, p. 98). Journalism can only respond to this question once it replaces the ironic or ritualistic appeal to the freedom of the press, to use Bok's terminology, with a critical one.

News as Non-generalizable Knowledge

The other common justification for journalism's exemption from the Common Rule is based on the legal definition of research. A second reply to the listserv question about the applicability of IRB procedures in reporting explains the usefulness and the limitations of this argument.

> A few years ago, we had a mini-revolt over orders to submit student interviewing/reporting activities to IRB review. Eventually, the administration here backed off and chalked up the dispute to a misunderstanding. The upshot was this: IRB research covers "human subjects research." By definition, research involves a "systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge" ...
>
> While routine interviewing clearly falls outside the definition of research, I'm not so sure about scientific surveys and opinion polls. Right now, I think we're turning a blind eye to that issue, and it may come back to haunt us. Increasingly, we are trying to make reporting more systematic—through CAR [computer-assisted reporting], for example. At some point, I think, we're going to have to say, "Well, this *is* research, but it's exempted by the First Amendment."

The argument of non-generalizability of journalistic knowledge operates smoothly only until one looks at it more carefully and, as in the response just quoted, takes into consideration more systematic kinds of reporting. In that case, the easiest shortcut, also suggested in this second listserv reply, is to go back to the First Amendment protection. A productive ethical debate, however, must analyze the generalizability clause more closely: What does the Common Rule mean by "generalizable knowledge" and how does that criterion draw a line of inclusion or exemption from the human subject regulations?

A strict conception of generalizable knowledge would define it as general statements that result from the use of inductive methods, that is, knowledge extracted from a representative sample and applicable to a corresponding universe of cases. Following this definition, most news stories would indeed be left out of the Common Rule. However, they would not be alone. As Jorgensen explains,

> Research techniques [in anthropology] are seldom based on explicit inductive methods. Data are often gathered from only a handful of subjectively chosen informants, and the researcher often spends a year or so in the field ... Even though we do not publish an informant's name, height, weight, or serial number, the interested reader can identify the revolutionary in the Santiago squatter settlement, the reformer among the Northern Ute, the Lebanese trader in Central Ghana, or the *patrón*, on the upper Rio Ucayuli. And often, in such cases, just the exposure of confidential information can cause harm. (1971, p. 331)

Jorgensen's quote has a double relevance here. First, it highlights the non-inductive character of ethnography, which, despite this, is subject to the federal regulations. Second, it suggests that non-generalizability understood in this sense does not lessen, but on the contrary, intensifies the researcher's ethical responsibilities. As mentioned earlier, anthropologists have insisted that the main danger involved in their work is related to the disclosure of the informants' identity. While experiments and surveys rely on the

statistical representativeness of individual cases, fieldwork and interviews are based on the specificity of those cases. From this perspective, the protection of people's privacy in non-generalizable research justifies additional ethical measures and, if anything, would be an argument for inclusion, not exclusion, from the Common Rule.

A more flexible definition of non-generalizability would understand it as knowledge that transcends the "sample" of the study, not by standing for a universe of comparable cases, but by enlightening a broader social reality. In that case, ethnography would be included into the category of generalizable knowledge, but so would at least some journalism. A paradoxical illustration of this is journalism's traditional ban against composite characters—sometimes used in anthropology to ensure the anonymity of the informants. Probably the best-known example here is Janet Cooke's "Jimmy's World," a story for which *The Washington Post* won and had to return a Pulitzer Prize in 1981. The problem was that Jimmy did not exist. What Cooke alleged later was that he was a composite of cases that she met in reporting. But the norm in journalism is clear: composite characters are not real persons and thus, they are not news. This could be taken as evidence of news' commitment to particularity. However, why would a story about an unknown eight-year-old heroin addict be considered news in the first place? Certainly not because of that particular child, but because his case could reveal how "[h]eroin has become a part of life in many of Washington's neighborhoods, affecting thousands of teen-agers and adults who feel cut off from the world around them, and filtering down to untold numbers of children like Jimmy who are bored with school and battered by life" (Cooke, 1980). If it had not been for this claim of generalizability, Jimmy's story would probably have never been published in *The Washington Post* nor considered for the Pulitzer Prize.

Since the two conceptions of generalizable knowledge proposed above cannot account for the specificity of scientific research—let alone for the exclusion of journalism—it may be useful to look back at the debates going on at the time when research was legally defined. An article from 1978, written by Kathleen Bond from the American Sociological Association, reports on the ongoing work of the federal commissions that would influence the new regulations of scientific research. A central challenge for them was to define research.

> Defining "research" and "researcher" for the purposes of legal protection raises many difficult questions: What distinguishes data collection for research purposes from other types of inquiry such as investigative journalism or administrative audits? Should research be defined by the credentials of the researcher? By the nature of the methodology employed? By the affiliation of the researcher? By sponsorship of research project? By the intended use of the data or the purpose of the research project? (Bond, 1978, p. 147)

The issue was too complex to allow for an ideal definition of research. As a result, any definition had to be pragmatic: it had to serve as a tool to differentiate research from the other activities that would not be regulated. In the case of the Commission for the Protection of Human Subjects, the central goal was to distinguish research from practice. The paradigmatic case was biomedical research. The Commission needed a definition that could explain the application of specific legal regulations on investigations in which certain persons were used as a means to generate knowledge not for the purpose of treating those persons, but for the possible benefit of other people. That is how the Belmont Report ended up stating that "the term 'research' designates an activity designed

to test a hypothesis, permit conclusions to be drawn, and thereby to develop or contribute to generalizable knowledge (expressed, for example, in theories, principles, and statements of relationships)" (National Commission for the Protection of Human Subjects in Biomedical and Behavioral Research, 1978, p. 3). The key in this definition seems to be not the actual generalizability of the knowledge but the intent. In public health, for example, the same kind of activities may be aimed either at curing or preventing a disease within a certain population or at learning about that disease through that population. Only the latter activities qualify as research (Department of Health and Education, 1999; Minnesota Department of Health, 2002).

This third approach to the notion of generalizable knowledge distinguishes the work of professionals who *treat* their informants—the case of lawyers, medical doctors, and psychiatrists with their clients—from the work of researchers who *use* their informants to gain knowledge. Two decades earlier than the Belmont Report, sociologist Edward Shils had underscored the ethical implications of this distinction:

> The mere existence of consent does not exempt the social scientists from the moral obligations of respect for another's privacy. Nor does the fact that priests, lawyers, and physicians and psychiatrists receive the confidences of other persons automatically resolve the issue for the social scientist. The priest receives confidences as part of a scheme of cosmic salvation to which the cosmic person is committed; the lawyer receives them because the confiding person needs his aid in coping with an adversary under the law; the physician and the psychoanalyst receive them because they offer the prospect of a cure to troubles of body and mind. The social scientist has, according to the traditions of our intellectuai and moral life, nothing comparable to offer. (1959, pp. 124–5)

Looking back at journaiism, what do reporters have to offer? The obvious answer within the profession is publicity. Yet, this is an offer of equivocal value. On the one hand, as discussed over and over by social scientists, publicity can harm. On the other, journalists themselves would be reluctant to explicitly accept deals in which the source gains as much as they do. If joumalists had to classify themseives as professionals that treat their clients or scientists that use their subjects, they would have no choice, but to class themselves with the scientists. Working for the sources (i.e., doing public relations) contradicts journalists' appreciation for their independence from sources' interests described at the beginning of this paper.

What is so Peculiar About Journalism?

The previous sections have shown that the two usual explanations of joumalism's exclusion from the federal regulations—non-generalizability of knowledge and First Amendment protection—are invalid. However, this does not automatically lead to the conclusion that joumalists can and should relate to informants in the same way that social scientists, and especially anthropologists, do to theirs. Taken at face value, the non-generalizability of news and appeals to the freedom of the press have hindered, rather than stimulated, a debate about joumalists' treatment of their sources. Thus, clearing up both arguments is only a first step toward understanding what accounts for the specific relationship that reporters establish with the people they study and to what extent that relationship is a necessary condition for the production of news. The next step is to move beyond the two usual justifications for exemption and identify other sites of conflict

between the Common Rule and journalism as a distinctive practice of social research. Three of these conflicting zones are: the watchdog role of the press, the apparent conflict between credibility and confidentiality, and journalists' reluctance to evaluate costs and benefits. Examining these contentions in light of the anthropological model of researcher–informant relationship underscores some of the basic assumptions of the corresponding relationship in journalism. These assumptions deserve more serious ethical consideration among news professionals.

The Watchdog Role or the Press

Journalism's incompatibility with the Common Rule on the basis of the watchdog role of the press goes as follows: reporters' most important informants are non-naïve sources, that is, powerful people with high expertise in dealing with the press and whom the press has to hold accountable. In dealing with such sources, federal regulation would not only be pointless, but would obstruct journalism's duty.

This justification is simple to dismiss. As stated before, the Common Rule does not apply in the case of "elected or appointed public officials or candidates for public office" (Common Rule, 1991, §102.b.3.i). The informed consent requirement, then, would not impede reporting about those in power. However, it would probably hinder the publication of non-public stories about these people and, in general, give subjects and sources of news stories certain control over their public presence through the media. Taken seriously, the distinction between public and private sources could lead to an important debate on differentiated ethical responsibilities of journalists toward their informants. Shils's distinction between professionals that treat their clients and researchers that use their subjects is helpful in this sense. It calls attention to the fact that certain subjects under certain circumstances—public officials in their public role—have a duty to participate in the newsgathering process, but ordinary people do not. What does the journalist have to offer to these ordinary people, who "give a human face" to their stories? The answer is not only "very little," but even less than what regular sources get. Indeed, mostly due to reporters' reliance on them, "people who are routine sources for the press are also more likely to be favorably portrayed in the news" (Sigal, 1987, p. 8).

In the case of anthropology, the possibility of differentiated standards of conduct with sources has only become an issue in the last three decades.

> Anthropologists have enjoyed the luxury of creating their ethics in response to work which centered on the subjects with little political or economic influence in their societies. We are understandably confused as we try to decide whether we should extend the respect we have accorded to these peoples to other individuals and institutions which are more clearly a part of the mainstream of their society. (Chambers, 1980, p. 335)

The increasing relevance of "studying up" projects, as opposed to the traditional fieldwork among marginalized people, involves an unresolved challenge for contemporary anthropology (Marcus, 1997). There are those who defend an antagonistic approach toward the superordinate groups in order to preserve the discipline's commitment to those who are disempowered (e.g., Galliher, 1980) and others that warn against the amoral behavior that can result from such a process of "dehumanization" (Appell, 1980). Although the "new" ethnographic fieldwork is precisely the space where reporters feel most

comfortable, journalism lacks the ethical guidelines that anthropology seems to be looking for.

Confidentiality Versus Credibility

Probably, the sharpest contrast between anthropological and journalistic practices refers to confidentiality. In anthropology, anonymity of informants and communities was the norm until some communities and informants demanded recognition (Fluehr-Lobban, 2003). Now, the rule is to respect the subjects' decision on whether they want to remain anonymous or not, making sure that the decision is informed, that is, that sources are well aware of the possible consequences of publicity (AAA, 1998).

In journalism, in contrast, confidentiality is not an asset, but a costly compromise in the tradeoff for information. This is clearly reflected in the profession's codes of ethics. In its latest version, the Society of Professional Journalists (SPJ), for example, removed from its code the brief clause about confidentiality—"Journalists acknowledge the newsman's ethic of protecting confidential sources of information" (Black et al., 1995, p. 7). The closest the 1996 SPJ code goes in terms of confidentiality is its appeal to journalists to "[b]e cautious about identifying juvenile suspects or victims of sex crimes" and "judicious about naming criminal suspects before the formal filing of charges" (SPJ, 1996). The *Statement of Principles* of the American Society of Newspaper Editors (ASNE) does refer directly to confidentiality, but underlines the high price—rather than the benefits—that it has for news practices: "Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified" (ASNE, 1975). The *New York Times*'s latest sourcing policy reinforces its "[g]uidance on limiting the use of unidentified sources" (2004). That means that in regular interviewing anonymity should not be even offered and, when it is granted, "an informative description" of the anonymous source must still be provided.

Journalists' view of confidentiality may be partly attributed to their limited testimonial privilege. Although shield laws protect them from testifying in 31 states and the District of Columbia (Reporters Committee for Freedom of the Press, 2002), there is no Supreme Court recognition of this privilege as there is for medical doctors, attorneys, and members of the clergy. However, this cannot account for the gap between the conditions for confidentiality in ethnographic fieldwork and in news reporting. Indeed, social scientists have been less successful than journalists in their demands for testimonial privilege (Jorgensen, 1971; Knerr, 1982). But since they conceive confidentiality as a device to minimize subjects' risk of participation, the lack of a legal protection is not a reason to avoid its use. On the contrary, this situation justifies special safeguards, such as replacing sources' real names even in the unpublished records, keeping those records under lock, and destroying them if they could be still harmful (Jorgensen, 1971).

Journalists are not forced by the law (or the lack of it) to avoid anonymous sources as much as they are by their standards of credibility. In journalism, real names are real people and hiding those names is a cause for suspicion. The absence of such a concern among anthropologists leads, at least, to question how much of a story's "truth" actually lies on the names of its characters. In other words, it uncovers the inadequacy of equating facticity with truth, a usual formulation in journalists' codes of ethics (Iggers, 1999).

The Assessment of Costs and Benefits

The Common Rule demands social scientists to make an assessment of the potential effects of their research for the subjects that participate in it and for others. Such a requirement in the case of journalism would be at odds with the common claim in the profession that the messenger is not to be blamed for the message. Journalists have to inform the public as accurately and completely as possible, not to make judgments about what may happen with that information next. In the words of journalist Walter Cronkite, "I don't think that it is any of our business what the moral, political, social, or economic effect of our reporting is. I say, let's go with the job of reporting—and let the chips fall where they may" (quoted by Glasser, 1992, p. 183). This logic fits into what Iggers (1999), p. 109) describes as a pervasive paradigm in US journalism, "the myth of neutrality and ideology of information:" journalists focus on the transmission of information and disregard the constructive dialogue in which that information engages. To the extent that journalists simply report what is "out there" they are only responsible for the accuracy with which they do so. In this sense, "journalists today are largely amoral" (Glasser, 1992, p. 176).

Interestingly, however, there seems to be an exception in journalists' avoidance of cost–benefit calculations. Professional codes of ethics do endorse formulas that justify intrusion to someone's privacy, undercover reporting, and even the infringement of "a criminal suspect's fair trial rights" in the name of "the public's right to know" (SPJ, 1996). Analyzed more closely, these prescriptions follow the same paradigm of the neutrality of information. A reductionist analysis of pros and cons enables journalists to measure the good for the public against the harm for a third party (the source) as if both—goods and harms, public and sources—were isolated from each other instead of in permanent interaction. The eventual gains that processes of informed consent and confidentiality may mean for the news story and the informative process as a whole are simply ignored.

Discussions in anthropology can illuminate the ethical challenges involved in the consideration of risks and benefits of research. The Common Rule's biomedical mold in this respect has been widely criticized for its utilitarianism, an approach that privileges "the greater good for the greatest number" and thus overlooks questions of faimess (May, 1980, p. 362). In other words, the regulations allow for rationalizations that justify harms to the informant in the name of a broader public benefit. The challenge for anthropologists, then, is to

> ... avoid this morally dubious feature of utilitarianism by insisting that the analysis only consider the goods and harms accruing to the people studied—to keep from sacrificing them to fieldworkers' more remote philanthropic purposes or narrower careerist aims. (May, 1980, p. 361)

Anthropologists have also defended a Kantian, as opposed to a utilitarian ethics, because the former rejects the use of other persons as a means, rather than as an end in itself. More recently, however, Wax has argued that the Kantian imperative continues to "violate anthropological principles" in the sense that it conceives society as an aggregation of human beings instead of "human actors organically related to each other" (1999, pp. 130–1). In the case of journalism, this aggregative conception of society underlies the isolation of sources from the public in such a way that it seems possible to do harm to one without harming or even affecting the other.

Conclusion

In his work on "Social Inquiry and the Autonomy of the Individual," Shils equates "the ethical quality of social science research" with "the ethical quality of the relationship of the investigator to the person he interviews or observes" (1959, p. 147). This ethical quality derives from the researcher's relationship, "as a person and as a citizen" (1959, p. 147) with society in general. The clearest proof that anthropologists would agree with Shils's equation is the priority they attribute to their responsibility with those they study. This is the guiding principle not only of anthropological codes of ethics but also of the broader ethical discussions within anthropology.

In journalism, in contrast, "ethical quality" is a matter of *getting it right* rather than of treating the sources in the right way. The profession's take on ethics, as suggested in the preceding sections, is fundamentally related to the motto of "the public's right to know;" the prevalence of a narrow definition of truth in terms of facticity; and of communication as transmission of messages rather than of constitution of the social world. In brief, it is an ethics constrained by the ideology of objectivity, a subject widely discussed by critical scholars (e.g., Ettema and Glasser, 1998; Glasser, 1992; Iggers, 1999; Schudson, 1978, 2003). Consequently, a manipulative relationship with sources is as commonsensical to the profession as the paradigm of objectivity.

The aim of this paper has been to challenge this kind of relationship by comparing journalistic with anthropological approaches towards informants and by scrutinizing journalism's alleged incompatibility with the Common Rule. Thus, the Common Rule functions here as a critical tool to engage journalism in a discussion which it has avoided. If journalists were to consider the Common Rule seriously they would have to elucidate, on the one hand, what differentiates news from the knowledge produced by social sciences and reporting from scientific inquiry. On the other hand, they would be forced to interrogate the analogy between their work and the work of professionals such as lawyers and medical doctors, with which journalists tend to compare themselves, especially in their demand for testimonial privilege. The point, then, is not to argue in favor of journalism's adoption of the federal regulations, but to take advantage of them as a platform for ethical debate. Similarly, the comparison with anthropology should not be understood as a contrast between "good" and "evil" but as an opportunity to see journalistic practices from a different perspective. Anthropology triggers a set of *what if* questions that could push journalism outside its common sense: What if journalists had a caring and open relationship with their sources? What if they adopted a policy of informed consent? What if news's truthfulness was independent of the anonymity of its characters? What if journalists evaluated the possible consequences of reporting and publishing and were willing to even give up on harmful though accurate stories?

If journalism ever engages in such a debate, it will not be to find clear and definite answers. Indeed, one of the most probable conclusions would be the need of a deeper understanding of journalists' ethical responsibilities, one that would allow for reasonable exemptions and differentiated guidelines. In the same way that only some journalism is considered "investigative" and its operation is usually highly independent, with a special budget, team of reporters, deadlines, and standards of quality in writing and presentation, there could be a criterion to decide what stories shall follow Common Rule-like procedures, what subjects should be protected, what situations justify the use of informed consent, and which ones do not.

NOTES

1. This paper focuses on US professional journalism. The dominance of this model as a normative ideal not only within the United States, but internationally (Hallin and Mancini, 2004), expands the relevance of this discussion beyond the limits of one particular country. Yet, its translation into other contexts must take into account the particularities of the US media system. The US model, as Hallin and Mancini (2004, p. 44) put it, is "the extreme case of a liberal system," characterized by market-dominated media significantly deregulated and detached from political interests as well as by a high level of professionalism among journalists (see also Bennett, 2000). In comparison with journalists from other countries, US journalists have a strong sense of professional autonomy, share a standardized set of ethical norms and practices, and have a clear "public service orientation" toward the general public's interest (Hallin and Mancini, 2004). These characteristics are shaped by objectivity as "the chief occupational value of American journalism" (Schudson, 2001, p. 149; see also Carey, 1969; Fishman, 1980; Gans, 1980; Glasser, 1992; Tuchman, 1972, 1978). Thus, journalistic contexts in which a different understanding of objectivity prevails present *non-liberal* media attributes, such as clientelism and instrumentalization (e.g., Hallin and Mancini, 2004; Ma, 2000) and political partisanship (e.g., Donsbach and Klett, 1993; Esser, 1998, p. 395; Mancini, 2000). To the extent that those attributes are closely related to journalists' relationship with sources, discussions about that relationship in those contexts would differ from the one presented in this paper.
2. See, for example, Hulteng (1976), Merrill (1997), Sanders (2003), Smith (2003) and Swain (1978).
3. Borden refers to the MacDonald and McGinniss case to illustrate how "journalists routinely use 'emphatic listening'—flattering attentiveness, reassuring gestures, and encouraging responses—as a technique for getting interview subjects to talk about things they probably would not reveal otherwise" (1993, p. 219).
4. "Methods" here is understood in simple terms as a set of research tools such as the interview, fieldwork observation, surveys, etc. This use of the term leaves aside the epistemological and political aspects involved in methodological decisions.
5. In a recent paper about the professional–client ethics in medicine, journalism, and anthropology, Coleman and May (2004) explore the contrasting views of confidentiality and disclosure in journalism and anthropology. They argue that both professions are alike in that: professionals use non-inductive methods, produce non-generalizable knowledge, and seek their "clients," as opposed to waiting for the clients to request their services (pp. 282–3). Coleman and May rely on the problematic assumption that the client in both professions is the source. They do acknowledge that journalists "are never quite clear about who the client is" (p. 283). However, it is also important to clarify that for anthropologists the client is the person or institution that has requested and/or funds the research, not the subjects with whom they have their first commitment (see AAA, 1998).
6. Minimal risk here "means that the probability and magnitude of harm or discomfort anticipated in the research are no greater ... than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests" (Common Rule, 1991, §102i).
7. The Common Rule's confidentiality requirement is less categorical: "When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data" (1991, §111.a.7).

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MEDIA CULTURE &SOCIETY

War, 'incendiary media' and international human rights law

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In numerous major military conflicts of the past twenty years, of which the second Gulf War is the most recent, there has been an increased focus by observers concerned with international law on the use and abuse of the media to incite violence, ethnic hatred and even genocide. Radio, print, television and the internet have all been identified as significant political tools for mass manipulation by dictatorial governments to drive deep-seated animosity between social and ethnic groups, resulting in an intense atmosphere of mistrust, misinformation and devastating killings. The pre-conflict abuse of the media to inflame inter-ethnic differences can be a catalyst for war. Journalists find themselves caught up in both direct and implicit censorship by those in power, particularly when they work for media outlets different from those controlled by the dominant ethnic group or political party. Sometimes editors and journalists find themselves in mortal danger for speaking out against the regime, or simply for exercising their free speech rights. At other times, however, print and television producers may become complicit with the regime in spreading messages of hatred. Once warfare breaks out, the media space can become central to the struggle between factions who want to utilize the media to escalate hatred and spread fear of those who oppose them.

In post-conflict times, with the media infrastructures possibly destroyed, journalists killed or fled, and the entire media space quickly becoming a site of renewed struggle between the interim authority and remaining factions, there are critical questions that urgently concern international human rights law. To what extent should foreign agencies – including possibly the occupying power – intervene in the post-conflict reconstruction of the media space in order to prevent it from being abused again, as well as to help produce and

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maintain public order? What is the legal basis in human rights law for such an intervention? How do different forms of intervention in the post-conflict state – 'managing' and even restricting the freedom of the press – stand up to legal scrutiny? How is the line drawn between a 'media intervention' aimed at achieving urgent military goals of stabilization and peace-keeping, and one aimed at longer-term development of a society that respects both civil and human rights? In what ways are the perspectives different among intergovernmental agencies (e.g. OSCE, EU, USAID, UN), donor nations and non-government organizations (NGOs, e.g. journalists' associations) regarding the legality of, as well as the actual protocol for, media intervention? What perspectives do they share, especially as benchmarked against international legal norms? At present, international law has not clearly delineated the legal and political conditions in which the international community, or any member of it, can take action to proscribe or suppress 'hate media' in a zone of potential or existing conflict. In human rights studies, 'media/information intervention' is a relatively novel concept. As Mark Thompson and Monroe Price (2002: 3) have suggested: '[T]he theme [of media intervention] is too fresh, too plastic. Practitioners are still defining its shape and form. Simply stated, it has not yet congealed to the point where analysts can get to work.'

This article examines these relatively new questions in international human rights law. It seeks to provide a legal analysis of media intervention or information intervention as carried out by foreign forces on a target state in its post-conflict condition. The legality of media intervention will be scrutinized by drawing on international human rights laws and principles protecting state sovereignty and the *jus cogens* norm of non-interventionism, while recognizing that human rights laws and principles allow the restriction of speech and the press on the legal basis of necessity, the principle of proportionality and the aim of producing and maintaining public order. There are different forms of media intervention, depending on its duration (e.g. short or long term), goals (e.g. stabilization after the war, peace-keeping in the transitional period, or building of a civil and democratic media space in the long run), and level of aggressiveness (e.g. media monitoring, peace broadcasting, jamming radio and television broadcasts or, in extreme cases, coercive military intervention with an information dimension, including the bombing of broadcasting towers). Each variation in the mode and form of intervention presents challenges to the legality of the operation.

While the issue of media intervention has previously been raised, particularly following the horrific experiences of media-associated violence and genocide in Rwanda and Bosnia-Herzegovina, there has not been a focused and detailed legal analysis of the issue. The next section of this article first defines the core terms related to the subject, then provides an outline of the debate over the question of media intervention by legal scholars and monitoring agencies. In the section that follows, I focus on the legal framework for scrutinizing media intervention according to international human rights norms. In particular,

a discussion will be provided regarding (a) the legality of intervening in a target state's media operation; (b) the ground for limiting the target state's media operations in post-war times (presumed to be either destroyed during the conflict or tainted by ideological propaganda); and (c) the principles of 'necessity' and 'proportionality'. This framework is then set against the range of key international instruments provided for the protection *and* permissible restriction of freedom of speech. Other customary norms, such as the norm of non-intervention and that of humanitarian intervention, will be discussed. From this survey, it will be asked: does 'media/information intervention' appear to have sufficient legal support, or does it still constitute free speech violation, a violation of state sovereignty, and even neocolonial domination?

Defining the terms

> We need to explore what can be done between the impossible everything and the unacceptable nothing. The political cost of doing everything is usually prohibitive. The moral cost of doing nothing is astronomical. If we accept that we are not going to do everything possible to stem a given conflict, what can we do to have as much impact as we are willing to have? (Metzl, quoted in Thompson, 2002: 41-42)

Jamie Metzl, a key proponent of information intervention, describes in the above the need for intervention as a moral obligation exercised in the context of limited influence. 'Hate media' typically operate over a protracted period of time in a society, sowing the seeds of hatred and ethnic division to an extent that no subsequent information campaign can easily root out. Yet in this moral call, Metzl also implicitly criticizes those who lack the political will to intervene in situations where ethnic hatred has escalated to crisis proportions. A former officer of international information for the US State Department, Metzl suggests that political will in the international community tends to fluctuate, its ad hoc approach to humanitarian crises often contributing to a prolongation of conflict and violence. In the case of Rwanda, political spinelessness of the international community – often disguised as legalist scruple – indirectly allowed ethnic violence to escalate to a point where it was uncontrollable. The Rwandan tragedy, during which 500,000 to 800,000 people were murdered in 100 days, including 75 percent of Rwanda's Tutsis, could have been avoided if the international community had taken action. Sadly, the textbook case of how the media in Rwanda were used by Hutu forces as weapons of ethnic cleansing against the Tutsis, may have been repeated in more recent conflicts in Afghanistan, Iraq and Darfur. What the international community needs, Metzl advocates, is an aggressive form of information campaign to propagate counter-information that opposes and ultimately suppresses harmful incitement carried by 'incendiary media'.

In legal terms, the media are largely conceived of as a key social space during peace time for the exercise of the right to free speech, which includes not only

the right to create messages but also the right to disseminate and to receive messages without interference. In times of armed conflict, the media have been seen as a force that sways international public opinion, and even shapes the very 'reality' of war. Media scholars, for instance, have long documented the so-called 'CNN effect' whereby international media coverage of the first Gulf War by the cable station significantly altered and heightened the perception of war through a 24-hour relay of live images to governments and ordinary households across the world (see Eagleburger et al., 2003; Natsios, 1996; Robinson, 2002).

The Martens clause found in the Hague Conventions on the Laws and Customs of War of 1899 and 1907, inscribes in the modern Geneva Conventions and their Additional Protocols a respect for 'the laws of humanity and dictates of public conscience'. A modern interpretation of 'public conscience' would have to include the power of media to generate, construct and alter public opinion. In fact, the importance of the media has been legally recognized in the Third Geneva Convention and in Additional Protocol I, whereby journalists are expressly recognized as 'protected persons' in either a captured or civilian state.[1] As such, a symbolic significance of the media has been implied in the humanitarian principle of international humanitarian law.

In human rights discourses, the media are seen to play the role of a watchdog, an integral role of exerting pressure on states to bring them into conformity with human rights obligations. In addition, the media play a role in asserting identities – ethnic, religious, gender identities – and therefore contribute to the assertion of collective rights. Therefore, the media are conceptualized simultaneously as (1) a space of meaning, persuasion, representation, conscience and consciousness, (2) an apparatus for human rights monitoring, as well as (3) a cultural space of identity-formation (in Benedict Anderson's sense of the 'imagined communities').

The most pressing legal and humanitarian consideration concerning the mass media, to which the whole question of media intervention is directed, is the profound problem of hate speech. The discussion of hate speech in human rights law has indeed moved beyond the confines of racial discrimination in community settings. It has moved into the contexts of inter-ethnic violence, armed conflict and genocide. Indeed, underpinning the legal mandate of the International Criminal Tribunal for Rwanda (ICTR) is the explicit association of the media and genocidal violence, as well as the prosecution of media-generated hate speech.

Broadly defined, hate speech was called 'race hate' and 'group libel' in the early 20th century. Today, Human Rights Watch has defined hate speech as 'any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women' (Walker, 1994). Aiming to 'exclude, subordinate, discriminate against, and create second-class citizenship for entire groups of people', racist hate speech is used not only to intimidate and humiliate, but also to silence opposition (Siegel, 1999: 379). The legal

definition of hate speech has been most clearly articulated in the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of Racial Discrimination (ICERD). Article 20(2) of the ICCPR prohibits: 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Article 4 of the ICERD defines racist speech as: 'ideas based on racial superiority or hatred, incitement to racial discrimination' and 'propaganda activities, which promote and incite racial discrimination'. In addition 'direct and public incitement to commit genocide' is punishable pursuant to Article 3 of the Genocide Convention.

Today, a diabolical mix of neo-Nazism, anti-Semitism, racism and homophobia has pervaded the internet. In addition, Holocaust denial as a propaganda movement has found the internet a haven for insinuating hateful anti-Semitic beliefs about Jews as exploiters of non-Jewish guilt, and as controllers of academia or the media. According to the Anti-Defamation League (1998): 'Holocaust deniers have used the Web to post thousands of pages of text filled with distortions and fabrications' (see also Fogo-Schensul, 1997/1998). Moreover, Jane Bailey (2004: 64) has warned that: 'the hateful nature of the messages ... can be combined with information on bomb making or advocacy of other violent activity'.

The whole host of international human rights instruments prohibiting hate speech, as well as the high-profile international trials of those who have committed mass violence by propagating hatred through the media, still leaves us with a quandary. Why has international law not been able to thwart mediated forms of hatred that continue to spawn human suffering? What ideological force, institutions and practices are missing? What action or system of intervention, based on strong human rights grounds, can be taken once a certain threshold of threat has been crossed, raising the spectre of imminent violence on a mass scale?

Media/information intervention refers to both the ideology and the means of getting involved in a humanitarian crisis where there is evidence that the media have been manipulated in order to incite hatred and violence. Where there is humanitarian intervention in order to avert mass suffering, media intervention campaigns are designed to supplement such an action. But where there is weak or even no political will to take action in crisis situations, media intervention campaigns are initiated to evoke an ideological force in the international community to confront the crises. Such campaigns are supposed to adhere to human rights norms.

Regarding methods, information intervention can take place in pre-conflict, mid-conflict and post-conflict times. Strategies such as broadcasting counter-information, dropping leaflets and, most controversial of all, jamming broadcasting signals from the target state, are best applied in pre-conflict and mid-conflict times. As for after the conflict, reconstruction work may include a robust 'media development' programme, which can include:

- human rights training and education of journalists;
- enhancement of independent local media outlets;
- setting up interim media commissions;
- establishing licensing mechanisms linked to hate speech laws and other codes of conduct to ensure quality balanced programming;
- creating programmes that promote inter-ethnic conversation;
- protecting journalists from intimidation and other violent threats;
- forging a monitoring role for the media during the transition to a stable government through election; and
- other democratizing activities of the media sphere.[2]

While the ultimate legality of such intervention methods, created in the name of reconstruction, will continue to be debated, the legal ground for more aggressive measures taken in times of imminent or present conflict appears to be tenuous, that is for measures such as jamming broadcasting signals, techniques of information manipulation (such as cyberwar), seizure of transmitters or bombing broadcasting towers. These aggressive actions resemble the 'use of force', which is prohibited by the UN Charter and other long-standing international norms. Monroe Price and Mark Thompson suggest:

> [T]he question of what standards should govern the actions of international actors when the mode of intervention *can* be characterized as the use of force does not (yet) have an automatic answer.... Yet, the majority of techniques and instances of information-related intervention are non-forceful. This is the prime source of their attraction for the international community. (2002: 12–13)

Others are more cautious:

> [T]he human rights rationale for what might be called 'aggressive peacemaking' and the intrusiveness into the zone of freedom of expression is a precarious one.... [Moreover] [w]hen an international governmental organization engages in regulation of the press, its actions may affect the nature of the political system that follows. How a regulatory rule is shaped, how it is presented in the society, how those who will be subject to a seemingly censorial rule react and accept that rule – all these are part of the difficult process of democracy development in a conflict zone. (Krug and Price, 2002: 164)

Certainly, it is one thing to prevent violence, it is another for the information intervention programme to intrude upon the target state's autonomous public sphere, and even to exert influence and authority in the target state.

Not surprisingly, Jamie Metzl has been criticized for promoting 'a more adroit spinning of United States foreign policy ... represent[ing] a fashionable means of enhancing United States predominance within the international system, using information technology' (Thompson, 2002: 56). It has been argued that the entire effort smacks of hegemonic or even neocolonial intentions under the guise of humanitarian intervention.

Information intervention: a human rights framework

Since it has serious implications for free speech rights and state sovereignty, the subject of media intervention requires a thorough legal analysis firmly grounded in human rights law. One may be able to establish a degree of legitimacy on the grounds of the historical experience of numerous atrocities where the media were implicated. But legitimacy qua history is not legal. Yet a stronger degree of legitimacy can be found in human rights instruments that expressly restrict incendiary speech. However, in international law, the primacy given to the *jus cogens* principle of non-interventionism presents a serious legal challenge to the media intervention model. The same principle also tends to underline international telecommunications law governing territorial sovereignty with respect to the protection of airwaves and the flow of information. Besides, those human rights instruments that restrict incendiary speech do not necessarily support *pre-emptive* curtailment of free speech. This section is devoted to a discussion of these and other relevant areas of human rights law that seem to expose a degree of ambiguity toward media intervention as a legal humanitarian practice. The next sub-section begins with a discussion of the non-intervention principle under international law. The following sub-section analyses how the media intervention model tends to adhere to the *exception* to free speech principles as permitted by various human rights instruments. To this effect, the important legal tests for interceding in and restricting free speech will be applied to ascertain the extent to which the media intervention model complies with or violates free speech rights and state sovereignty.

The non-intervention principle

Proponents of media intervention are well aware of the inviolable nature of state sovereignty guaranteed by the non-intervention principle in international law. This legal principle clearly appeared at the time of the creation of the League of Nations. Article 15 of the League of Nations Covenant (1919) provides that:

> ... if the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

More explicitly, Article 2(7) of the UN Charter (1945) states that: '[n]othing in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state'. Two other key documents that enshrine this legal principle include the United Nations General Assembly Declaration on the Inadmissibility of Intervention

in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (GA Res. 2131/XX, 21 Dec. 1965), and the 1970 General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA Res. 2625 (XXV), 24 Oct. 1970). Although not legally binding, these declarations establish that every state is sovereign and equal in law vis-a-vis every other state.

Besides the UN Charter as a key legal source for establishing the non-intervention principle, in *Nicaragua* v. *United States* the International Court of Justice (ICJ) considers the non-intervention principle a general principle of customary international law. In a concurring opinion in the same case, Judge Sette-Camara adds that:

> ... the non-use of force as well as non-intervention – the latter as a corollary of the equality of States and self-determination – are not only cardinal principles of customary international law but could in addition be recognized as peremptory rules of customary international law which impose obligations on all States. (*Nicaragua* v. *United States*, 1986: 199)

The weight of this principle was made clear in the international outcry against NATO's 1999 bombing of Kosovo. Observers have condemned the mass destruction caused by NATO's 78-day aerial campaign. In the name of humanitarian intervention, whose legality is murky, the bombing was not only anti-humanitarian, it also deepened the conflicts and hatred between the Serbs and the Kosovar secessionists, and contributed to the outflow of millions of Albanian refugees. The British Foreign Office had in fact noted in the mid 1980s that contemporary legal opinion was against the existence of a right of humanitarian intervention. This was so for three reasons:

> [F]irst, the UN Charter and the corpus of modern international law do not seem to specifically incorporate such a right; secondly, State practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation.... In essence, therefore, the case against making humanitarian intervention an exception to the principle of non-intervention is that its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law. (UK Foreign Office, 1986: para. II.22)

Jianming Shen has issued a strong criticism of the exception argument:

> [T]he debate over the permissibility of unilateral humanitarian intervention, on the whole, is *essentially a matter of interests, power and dominance*. Today, the notion of humanitarian intervention is of particular importance to powerful nations that no longer enjoy the same prestige and power as they did in the past to compel other nations and peoples, or to act as the 'masters' of the world through colonial expansion and aggression. 'Humanitarian intervention' is a high-sounding and convenient tool for maintaining, and yet concealing, their dominance and their supremacy.

> The notion has no meaning to the vast majority of small and weak States. (2001: 10, emphasis his)

Michael Byers and Simon Chesterman concur:

> The greatest threat to an international rule of law lies not only in the occasional breach of that law – laws are frequently broken in all legal systems, sometimes for the best of reasons – but in attempts to mould that law to accommodate the shifting practices of the powerful. (2003: 203)

If the veneer of humanitarian intervention has been demystified and hence its legal basis denied, how can media or information intervention campaigns be executed legally in situations where there is strong evidence that the media have been identified as instrumental in propagating hatred and violence? Are there legal arguments for a possible UN Charter authorization under Chapter VII to permit media intervention for the sake of restoring peace and security? As well, are there elements or specific techniques of media intervention that possibly do not violate the non-intervention principle? Finally, are there 'loopholes' in the non-intervention principle as found in Article 2(7) of the Charter? Proponents of the media intervention model have indeed provided legal blueprints for legitimizing the practice in line with human rights law.

Media intervention: a legal architecture

The UN Charter has provided an inspiring source of legal support for those who endeavour to advance media intervention as a human rights practice. As mentioned before, the Charter can authorize Security Council resolutions in order to extend humanitarian aid to conflict-ridden zones. Yet there is a stronger ground for the Charter to exert authority within sovereign states, and that is through the very concept of constitutionalism. It is clear that, insofar as governance and self-determination within a state rests on constitutionalism, at least two legal consequences follow. Besides the obligation to protect 'the just requirements of morality, public order and the general welfare in a democratic society', the state's constitution is at the same time bound to international legal obligations through the UN Charter and other international treaty norms. In this relationship that exists between national constitutionally derived obligations and international norms, the sovereignty of a given state cannot be absolute or exclusive. This is understandably a controversial proposition, given the rights to territorial integrity or political independence of states guaranteed by the UN Charter, and by the Friendly Relations Declaration. Yet when a state consents to the Charter and other UN treaties, it realizes that the Charter entrusts the Security Council with the goal of monitoring, and if necessary intervening in domestic affairs, in order to maintain international peace and security. Eric Blinderman puts it this way:

> If international law precluded a state from voluntarily delegating fragments of its sovereignty to a multinational treaty organization, the international system could not operate. As such, courts have long recognized that a state's consent to a particular treaty covering a specific matter forecloses its ability to claim that the matter is exclusively within its domestic jurisdiction. (2002: 111)

Under Article 41 in Chapter VII of the UN Charter, the Security Council may decide on measures to maintain peace and security, including: 'complete or partial interruption of economic relations and of rail, sea, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'. As such, a UN-authorized information intervention campaign aimed at restoring peace and security (or aimed at thwarting media outlets that threaten peace and security, or impede the effect of prior Security Council resolutions) appears to be *prima facie* legal (Blinderman, 2002: 111).

One form of aid that the Security Council can authorize in the area of information intervention is the facilitation of 'peace broadcasting'. Jamie Metzl (1997a: 15) refers to peace broadcasting as 'any non-incendiary transmissions broadcast from an intervening state directly into a target state as part of the intervening state's attempt to prevent or stop a human rights crisis'. Aided by the vast technical capability of media broadcasting across national territories today (e.g. through Direct Broadcasting Satellites; see e.g. Gher and Amin, 2000), non-incendiary transmissions can therefore be presumed to be a legal practice as long as such broadcasts satisfy humanitarian obligations. Further, peace broadcasting can be seen as a *pre-emptive* action that does not necessarily violate the non-intervention principle. Blinderman goes so far as to say that the authorization to practise peace broadcasting in fact:

> ... directly buttresses the principles and objectives contained in Chapter I of the Charter, as the prevention of the occurrence of systematic and widespread human rights violations 'strengthens universal peace' and 'promote[s] and encourage[s] respect for human rights and for fundamental freedoms'. (2002: 112)

Further legal justifications can be found in international treaties. Article 19(2) of the ICCPR provides for the right to freely receive information regardless of frontiers. It means that a state cannot prohibit individuals or media organizations from receiving humanitarian assistance in the form of information assistance, such as peace broadcasting. Related strategies, such as printing newspapers in a foreign state and giving them to local nationals to distribute within the target country, mass faxing, professional training of journalists, and even air-dropping newspapers or information supplies from airplanes flying into the target state's airspace, will adhere to the free speech provision of the ICCPR and, by implication, will not violate the non-intervention norm so long as the information is imparted to and received by individuals and media outlets that promote human rights.

Even more broadly, media intervention aimed at preventing mass suffering can be justified legally by applying Article 20 of the ICCPR. Article 20(1)

states that '[a]ny propaganda for war shall be prohibited by law', while section (2) states that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. Moreover, the ICERD condemns all dissemination of ideas of racial superiority by individuals or organizations that incite racial discrimination. In still broader terms, the American Convention on Human Rights prohibits any advocacy of hatred that constitutes incitements to lawless violence 'on any grounds including those of race, color, religion, language, or national origin'. Further, the European Convention on Human Rights also puts restriction on freedom of expression should speech or any other activities be aimed at the destruction of other rights and freedoms set forth in the Convention (Article 17).

Undoubtedly, it is the UN Convention on the Prevention and Punishment of the Crime of Genocide that provides the strongest and clearest statement allowing media interventions. Article III (c) makes explicit that the 'direct and public incitement to commit genocide' is a punishable crime. Formerly appearing under the name of 'crime against humanity' used in the Nuremberg trials, the crime of 'incitement' to commit genocide has been identified today largely with media outlets and practitioners, as seen in the high-profile ICTR trials and convictions of media personalities responsible for spreading hate speech that led to the Rwandan genocide. These and other legal precedents can be cited to lend support to the need for *preventive*, *pre-emptive* and *pro-active* measures to predict and intervene in potential mass suffering due in part to hate speech propagated by incendiary media.[3]

As we have seen, the coupling of the UN Charter's exception to the non-intervention norm with various international treaties and conventions that prohibit hate speech, forms the ground upon which a legal architecture for media and information intervention can be built in international law. These treaties and conventions also directly attest to the sensitivity of the drafters in creating legally justifiable restriction to freedom of expression (see Farrior, 2002: 70).

In terms of concrete examples of media intervention, the various media commissions established under the auspices of UN authority (or authority of other inter-governmental agencies such as the Organisation for Security and Co-operation in Europe [OSCE]) represent systematic media intervention campaigns directed at rebuilding the media space of post-conflict zones. For instance, after the 1991 Paris Peace Accords that brought an end to civil war and communist rule in Cambodia, the United Nations Transitional Authority for Cambodia (UNTAC) set out to establish a free press in the war-torn country. Similarly, the 1995 Dayton Accords provided a peace plan that helped establish the Media Experts Commission in post-war Bosnia, as a sub-committee of the Provisional Election Committee whose role was to oversee the elections at the federal, entity and municipal levels. And when NATO forces moved into Kosovo following the Serbian withdrawal of military and police forces in 1999, media reform was very much on the mind of the United Nations

Interim Administration Mission in Kosovo (UNMIK) as well as the OSCE. The OSCE's plan to rebuild the media space included the establishment of a Media Regulatory Commission, which was modelled in part on the Bosnian precedent and on the functions of the Federal Communications Commission of the United States (Price et al., 2001). While the results of these efforts to reform the media in post-war Cambodia, Bosnia and Kosovo have largely been dismal – ethnic hatred continued to be spread through the media in these post-conflict societies – they represent instances where media intervention efforts were legally sanctioned.

The fact that these particular instances were largely unsuccessful efforts (some of them patently flopped) to produce rights-abiding media practices, points to three important problems, one operational and the other two legal. The operational problem often has to do with conflicting agendas of the multiple parties involved in reform of the post-conflict media space. In general, inter-governmental agencies such as USAID, the OSCE and the UN prefer extra-local measures to ensure the development of Western-style democratic media space, while donor nations and NGOs tend to champion local, indigenous growth of new media practices. Cases like Cambodia, Bosnia and Kosovo show exactly the cleavages among these stakeholders, in the end stifling a healthy development of the post-war media space in these countries.

As for the legal problems that have led to the miserable failure of media reform in those cases, there are two. The first legal problem has to do with the possible weakness of the purportedly legal exception to the non-intervention norm in the first place. The second legal problem concerns the unjustifiable exuberance of the transitional governments in post-conflict societies in expanding their power of control through their newly established media regulations, edging toward censorship and hegemony of control reminiscent of the totalitarian power toppled in the war. Taken together, the two legal problems can be restated in this way: the questionable legality of exceptionalism opens the way for a potential legal abuse of power given to an interim authority. For instance, the interim government in post-war Iraq established media rules (and other administrative codes) that showed a tendency toward hegemonic control of the information space, instead of promoting free flow of information and diversity of views in the Iraqi media (see Erni, 2005; Price et al., 2007). In some ways, we have seen these two entangled problems all too often in Article 19 jurisprudence.

Article 19 of the ICCPR can be viewed as containing a legal structure of exceptionalism for free speech rights. It provides that the right to free speech is not an absolute right, yet at the same time, it also provides that derogation of that right must remain within strictly defined parameters. Put another way, what Article 19 provides is the discursive concept of a *narrow* exceptionalism. Recall that this concept is grounded in a jurisprudence that demands a strict three-part test: the test of legality ('provided by law'); the test of the legitimacy of the aim; and the test of necessity and proportionality. The fulfilment of the

test of legality requires that the law be accessible and 'formulated with sufficient precision to enable the citizen to regulate his conduct' (according to *The Sunday Times* v. *United Kingdom,* 1979). The test about 'legitimate aims' is presented in Article 19(3) as *exclusive* aims ('(a) For respect of the rights and reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals'). No other aims are considered legitimate as grounds for restricting freedom of speech. As for the third test, that of necessity, *Lingens* v. *Austria* (1986: paras 39–40) provides that (1) the word 'necessary' means that there must be a 'pressing social need'; (2) the reasons given for the necessary restriction must be 'relevant and sufficient'; and (3) the restriction must be proportionate to the aim pursued.

With this narrow exceptionalism found in Article 19, we can then explain at least three possible approaches or positions that Article 19 has offered to states in relation to the practice of media intervention:

A position of 'calculated indifference'. This is a protectionist position in which a state chooses to stay out of conflict-ridden zones. A refusal to perform media intervention to thwart incendiary speech is justified on the ground that the action does not pass the legality test (with all the supportive rhetorics of respecting state sovereignty). Often, though, the real reason for not getting involved has to do with the lack of national benefit, as seen in the US refusal to intervene in the Rwandan situation.

A position of blatant belligerence. This is the opposite of the first position, which has been associated with interim governing bodies in post-conflict times. The tendency of these interim bodies to establish draconian regulatory policies for the media in the name of reconstruction and democracy, is justified by the exceptions provided in Article 19 jurisprudence and the explicit exception to the non-intervention principle authorized by the UN Charter, even though those policies may not pass the proportionality test. In post-war Bosnia, the US-backed NATO stabilization forces' attempt to influence public opinion in the elections, and their control of broadcast transmitters in the name of 'security protection', demonstrate this position of blatant belligerence. In Iraq shortly after the war was declared over, the media regulation policies issued by the Coalition Provisional Authority (CPA) and the interim Governing Council displayed the same arrogance. The rebuilding of media space for long-term security and democratic development is made all the more difficult when the government exaggerates the exceptions narrowly granted in Article 19.

An intermediate position. This moderate position relative to the first two positions regards the customary rule of non-intervention as the *default* rule, but is willing to risk political and economic capital to intervene responsively in dire situations. This is also a position that recognizes the passing of Cold War era absolutism, when the superpowers used the non-intervention norm politically to keep each other's media intervention programmes at bay.

> At the same time, this third position recognizes the problems associated with neocolonialism, in which a superior power (including the occupying power) colonizes the media space of a weak or war-torn state. In Iraq, where the interim administration in 2003–4 disguised its neocolonial policies as anti-terrorist policies, there are serious questions about the violation of international law, including the violation of free speech laws by the new Iraqi government in the area of media regulation.

Unfortunately, when faced with an emergency situation of significant abuse of the media to incite hatred and even cause mass suffering, we tend to see a polarity of international neglect on the one hand and unilateral intervention on the other. A humanitarian response that can stand the scrutiny of Article 19 – an intermediate position between too little response and too much response – has yet to emerge.

Conclusion: toward a 'limited exceptionalism'

It may be instructive to briefly contrast the 'freedom of speech model' underpinning general civil and political rights and the customary principle of non-intervention, with the 'media or information intervention model' that requires the restriction of speech rights and the exception to the non-intervention principle. Such a contrast at the conceptual level can be useful in helping to locate where the tensions and challenges are for the latter model (see Table 1 on the next page).

The notion of a 'marketplace of ideas', which is widely recognized as the starting point in modern judicial concern for free expression pursuant to *Abrams* v. *U.S.* (1919), has proven to be both a blessing and a curse. The proliferation of mediated speech, when media outlets have fallen into the hands of a mono-ethnic party, often results in the incitement of antagonism, and words may then become actions. Recent large-scale historical traumas have shown how words and images in the media were used to pitch Serbs against Croats, Hutus against Tutsis, Muslims against Roman Catholics, Israelis against Palestinians, Kurds against Iraqis. Hate speech, which can be seen as a perversion of the notion of a marketplace of ideas, is a formidable enemy to basic human rights norms.

This article set out to study the legal foundation for information or media intervention as a part of the post-conflict rebuilding of societies. It is firmly recognized that the media space is a crucial site for such a reconstruction, particularly when factional conflict and violence persist after the war is declared over, as in the present case of Iraq. It is also recognized that media intervention as a practice has only ambiguous legal support in international law, due to the conflict between the *jus cogens* principle of non-intervention having serious implications regarding state sovereignty and the limited derogation of

TABLE 1
Comparing the 'free speech rights model' and the 'media/information intervention model'

	Freedom of speech/freedom of media model	Information/media intervention model
1	Protection of freedom of expression as a high standard	Restriction of freedom of expression in crisis conditions
2	Media are conceptualized as diverse and free-flowing, viz. 'marketplace of ideas'	Media are seen as political tools subject to nationalistic and regime-controlled manipulation
3	Rooted in classic liberalism	Highlights the virtue of interventionism and humanitarianism
4	Rests upon constitutional legal foundation in the national and international contexts	Emphasizes compliance with international humanitarian principles at the inter-governmental level
5	Based on normative provisions	Based on pre-emptive and/or restorative actions
6	Promotes indigenous use of media and dissemination of information	Promotes Western model of democratic information flow
7	Reliance on power and trust of local media and national government	Reliance on credibility of international legal norms and institutions (e.g. UN, donor governments)
8	Permits space for all speech types and forms	Empowers voices of moderation, stability and peace
9	Supported by major international conventions, treaties and customary norms	Ambiguous legal authority (although may be authorized by the UN Charter); may be driven less by law than by politics
10	Tends to retreat from responding to situation of human rights abuse by rogue media	Tends to over-exert influence, potentially crossing the line into new forms of media censorship and hegemonic control

that principle provided for by Chapter VII of the UN Charter as well as by exceptions to allow restriction of speech provided in Article 19 of the ICCPR. A clear picture is emerging here: between an absolute prohibition of intervention and a set of highly specific conditions allowing derogation from non-interventionism, lies a small window of opportunity. Unless international non-government organizations, NGOs and donor nations grasp the significance of this narrow opportunity, the prospect of rebuilding peace and security in post-conflict societies will be limited. It is argued here that a comprehensive and legally sound programme of media intervention should be located conceptually in this dialectical space of 'limited exceptionalism'.

In order to further unpack this notion of limited exceptionalism, we must first weigh up a series of dualism that can be found in the post-conflict condition at large:

Military stabilization versus civil administration. The immediate post-conflict phase may necessitate stringent action to control and stabilize the war-torn society. Yet stringent action must still be grounded in legitimate legal justifications. At the same time, however, the restoration of a civil society where there are divergent views of control and security must be allowed to proceed. In media interventionist terms, there is a dichotomy between 'aggressive intervention' and 'peace broadcasting'.

Authority versus persuasion. In post-conflict times, there are important strategies for building a sense of convergence around the new administrative authorities, lest the society fall into lawlessness. This process may also coincide with the establishment of a tribunal for achieving 'transitional justice' by addressing human rights abuses committed by the fallen regime and the transitional authorities, and with refugee repatriation issues. Direct and affirmative communication with the population may be called for. Yet if the media space is dominated by the authorities, it is hard to build audience trust and loyalty. Consideration of programme types, genres, forms of message, types of media outlets, etc. must be carefully taken so as not to appear 'too hard' or 'too soft' in communication.

Rule of law versus rule by bureaucracy. This dichotomy is clear. Basically, the cultivation for a respect for the rule of law is not the same as pursuing a top-down approach to implementing the law. The scope of legal authority – as to executive, legislative and judicial powers – must be clearly delineated and must not be over-stepped.

European versus US free speech jurisprudence. The European human rights system espouses a less absolutist interpretation of the right of free expression than the American courts. Particularly when it comes to cross-border hate speech laws, current thinking at the international level about jurisdictional conflict tends to favour a flexible legal apparatus. The US, however, stands alone in establishing a high resistance to regulating and prosecuting hate speech. When the European donors meet aid groups dispatched from the US, a strong cleavage between the approach of the former, based upon Article 10 of the ECHR, and the model of the latter, based upon the First Amendment, is often found.

As seen in this series of dualisms, there are legal and extra-legal challenges in the attempt to redevelop structures, regulations and visions for the media.

What is advocated here is a valid, normative system of intervention in the media sphere when strong evidence shows abuse, by calling on international laws dealing with hate speech, incitement to violence and genocide. The normative base is predicated on a high standard of proof so as to justify limitation of free speech; there should be a strong presumption against intervention. The Security Council, as well as a delegated international commission of human rights and media experts, can make the determination for a *narrowly defined and clearly delineated exception* to halt publications or broadcasts that pose

imminent danger of incitement to violence. This narrow exception thus avoids what Jamie Metzl calls the 'on/off mechanism':

> ... either enormous resources need to be expended with a view to intervening, as was the case in Haiti, or virtually nothing is done, as in Burundi.... This polarization of possible responses between very much and very little strongly suggests the need to establish and develop meaningful intermediate measures. (1997b: 648)

In the conception of media intervention being advocated here, emphasis is initially placed on media responsibility. In Kosovo during the transitional period, the OSCE Head of Mission Dan Everts from the office of the Temporary Media Commissioner (TMC) stated in 2000 shortly after the promulgation of the new Hate Speech Regulation:

> Most of all, the new regulation should work as a deterrent.... We have no plan to have a press law for printed media; in fact we are determined *not* to have such a law. It smacks of censorship. But if a paper publishes vitriol and bile, which incite hatred against a community or group – as some Kosovo papers have done – there is a legal route to take action against them. (quoted in Krug and Price, 2002: 154)

The idea of deterrence is to encourage journalists' self-regulation. It encourages the media to take responsibility. And if it does not work, then a public safety approach can be activated, with more aggressive measures of interference taken. What is at issue, then, is not simply 'law' in the traditional sense of restraining conduct, but in the sense of self-generated conduct. Through engendering flexibility between a hate-speech oriented legal rationale and a public-safety oriented administrative rationale, the limited-exceptionist approach can create a sliding scale or space between domestic media and criminal laws on the one hand and international conventions dealing with hate speech and incitement to violence on the other. This sliding scale of legal standard can be envisioned as the space between the right to speech and the right to life, with the flexibility to allow each form of human right to move to the foreground depending upon the level of threat to public safety, the seriousness of media abuse, and so on. In this way, the practice of 'limited exceptionalism' can be considered a dialectical approach to handle the recurrent dilemmas between international neglect and unilateral intervention.

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Notes

1. Article 4 of Geneva Convention III provides that war correspondents are entitled to POW status if captured, with all the due protections of POWs extended to them. In addition, Article 79 of the Additional Protocol I provides that if journalists are not war correspondents, they are protected as civilians.

2. This list is compiled from several media development experiences in post-conflict Bosnia and Kosovo. See, among others, Pech (1999/2000); Price (2000); Mertus and Thompson (2002).

3. Unfortunately, the Rwanda tragedy was partly the result of a total lack of political will in the international community to intervene. Likewise, the Bosnian war led to the Dayton Peace Accord, which contained next to no provisions on the media. Weak international intervention prolonged these wars (see Des Forges, 2002; Thompson and de Luce, 2002).

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ARTICLE

Human writes: The media's role in war propaganda

Liz Harrop

This article by Liz Harrop argues that by filtering communications and compromising access to contrary views, war propaganda is capable of violating human rights, including freedom of information, freedom of expression, freedom from discrimination, and freedom of the press. War propaganda is illegal under international human rights law. The article focuses on the United States of America and the United Kingdom, particularly in relation to the ongoing conflict in Iraq. And it concludes by stressing that media professionals should consider their role – not just in exposing human rights violations – but in perpetuating their own.

States wage war in the name of peace and democracy. Yet war propaganda can violate human rights and undermine the democratic principles it seeks to champion. Despite this it is rarely acknowledged, by the media, governments, or even anti-war campaigners, that war propaganda is illegal under international human rights law.

To date there is no legal precedent accusing government officials or media professionals of disseminating war propaganda. However, media workers have been tried by the International Criminal Tribunal for Rwanda (ICTR), which has provided important precedents for incitement to genocide. In the case of Georges Ruggiu, a journalist and broadcaster with Radio Television Libre des Milles Collines, the judgment found Ruggiu 'played a crucial role in the incitement of ethnic hatred and violence, which RTLM vigorously pursued'.[1]

According to the International Council on Human Rights Policy, 'The central questions in (the ICTR) are these: Can journalism kill? And at what point does political propaganda become criminal?'[2]

Thes questions also apply to the role of media professionals in war propaganda. These violations may not be as extreme as Rwanda's radio broadcasts, but may still undermine human rights principles including the right to freedom of information, the right to freedom of expression, the right to freedom from discrimination and the freedom of the media themselves.

Propaganda needs a medium

Governments are not obliged to reveal every detail of their military operations. Indeed the UN human rights treaty, the International Covenant on Civil and Political Rights 1966 (ICCPR)[3] allows governments to restrict many rights including freedom of information during a declared 'State of Emergency'.

However, the guidelines for governments operating within a state of emergency can be unclear in international law. In communication terms, this results in a blurry division between appropriate censorship and unjustifiable withholding of information; between appropriate restrictions of freedom of expression and the unsanctioned silencing of dissenting voices.

It is not just governments that are responsible for the machinery of propaganda. Effective war propaganda selects which voices and messages are legitimate and undermines contrary views or information. Successful war propaganda, therefore, requires a media which are unwittingly manipulated by governments, or which are a willing party to its propaganda.

How propaganda violates human rights

Through its prohibition in Article 20 of the ICCPR[4], war propaganda is an acknowledged opponent of human rights. Ironically, many wars, including the present Iraq conflict, are fought based on an agenda of combating human rights abuses or diffusing a threat to global peace and security.

The ICHRP (2002) has expressed concern over the misuse of human rights concerns in war propaganda, stating: 'Governments and other authorities have often used human rights to manipulate or inflame public opinion, particularly when they are involved in wars.'[5]

Freedom of information and expression

Freedom of information and freedom of expression are inextricably connected: without the freedom to express information, there can be no access to a diversity of information sources. Likewise, without the freedom to access information, creative thought and the formulation of an informed opinion is not

possible. Freedom of information and expression are also a vital component for the realisation of other rights. Access to information is a prerequisite of the right to education outlined in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[6] In addition, without access to information on political parties, and the ability of political parties to express their opinions, a democratic voting system can not operate. Article 25 of the ICCPR therefore talks about 'guaranteeing the free expression of the will of the electors'.

As Denis McQuail (1991: 71) summarises: '...democratic political process ... requires the services of public channels of communication; the full concept of citizenship presupposes an informed and participant body of citizen.' War propaganda limits the availability of facts, context and transparency of political motivation. Such information, were it available, would allow objective judgments to be made. For example, in allowing citizens to answer the question: 'Is the desire of our government to go to war valid and necessary?'

The media, therefore, have a crucial role in refusing to parrot the government line and in uncovering hidden facts. Article 1 of the 1978 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 (Declaration on Mass Media) reinforces this point:

> The strengthening of peace and international understanding, the promotion of human rights and the countering of racialism, apartheid and incitement to war demand a free flow and a wider and better balanced dissemination of information. To this end, the mass media have a leading contribution to make.[7]

Freedom from discrimination

Article 2, paragraph 1 of the ICCPR protects an individual's freedom from discrimination 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The effects of war propaganda, however, are inherently discriminatory. In order to 'make the enemy thoroughly hated' (Williams 1992: 157) and predispose the public to war, the enemy must be characterised as worthy of destruction.

War propaganda, therefore, encourages ignorance and creates a climate of prejudice and fear. Violations of the human rights of the opposing side may be tolerated as being necessary to the war effort, for example targeting civilians and the torture of detainees. Meanwhile racial prejudice, discrimination and suspicion on home soil thrive, for example, in the treatment of detainees under the British anti-terrorism legislation, which the UK Special Immigration Appeals Commission found to be unlawful and discriminatory.[8]

Peoples and their leaders are polarised as 'good' and 'evil', which pre-supposes a moral right to wage war on (or 'liberate') the enemy, and which attempts to establish the crusade of civilising goodness as a higher norm than respecting the rights of alleged 'evil-doers'. For example, Tony Blair's comment on the Kosovo war of 1999 that it was not just a military campaign 'it is a battle between Good and Evil; between civilisation and barbarity' (see Knightley 2002: 507).

Lee Wigle Artz and Mark Pollock (1997: 121) analysed the caricatures that accompanied the 1991 Gulf War, commenting:

> The singular demonisation of Hussein was accompanied by commonplace images of other Arabs – including US allies – as incompetent, weak, self-centred and incapable of diplomacy in their own region...The corollary, of course, was another powerful commonplace: the righteousness of a civilized Western world courageously defended by US soldiers. These images had little subtlety or variation.

Marginalising the voice of dissent

Violations of freedom of expression and freedom from discrimination combine in branding dissenters among the domestic population and international community as traitors who are unworthy of being heard. For example, in the US, Pulitzer Prize winner Seymour Hersh was accused of being a media terrorist by Pentagon advisor Richard Perle for opposing the 2003 Iraq war[9]. Meanwhile Defense Secretary Donald Rumsfeld categorised France and Germany as 'old Europe'[10] for their unwillingness to support a war with Iraq and according to the US Administration, the UN 'risked irrelevance'[11].

The disapproval and silencing of dissenting voices is therefore officially sanctioned and encouraged. As a result, dissenters may be less willing or able to air their views due to factors including popular opinion, being publicly discredited by officials or having lack of access to media willing to carry their views. This applies equally to members of the public, journalists, academics and politicians.

As Edward Herman (1992: 11) explains a 'greatly underrated constraint on freedom of speech is dissenters' lack of access to the mass media, and thus to the general public. Their freedom is in an important sense only a personal freedom with limited public and social significance'.

Even where two opposing views are given, this may still be unsatisfactory in human rights terms. David Detmer (1995: 96-100) outlines the 'both sides' ideology whereby journalists invite debate by illustrating two sides of a story. Detmer comments: 'Members of the audience... are not encouraged to consider the possibility that both sides might share important points in common and that these points might be precisely those standing most in need of being challenged.'

Freedom of the Press

Under the various UN Human Rights treaties, states carry the responsibility for ensuring freedom of the press. This has a legal basis in, for example, Article 19 of the ICCPR on freedom of opinion and expression and Article 15 of the ICESCR which concerns the right to take part in cultural life including steps necessary for 'the diffusion of science and culture'.

Supporting the right to freedom of the press is often in conflict with the aims of the state, which may wish to dominate media output to protect state power. Government control is of paramount importance in time of war. However, it is at exactly this time when the media can be dependent on government for access to information. The dilemma facing media is played out in the roles of unilateral versus embedded reporters, whereby the embedded reporters exchange their independence for access to information and army protection, while unilateral reporters enjoy both the benefits and disadvantages of going it alone.

One of the most famous unilateral reporters, Robert Fisk, has been criticised by embedded journalists for jeopardising media access through disobeying army instructions. For example in the first Gulf War of 1991, Fisk discovered that fighting remained in the Iraqi town of Khafji long after the US-led forces claimed it was liberated. He was harshly criticised by an NBC-TV pool reporter of whom Fisk said: 'For the NBC reporter, however, the privileges of the pool and the military rules attached to it were more important than the right of journalists to do their job.' (Knightley op cit: 492)

Some journalists are explicit in their support for the government. In the Iraq war 2003 for example, Fox News took an openly pro-war stance in its new output, despite its seemingly ironic strapline of 'We report, You decide'. During the conflict, Oliver North, infamous for his role in the Iran/Contra affair of 1987-88 and an embedded commentator for Fox News, said: 'You're an American before you're a journalist.'[12]

For media reporters who do not comply, governmental pressure attempts to encourage their cooperation. Paul McMasters, of the Freedom Forum, comments: 'Federal officials, after all, have what journalists need: the news. A journalist's usefulness to her news organization flames out if she burns a source by complaining about the ground rules, let alone resists abiding by them.'[13]

Media deaths

The most devastating blow to freedom of the press is the deaths of the many journalists who have lost their lives reporting war. There have been allegations that media 'murders' on the battlefield are used, in the words of the BBC's John Simpson, as 'the ultimate act of censorship'[14] in the war propaganda process.

The International Press Institute (2003) reported that 'some observers claim that they had been targeted as media workers'[15] and *Independent* journalist Robert Fisk said 'I suspect they were killed because the US ...'decided to try to "close down" the press'[16]. This amounts to an extremely grave charge, which would violate both international human rights law and international humanitarian law under the Geneva Conventions.

Protocol 1 of the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts contains measures for the protection of journalists in Article 79. This

considers journalists to be civilians and therefore affords special protection including 'general protection against dangers arising from military operations' and they 'shall not be the object of attack'[17].

The Iraq war has had tragic consequences for the media. According to Reporters Without Borders, 67 journalists and media assistants have been killed since the start of fighting in Iraq in March 2003, and two are still missing[18]. The lives of media are also threatened because under the genocide convention, governments are required to 'prevent ... direct and public incitement to commit genocide'[19]. This is also reflected by Article 3 of The International Convention concerning the Use of Broadcasting in the Cause of Peace.

Context

In order to avoid subjectivity and the presentation of a narrow viewpoint, the media it could be argued, should provide context and analysis over and above simple news briefings. Contextualising news is an important but often missing part of contemporary news reporting. In terms of reporting around a war, this could include reminding audiences of how power balances have shifted over the years so that once allied regimes are now branded as enemies. Likewise, valuable political context, about what a state has to gain from war, over and above the righteousness of the moral high-ground would provide valuable background.

John MacArthur, publisher of *Harper's Magazine*, identifies a particular problem for the United States. He explains: 'Americans live in a perpetual present. This is the country with the shortest attention span in the civil world, and it is a cultural problem. We don't know anything that happened six months ago much less 20 years ago when we supported the Afghan resistance and Bin Laden against the Soviet Union. No one remembers that we were Saddam's ally and supporter during the Iran-Iraq war. Nobody remembers.'[20]

The continual flow of short news pieces, although large in quantity can be short on quality and are unable to relay deeper meaning and context. As Philip Taylor comments on TV coverage of the Iraq war: 'Discerning the truth is complicated, if anything, by the incessant television coverage from Iraq; news comes in so fast that we barely have time to evaluate its wider meaning before the next images fire in.'[21]

Noam Chomsky argues that the very structure of the media is designed to induce conformity to established doctrine. Chomsky says (1989: 10): 'In a three-minute stretch between commercials, or in seven hundred words, it is impossible to present unfamiliar thoughts or surprising conclusions with the argument and evidence required to afford them some credibility. Regurgitation of welcome pieties faces no such problem.'

These welcome pieties form what Chomsky calls 'the basic presuppositions of discourse'. In the case of the US, these include the assumption that foreign policy is guided by a benevolent 'yearning for democracy' in the face of aggressors (ibid: 59). These presuppositions allow the media to gloss over uncomfortable facts and to paint out grey areas. Such grey areas, would require deeper explanations and would risk boring or unsettling viewers seeking an instant news summary and confirmation of their belief system.

News segments are designed to be short, sharp and sexy and to educate the audience instantaneously. To help meet this objective, news reporting may be sensationalised so that its messages are more obvious and immediately digestible. In any number of news items, consumers are given a black and white version of grey reality where selected facts paint an impactful, morally simplistic picture. This applies whether it is a celebrity divorce or a war.

Acts of omission

Context, or lack of it, is therefore a key factor in media bias. However, bias and distortion in media reports is not just about the presence of false information, it is also about their absence. A 2001 report by media watchdog, Fairness and Accuracy in Reporting[22], found that the evening newscasts of the three commercial broadcast networks in the US (ABC, CBS and NBC) had deliberately avoided discussing the effects of bombings of civilians in the 2001 Afghanistan war. The study claimed that network journalists failed to inquire about the numbers of casualties, nor did they discuss the legal implications of these bombings. Instead, they communicated the civilian casualties as a regrettable but justifiable consequence of America's military retaliation or as unverifiable Afghan propaganda.

The media's attribution of the source of stories

is also problematic because as long as the media attribute their story to a source and quote that source accurately, they are being 'truthful'. It could be argued that a journalist or media outlet does not have the resources or time to cross-check every single report or quote given to them by an official spokesperson and that to do so would hinder the news-making process so much as to make it commercially uncompetitive.

According to David Gordon, attribution is not an acceptable media practice without verification of the facts. Says Gordon (1999: 86): 'The media ... have the responsibility to assess the validity or truth of the information they disseminate ... (to) allow readers, listeners and viewers to reach their own conclusions.'

However, Daniel Hallin sees attribution not as a violation of duty, but as a positive norm of media ethics. Talking of the Vietnam war, he comments (1994: 50): 'It was not simply the use of official sources which gave officials so much influence over news content. It was the fact that the norms of objective journalism required the journalist to pass on official information without comment on its accuracy or relevance.'

Censorship of media by media

Who carries the responsibility for fair and accurate reporting? Is it the journalists themselves, their editors or media owners and what is the impact of stakeholders such as consumers and advertisers? The different motivations and pressures applied to the media in censorship of wartime news is a complex one, involving different actors and ethical frameworks.

The interplay between all these groups means that the final media output has been influenced by a manifold of different sources. Therefore holding the individual author to moral or legal account for an act of omission or commission may not be realistic.

John MacArthur believes the Iraq War 2003 was 'the most self-censored war in history', arguing: '95% of the war coverage was beside the point. It had nothing to do with the war. It was trucks rolling down the highway ... boxes being loaded and unloaded, GIs talking about feeling lonely.'[23]

Journalists may opt for self-censorship for a variety of reasons including personal loyalty as an embedded reporter, patriotism, to best-ensure promotion, or simply from a weight of official pressure. CNN's top war correspondent, Christiane Amanpour, commented on the Iraq war: 'My station was intimidated by the administration and its foot soldiers at Fox News. And it did, in fact, put a climate of fear and self-censorship, in my view, in terms of the kind of broadcast work we did.'[24]

Many media proprietors are guilty of censoring their journalist's work and opinions. For example in the Iraq war 2003, MSNBC's Ashleigh Banfield was openly critical of the war's sanitised media coverage. The *Hollywood Reporter* noted that NBC News president Neal Shapiro 'has taken correspondent Ashleigh Banfield to the woodshed' for a speech in which she criticised the networks for portraying the Iraq war as 'glorious and wonderful'. An official NBC spokesperson later told the press: 'She and we both agreed that she didn't intend to demean the work of her colleagues, and she will choose her words more carefully in the future.'[25]

Meanwhile pro-government media apply pressure by rallying against media which display rebel tendencies. For example, the *Sun* newspaper in the UK turned on the BBC, *Guardian* and *Mirror* during the 1982 Falklands conflict, accusing the *Mirror* and BBC of treason because of their war reporting. Speaking also of the Falklands, Phillip Knightley (op cit: 481), comments: 'Some newspapers contributed as a matter of policy. They supported the government all the way, even to the extent of attacking other newspapers or television programmes that expressed the slightest reservation about Britain's actions. This helped create a climate in which to dissent was little short of treason.'

The flip side to the resistance of censorship is the desire for censorship, with some journalists preferring explicit censorship rather than self-censorship at their own discretion. Kevin Williams (op cit: 161) discusses the Vietnam war, in which it is widely believed there was less formal censorship than in other wars. An increase in self-censorship during the war, he says, proved that many journalists preferred censorship being 'uncomfortable with taking the responsibility for what they wrote'.

Commercial concerns

The unattractiveness of 'un-newsworthy' information and the short, sharp format of news coverage, both prohibit the

contextualising of news output and are largely governed by commercial concerns. The need to satisfy an audience with a short attention span and to maximise audience numbers and advertising revenue can therefore be barriers to accurate reporting. With commercial factors taking prevalence, Kevin Williams (ibid: 166) comments that in a competitive mass media market 'truth must take second place to the swift production of copy'.

The ICHRP (2002) has expressed its concern over the influence of commercial factors in journalism, saying: 'Driven by new technologies and the lure of lucrative mass markets, media owners are themselves guilty of upsetting the balance of interest between journalism as an instrument of democracy and its exploitation as a tradable commodity.'[26]

With exactly this kind of situation in mind, the Vienna Declaration on Public Broadcasting 1993, outlined a range of measures to ensure media freedom, including in paragraph 10: '... the abolition of monopolies and ... of all forms of discrimination in broadcasting and frequency allocation, as well as the abolition of all barriers to the launching of new private media outlets'.

Conclusions

The issues surrounding the prohibition of war propaganda are complex. From a legal perspective they involve problematic arguments about the legality of war, the declaration of states of emergency, the ratification, reservations and reporting on the ICCPR and the domestic codification of an internationally illegal practice.

The media, meanwhile, at the behest of commercial, governmental, ethical and legal influences and responsibilities, attempts to find a balance (or not) between them. A whole range of rights, including freedom to information and expression, freedom from discrimination, academic freedom, freedom of the press and even the right to life, are interwoven with the prohibition of war propaganda in an intricate web of mutually supporting human rights.

One of the roles of a free press could be to educate the public about its role, particularly in a state of emergency, when freedom of information is threatened. In this way it may be possible to confront the prejudice encountered by the 'voice of dissent' discussed above. War reporter, Peter Arnett, believes this is a valid role for the press. Arnett reported from the Iraqi side during the 1991 Gulf War and was heavily criticised. Phillip Knightley (op cit: 493) recounts: 'On his return to the United States Arnett defended his role, saying that the media was partly to blame for the negative reaction because it had not educated the pubic about the function of a free press in wartime.'

The importance of freedom of the press can not be underestimated as a moderator of social injustice, including war propaganda. As Denis McQuail (1997: 70) concludes: 'The most practical instruments for protecting freedom and combating tyranny have involved using the means of communication to claim rights, criticise power-holders, advance alternatives.'

Notes

1 Paragraph 50 of the Judgment of International Criminal Tribunal for Rwanda, The Prosecutor versus Georges Ruggiu, 2000. Available online at http://www.ictr.org/default.htm, accessed on 25 August 2005

2 International Council on Human Rights Policy (2002) *Journalism, Media and the Challenge of Human Rights Reporting*, Switzerland, p16 quoting Marlise Simons, *International Herald Tribune* 'Trial examines war crimes free speech and journalism' 5 March 2002

3 The ICCPR has 152 State Parties as at 9 June 2004. Available online at http://www.unhchr.ch/pdf/report.pdf, accessed on 9 September 2005

4 '1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'

5 International Council on Human Rights Policy, *Journalism, Media and the Challenge of Human Rights Reporting* p 90

6 The ICESCR has 149 State Parties as at June 2004. Available online at http://www.unhchr.ch/pdf/report.pdf, accessed on 25 August 2005

7 Article 1 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 1978 http://www.unhchr.ch/html/menu3/b/d_media.htm, accessed on 9 September 2005

8 In 2002, the UK Special Immigration Appeals Commission judges found there was a public emergency justifying the derogation from Article 5 of the ECHR – allowing people to be detained without charge or trial – but found that the derogation was unlawful and discriminatory because the new powers only concerned foreign nationals. The judgment means a core part of the Anti-Terrorism, Crime and Security Act is contrary to the ECHR. See http://www.liberty-human-rights.org.uk/issues/terrorism.shtml, accessed on 25 August 2005

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17 xvii Article 51 of Geneva Convention relating to the Protection of Victims of International Armed Conflicts

18 Reporters Without Borders http://www.rsf.org/rubrique.php3?id_rubrique=20, accessed on 9 September 2005

19 Text from Articles 1 and 3 of Convention on the Prevention and Punishment of the Crime of Genocide 1948. Available online at http://www.unhchr.ch/html/menu3/b/p_genocd.htm, accessed on 25 August 2005

20 John MacArthur, Censorship And The War On Terrorism, 27 September 2001. Available online at http://www.mediachannel.org/views/interviews/macarthur.shtml, accessed on 25 August 2005

21 Philip M. Taylor, *Washington Post*, Credibility: Can't Win Hearts and Minds Without It, 30 March, 2003. Available online at http://ics.leeds.ac.uk/papers/vp01.cfm?outfit=pmt&requesttimeout=500&folder=40&paper=45, accessed on 9 September 2005

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23 Interviewed in Channel 4 Television The War we Never Saw 5 June 2003.

24 USA Today Amanpour: CNN practiced self-censorship, 14 September 2003

25 As quoted by Danny Schechter, The Media Channel, The Link Between The Media, The War, And Our Right To Know. Available online at http://www.mediachannel.org/views/dissector/moveon.shtml, accessed on 25 August 2005

26 International Council on Human Rights Policy, *Journalism, Media and the Challenge of Human Rights Reporting*, p xv

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Case No: CO/9919/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2010

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION

MR JUSTICE BLAIR

Between :

GAUNT	**Claimant**
- and -	
OFCOM	**Defendant**
- and -	
LIBERTY	**Intervener**

G Millar QC and M Henderson (instructed by **Howe & Co**) for the **Claimant**
D Anderson QC and D Glen (instructed by **Ofcom Legal Dept**) for the **Defendant**
Ivan Hare instructed by **Liberty** for the **Intervener**

Hearing dates: 15th and 16th June 2010

Judgment

President of the Queen's Bench Division:

This is the judgment of the court

The radio interview

1. The claimant, Jon Gaunt, claims in these judicial review proceedings that a finding of the defendant, OFCOM, that a broadcast radio interview conducted by him on 7th November 2008 breached rules 2.1 and 2.3 of the Broadcasting Code is a disproportionate interference with his freedom of expression and an infringement of his rights under Article 10 of the European Convention on Human Rights. His claim is supported by Liberty, the Intervener.

2. The radio interview was with Michael Stark, the Cabinet Member for Children's Services for Redbridge London Borough Council, who was centrally concerned with his council's controversial proposal to ban smokers from becoming foster parents on the ground that passive smoking has a propensity for harming foster children. The

claimant, who had himself been in care as a child and had then had foster parents, strongly opposed this proposal. He wrote a highly critical newspaper article published in the Sun newspaper on 7th November 2008 on this topic under the headline "Fags didn't stop my foster mum caring for me". The article was expressed in forceful and at times colourful language. It expressed great appreciation for foster parents generally and the claimant's own foster parents in particular and criticised Redbridge as "health and safety Nazis", with reference to a "master race philosophy" and the Social Services who are referred to as the "The SS". This article did not strike us as unduly offensive.

3. Later that day, at something after 11.00 a.m., the claimant conducted a live interview with Mr Stark on the radio station Talksport. We have been provided with a transcript of the interview and have listened to a recording of it on CD. The first part of the interview was reasonably controlled, giving Mr Stark a reasonable opportunity to explain his council's policy. The claimant then asked him about existing foster parents who only ever smoke in the open air. Mr Stark explained that the council would not drag children away from existing foster parents, but that such smokers would not be used in the future. The trouble was that such people do smoke in the house. Asked by the claimant how he knew this, Mr Stark explained that there were Redbridge councillors who say they never smoke in the building, but in fact do so. To which the claimant said "so you are a Nazi then?". When Mr Stark began to protest, the claimant again said "no you are, you're a Nazi". Mr Stark protested vehemently that this was an offensive and insulting remark, and the interview then degenerated into an unseemly slanging match. When Mr Stark protested that the insult, as he saw it, was probably actionable, the claimant challenged him to "take action if you wish", but then said "you're a health Nazi". The slanging match continued with the claimant asking Mr Stark if he wanted to carry on with the interview, and Mr Stark replying that he would love to if the claimant would just shut up for a minute. It emerged that the claimant had himself been in care. He referred to his column in the Sun that day and again called Mr Stark a "health Nazi" and then "a Nazi". The heated shouting continued with the claimant doing much of the talking. Mr Stark asked him just to shut up for a moment, and said in effect that the conditions of those in care were better than they had been. The claimant regarded this as an offensive insult to his own upbringing and called Mr Stark "you ignorant pig". He later referred to him as a "health fascist" and an "ignorant idiot", and shortly after this he ended an interview that by then had got completely out of control.

4. It is scarcely possible to convey the general and particular tone of this interview in a short written summary, and the full transcript is in this respect incomplete. You have to hear it for its full impact. As we have said, it degenerated into a shouting match from the point when the claimant first called Mr Stark "a Nazi". That first insult was not said with particular vehemence, but "you ignorant pig" was said with considerable venom and was we think gratuitously offensive. The interview as a whole can fairly be described as a rant.

5. There is a factual dispute, which we cannot resolve, about whether, and if so to what extent, Talksport's broadcasting editors may have encouraged the claimant during the live broadcast itself to moderate its conduct. Whatever the precise position, within 10 minutes of the end of the interview, the claimant apologised to the listeners (but not to Mr Stark) accepting that he did not hold it together. He had been, he said,

unprofessional and lost his rag. It was something very close to his heart. He wished that he had not. About an hour after the end of the broadcast, he broadcast a further apology saying "The councillor wants me to apologise for calling him a Nazi. I'm sorry for calling you a Nazi". The claimant was suspended from his programme by Talksport that day. Talksport terminated his contract without notice by letter dated 17th November 2008.

6. The defendant regulator investigated the matter under the Broadcasting Code having received 53 complaints from listeners about the broadcast. On 8th June 2009, the defendant issued their Amended Finding, which is challenged in these proceedings.

Legislation and the Broadcasting Code:

7. By section 6(1)(a) of the Broadcasting Act 1990, broadcasters were regulated so as to require them to comply with a requirement that nothing would be included in their programmes which "offends against good taste or decency or is likely to encourage or incite to crime or lead to disorder or to be offensive to public feeling". This has been replaced by section 3(2)(e) of the Communications Act 2003, which places the duty on OFCOM to secure the application by all television and radio stations of standards that provide adequate protection to members of the public from the inclusion of "offensive and harmful material". By section 3(4)(g), they are required to have regard to the need to do this in the manner that best guarantees an appropriate level of freedom of expression. Section 319 of the 2003 Act obliges OFCOM to set such standards for the content of programmes as appear to them best calculated to secure standard objectives. These objectives include, at section 319(2)(f), that generally accepted standards are applied to the content of broadcast programmes to provide adequate protection for members of the public from the inclusion in such programmes of offensive and harmful material. OFCOM is obliged by the Broadcasting Act 1996 and the 2003 Act to draw up a Code for television and radio covering, among other things, standards in programmes. This is known as the Broadcasting Code, which states explicitly that it has been drafted in particular in the light of the right to freedom of expression as expressed in Article 10 of the European Convention on Human Rights, which encompasses the audiences' right to receive creative material, information and ideas without interference, but subject to restrictions prescribed by law and necessary in a democratic society.

8. Paragraph 2.1 of the Code provides that generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive materials. Paragraph 2.3 provides that, in applying generally accepted standards, broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, among other material, offensive language.

The Amended Finding

9. OFCOM's Amended Finding of 8th June 2009 gave details of the interview, quoting parts of it. It referred to the fact that OFCOM had received 53 complaints, a number of them suggesting that the use of the term "Nazi" belittled the sacrifice made in World War 2. It noted that Talksport regretted what had happened and accepted that the interview fell way below the acceptable broadcasting standards that Talksport expects and demands. Talksport totally accepted and regretted that the language used

by the claimant was offensive and that the manner in which the interview was conducted was indefensible. Talksport said that the claimant was known to be an outspoken, hard-hitting, opinionated and aggressive presenter. They had encouraged him to be himself, but also made clear to him the requirement always to remain within the law and to abide by the Code. Talksport maintained (but the claimant disputed) that the claimant had been given moderating instructions during the broadcast. Talksport had self-imposed boundaries: first, not to let robust debate descend into an unedifying war of words that included personal insults, offensive language and bullying; and second, to give both callers and guests a fair crack at expressing their views without being subjected to ridicule or abuse. Talksport considered that both boundaries had been crossed. The Finding noted that the claimant had broadcast two apologies to which we have referred. Talksport itself broadcast an apology on 21st November 2008.

10. OFCOM's decision noted the importance of freedom of expression in broadcasting and recognised that Talksport specialised in a genre of hard-hitting radio talk, which encouraged robust interaction between its presenters and invited guests. They observed that the fact that material may be offensive to some is not, in itself, a breach of OFCOM's Code. The decision then continued:

> "In this case, a well-known talk radio presenter, with a distinctively robust style, conducted an interview with a local councillor, who had been invited onto the programme to explain his council's new policy on foster carers. OFCOM noted that from the outset, not uncharacteristically Jon Gaunt took an aggressive and hectoring tone with Michael Stark. As indicated above, such an approach may well not have been at odds with audience expectation for this programme or station. However, this tone sharpened as the interview progressed. Jon Gaunt gave little chance for his guest to answer his questions, and dismissed those answers he did give. OFCOM noted that this culminated with Jon Gaunt calling Michael Stark, at times, a *"Nazi"* and an *"ignorant pig"*. The overall tone of Jon Gaunt's interviewing style on this occasion was extremely aggressive and was described by complainants as "oppressive", "intimidating" and felt the interviewer was "shouting like a playground bully".
>
> OFCOM recognises that the subject matter in this case may have been a particularly sensitive one for the presenter, given his own experience of being in care as a child. Further, OFCOM noted that Jon Gaunt later qualified his use of the word *"Nazi"* to some extent by subsequently referring to Michael Stark as a *"health Nazi"*. However, following that qualification, he reverted back to the original term *"Nazi"*. The presenter also referred to the interviewee as *"an ignorant pig"* and told him to *"shut up"*."

11. OFCOM expressed concern that Talksport's compliance procedures did not appear robust enough to deal with problematic material being broadcast live. The broadcaster should retain control over all output to ensure that presenters apply

generally accepted standards and protect members of the public adequately from the inclusion of material which is offensive or harmful. The decision concluded:

> "Rule 2.3 of the Code states that offensive material: "may include ... offensive language ... humiliation, distress [and] violation of human dignity". OFCOM considered the language used by Jon Gaunt, and the manner in which he treated Michael Stark, had the potential to cause offence to many listeners by virtue of the language used and the manner in which Jon Gaunt treated his interviewee. In this case, the offensive language used to describe Mr Stark, and what would be considered to be a persistently bullying and hectoring approach taken by Jon Gaunt towards his guest, exceeded the expectations of the audience of this programme, despite listeners being accustomed to a robust level of debate from this particular presenter. Even taking into account the context of this programme such as the nature of the service, the audience expectations and the editorial content, OFCOM did not consider that this was sufficient justification for the offensive material. The broadcaster therefore failed to comply with generally accepted standards in breach of Rules 2.1 and 2.3 of the Code."

12. It is to be noted, first, that the decision is against the broadcaster, Talksport, who do not challenge it before this court. Indeed they accepted before the decision was made that there had been a breach of the Code. It is to be noted further that no sanction or penalty was imposed.

13. Although the parties have covered a deal of paper on the subject, it is accepted (and we think rightly) that, although the OFCOM decision was against Talksport, the claimant has standing to challenge it in these proceedings. The decision enunciates an inhibition capable of affecting his unrestrained freedom to conduct radio interviews in the way in which he did on this occasion. We need say no more about his standing.

14. Article 10 of the European Convention of Human Rights provides:

> "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."

15. Section 6 of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. OFCOM is a public authority.

16. The claimant does not contend in these proceedings that the Broadcasting Code itself offends Article 10 of the Convention.

Submissions

17. Mr Millar QC, on behalf of the claimant, submits uncontroversially that legitimate restrictions on freedom of expression must be prescribed by law and necessary in a democratic society (in this instance) for the protection of the rights of others and they must be proportionate. He accepts that the provisions of the Broadcasting Code are prescribed by law and, in general, necessary in a democratic society. But he says that OFCOM's Amended Finding here was unnecessary in its particular application and a disproportionate interference with the claimant's freedom of expression for which there was no pressing social need. OFCOM's reasons were insufficient to justify the interference under Article 10.2 – see for this approach *R v Shayler* [2003] 1 AC 247 at paragraph 23 (Lord Bingham) and paragraph 61 (Lord Hope). Mr Millar submits that it is for the court to assess for itself the justification for the interference, rather than simply judging whether OFCOM considered all relevant matters and came to a conclusion which was not perverse. On the contrary, a close and penetrating examination of the factual justification is needed – see Lord Hope in *Shayler* at paragraph 61. Mr Millar submits that the medium was a radio broadcast, which has less potential for impact than television. The category of the broadcast was political speech which is to be accorded especial protection. The broadcast was connected with Mr Stark's defence of his council's political decision not to have smokers as foster parents. The offensive comments were not gratuitous or unrelated with the subject matter of the discussion. They were explicable by and related to what was being discussed in the interview. They were, moreover, value judgments, not assertions of fact. There was no profanity or sexually offensive language. The use of the word "Nazi" was not in its historical or ideological meaning, but rather a provocative slang use meaning one who imposes his views on others.

18. As to offensive expression, Mr Millar draws attention to *Handyside v United Kingdom* (1976) 1 EHRR 737, where the European Court said at paragraph 59 that freedom of expression was not applicable only to inoffensive material, but also to that which offends, shocks or disturbs the State or any sector of the population. Such are the demands of pluralism, tolerance and broad mindedness without which there is no democratic society. Restrictions must therefore be proportionate to the legitimate aim pursued.

19. Mr Millar submits that the highest importance is given to the protection of political expression by the media, which is widely defined to include speech on all matters of general public concern. The limits of acceptable criticism of broadcast information and ideas on political issues are wider as regards a politician than as regards a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large. He must

consequently display a greater degree of tolerance – see *Lingens v Austria* (1986) 8 EHRR 407 at paragraph 41-42 and *Oberschlick v Austria (No 1)* (1995) 19 EHRR 389 at paragraph 59. Expressions of opinion or value judgments are afforded greater protection than statements of fact which are susceptible of proof (see *Oberschlick* at paragraph 63). Expressions of opinion must still be relevant and have a sufficient factual basis.

20. The European Court has said that there is little scope under Article 10.2 for restriction on political speech on questions of public interest. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which it is conveyed. Journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation. However, even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive – see *Dichand v Austria* App. No. 29271/95, 26th February 2002.

21. Mr Millar submits that the court can and should decide for itself whether the public authority has violated human rights, which will involve deciding for itself whether the interference is proportionate. He refers to *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420. In the first of these cases, Lord Bingham of Cornhill said that the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated (paragraph 29). The court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted in judicial review in a domestic setting. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time (paragraph 30). In the latter case, Lord Hoffmann said at paragraph 13 with reference to the *Denbigh High School* case that either the City Council's refusal to licence the claimant's proposed sex shop infringed their Convention rights or it did not. He said at paragraph 16 that this was an area of social policy in which the Strasbourg court had always accorded a wide margin of appreciation to member states, which in terms of the domestic constitution translates into the broad power of judgment entrusted to local authorities by the legislature. Lord Rodger said at paragraph 26 that, where the public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, the court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful. Baroness Hale said at paragraph 31 that the role of the court in human rights adjudication is quite different from the role of the court in ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account. Lord Mance said at paragraph 44 that the court's role is to assess for itself the proportionality of the decision-maker's decision. He said at paragraph 46 that that approach interrelated with the court's recognition of a discretionary area of judgment within which the judiciary would defer on democratic grounds to the considered opinion of the elected body or person whose decision is said to be incompatible with the Convention. The existence of a discretionary area of judgment means necessarily that there may be decisions which a

court could regard as proportionate whichever way they went. The court may have to strike a balance for itself by closer scrutiny if the court is deprived of the primary decision-maker's considered opinion. In this context, Mr Millar submits that the court should not regard OFCOM as better able than the court to assess what are "generally accepted standards" under the Broadcasting Code.

22. In *R (Nasseri) v SSHD* [2010] 1 AC 1, Lord Hoffmann, with whom the other members of the court agreed, adopted the court's approach in the *Denbigh High School* case. He said at paragraph 14 that, when breach of a Convention right is in issue, an impeccable decision-making process will be of no avail if the decision-maker actually gets the answer wrong.

23. Mr Millar accepts, we think, that there may be cases in which the carefully considered view of the decision-maker which correctly addresses the relevant human rights considerations may be a factor contributing to the court's decision. But he submits that no real weight should be given on an issue concerning a political debate between a presenter and a politician.

24. Mr Millar submits that the fact that a number of listeners who had been displeased or surprised by the programme complained does not of itself constitute a sufficient reason to justify taking action – see *Monnat v Switzerland* (73604/01). In so far as OFCOM took note of complaints on this occasion, it is suggested that they failed to give weight to contrary and supporting views including those of Liberty. Mr Millar submits that research into perceptions about offensive language conducted on behalf of OFCOM does not support a wide perception that "Nazi" is regarded as offensive when it is not used in a political or ideological context.

25. Mr Millar submits that the elements of the interview that OFCOM criticised are value judgments and that in context the word "Nazi" was not used in an ideological sense. It was used to suggest that Mr Stark was being judgmental and authoritarian in imposing a blanket ban on smokers fostering children. In *Scharsach v Austria* (2005) 40 EHRR 22, the European Court concluded that the use of the term "closet Nazi" was justified as a value judgment for which there was a sufficient factual basis notwithstanding its special stigma. In the present case, the use of "Nazi" and "health Nazi" were value judgments sufficiently supported by the facts. Similarly in *Gorelishvili v Georgia* (2009) 48 EHHR 36, the court regarded the phrases complained of as sarcastic and cynical, but they did not constitute a gratuitous personal attack devoid of any factual basis.

26. Mr Millar emphasises that there was no finding of breach of the provisions about fairness in section 7 of the Code, and further that Mr Stark himself had not complained.

27. Mr Hare, appearing for Liberty, emphasised that freedom of expression is fundamental to the functioning of democracy and that this applies especially to the communication of opinions and argument about the policies which all levels of government should pursue – see Lord Bingham in *R (Animal Defenders International v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 at paragraph 27. Freedom of political expression includes not only the inoffensive, but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence. Freedom only to speak inoffensively is

not worth having – see *Redmond-Bate v DPP* (1999) 163 JP 789. For verbal statements made during live radio broadcasts, the proportionality question must have regard to the fact that the broadcaster cannot reformulate, perfect or retract what is said before it is made public.

28. Mr Hare submits that the radio discussion in this case was on a topic of great public importance with an elected politician promoting a new and controversial policy. Mr Stark was well aware of the claimant's style of presentation. The words he used were in response to Mr Stark's statements. The interview was one of political expression and entitled to the highest level of protection. Mr Hare accepts that Strasbourg jurisprudence does not protect gratuitous abuse unrelated to the political content of the discussion, but this is a very limited exception to the broad protection of political expression. In the present case, each of the epithets used was part of the discussion of the issue between the claimant and Mr Stark. In the cases relied on by OFCOM the offensive, provocative or sarcastic speech in question was held to be protected by Article 10. He submits that the margin of discretion to be accorded by the court to OFCOM's decision should be very limited.

29. Mr Anderson QC, for OFCOM, says that they are highly conscious that restrictions on freedom of expression, however slight or marginal, need to be justified. But the interference in the present case was an entirely proper application of the relevant statutory framework and Code (which are not themselves challenged) taken with Article 10 of the European Convention on Human Rights. He submits that OFCOM's Amended Finding explicitly recognises the freedom of broadcasters to choose the manner in which they broadcast; the need to apply standards which best guarantee an appropriate level of freedom of expression; the fact that broadcasting offensive material is not in itself a breach of the Code; and the fact that broadcasting offensive material needs to be justified by the context.

30. OFCOM noted that the interview was conducted by a well known radio presenter with a distinctly robust style who adopted an aggressive and hectoring tone from the outset. The interview was with a local councillor to explain the council's proposed new policy on foster parents. The tone sharpened as the interview progressed and the claimant gave the councillor little chance to answer his questions. The claimant called the councillor a "Nazi" and an "ignorant pig", later modifying the first of these to "health Nazi" before reverting back to "Nazi". His overall tone was extremely aggressive. The subject matter was a sensitive one for the claimant because of his own childhood experiences.

31. Mr Anderson notes that the relevant statutory provisions and the Broadcasting Code are not challenged as not complying with Article 10. It is accepted that the Amended Finding was prescribed by law and that it pursued a legitimate aim under Article 10.2. There is no primary Convention right not to be offended, but the European Court has acknowledged such a right in the context of Article 10.2 – see *Otto-Premmiger-Institut v Austria* (1994) 19 EHRR 34 at paragraph 49 where the court included as one of the obligations in Article 10.2 an obligation to avoid as far as possible expressions that are gratuitously offensive to others, and thus an infringement of their rights. It is not suggested that OFCOM applied the wrong test. The case is, and only is, that there was no pressing social need for the Amended Finding and that it was a disproportionate interference with the claimant's freedom of expression.

32. Mr Anderson submits that radio and television broadcasters have duties and responsibilities going beyond those imposed on newspapers, because broadcasting is more immediate, pervasive and powerful. He refers, for instance, to *Murphy v Ireland* (2000) 38 EHRR 13 at paragraph 74 and *R (ProLife Alliance) v BBC* [2004] 1 AC 185 at paragraph 21, a case decided under earlier legislation. The responsibilities find expression in the Code. Mr Anderson notes that Lord Walker said in the *ProLife* case at paragraph 121 that in practice the obligation to avoid offensive material is interpreted as limited to what is needlessly (or gratuitously) shocking or offensive.

33. As to the claimant's submission that the content of the interview was political speech and the relevant offensive language value judgments, Mr Anderson accepts that this was an interview with an elected councillor on an issue of public concern. But OFCOM's ruling did not interfere with the claimant's rights as a journalist to express robustly and forcibly to the extent that his employers were prepared to allow it his own view on an issue of public concern. The finding was by its terms directed to the bullying and insulting of the person being interviewed, a form of expression which contributed nothing to any political or policy debate, which on the contrary derailed the interview altogether and caused it to degenerate into a slanging match. The aspects of the interview found to be in breach of the Code were not political comment or opinion at all, but gratuitous and offensive slurs and abuse. Mr Anderson points to the judgment of Collins J in *Livingstone v Adjudication Panel for England* [2006] HRLR 45, where the judge said that Mr Livingstone was not to be regarded as expressing a political opinion attracting a high level of protection when he indulged in offensive abuse of an Evening Standard journalist outside a city hall reception. The facts of that case were different, but the general point validly made was that gratuitous offensive abuse cannot be regarded as the expression of political opinion. Mr Anderson also refers to *Lopez Gomez da Silva v Portugal* (2002) 34 EHRR 56 at paragraph 34 for the distinction between expressions of polemical political opinion and gratuitous personal attack with no factual basis. Mr Anderson accepts that the limits of acceptable criticisms are wider for politicians than private individuals, so that a politician is expected to tolerate robust criticism and scrutiny particularly in defending a controversial policy. That greater tolerance does not constitute an open ended invitation to offend or insult. He submits that, regardless of the forcefulness of political struggles, it is legitimate to try to ensure that they abide by a minimum degree of moderation and propriety – see *Lindon, Otchakovsky-Laurens and July v France* [2008] 46 EHRR 35 at paragraph 57.

34. As to value judgments, Mr Anderson submits that the cases relied on are concerned with an individual's inability to prove the truth of expressions of opinion which are incapable of objective verification. Such matters were not in issue in the present case. OFCOM intervened, not for this reason, but in part because the term "Nazi" was used for no purpose other than to insult or bully. The same applies to the expression "ignorant pig". These were offensive according to generally accepted standards.

35. Mr Anderson points to *Dichand* for the distinction between a value judgment, where the proportionality of an interference may depend on whether there is a factual basis for the impugned statement, and a gratuitous personal attack where there is insufficient factual basis, where interference may be justified. Mr Anderson refers also in this context to *Lingens v Austria* (1986) 8 EHRR 407 at paragraph 42; *Oberschlick v Austria* (1997) 19 EHRR 389; *De Haes and Gijsels v Belgium* (1997)

25 EHRR 1; *Gunduz v Turkey* (2005) 41 EHRR 5 at paragraph 37; *Malisiewicz-Gasior v Poland* (2007) 45 EHRR 21 at paragraph 66 and *Janowski v Poland* (2000) 29 EHRR 705. He submits that arguments about value judgments and political speech do not provide a justification for the intimidating and bullying atmosphere into which the interview in the present case descended.

36. Mr Anderson accepts that the fact that the ruling was made against Talksport does not preclude the claimant from asserting that his Article 10 rights are infringed. It is, however, he submits, difficult to see how censure of gratuitous insult and a generally intimidating and bullying interview can interfere with his right to express, in forceful terms if he chooses, the views which he espoused in the interview. The restriction articulated was very limited. There was no sanction or punishment, unlike many of the cases on which the claimant relies.

37. Mr Anderson accepts that the court's approach to proportionality under the Convention goes beyond that traditionally adopted by judicial review in a domestic setting. But this does not mean that the court should place itself in the position of the decision-maker and engage in a merits-based review. The court's task is not simply to substitute its own view for that of OFCOM, but to review OFCOM's decision with an intensity appropriate to all the circumstances of the case. Mr Anderson refers to *R (Daly) v Secretary State for Home Department* [2001] 2 AC 532 at paragraphs 27-28 and *ProLife Alliance* at paragraph 139. He submits that the present case is distinctive because, unlike the *Denbigh High School* case, OFCOM have an intermediate role as statutory regulator. Where the relevant statutory body has applied the right principle, the court will be particularly cautious about interposing its own judgment. He refers to Lord Bingham in the *Denbigh High School* case at paragraph 31 and Baroness Hale in the *Belfast City Council* case at paragraph 37. Baroness Hale there said that, had the Belfast City Council expressly set itself the task of balancing the individual's right to sell and buy pornographic literature and images against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck – see also Lord Neuberger at paragraph 91. It is not, perhaps, a matter of deference but of the extent to which the court in making its own decision will have regard to and give weight to the value judgment of the regulator. Thus considerable weight should be given to OFCOM's expert judgment on what constitutes generally accepted standards on the inclusion of offensive material.

38. Mr Anderson submits that the content of the broadcast was undoubtedly offensive and there was no sufficient contextual justification for it. It was appropriate for OFCOM to rule that Talksport had breached Rules 2.1 and 2.3 of the Code. The Amended Finding, which had no sanction, was plainly a proportionate response. There is no proper basis for the court to interfere.

39. Mr Anderson submits that the court should judge the broadcast by the impression its overall tenor would have on a listener, not by the isolated impact of one constituent phrase. The assessment should not be over- elaborate. OFCOM were entitled to conclude that the broadcast did not comply with generally accepted standards and that its offensive nature was not justified by its context. The general tenor of the interview was extraordinarily abusive which went far beyond an aggressive or hostile critique of Mr Stark's political stance. It descended into unfettered personal abuse which was plainly offensive. The use three times of the word "Nazi" was particularly offensive especially since after the first use Mr Stark made it plain that he found it offensive and

insulting. Even the flippant use of "Nazi" to denote a person who imposes his views on others can be regarded as offensive and in very poor taste and can be used to offend out of anger or intentionally. The context in which the expression is used is critical. The claimant had a basic duty to abide by a minimum degree of moderation and propriety (see *Lindon*), which he abused, resorting to insults and bullying. The interview quickly degenerated to the point where really there was no interview at all. The underlying issues ceased to be discussed in a succession of insults. The suggestion that a dialogue of this kind is entitled to a very high degree of protection is misconceived.

40. Mr Anderson submits that the nature and severity of the penalty imposed (none in this case) are important factors to be taken into account when assessing the proportionality of any interference – see *Perna v Italy* (2004) 39 EHRR 28 at paragraph 39. Further OFCOM had a statutory duty to regulate Talksport, who accepted that their broadcast had breached the Code and their own self-imposed standards. There is nothing in the Amended Finding which impinges on the claimant's ability to advance his political viewpoint with emphatic vehemence. The restriction imposed, such as it was, was plainly proportionate.

Discussion

41. For all that the parties have covered much paper and addressed the court at some length, they are not much at issue as to the principles to be applied and the resulting decision for the court is quite narrow.

42. We take it compendiously from the *Denbigh High School* case, the *Belfast City Council* case and the *Nasseri* case that the court's task is to decide for itself whether the Amended Finding disproportionately infringed the claimant's Article 10 freedom of expression. In doing so, we have due regard to the judgment of the statutory regulator who proceeded on correct legal principles.

43. No point is taken to impugn the relevant provisions of the 2003 Act or the Broadcasting Code, so that, in a sense, the narrow question is whether, having regard to the Article 10 rights of freedom of expression, the broadcast failed to achieve generally accepted standards such that members of the public were not protected from the inclusion of harmful and/or offensive material. We regard "generally accepted standards" in this context as elusive, and the concept of harmful and/or offensive material needs to be moderated in the light of Article 10 and the domestic and Strasbourg case law.

44. The unchallenged statutory basis for the Amended Finding means that it was prescribed by law and, in the abstract, necessary in a democratic society for the protection of the rights of others. The particular application requires us to decide whether the Amended Finding fulfilled a pressing social need and constituted a proportionate interference with the claimant's freedom of expression. That is the ambit of our consideration.

45. This was a live radio broadcast reaching a wide audience. So far as this may require a degree of moderation, this is set against the fact that the claimant had no opportunity to edit or correct what he had said once he had said it.

46. The subject of the interview was political and controversial and the person interviewed was an elected politician who would expect to receive and tolerate a rough ride. The expressions complained of were not essentially statements of fact, but expressions of value or opinion. It was therefore an interview where the claimant's freedom of expression should be accorded a high degree of protection and that was capable of extending to offensive expression.

47. His freedom of expression may not however extend to gratuitous offensive insult or abuse, nor, we think, to repeated abusive shouting which serves to express no real content. We take gratuitously offensive insult or abuse to comprise offensive insult or abuse which has no contextual content or justification.

48. Applying these principles and giving due weight to OFCOM's judgment, we consider that to call someone a "Nazi" is capable of being highly insulting. It may be that the first use of "Nazi" and the soon to follow qualification had some contextual content and justification. It came after a reasonably controlled introductory dialogue and was not expressed with undue vehemence. Just as the claimant's use of the word in his newspaper article had a contextual content and was not unduly offensive, so this first use (offensive though it was) may be seen as an emphatic and pejorative assertion that Mr Stark was, in the matter of smoking and fostering children, one who imposes his views on others. It was not, in the context, a description of Mr Stark's wider political or ideological position.

49. However, the tone of the interview degenerated from that point, partly because Mr Stark understandably took offence and because the claimant's conduct of the interview became increasingly abusive, hectoring and out of control. The claimant's subsequent uses of the word "Nazi" undoubtedly assumed the nature of undirected abuse. The expression "ignorant pig" had no contextual justification at all and was said with such venom as to constitute gratuitous offensive abuse in the sense we have indicated. The claimant lost control of the interview – "I didn't hold it together" – and, as he had admitted, lost his rag. The later part of the interview became abusive shouting which served to convey to listeners no real content at all.

50. In these circumstances, and taking full account of the claimant's Article 10 rights, we consider that OFCOM were justified in their conclusion, the terms of which we have quoted in paragraph 11 above. The broadcast was undoubtedly highly offensive to Mr Stark and was well capable of offending the broadcast audience. The essential point is that, the offensive and abusive nature of the broadcast was gratuitous, having no factual content or justification. In the result, we accept Mr Anderson's submission that the Amended Finding constituted no material interference with the claimant's freedom of expression at all. An inhibition from broadcasting shouted abuse which expresses no content does not inhibit, and should not deter, heated and even offensive dialogue which retains a degree of relevant content.

51. No sanction or penalty was imposed on the broadcaster, let alone the claimant. This is relevant, though not decisive, to our consideration, because it bears on the proportionality of the interference. The fact that the Amended Finding was against the broadcaster does not disentitle the claimant from advancing his claim, but again is of some relevance. OFCOM's finding, unchallenged by Talksport, that the broadcaster's compliance procedures did not appear robust enough to deal with problematic material being broadcast live, was justified and depended on the

proposition that the broadcast breached rules 2.1 and 2.3 of the Code, which we consider it did.

52. For these reasons, the claim for judicial review fails and is dismissed.

CHAPTER 14

MEDIA SELF-REGULATION

INTRODUCTION

Notwithstanding the number of legal restraints on the media, it has 14-
power to damage reputations by falsehoods, invade privacy and conduct partisan campaigns. The unavailability of legal aid effectively deters all but the intrepid or wealthy from taking action for libel, and there is as yet no direct protection for privacy in British law. Blatant examples of unfair and unethical media behaviour towards individuals and organisations have led to demands for more statutory controls, which media industries have sought to avoid by trumpeting the virtues of "self-regulation". They have established tribunals that affect to regulate media ethics through adjudicating complaints by members of the public who claim to have been unfairly treated by journalists and editors. Complaints about newspapers and journals may be made to the Press Complaints Commission (PCC), a private body funded by newspaper proprietors. It has no legal powers, but its adjudications will be published by the paper complained against, albeit usually in small print and without much prominence. Allegations about false or offensive telephone services may be made to ICSTIS, an adju-dicative body set up by British Telecom. The Advertising Standards Authority (ASA) is the body that will hear complaints that advertisements are not "legal, decent, honest and truthful". Although a private company funded by the advertising industry, it derives a powerful sanction from the preparedness of newspapers and journals to withhold space for advertisements that are in breach of its code.

Journalists should recognise the political purpose behind these organisations.[1] They serve as public relations operations, funded by media industries to give the impression to Parliament that the press, the telephone service providers and the advertising industry really can put their houses in ethical order without the need for legislation. Press proprietors are prepared to invest £1.5 million each year in the PCC because its existence offers a form of insurance against new

[1] See G. Robertson, *People Against the Press* (Quartet Books, 1983).

laws to safeguard personal privacy, prohibit chequebook journalism and to guarantee a right of reply. The advertising industry funds the ASA, to a tune of more than £3 million annually, to avoid exposure to laws against deceit and indecency. Both organisations have performed imperfectly from the public point of view, but owe their continued industry support to that mixture of fear, prudence and masochism identified by Hilaire Belloc:

> "Always keep a-hold on nurse/For fear of finding something worse."

Whether "something worse"—i.e. a statute rather than a self-help arrangement—would be worse for the public, as well as for the newspaper and advertising industry, remains debatable. The PCC has failed to demonstrate many virtues in self-regulation: it has designed an ethical code which it declines to monitor, and its decisions are accorded a degree of cynicism, bordering on contempt, by editors—especially when they relate to coverage of the Royal Family, which the PCC has spent a lot of its time trying to protect, often from its own media gaffes. Although tabloid editors give lip-service to PCC guidelines on privacy, chequebook journalism and race reporting, they are sometimes prepared to break them in the interests of increasing circulation. One of the serious consequences for journalistic standards is the way newspapers, out of self-interest, contrive to pretend that PCC rulings are both effective and newsworthy, and rarely tell their readers that the organisation is something of a confidence trick, perpetuated by those very same newspapers.

14–002 Nonetheless, the PCC and the ASA are significant organisations, with a potential for good and a capacity to inhibit genuine investigative reporting and the amount of information available to the public. A code of practice promulgated by an authoritative organisation can be of great assistance to journalists in resisting editorial pressures to behave unethically in the quest for circulation-building stories of prurient, rather than public, interest. Some of the journalists who were held to have "ferociously and callously harassed" relatives of a "Yorkshire Ripper" victim evinced a sense of shame, but excused themselves on the ground that they were only obeying editorial instructions.[2] A code of conduct should assist journalists to develop the moral muscle to resist unethical orders to invade privacy and sensationalise private grief, especially if the code has been incorporated in their contract of employment. The ASA code has practical force because media outlets will not accept advertisements ruled to be in breach of it, and the PCC code, which has no practical force at all, can have a legal impact through the operation of s.12(4) of the Human Rights Act, which requires courts to pay attention to "any relevant privacy code" in deciding whether to impose prior restraint. The assumption is that courts will be more likely to injunct if the alleged breach of confidence also involves a breach of the code—which will be interpreted by judges, not the more media-friendly PCC. Privacy codes which are too widely or loosely drawn, or which go beyond what the law requires (e.g. the amendments made to the PCC code in the wake of Diana's death) have proved counterproductive in the courts, and may become trip-wires for important investigative journalism based (like much of that genre) on confidential leaks from "insiders".

The courts have tended to show considerable deference to self-regulating bodies, resisting most attempts to second guess the decisions of their so-called "expert" or "representative" members. Support for this hands-off approach is usually found in the Law Lords' decision in *R. (ProLife Alliance) v BBC*[3] where they narrowly confined the judicial role (in reviewing a BBC decision to ban an election broadcast by an anti-abortion party) to checking that it was rational, made in good faith and had applied the appropriate standard. But this decision had been made by the BBC pursuant to a statutory provision—i.e. a determination by Parliament—that television should not show offensive scenes. The position is very different when an industry, to protect itself from precisely that sort of statutory regulation, erects voluntary censorship bodies like the PCC, the ASA and ICSTIS. The very fact that they are funded by the industry, in the interests of maintaining profits and avoiding public accountability, means that the courts should be more rather than less interventionist, and more alert to strike down unnecessary censorship. The PCC is funded by press proprietors with the objective of staving off the advent of privacy laws and is generally recognised as "an ineffective regulator which fails to offer adequate redress in a great many cases".[4] ICSTIS, the most recent regulator, was revealed in 2007 to have abjectly failed in its duty to curb the TV quiz lines that had gulled viewers into making phone calls at premium rates. These self-appointed regulators should be subject to close scrutiny by the courts whenever their decisions impinge upon media freedom.

THE PRESS COMPLAINTS COMMISSION

From Press Council to PCC

14–00 The idea that disputes over the content of newspapers might be resolved by some independent but non-legal body developed first in Sweden, where publishers and journalists established a Press Fair

[2] Press Council, *Press Conduct in the Sutcliffe Case*, 1983, Ch.18.

[3] [2003] 2 All E.R. 977.

[4] See Feintuck and Varney, *Media Regulation, Public Interest and the Law* (2nd edn, 2006, Edinburgh University Press), p.195.

Practices Board in 1916. In due course, all major Swedish newspapers bound themselves by contract to accept the rulings of a press ombudsman—a judge who rules on complaints from the public, orders newspapers to print retractions of false statements, and fines them for proven deviations from a code of conduct drawn up by the country's Press Council.[5] In Britain the idea of a Press Council was first mooted by the National Union of Journalists (NUJ) after the lifting of wartime censorship in 1945. The union was alarmed at the concentration of ownership in the provincial press, the suppression or distortion of news for politically partisan or commercial reasons, and the proprietorial pressures imposed upon editors and journalists. There were debates in Parliament, and journalist-M.P.s like Michael Foot claimed that some editors were merely "stooges, cyphers and sycophants". The First Royal Commission on the Press reported in 1949, and suggested that the industry should establish "a General Council of the Press", which, "by censuring undesirable types of journalistic conduct and by all other possible means, would build up a code of conduct in accordance with the highest professional standards".[6] The next four years were spent in desultory and unenthusiastic discussions amongst proprietors, until a private member's bill was introduced in Parliament to set up a statutory council. This prospect brought a speedy end to discussions, and a General Council of the Press commenced operations in 1953.[7] It had no lay membership, and its first chairman was the then proprietor of *The Times*.

The first decade of the Council's operations was unimpressive. Its rulings were oversensitive to Government and to royalty—its first declaration was that a *Daily Mirror* readership poll on the question of whether Princess Margaret should be allowed to marry Group Captain Townsend was "contrary to the best traditions of British journalism".[8] Its poor performance was subjected to scathing criticism by the second Royal Commission on the Press, reporting in 1962, which urged the Government to set up a proper disciplinary body with statutory powers if the Council failed to reform itself immediately.[9] The renewed threat of legislation made newspaper

[5] Lennart Groll, *Freedom and Self-Discipline of the Swedish Press*, Swedish Institute, 1980; Lennart Groll and Geoffrey Robertson, "Legal Constraints on the Press: Swedish and British Viewpoints" in *Freedom and the Press* (Department of Visual Communication, Goldsmith's College, 1979).

[6] Royal Commission on the Press, Cmnd. 7700 (1949), para.650.

[7] The Press Council Bill had its second reading in November 1952. It was moved by C. J. Simmons M.P., who reminded the House that "nearly three-and-a-half years after [the Royal Commission Report] we are still awaiting its formation by the Press of their own volition". See generally H. Phillip Levy, *The Press Council*, (Macmillan, 1967), Chs 1 and 2.

[8] "A Royal Romance: Princess Margaret and Group Captain Townsend", *Daily Mirror*, February 21, 1954 (Press Council).

[9] Royal Commission on the Press, Cmnd. 1811 (1962), para.325.

proprietors jump to attention: they supplied the Council with increased finance, appointed a retired Law Lord, Lord Devlin, as chairperson, and changed the constitution so that 20 per cent of members were drawn from outside the media. Under Devlin's leadership, the Council began to display a more impressive tone and authority. It began to reprimand press misconduct in positive terms, and evinced a powerful concern for press freedoms. However, its higher profile on press freedom issues caused it to be perceived publicly as a champion of the press rather than a watchdog for the public.[10]

The first detailed study of the Press Council's work was conducted by the third Royal Commission of the Press, chaired by Lord MacGregor.[11] It found evidence of "flagrant breaches of acceptable standards" and "inexcusable intrusions into privacy". "We feel strongly", it stated, "that the Press Council should have more power over the press . . . There is a pressing call to enhance the standing of the Press Council in the eyes of the public and potential complainants."[12] It called upon the newspaper proprietors who fund and effectively control the Council to ensure that it had sufficient funds to advertise its services and to monitor press performance. Complaints upheld by the Council should be published on the front page of the offending newspaper, and a written code of conduct for journalists should be produced. The Council should give more support to an effective right to reply, condemn journalistic misbehaviour in a more forthright way and take a stronger line on inaccuracy and bias. The Council responded to these criticisms by increasing its lay membership to half but in other respects it failed to improve its image. A study of its work published in 1983 revealed that even successful complainants were overwhelmingly critical of the services it offered.[13] Its adjudication procedures were obstacle courses and its delays in judgment ensured that any redress it provided was usually ineffectual. Its principles were confused and inconsistent, rulings were not respected and it did not work to improve the ethical standards of the British press.

A new chairperson, Louis Blom-Cooper Q.C., instituted a thor- 14
oughgoing review of the Council's role and function but its basic problem remained: its failure to make its Declarations of Principle stick in the absence of any effective sanction. Editors at every level defied and derided it: the *Daily Telegraph* publicly refused to abide by its ethical convention on race reporting while the *Sun* took a malicious delight in vilifying individuals who "successfully" complained about it to the Council. It was no longer serving as an insurance policy against new press laws, and in 1989 support from

[10] Report of the Committee on Privacy, Cmnd. 5012 (1972), para.189.

[11] Royal Commission on the Press, Cmnd. 6810 (1977), Ch.20, para.15.

[12] Royal Commission on the Press, Cmnd. 6810 (1977), para.48.

[13] Robertson, *People Against the Press*, Ch.3.

M.P.s from all parties threatened to advance the passage of a private member's bill to establish a statutory body to enforce a right of reply. The progress of this bill was halted only when the Government set up a committee chaired by David Calcutt Q.C. to respond to press intrusions and privacy.

Calcutt correctly identified the Council's central problem in terms of its contradictory claims both to safeguard press freedom and to condemn press malpractice.[14] It was this latter function that should be performed by a Press Complaints Commission, an expert body with sufficient funding to adjudicate speedily and effectively complaints by members of the public about breaches of an expanded code of practice. The Calcutt Committee was profoundly unimpressed by the cynical attitudes displayed towards the Council in the past by editors and proprietors, and it evinced no great confidence that its proposed Press Complaints Commission would be allowed to work effectively if it remained a voluntary body. So it drew up plans for a statutory complaints tribunal which would wait notionally in the wings, to be wheeled out if there was a "less than overwhelming rate of compliance" with the new Commission's adjudications.

The Calcutt "fallback" recommendation for a statutory tribunal served to concentrate the minds of newspaper proprietors. The newspaper industry, through the Newspaper Publishers' Association (representing the owners of national newspapers) and the Newspaper Society (representing owners of provincial newspapers), acted speedily to establish a Press Complaints Commission, which commenced operations in January 1991. The new body abandoned the Press Council's contentious efforts to defend press freedom and combat media monopolies; it existed solely to adjudicate complaints that editors of newspapers had infringed the published code of conduct.

14–005 The early days of the PCC were underwhelming: Calcutt, invited to report again for the Government in January 1993, recommended jettisoning voluntary self-regulation in favour of his statutory Press Complaints Tribunal with its power to injunct impending privacy breaches and to fine reckless journalists.[15] John Major's government dared not antagonise the media, especially after its exposure of David Mellor (the minister who had accused editors of "drinking in the last chance saloon") who was bugged whilst having exhaustive sexual intercourse with a "resting" actress. Despite further demands in 1993 for statutory controls by the Lord Chancellor's Department[16] and the National Heritage Select Committee,[17] and a private member's bill which failed only on its third reading, the Conservative Government compromised: afraid of alienating newspapers before a general election, it gave "self-regulation" its approval, subject to "strengthening the system still further" [*sic*].[18] The Labour Government in proved just as emollient, legislating s.12(4) of the Human Rights Act on the assumption that the PCC's "relevant privacy code" would be a suitable subject for judicial notice. By dint of immediate condemnations of gross invasions of royal privacy and decisions favourable to important politicians, the PCC has kept its head, although in a shape which may not be much in the interest of either the press or the public. Its 10th anniversary party, in January 2001, featured Princes Charles and William—chaperoned by Lord Wakeham, who introduced them to their tabloid tormentors with the discreet aplomb of a high-class madam. The party symbolised the inter-dependence between celebrity and paparazzi, which like that between thief and receiver, makes the relationship profitable for both unless disturbed by the law.

Lord Wakeham's tenure ended suddenly and embarrassingly with the Enron collapse. As a member of one of its accounting boards, his own ethics came into question and he left to spend more time with his lawyers. He was succeeded in 2003 by arch-diplomat Sir Christopher Meyer, who survived a spat over his own ethics (his memoirs, as serialised in the press, told some confidential stories about the Blair entourage, observed whilst he was Ambassador to the United States). He has been much less obsessed with protecting the royals and has concentrated on the Commission's most valuable work, that of developing an authoritative code of conduct and of expeditiously dealing with complaints, mostly against the provincial press. He steered the PCC through a stormy enquiry in 2003 by the Culture, Media and Sport select committee into privacy and media intrusion, from which it emerged battered but still afloat. In 1993 that select committee had recommended the PCC's abolition and replacement by Calcutt's statutory tribunal. In 2003 it made some trenchant criticisms but accepted the principle of self-regulation; it noted the PCC's improved performance and complimented it on its work in developing the Code. The problem of the PCC is not so much what it does but what it claims that what it does, does—i.e. provides an effective reddress which makes any privacy law redundant. To that extent, it has become a propagandist for the press proprietors. The front page of its website (as accessed in January 2007) proclaims

> "The success of the PCC continues to underline the strength of effective and independent self-regulation over any form of legal or statutory control. Legal controls would be useless to those members of the public who could not afford legal action—and would mean protracted delays before complainants received

[14] *Report of the Committee on Privacy and Related Matters* (HMSO, 1990), Cmnd.1102.
[15] Sir David Calcutt, Review of Press Self-Regulation, Cm. 2135 (1993).
[16] The Lord Chancellor's Department has forcefully recommended legislating a new tort of infringement of privacy: Consultation Paper, July 1993.
[17] Report on Privacy and Media Intrusion 1992–3, H.C. 294–1.
[18] Cm. 2918 (July 1995).

redress. In our system of self-regulation, effective redress is free and quick."

This statement misleads the public. Legal redress might be available to the poor through conditional fee arrangements and a statutory body would probably be free-of-charge to complainants. In any event, it cannot be suggested that legal controls against negligence or faulty products, for example, are useless to members of the public simply because the rich may have better access to them. Invoking the law often produces immediate and effective redress, because newspapers which indefensibly err (as in defamation) will usually admit their mistake and pay compensation to avoid successful claims. And it begs the question of whether PCC redress is "effective" in serious cases where the law would provide compensation and damages but where all the PCC can do is broker an often insincere apology. By proselytising in this misleading way the PCC is falling into the trap which Calcutt identified as the flaw in the Press Council, of trying to combine a complaints function with a propagandistic role on behalf of press interests. The PCC would be much better advised to drop its campaign against the privacy law that is being developed by the judges under the spur of Article 8 of the ECHR, and to work hand in hand with the courts by accommodating their decisions to its own code in the hope that (pursuant to HRA Section 12(4)) they will return the compliment.

14–006 The PCC can no longer honourably claim that its redress (which does not even include the power to fine) is "effective" after the Euro court decision in *Peck v UK* that the sanctions available to broadcasting regulators (who did have the power to fine) were ineffective to redress the privacy violation:

> "The court finds that the lack of legal power of the commissions to award damages to the applicant means that those bodies could not provide an effective remedy to him. It notes that the ITC's power to impose a fine on the relevant television company does not amount to an award of damages to the applicant."[19]

In consequence, the United Kingdom is under a duty to develop a privacy law in which violation by press and broadcasters can result in damages and the judges, beginning with the *Naomi Campbell* case, have been doing just that. The PCC could help them and thereby play a role in the development of a privacy law which is sensitive to press freedom. However, if it maintains its hostility and continues to paint the legal process as an ineffective rival, it will jeopardise both its own integrity and the potential that s.12(4) offers of having code principles adopted by the court.

[19] (2003) 36 E.H.R.R. 41 at para.109.

Is the PCC reviewable?

14- The history sketched out above provides a clear answer: the PCC is exercising a recognised public adjudicative function, as a government-brokered alternative either to a Calcutt-devised complaints tribunal or to a privacy law introduced by Act of Parliament. The reasoning which has led the courts to declare the ASA reviewable applies by close analogy to the PCC: it is a body "clearly exercising a public function which, if the ASA did not exist, would no doubt be exercised by (a statutory office)".[20] Moors Murderer Ian Brady and T.V. newsreader Anna Ford have attempted to review the PCC; few have regarded its decisions as important enough to quash.

> *The Sun* ran a story about Moors Murderer Ian Brady receiving inappropriate hospital treatment, which it illustrated with an indistinct photograph, unobjectionable other than that it had been taken through a tele-photo lens while he was in the hospital. This was technically a breach of the PCC privacy code (no pictures on private property without consent unless in the public interest) but the Commission made no finding because any breach would not warrant censure since the article itself had been in the public interest, and the picture had been obtained without intrusion or harassment. Brady sought judicial review, but the courts could see no basis for interfering with this decision: any breach which may have occurred was not serious and the PCC was entitled to decide that *The Sun* was not deserving of censure. The court "assumed" that the PCC was a body amenable to judicial review.[21]

In the *Brady* case Lord Woolf made clear that any exercise of jurisdiction over the PCC "would be reserved for cases where it would clearly be desirable for this court to intervene". The courts will not trip the PCC up on technicalities, but only when it makes a fundamental error of interpretation. (If, for example, the PCC had decided that Brady's crimes were so horrendous that he had forfeited all right to privacy, that decision would have been so plainly wrong it would have been quashed.) Unsatisfied complainants will have to show an irrational interpretation of the code or a decision flatly inconsistent with other precedents or else a serious misunderstanding of the facts before judicial review is likely to succeed. It may be, however, that judicial review proceedings could successfully attack some of the unfair aspects of the PCC's procedures—its refusal to give complainants a hearing or an opportunity to cross-examine editors, for example, or infringements of the Art.6 rule requiring tribunal members to be independent and impartial.

[20] *R. v ASA Ex p. The Insurance Service* [1990] 2 Admin. L.R. 77, *per* Glidewell L.J.
[21] *R. v PCC Ex p. Stewart-Brady* [1997] E.M.L.R. 185; followed by Silber J. in *R. v PCC Ex p. Anna Ford* (unreported), July 29, 2001.

The Complaints Procedure

14–008 The PCC operates from Holborn with a small staff and a full time Director, serving on a 16–person Complaints Committee which has been chaired since 1995 by Lord Wakeham. Seven of the Committee are newspaper and magazine editors. The full time Director is also a commissioner along with the chairman and eight other worthy citizens; including the former head of the D notice committee, a director of Camelot and a bishop ("formerly Clerk of the Closet to the Queen"). The Royal connection is appropriate, since the PCC spends a good deal of its time upholding complaints made by Buckingham Palace.[22] These public members, unrepresentative of the general population, are chosen by an appointments committee. The PCC has an all-press committee responsible for its ethical code: its membership includes editors whose ethics are constantly called into question. The operation costs about £1.6 million a year, funded by a levy on newspaper and magazine publishers. Their contributions are much less than the funding of the ASA or even of ICSTIS, and are paid out of self- interest—i.e. to finance a body which they hope will help them to stave off further legal regulation.

The PCC receives several thousand complaints each year, yet it actually adjudicates comparatively few cases (30 in 2005). It claims that it "resolves" the complains that it does not adjudicate, but one-third of these complaints were "outside its remit" while others were "made by third parties" a class of complaint which for no good reason the PCC does not accept, however grievous the breach complained about. Many complaints are settled by an editorial offer of a reply or a correction. but in the year 2005, 3,654 complaints were received and merely 30 were adjudicated. The 2005 report fudges these figures. It boasts of receiving 3,654 complaints but only 348 of these were "resolved". It does not mention what happened to the rest but presumably they were trivial or beyond the PCC's remit, which does not cover issues of taste or decency.

About 60 per cent of all complaints concern inaccuracies, with privacy infringements featuring in 15 per cent. Adjudications are short for the benefit of the paper that must publish them with "due prominence" (which generally means under a banner headline if it is cleared, but in small print on an inside page if it is criticised). Successful complainants have no right to an apology, let alone to costs or expenses or compensation—their "victory" is especially hollow in privacy cases, when the adjudication can provide an occasion for re-publicising the breach (a reason why so many victims of privacy invasions do not complain or take their case to court). The PCC has refused to adopt one of Calcutt's main recommendations, namely that it should monitor the media for breaches of its code.

[22] See "A Right Royal Farce", *The Observer*, April 8, 2001, p.13.

14– The PCC has no "hotline" procedure for intervening between the time of code-breach (e.g. by invasion of privacy) and the time of publication. This fact alone ensures that the code is not enforced when it really matters, i.e. to prevent invasions of privacy which have no public interest justification. There is one exception, in that the PCC is always at the beck and call of Buckingham Palace. This was demonstrated in 2001 when the Countess of Wessex was caught, by a *News of the World* undercover operation, promoting her PR company on the back of her royal connection. When the Queen's private secretary learnt of the problem, three days before publication, he summonsed Lord Wakeham, who came running to advise the Royal Family on how to minimise their embarrassment. He had to deny media suggestions that it was his advice that led the Countess to give a disastrous interview to *News of the World* ("SOPHIE: My Edward is NOT gay").

The Commission adjudicates complaints by reference to its 16–clause Code of Practice. It meets for half a day each month to consider rulings drawn up by the chairperson and the staff, which are subsequently published on its website. It refuses oral hearings and decides each case upon written submissions. Its adjudications will be sent, as a matter of courtesy, to parties shortly before publication, although it will not entertain any protest prior to publication. It will not consider any complaint about press conduct falling outside its written code. A particular problem is encountered in relation to complaints from individuals who might also have a legal remedy against the newspaper by suing for libel. The Press Council practice—severely criticised by Calcutt—was to extract a "legal waiver" from such individuals as a quid pro quo for the newspaper's agreement to co-operate with the Council and to publish its adjudications. This waiver was effective to bar any subsequent libel action, but only if it was expressly made and signed—a complaint to the Council did not of itself operate as an implied waiver.[23] As Calcutt pointed out, it is plainly wrong in principle that a complainant should be obliged to surrender a legal right to damages before obtaining an adjudication as to whether an ethical standard has been breached. The PCC has in theory abandoned the waiver, although it exercises a discretion to postpone any adjudication if it relates to a matter that is or may be the subject of litigation.

Any member of the public, or any organisation involved in the matter, may complain to the Commission about a breach of the Code of Practice by an editor of a newspaper or magazine. The complaint will be accepted against an editor, even if it relates to conduct by a journalist or a freelance. Complaints are forwarded to that editor, who is required to contact the complainant direct and reach an amicable settlement. If this is not achieved within a short

[23] *Franks v Westminster Press Ltd, The Times*, April 4, 1990.

time-frame, the editor will be required to provide a written response, which will be sent to the complainant with an invitation to comment. This process will continue until the issues are clear and each party has had an opportunity to deal with the other's contentions in writing. There will be no contested hearing and no opportunity for parties to cross-examine or to discover the other side's documents.

14–010 The PCC staff, in consultation with the chairman, produce a draft adjudication which is despatched to Council members who will communicate their agreement. Draft adjudications that evoke disagreement are debated and finalised at the monthly Commission meeting. The defending editor is under no duty to publish favourable adjudications, although these are often reported as triumphs for free speech or in ways that belittle unsuccessful complainants. However, the Code preamble insists that "Any publication which is criticised by the PCC must print the adjudication in full and with due prominence". The PCC does not indicate what prominence is "due" and does not monitor compliance. A typical example is the privacy complaint upheld on behalf of *Coronation Street* actress Jacqueline Pirie, whose private life was splashed, without a shred of public interest, over the *News of the World* in January 2000. The PCC adjudication criticising the newspaper was published three months later, in small print and surrounded by advertisements, on p.40 of the offending paper.[24] It is difficult to understand how this could amount to a prominence that was "due", either to the victim or proportionately to the publicity given to the original story.

In 2005, stung by constant criticism of its refusal to oversee editorial decisions about where "prominently" to print its adjudications, the PCC announced, under the headline "Prominence—a Myth Exposed" that 25 per cent of the "corrections and apologies" that resulted from its rulings appeared on the same page as the original article, 22 per cent in a dedicated "corrections" column and 34 per cent further forward than the original article.[25] These bland statistics do not, however, answer the criticism or expose any "myth": they do not apply to critical adjudications which tend to be "buried", like that relating to Ms Pirie. And they say nothing about "prominence" or whether it was proportional: corrections printed in small typeface, or obscure in terms of the page layout, hardly redress a falsehood published under a banner headline or as the peg for a full-page character assassination.

14–011 The PCC is defensive, and sometimes devious, about the defects in its procedure. For example, it tries to deter complainants from using lawyers ("complaints involving solicitors tend to take longer to be concluded, without noticeable improvement in the results") although it is noticeable from studying PCC rulings that complainants who succeed are frequently represented by law firms. It does not

[24] *News of the World*, April 9, 2000, p.40.
[25] Annual Review, 2005, Press Complaints Commission, p.10.

tell complainants in terms that they will have no right to confront editors or journalists, or that the "investigation" will be no more than an exchange of letters. In these "*Frequently Asked Questions*" on its website[26] it goes to extravagant lengths to defend its practice of refusing to investigate even the most blatant ethical breaches of its code unless the complaint is from the victim. It even asserts, bizarrely, that "the commission could arguably breach someone's privacy under the Human Rights Act by insisting on investigating an article about them without their consent". It claims that a critical adjudication "is a far greater deterrent than a fine", a proposition that defies commonsense and which is developed by misstating the position in France and in the European Court of Human Rights. This is all tendentious proselytising, which only serves to reduce the PCC's authority. In a section headed "Philosophical Advice" it answers the question "**Why should I use the PCC rather than the courts**?" with four reasons:

1. *It is absolutely free.* (And can be absolutely ineffective. It does not explain that court actions can sometimes be brought on legal aid and often with conditional fee agreements).
2. *It is fast—on average seven weeks Legal actions can last several years.* (They can also last a matter of days or weeks, if the newspaper sensibly settles, immediately, an indefensible case.)
3. *There is no risk.* (And no gain. No damages, no compensation, no injunction. And there is the risk that the newspaper will hold you up to ridicule. Or else may deduce, from the fact that you have gone to the PCC rather than to court, that you lack the resolve or the evidence to fight, or have something to hide, and so they will continue to harass you.)
4. *It is private. A court action will, in most circumstances lead to full disclosure.* (Not so: claimants in breach of confidence/privacy actions may have their names withheld, as they may in a privacy adjudication. They will, however, be able to discover all relevant newspaper documents and confront the editor and journalist—advantages they will not have in the PCC paper process.)

The PCC does not need to make these bogus arguments, or hold itself out as a superior system to legal redress. Plainly, as the ECHR implied in *Peck's* case, it does not offer effective redress and it should not persist in pretending that it does. What it does offer is a conciliation service, and that (as the courts now recognise) is a valuable first step in resolving most disputes. Indeed, under the rules

[26] *www.pcc.org.uk/faqs/index.html*, accessed December 4, 2006.

of court for civil cases it is an essential first step, and in the early stages of any privacy claim against a newspaper it is likely that the court will invite the parties to try PCC conciliation before the action goes further. It offers this important service which resolves many minor claims and a few important cases which the claimant does not want to bring the court. But it is wrong and damaging for its own reputation for the PCC to keep running this campaign against the courts, in what may well be perceived as an effort to please its paymasters, the newspaper proprietors with an interest in avoiding actions for damages.

The Code of Practice

14-012 The PCC Code has emerged from a number of sources. Much of the language is adapted from the Calcutt Committee's draft, in turn influenced by a series of Press Council "Declarations of Principle" issued over the 36 years of its operation, developed and refined at times by major adjudications or reports. The PCC pays some attention to these precedents but it claims that the Code derives its influence from the fact that it is regularly reviewed by a group of senior editors on its Code Committee, which is chaired by Les Hinton, the widely respected executive chairman of News International Plc. The Code provisions are:

1. Accuracy

(i) The press must take care not to publish inaccurate, misleading or distorted information, including pictures.

(ii) A significant inaccuracy, misleading statement or distortion, it must be corrected promptly and with due prominence, and an apology published.

(iv) Newspapers, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.

(v) A newspaper or periodical must report fairly and accurately the outcome of an action for defamation to which it has been a party", unless an agreed statement states otherwise or an agreed statement is published.

These are "motherhood" provisions which need little elucidation. Most complaints are about inaccuracies, which are easily put right by prompt and prominent corrections. There is no definition of "due prominence": the PCC should insist upon a correction being carried with a prominence, in terms of reader impact, similar to that of the original publication. (Reader impact must be judged from the typeface, layout and wording of the two items.) The PCC does not have the investigative or forensic resources to decide whether a story is false, and should not be regarded as a tribunal for establishing the truth. It will depend on the newspaper to admit error, or else insist that the complainant establish falsity by producing documentary evidence. Otherwise, it maintains that "it is not the Commission's job to establish the facts of the matter when two parties dispute the accuracy of an article but to consider, under the Code, whether sufficient care has been taken by a newspaper not to publish inaccurate material".[27] This is *not* a rule against inaccuracy, but a rule that newspapers should think twice before publishing allegations they cannot prove. Journalists accused of "inventing" quotations will be expected to have kept their notebooks, but the PCC never insists that they be submitted to an ESDA test. Editors cannot rely on having given the complainant an opportunity to correct the story unless that has been a real and considered opportunity,[28] and in the case of some stories (such as sexual gossip) editors cannot rely on a refusal to comment as corroboration.[29]

The PCC will, however, conduct its own investigation into a 14-
complaint if the complainant is sufficiently important. When the Prime Minister and his wife alleged that *The Mail on Sunday* had breached the Code by a story about their daughter whom it alleged had jumped the queue to attend a new school, the PCC took pains to establish the facts. There had in fact been no preferential treatment for the Prime Minister's daughter, although some parents honestly believed the contrary: the paper should not have published their speculation in a manner which suggested it was well-founded.[30] This ruling was a valuable exercise in fact-finding which served to put the record straight; it is not a service vouchsafed to many others who complain of inaccuracy. But when complaints are made by Buckingham Palace, the PCC loyally accepts the Queen's evidence:

> The Queen complained that her wealth had been greatly exaggerated by *Business Age* magazine, which had placed her at the top of its "RICH 500". The magazine explained that it had included not only her racehorses and shareholdings, worth £158 million, but some art treasures, jewellery and palaces which brought her assets up to £2.2 billion. The magazine added, truthfully, that its estimate of what she owned in her own right "was a matter of legal argument" and that "royal retainers are willing to go to remarkable lengths to minimise estimates of the monarch's personal wealth". The lengths included a letter to the PCC by her Press Secretary, who complained that the Queen's personal income was "a private matter" and in any event it did not exceed £100 million: the magazine had failed to check with the Palace before publication. The magazine defended its estimate at length and requested an oral hearing to present expert legal and

[27] *Macleod v Sunday Mail*, Report No. 52, January 24, 2001.
[28] See *Bernie Grant M.P. v The Times* PCC Report No. 2, 1991, p.24 (message left on victim's answering machine inviting him to call the newspaper was not a sufficient check for accuracy).
[29] *Calthorpe v Sunday Express*, PCC Report No. 50, July 27, 2000.
[30] *Blair v The Mail on Sunday*, PCC Report No. 47, October 27, 1999.

accounting evidence and to question the royal estimates. This was refused: the PCC, in a decision conspicuous for its unfairness and partiality, found the magazine in breach of the Code because it had not reported sufficiently the basis for its valuation, and had "presented speculation as established fact". This was manifestly wrong, since the journal had made plain to readers that its valuation was open to legal dispute—a dispute which the PCC royally refused to entertain.[31]

The rule that newspapers must report the outcome of defamation actions to which they are a party is an unnecessary fetter both on editorial discretion and a newspaper's legal tactics in libel actions. When a paper settles, as many do, for "commercial" reasons (i.e. merely to avoid legal costs) there is no reason why they should report the outcome unless this is made a term of the settlement.[32] There is no reason to restrain a newspaper from attacking an adverse defamation verdict. The PCC in 2004 rejected a complaint from Kimberley Fortier (*Spectator* publisher and Blunkett *inamorata*) that her privacy had been invaded by photographs taken whilst she was walking along a street in Los Angeles. It made clear that it "does not generally consider that the publication of photographs of people in public places breached the Code. Exceptions might be made if there are particular security concerns, for instance, or in the rare circumstances where a photograph reveals something about an individual's health that is not in the public interest." It was prepared to uphold a complaint from Allegra Versace about photographs in a magazine which had illustrated something about the state of her health. The PCC describes these badly argued decisions as "commonsensical" but they provide little precedential guidance.

2. Opportunity to Reply

14–014 **A fair opportunity to reply to inaccuracies must be given to individuals or organisations when reasonably called for.**

This is not the fabled "right of reply" but a mere opportunity, limited to replies to factual inaccuracies. It is regrettable that the newspaper industry should fudge a principle of basic fairness, noncompliance with which has been a major issue of public dissatisfaction with the British press. Rule 2 marks a retreat from the Press Council's principle that a right of reasonable reply should be provided to any "attack" on an individual or organisation, and from the draft Calcutt code, which called for "a proportional and reasonable right to reply to *criticisms or alleged inaccuracies*" [our italics]. Rule 2 permits the editor to be the judge of what amounts to an

[31] *The Queen v Business Age* (1998) PCC Report No. 34, pp.5–8.

[32] See *Givenchy SA v Time Out*, Report No. 46, July 28, 1999, where the PCC acknowledges the inappropriateness of the rule by declining to censure *Time Out*.

"inaccuracy", and implies that it may be reasonable to refuse an opportunity to put right a published misstatement of fact. Editors should always offer to publish letters from persons severely criticised by way of comment or conjecture, or by factual statements that cannot be verified but that the complainant alleges to be untrue. That said, there are genuine difficulties in deciding whether a published reply is "reasonably called for". Press Council precedents have held that no right of reply arises where the attack is contained in a news report of a speech by a third party, or where the person seeking to reply has threatened or commenced a libel action against the newspaper, or where the reply submitted is overlong or contains defamatory attacks on the newspaper's employees, or where an opportunity to reply has already been afforded in the original story.[33]

3. Privacy

Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent. 14–

This key provision, given legal import in breach of confidence cases by s.12(4) of the Human Rights Act, begins with a statement of the right to privacy guaranteed by Art.8(1) of the ECHR. Any intrusion must be "justified"—but on what basis? The PCC adopts a different standard, which requires any infringement to be: (i) in accordance with law; (ii) pursuant to a legitimate aim; and (iii) necessary and proportionate to the interests of public safety, health or morality, the prevention of crime, or the rights of others in a democratic society. Under the Code, editors have an easier task: their infringements may be justified "in the public interest", defined (for the purposes of this and other sections of the Code) as *including* (i.e. not limited to):

(i) detecting or exposing crime or serious impropriety;
(ii) protecting public health and safety;
(iii) preventing the public from being misled by a statement or action of an individual or organisation.

The infringement of a child's privacy calls for an *exceptional public interest* justification.

The Code formulation of the privacy principle and the public interest defence (together with its associated rules relating to harassment, intrusion into grief and shock, hospitals and listening devices) are likely to feature in common law developments of privacy through the doctrine of breach of confidence.

[33] See Robertson, *People Against the Press*, pp.79–88 (above, fn.1).

14–016 It was because Earl and Countess Spencer had failed to sue tabloid newspapers for breach of confidence that the European Commission of Human Rights rejected their complaint that the United Kingdom insufficiently protected privacy:

> In 1995, the *News of the World* published a front page article, "DI'S SISTER IN BOOZE AND BULIMIA CLINIC", which contained details of family problems and illnesses illustrated with a telephoto picture of the applicant captioned "SO THIN: Victoria walks in the clinic grounds this week". The applicants complained to the PCC, which judged that the paper had breached s.3 (ii) of the Code (see below). The newspaper apologised (but only to the Countess) and published the adjudication. Nonetheless, the applicants complained to Strasbourg that they could not obtain any "effective remedy" in the United Kingdom. The European Commission noted that although newspapers were bound to print adjudications with due prominence "the PCC has no legal power to prevent publication of material, to enforce its ruling or to grant any legal remedy against the newspaper in favour of the victim". For those reasons the PCC could not be considered an "effective remedy", and the UK Government did not even attempt to argue that it was. The Spencers were wrong-suited, however, because they had failed to go to court to obtain one available remedy, namely an injunction and damages under the developing civil law of breach of confidence.[34]

Although the PCC claims in its advertising material that it offers an "effective remedy" for breaches of privacy, the *Spencer* case shows that neither the Government nor Strasbourg consider that this claim is true.

It is noteworthy that the code is confined to an individual's private life and offers no protection to individuals in their business capacity or to any public or private company, unless subject to unjustifiable subterfuge or harassment. The justification for invasion of privacy must be based on specific public interest: it cannot be contended that press revelation of adultery or homosexuality or run-of-the-mill heterosexual behaviour qualifies, unless the victims are hypocrites. There is alack of clarity in the phrase "serious impropriety": it did not appear in the Calcutt draft, but was inserted by newspaper interests as something that might, in addition to "crime", be properly exposed through invasion of privacy. The excuse of "preventing the public from being misled by some statement or action of that individual" permits the press to invade the privacy of public figures who have acted contrary to their professed beliefs, so stories about adulterous vicars, politicians, and the like are justified under this exception.

14–017 The PCC has consistently condemned "kiss and tell" (more accurately, "kiss and sell") stories about celebrities and soap stars which are a staple of the British tabloids. These breach Rule 3 of the Code because they reveal intimate personal details (what the "star" is like in bed) without any trace of public interest. Granada Television regularly takes up cudgels on behalf of *Coronation Street* actresses whose sexual performances are luridly related by well-paid former boyfriends: editors offer humbug defences (they were upholding the ex-lover's "right" to free speech; for actors, all publicity is good publicity) which are routinely held to fall short of any "public interest" defence.[35] The editors are usually censured, and continue to publish similar stories about other celebrities, most of whom are advised that it is pointless to complain to the PCC. The proven inability of the PCC to stamp out this genre of privacy invasion gives the lie to its claim that its Code is honoured by British editors.

Determinations under s.3(1) of the Code will depend on the circumstances of the particular case. The PCC is at heart a public relations operation, and in the hysterical aftermath of Diana's death (in a car crash at first wrongly attributed to menacing paparazzi) some amendments were made to the Code to assuage public anger:

> **3(ii) It is unacceptable to photograph individuals in private places without their consent.**
>
> **Note: Private places are public or private property where there is a reasonable expectation of privacy.**

What constitutes "a reasonable expectation of privacy" has been the subject of a number of conflicting decisions, some plainly influenced by the status of the complainant. What principle, for example, underlies the following two rulings?

> Prince William was photographed hiking on a public trail and fording a river at a public crossing, during his "gap year" in Chile. The pictures were published as part of a hagiography in *OK!* magazine. Buckingham Palace complained, and the PCC decided the Code was breached because "Prince William was on a trip to a place where he had a reasonable expectation of privacy". It additionally condemned *OK!* for "making the Prince's life more uncomfortable" and for "harassment"—although there was not the slightest evidence that the photographer had come near the Prince. But when the Palace calls, the PCC jumps, even to conclusions: "William was not in a place where photographers would normally have been and must, therefore, have been followed by foreign paparazzi".[36]
>
> Moors Murderer Ian Brady was photographed in the grounds of a hospital. He was in a police van, about to be driven to another hospital (the curtains had been "left open"—doubtless by pre-arrangement—so

[34] *Earl and Countess Spencer v UK* Application No. 28851/95, [1998] E.M.L.R. CD 105; and see *Spencers v News of the World*, PCC Report No.29 (1995), p.60.

[35] See *Pirie* case, above, and *Granada TV and Taylor v Sunday Sport*, PCC Report No. 51, October 25, 2000, Case 1.

[36] *HRH Prince William v OK! Magazine* PCC Report No.52, January 24, 2001, Decision No.3.

a picture could be taken). The PCC ruled that since "the picture was taken in an area of the hospital grounds which was open to the public" the complaint failed.[37]

14–018 The true distinction between these two decisions is not that between the wilderness of South America and the confines of an English mental hospital, it is between a much-loved Prince and a much-loathed child murderer. What weighs with the PCC is the nature of the person rather than the nature of the place. Thus the Aga Khan, a royal and a spiritual leader of millions, had a "reasonable expectation of privacy" whilst sunbathing on his luxury yacht at the height of a Mediterranean summer (No "Highness" can be expected to go below decks).[38]

Anna Ford, a mere BBC newsreader, had no such expectation when she and her companion were targeted by telephoto lens whilst sunbathing on their private hotel beach in Majorca.[39] Ms Ford could hardly have expected to be stalked by two paparazzi or that their sneak pictures would appear in colour in a national newspaper, prompting poison pen letters. When Ms Ford becomes Dame or Baroness, doubtless the PCC will uphold her complaints as it does for knighted pop stars: Sir Elton John's privacy was invaded by pictures of guests "relaxing" at his home in the South of France, even though the pictures were taken from a public footpath,[40] and Sir Paul McCartney was unaccountably held to have suffered a loss of privacy by being pictured in *Hello!* walking with his children by the banks of the Seine and eating lunch outside a café. (The publication of a further photograph, as he lit a candle inside Notre Dame Cathedral, was rightly found to be "deeply intrusive".)[41] What the PCC is attempting to do by this anti-paparazzi rule is to enforce a prohibition which at the time went beyond legal requirements. It does so inconsistently. Privacy can reasonably be expected in cemeteries, churches and changing rooms, but not whilst fording rivers or sitting in street-cafés or lounging in hotel lobbies.

Occasionally the PCC suggests that the *tone* of the picture might be relevant, although as a matter of logic the existence of a breach cannot depend on whether the result is unflattering (in law, this would go to damages, not liability). Sometimes a "public interest" defence is applied by association with the text (the Brady picture illustrated an article which *was* in the public interest, concerning his suicide attempt). Although the inside of a public servant's office is

[37] *Stewart-Brady v Liverpool Echo and The Mirror*, PCC Report No.49, April 26, 2000, Case No.10.
[38] *His Highness the Aga Khan v Daily Mail*, PCC Report No.46, p.10.
[39] *Anna Ford v Daily Mail and OK!*, PCC Report No.52, January 24, 2001, Case No.5. The High Court declined Ms Ford leave to review the decision: *R. v PCC Ex p. Anna Ford*, July 29, 2001, unreported.
[40] *Elton John v Daily Star*, PCC Report No.45, April 28, 1999, p.7.
[41] *Sir Paul McCartney v Hello*, PCC Report No.43, November 4, 1998, p.12.

protected, there is no reasonable expectation of privacy in a private club for sadomasochists—or anywhere else that undercover *News of the World* reporters might wish to frequent.[42]

4. Harassment

14

(i) Journalists must not engage in intimidation, harassment or persistent pursuit.

(ii) They must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; nor remain on their property once asked to leave and must not follow them.

(iii) Editors must ensure that these principles are observed by those working for them and must take care not to use non-compliant material from other sources.

These post-Diana amendments are directed at foreign and freelance paparazzi, whose activities they have not in any way curbed. Editors are repeatedly ticked off for purchasing snatched or long-lens photographs, but the menace of snappers in hot pursuit has only been stopped effectively in California (by a criminal law which has put several British photographers in jail) and in New York, where a tort action for damages brought by Jacqueline Onassis was held compatible with the First Amendment. The PCC Code fails to draw a sensible line between public figures who genuinely wish to protect their privacy and those who wish to protect it only after they have exhausted the prospect of favourable publicity. The advent of celebrities—Diana herself was one—who invade their own (or their husband's) privacy and complain if they dislike the results (or were found out) make such distinctions important. One particularly unpleasant form of indirect harassment, namely the publication of addresses of a person against whom readers might seek reprisals, has not been consistently censured. The *Evening Standard* was condemned as irresponsible for publishing the address of a well-known Englishman's holiday home in Wales in an article about burning down such houses.[43] But the *New Nation* was not censured when it published the addresses of the suspects for the Stephen Lawrence murder, in a column suggesting that readers might like to visit them "to enhance their facial features".[44] Is the inconsistency explained by the fact that the Lawrence suspects are violent racists, while the English country gentleman was a former chairman of the Press Council? His case provides the correct precedent, and in 2005 security concerns were sufficient for the PCC to condemn publication of a picture of the home of J.K. Rowling.

[42] *Desyre Foundation v News of the World*, PCC Report No.48, January 26, 2000, p.11.
[43] *Sir Louis Blom-Cooper v The Evening Standard*, PCC Report No.7 (1992).
[44] *Norris et al v New Nation*, PCC Report No.45, April 28, 1999, pp.16–17.

5. Intrusion into grief or shock

14-020 **In cases involving grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. This should not be restrict the right to report legal proceedings.**

Clause 5 waters down a key clause in the Calcutt draft, which expressed the view that the press should not intrude unsolicited into personal grief or shock, especially after accidents and tragedies, unless justified by exposure of crime or anti-social behaviour or to protect public health and safety. Quite plainly, the press is not, as an industry, prepared to hold its hand on these occasions, save to offer "sympathy and discretion" to the newly breaved it continues to besiege in efforts to obtain tear-jerking "human interest" stories. This is an area where the Press Council was notably ineffective in curbing media misbehaviour. Professor Harry Bedson's suicide was partly attributed by the Coroner to press harassment after an outbreak of smallpox in his Birmingham University Department. The Council declared that people under stress as a result of bereavement or involvement in a public crisis should not be put under pressure by the press.[45] In 1983 it was driven to conclude that both Peter Sutcliffe's wife and the relatives of his victims were harassed by the media "ferociously and callously".[46] Yet in 1989 it had once again to condemn many newspapers for callous and intrusive behaviour in reporting the Hillsborough tragedy. The PCC, "enforcing" the weasel words of cl.5, has had no more success in mitigating the distress press inquiries cause after major tragedies. Calcutt's recommendation was that editors should be held responsible for unjustifiable decisions to dispatch reporters in the first place; cl.5 is drafted in a way that assumes they will dispatch reporters, and will attract only vicarious criticism if the reporters they dispatch act insensitively.

The PCC has repeatedly defended the right of journalists to "doorstep" families in crisis, especially when their children are missing, presumed dead. Censure is reserved for those occasions when an "insensitive" reporter actually breaks news of the death to family and friends,[47] or harasses them for interviews.[48] A more difficult problem is encountered over editorial decisions to publish close-up pictures of victims of rail and car crashes: here the complaints of shocked relatives tend to be brushed aside on the ground that the Code does not cover tasteless or offensive photographs, although this will not have been the point of the complaint.[49]

[45] Press Council, *People Under Pressure*, 1980.
[46] Press Council, *Press Conduct in the Sutcliffe Case*, Ch.18, para.22.
[47] As in *Mckeown v Evening Chronicle*, PCC Report No.40, January 28, 1998.
[48] *Ajayi v New Nation*, PCC Report No.52, January 24, 2001, Case 7.
[49] See *Telford v Lancaster Guardian*, PCC Report No. 50, July 26, 2000, Case 7; *Salisbury v Lancaster Evening Post*, PCC Report No. 51, October 25, 2000, Case 7.

A public interest defence will normally succeed where the photograph makes a political point, e.g. about the inadequacies of the NHS, even though it identifies the sick or dying and invades the privacy of hospital patients.[50] One newspaper avoided censure for publishing pictures of a mentally ill man jumping off a railway bridge situated directly opposite the editor's office, from where the photographs were taken. This had been a tragic but public news event, gathering a crowd and lasting several hours, and the distress to the suicide's family was not covered by cl.5 of the Code.

8. Hospitals

14 **(i) Journalists must identify themselves and obtain permission from a responsible executive and obtain permission before entering non-public areas of hospitals or similar institutions to pursue enquiries.**

(ii) The restrictions on intruding into privacy are particularly relevant to enquires about individuals in hospitals or similar institutions.

Unless, that is, the inquiries are into a Moors murderer, Denis Nielson or any other "psycho" (in tabloid speak), in which case the PCC will readily find a public interest excuse (e.g. to question the appropriateness of his treatment or the possibility of his public release).[51] The ease with which hospitals may be infiltrated came to public attention during the last days of television personality Russell Harty, when reporters in white coats and wearing stethoscopes obtained access to his medical notes and the occupants of other beds in his terminal ward were besieged with bouquets of flowers in which requests for an update on his condition were hidden.[52] Clause 9 was adopted following the outrageous behaviour of a *Sunday Sport* journalist and photographer who sneaked into actor Gorden Kaye's hospital room to "interview" him as he was coming round from brain surgery—behaviour which led the Court of Appeal to call for a statutory privacy law Decisions of this kind will need reconsideration after the 2004 decision of the European Court in *Peck v UK*, which forbade the broadcasting of pictures of an attempted suicide. Although the privacy interest there protected was that of the survivor, Art.8 covers family privacy and may in such cases extend to grieving relatives.

10. Clandestine Devices and Subterfuge

14 **1. The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls,**

[50] *Harrison v Daily Mail*, PCC Report No. 46, July 28, 1999, pp.15.
[51] See *Brown v The Sun*, PCC Report No. 47, October 27, 1999, pp.20.
[52] The bouquet delivered to the bedside with a calling card message to contact a reporter remains a common subterfuge: see *Taylor v Sunday Mercury*, PCC Report No.49, April 26, 2000, Case 13.

messages or emails; or by the unauthorised removal of documents or photographs

2. **Engaging in misrepresentation or subterfuge can generally be justified only in the public interest and then only when the material cannot be obtained by other means.**

This rule overlaps with the criminal law, as Clive Goodman, the *News of the World's* "Royal Reporter" discovered to his cost when he was jailed for three months in 2007. He pleaded guilty to offences related to intercepting messages from the royal princes, and his co-conspirator had intercepted messages left for a number of other public figures. It was notable how widespread this practice obviously was, and the PCC's regular claim to have deterred it became laughable. In 2003, in upholding a complaint from Peter Foster that his private telephone conversations had been intercepted and published, the Commission had ruled that "eavesdropping into private telephone conversations is one of the most serious forms of physical intrusions into privacy . . . the Commission expects a very strong public interest justification".[53] The Clive Goodman case demonstrated the utter triviality of the information Goodwin was prepared to breach this rule in order to obtain.

Journalists who remove documents or photographs without the consent of the owner run the risk of conviction for theft, unless they can prove an intention to return them. Subterfuge is a common and sometimes necessary technique. When one of the social workers criticised for over-zealousness in the Cleveland child abuse inquiry set up a practice to counsel adult victims, a *Daily Mail* reporter pretended to be such a victim in order to gather information about her methods. This subterfuge was approved by the PCC in the interests of "protecting public health", although the paper had no evidence (and failed to obtain any) that the counselling service was unprofessional.[54] On this basis, journalists could use subterfuge to test the advice of any professional person, whether or not it was controversial. The distinguished psychiatrist Dr Pamela Connolly has found undercover tabloid reporters in her Los Angeles consulting rooms, complaining (perhaps accurately) of their own sexual dysfunction, in the hope of writing about their treatment at the hands of the wife of Billy Connolly. The PCC has failed to make clear that this kind of behaviour is unacceptable.

14–023 Subterfuge is, in fact, becoming an increasingly productive tabloid technique. In 2001 the PCC somewhat unnecessarily censured *News of the World* when two of its journalists "crashed" a party for the cast of *Emmerdale* at a private hotel, carrying covert video equipment, even though the journalists left before they were spotted and no story was published. But no censure—only news attention and

[53] PCC Review of the Year, 2003, p.7.
[54] *Sue Richardson v Mail on Sunday*, PCC Report No.2 (1991), p.15.

increased circulation—followed when a reporter dressed as an Arab engaged in an expensive charade to hoodwink Sophie Rhys-Jones and her business partner into offering her royal connections for the promise of large sums of money. Whether this was really in the public interest the PCC declined to investigate: it had in any event been hopelessly compromised by Lord Wakeham's attempts to assist the palace before the story was published.

The same reporter was criticised by several judges in 2006 when cases in which he was a prosecution witness and which were largely based on his "investigations" by way of subterfuge into alleged criminal operations, collapsed. Despite the waste of public money and the the allegations made against *News of the World* in court, the PCC stuck its head in the sand and declined to investigate. George Galloway MP took more robust action after this journalist had tried to entrap him: he put Mr Mahmood's picture on his website so that other potential victims might be forewarned. The journalist sued, but the court declined to order Galloway to remove the photograph.

6. Children

(i) Young people should be free to complete their time at 14 school without unnecessary intrusion.

(ii) A child under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.

(iii) Pupils must not be approached or photographed while at school without the permission of the school authorities.

(iv) There must be no payment to minors for material involving the welfare of children nor payment to parents or guardians for material about their children or wards unless it is clearly in the child's interest.

(v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

Although this section of the code notionally applies to infants, the PCC sensibly permits stories which relate more to the public life of the infant's parents (such as the prime ministerial adviser who left his eight-month-old baby in the care of an attendant at the Groucho Club[55]). It censored the *Daily Sport* for publishing a photograph of the Prime Minister's son kissing a dance partner at a private ball, although what was really objectionable was the dishonest caption ("Horny Blair") rather than the photo, which was not in fact a breach of cl.6(ii) since dancing is hardly "a subject involving the

[55] *Holm v Mail on Sunday*, PCC Report No.51, October 25, 2000, Case 3.

welfare of the child".[56] Interestingly, the photographs in this case were hawked around national newspapers before they found a buyer in the *Daily Sport*: an indication that the mainstream press will sometimes exercise a restraint over and above code requirements, at least towards the children of famous people they like (or, alternatively, fear). However, when the PCC condemned *The People* for publishing a covert picture of the Duke of York's baby daughter frolicking naked in the garden, the paper republished the picture alongside a picture of the naked Duke of York, and invited readers to participate in a telephone poll over whether either or both pictures were offensive.[57]

A major part of the PCC's work involves protection of the Royal princes. This is the only subject on which it is prepared to monitor press coverage: its Annual Review has a special section entitled *The Royal Princes* (more recently *Prince William—Life after School*) and it has from time to time, unbidden, issued long statements instructing the media on how to behave ("editors should continue to err on the side of caution . . . it is far better that matters proceed by agreement and consent between editors and the Palace"[58]). Complaints by Buckingham Palace are immediately taken up with editors and with their proprietors, and are quickly resolved to the Palace's satisfaction. Lord Wakeham would act, in effect, as the royal press agent, brokering photo opportunities (e.g. William's "coming out" at the PCC's 10th anniversary party) and mediating between tabloid editors and the Palace to ensure a coverage which burnishes their image and partly satisfies the demand for royal gossip. This lickspittle tradition has been less in evidence since Lord Wakeham's departure. The royal princes are now old enough to look after themselves.

7. Children in Sex Cases

14–025

1. **The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.**
2. **In any press report of a case involving a sexual offence against a child**
   - i. **The child must not be identified**
   - ii. **The adult may be identified;**
   - iii. **The word "incest" must not be used where a child victim might be identified;**
   - iv. **Care must be taken that nothing in the report implies the relationship between the accused and the child.**

[56] *Blair v Daily Sport*, PCC Report No.79, April 26, 2000, Case 1.
[57] PCC Report No.1 (1991), p.16.
[58] Statement on Reporting the Royal Princes, PCC Report No.46, July 28, 1999.

These clauses are well intentioned, although they enjoin editors to show more restraint than is required by an exceedingly complex and comprehensive law governing court reporting. (See Ch.8, *Reporting the Courts*. The Code usefully summarises the legal principles, although in general terms they do not account for exceptions: child witnesses can sometimes be named, for example, and it is permissible to name the child victim of a sex attack who has died in consequence of it.)[59] The word "incest" may not be used if a parent is identified as the offender. The main problem is "jigsaw identification", where the anonymous child will be readily identified if the defendant's name and the relationship is given or bracketed with the word "incest". The present convention—to give the defendant's name but omit reference to "incest"—is a sensible compromise which gives correct priority to naming the defendant, at the cost of some obfuscation about the crime. The effect of compliance with cl.7 may be to protect, undeservedly, adult offenders who are related to the child, and whose name might have to be suppressed in order to avoid the child's identification. In such cases, at least if the law permits, the code may be breached on public interest grounds, although it emphasises that:

> **In cases involving children under 16 editors must demonstrate an exceptional public interest to override the normally paramount interests of the child.**

The laws which restrict court reporting are elaborate and under constant review (i.e. extension) by Parliament: the PCC should be cautious about censuring editors for publications which the law allows. Ethical sensitivity harks back to a notorious case in 1986 when the *Sun* published, over three full columns on its front page, a picture of the victim of a rape at an Ealing vicarage, taken as she was leaving her church the following Sunday. The victim's family told the Press Council that the thin black line masking her eyes still left no doubt of her identity and the *Sun*'s coverage had been deeply distressing. The Council condemned the newspaper for taking and publishing the photograph: "Both were insensitive and wholly unwarranted intrusions into privacy at a time of deep distress for the subject and neither served any public interest." The *Sun* showed no remorse. Its managing editor told the Council, with more than the usual display of humbug, that the newspaper had a duty to present rape as sordid crime and the picture was published to highlight the victim's "ordinary, girl-next-door qualities".[60] Public outrage at the newspaper's conduct produced a law that now prohibits the media from publishing any picture of an alleged rape victim from the moment a complaint has been made, and this prohibition lasts for

[59] See *Re S* [2005] 1 A.C. 593.
[60] Press Council, *The Press and the People*, 1987, p.241.

her lifetime—even if the complaint is not pursued or the man complained against is acquitted.[61]

Chequebook journalism

14–026 Press payments to criminals, their associates and their relatives have long been a feature of the coverage of sensational trials. In the days before legal aid was routinely granted to defendants charged with murder, newspapers hired fashionable Q.C.s to defend accused persons facing the death sentence, in return for "exclusives" from them and their about-to-be-bereaved families. The practice of paying "blood money" in any form for such stories was widely condemned in the aftermath of the "Yorkshire Ripper" prosecution, and the Press Council forbade the practice in a detailed declaration after its inquiries revealed a host of unedifying offers of money by editors of national newspapers to friends and relatives of Peter Sutcliffe. Many years later, the same vice of payments to witnesses threatened to undermine the prosecution case against Rosemary West, who collaborated with her husband in committing perverted murders. In 1979, Liberal leader Jeremy Thorpe was acquitted of conspiracy to murder because of the behaviour of the *Sunday Telegraph* in suborning the main witness with a payment of £25,000 and a promise of a further post-trial payment of £25,000 if his evidence secured Thorpe's conviction. Twenty years later, the *News of the World* bore a heavy responsibility for the acquittal of Gary Glitter on indecent assault charges by a similar "jackpot on conviction" contract. The trial judge told the jury:

> "Here is a witness who first made public her allegations of sex abuse in return for the payment of £10,000 and who stands to make another £25,000 if you convict the defendant on any of the charges. That is a clearly reprehensible state of affairs. It is not illegal, but it is greatly to be deprecated."[62]

Had such conditional offers been outlawed after the *Thorpe* trial, the *News of the World* editor might have been jailed rather than slapped on the wrist by the PCC. The issue came to a head after payments were revealed to witnesses in the course of the trial of school teacher Amy Gehring in 2002, and in consequence the Lord Chancellor's department announced that it would introduce a new criminal law to cover the matter. The PCC leapt into action and persuaded the Lord Chancellor that by strengthening the wording of its code, a more satisfactory position could be reached. In consequence, cl.15 now reads:

[61] Criminal Justice Act 1988, s.158, supplemented by the Sexual Offences Amendment Act 1992 and now consolidated in the Sexual Offences Act 2000. See p.436.

[62] Butterfield J., November 1999. See *Taylor v News of the World* PCC Report No.48, January 26, 2000, Case 1.

15. Witness payments in Criminal Trials

14 **i. No payment or offer of payment to a witness—or any person who may reasonably be expected to be called as a witness—should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981. This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court, or, in the event of a not guilty plea, the court has announced its verdict.**

ii. Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.

iii. Any payment or offer of payment made to a person later cited to give evidence in criminal proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

These provisions are a great improvement upon the wishy-washy previous clause. They finally put an end to the practice which allowed Jeremy Thorpe to escape justice, after the *Daily Telegraph* had offered the chief witness "double your money" if he could get Thorpe convicted. The Code does not prevent newspapers from making arrangements to interview witnesses after the conclusion of the trial, so long as payment is discussed at that later stage. There are difficulties, however, in deciding whether a person "may reasonably be expected to be called as a witness".

It is impossible to foretell, in the days after arrest, how the prosecution and defence cases are likely to develop. In the Sutcliffe case the Press Council rejected the excuse that police had informed editors that Sutcliffe had confessed and that there was unlikely to be a contested trial: it pointed out that experienced editors should be aware that defendants frequently repudiate confessions made in police custody. Clause 15(1) does not make what should in practice be a crucial distinction between a witness to disputed facts (whose testimony must be kept free from any influence) and a witness to matters of formal record or to character. The interests of justice served by a rule against paying witnesses do not apply with very great force to witnesses of the latter kind.

The Code does not apply to witnesses who are on the run, or whom journalists discover themselves. One of the most notable

pieces of recent investigative journalism was the tracing and interviewing of a potential witness in a drugs trial by David May of the *Sunday Times*, which led to the exposure of police corruption and the abandonment of the prosecution.[63] Such "exceptional circumstances" may justify payments to witnesses for their time or their future protection, although they should never be made conditional on the story standing up in court. If a paper pays a witness for an interview it cannot publish (for contempt reasons) until after the trial, but the witness's credibility is destroyed at the trial, then it must accept the fact that its story is worthless. With witnesses, a "success fee" must never be contemplated.

14–028 It must be remembered that these code provisions apply only to *paying* witnesses—they do not preclude interviews with witnesses who are prepared to volunteer information. Such interviews can be very important, both as background to the trial and, just possibly, to exposing a perversion of justice if the witness in his subsequent testimony changes his story. Although the rule is cast in absolute terms, there should be no problem with paying witnesses their reasonable travel expenses and accommodating them in a 3 star or 4 star hotel.

In its report on press conduct in the "Yorkshire Ripper" case the Press Council inveighed against payments of "blood money" to criminals and associates: "the practice is particularly abhorrent where the crime is one of violence and payment involves callous disregard for the feelings of the families".[64] This declaration was issued in the context of public outrage over the behaviour of the press in offering enormous sums of money to Mrs Sonia Sutcliffe (who refused them) for no other reason than that she was the wife of a notorious mass murderer. The Press Council prohibition is now embodied in cl.16 (ii) of the PCC code:

16. Payment to Criminals

14–029
- **i. Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates—who may include family, friends and colleagues.**
- **ii. Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.**

Payment or offers of payment for stories, pictures or information, which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates—who may include family, friends and colleagues. This provision attracted attention in 2006, when the Lord Chancellor's department threatened to introduce a law which would prohibit criminals from ever profiting from books which dealt with crime. The rule stems from the Press Council's concern about "blood money" payments which were made to obtain stories that would sell on the back of crime. (They were not necessarily glorifying the crime so much as explaining what the criminal was like in bed.) David Shayler's payment from *The Mail on Sunday* of £40,000 was sought by the crown after his conviction although by that time it had been long gone, expended on travel and legal fees that the newspaper had reasonably anticipated at the time it entered into negotiations with him. Given the risk that Shayler was taking and the expense of his whistle-blowing effort, the large amount was, exceptionally, justifiable. In 1987 the *News of the World* was censured for blood-money payments to girlfriends of major criminals. The newspaper accepted that it had made payments (although it refused to say how much it paid) to the girlfriend of convicted murderer Jeremy Bamford in return for the right to publish a prurient "world exclusive" about their sex lives. Although the girlfriend had been innocent—she had informed on and given evidence against him—the story was nonetheless "sold on the back of crime" and had no public interest justification. Another payment, to an Irish barmaid who had been innocently duped by terrorist Nizar Hindawi into carrying a bomb on board an Israeli airliner, elicited a story that was plainly of public interest, but the Council nonetheless held that this was insufficiently "overriding" to justify the payment. It is difficult to see how this woman (who had testified against Hindawi) could meaningfully be regarded as his "associate"—she was intended to be amongst his many victims when the jumbo jet exploded over London. Her story was of enormous public interest, and had been sold to newspapers in many other countries: a strict compliance with the Council's declaration would have denied the British public an insight into a dastardly crime that would have caused many British casualties.[65]

The PCC has censured papers which pay murderers' girlfriends for "exclusives" on their sex lives: the "public interest" is not engaged and such brazenness only exacerbates the grief of relatives.[66] It condemned an interview in *Hello!* conducted from prison with fraudsman Darius Guppy which glorified his crimes,[67] and it condemned *The Daily Telegraph* for paying Jonathan Aitken's daughter for a soppy mitigation of his perjury ("My Father is Paying Too Heavy a Price").[68] Inconsistently, however, it declined to censure the

[63] See *R. v Ameer and Lucas* [1977] Crim.L.R. 104.
[64] Press Council, *Press Conduct in the Sutcliffe Case*, Ch.15, paras 5–10.
[65] Press Council, *The Press and the People*, p.210.
[66] See *Collier v Sunday Sport*, PCC Report No. 51, October 25, 2000, Case 5.
[67] *Huins v Hello!*, PCC Report, August–September 1993.
[68] *Barlow v Daily Telegraph*, PCC Report No. 47, October 27, 1999, p.10.

Sunday Times for paying to serialise Aitken's *mea culpa*, *Pride and Perjury*.[69] In a confused adjudication, it said it was "necessary" to pay the publishers for serialisation rights (but that payment would obviously benefit Aitken, the convicted criminal). It said the extracts were in the public interest because Aitken had held high ministerial office and "the articles went some way to explaining for the first time why he had embarked on the strategy which in the end exposed his lies". Darius Guppy did the same explaining to *Hello!*—had he held ministerial office, doubtless the magazine would have been exculpated.

14–030 The PCC ruling in Aitken deprives cl.16 of much significance in respect to payments to celebrated convicts, or those whose convictions are in any doubt. The "public interest" is invariably engaged, so the PCC thinks, by protestations of innocence or by any "revelation of new material". Thus Deborah Parry and Lucille MacLaughlan,[70] convicted of killing a fellow nurse in Saudi Arabia, and nanny Louise Woodward,[71] convicted of manslaughter in Boston, were permitted to profit from complaining about justice in other countries. Had all papers abided by the letter of cl.16 (ii), these defendants would doubtless have told their stories, free of charge, at a press conference: money was not "necessary" to elicit their eager self-justifications. The PCC pretends ignorance of the obvious—these payments are not made to obtain information, but to ensure exclusivity.

But the issue came back into the sights of the government's political radar in 2003, after the *Daily Mirror* paid the farmer Tony Martin, jailed for murdering a burglar, and the *Guardian* paid an ex-prisoner for his stories of sharing a cell with Jeffrey Archer. The PCC was initially relaxed, pointing out that it had always taken a liberal view of the serialisation of books (not surprisingly, since its director Sir Christopher Mayer had sold the serialisation rights to his memoirs for a handsome sum) and that it would not censure a newspaper if it had made a payment to charity to secure a story from a famous criminal. It was only prepared to draw an a priori line in cases where the memoir glorified the crime, but this is a difficult test to apply—there may be remorse (at least at having been caught) but the description of the thrill of the chase and the excitement of apparently pulling off the heist is difficult to downplay. The matter reached a head in 2006, when a US book publisher, owned by Rupert Murdoch, paid O.J. Simpson to provide a "hypothetical" account of how he would have murdered his wife if, as everyone (except the jury) believed, he had in fact murdered his wife. This sham was plainly devised so that he could make a large sum of money out of what readers would think was a blow-by-blow description of the actual murder. There was nationwide outrage and not

[69] *Bradley v The Sunday Times*, PCC Report No. 50, July 26, 2000, Case 6.
[70] PCC Report No. 43 (1998) pp.5–9.
[71] *Bright v Daily Mail*, PCC Report No. 44, January 27, 1999, pp.12–17.

even the First Amendment came to Murdoch's assistance: he was forced to abandon the project (doubtless after paying Simpson a "kill fee"). In Britain, the government has always perceived a law against criminals earning royalties as a popular measure, and the Lord Chancellor's department has drafted a provision in the usual vague and wide terms, which they threaten to introduce in an appropriate criminal justice bill.

The PCC rightly rejected some complaints against *The Times* for **14–** serialising *Crimes Unheard*, Gita Sereny's important book about child-killer Mary Bell.[72] An absolute rule against press payments to criminals and associates would deter criminals from revealing incriminating associations with powerful people. In such cases shady characters with a public interest story to tell are often in genuine need of some remuneration for telling it. If they are prepared to go public with revelations about policemen or employers or persons in authority, they need financial protection against reprisals. The real question is whether the importance of the story and the exigencies of its author justify the size of the payment, rather than whether payment should be made at all. So long as newspapers continue to refuse to divulge the size of their payments to informants, the PCC will be unable to decide this question. It should be noted that criminals who are paid money in return for recounting details of an offence for which they have yet to be convicted may have the payment seized, on the theory that it is part of the profit they have made from the offence. Section 71 of the Criminal Justice Act 1988 gives the sentencing court wide powers to confiscate property obtained "in connection with" an offence, and the High Court may make charging orders to secure the position until the verdict. These powers were used against Michael Randle and Pat Pottle, authors of *The Blake Escape: How We Freed George Blake and Why*, when a High Court judge directed that their homes be charged to the Crown for an amount equivalent to the royalties they had earned on their book. They argued that the royalties had been earned by recounting an experience rather than in connection with a crime committed 25 years before, but the order was allowed to stand until it was discharged on their acquittal.[73] Where an advance and royalties were due to George Blake from the publisher of his own book, however, the courts decided it should be held in trust for the Government, on account of the traitor's breach of the confidence he owed to his employer MI6.

In 2001 *The Sun* indirectly made large payments to Ronald Biggs and another "great" train robber as part of its operation to return him from Brazil to spend his dying days at the taxpayer's expense in a British prison. The PCC fell for the *Sun's* defence—derided by its rivals—that those payments to criminals were necessary in the public

[72] Report No.43 (1999), p.9.
[73] *Re Randle and Pottle, The Independent*, March 26, 1991, Webster J.

interest,[74] although they were more in the interests of Biggs. The story they elicited about his farewell to his grandchildren—"Ronnie sobs as tot gets a final cuddle"—may have interested the Brazilian public, but left British readers unamused (*The Sun* dropped in circulation). The Code has no provision relating to payments to non-criminal informants, jilted lovers and other familiar sources of kiss-and-tell stories. There is often no public interest justification for such tales, and on occasion the tabloid press has paid large sums of money to drug addicts and prostitutes in order to tell them. It is ironic that the people who would be prosecuted for the serious crime of blackmail if they threatened their victim with public exposure unless they were paid a sum of money can now obtain that sum quite legally by taking their story direct to a newspaper. It has been suggested that newspapers that purchase sensational stories of this sort should be required to disclose the amount of the payment on publication: this would serve to alert their readers to the possibility that the sensation in the story may be related to the sensation of receiving a large amount of money for telling it.

13. Discrimination

14–032 **(i) The press must avoid prejudicial or pejorative reference to a person's race, colour, religion, sex or sexual orientation or to any physical or mental illness or disability,**

(ii) It must avoid publishing details of a person's race, colour, religion, gender, sexual orientation, physical or mental illness or disability unless these are genuinely relevant to the story.

These simple provisions are difficult to apply in practice. In 1987 the editor of the *Daily Telegraph*, Max Hastings, announced his newspaper's intention to defy Press Council censure for describing convicted criminals as "black", however irrelevant this was to their offence, on the grounds that he could communicate the same information by publishing their photograph.[75] However, editors have over the years become more sensitive to allegations about racist reporting.

The rule that the press should avoid pejorative or prejudicial language in relation to classes of citizens who often suffer from discrimination has had some effect in moderating press polemics, especially against sexual minorities. In 2005 a change was made to this section of the code to add "gender" to the other categories covered by the discrimination clause. This was to mark the new legal status of the transgender community which had been affected by the introduction of the Gender Recognition Act. This is a good example of the valuable role a voluntary standards body can play, in discouraging the use of "socially unacceptable language" that denigrates groups on the basis of race or gender or sexual preference, by marking public distaste for language that stigmatises whole classes of citizens. In 1991 the PCC censured the *Daily Star* for encouraging the persecution of homosexuals in a lead story about "Poofters on Parade" in the army, which attacked gay rights groups as "preachers of the filth".[76] The editor of the *Star*, a homophobe named Brian Hitchen, continued the vilification (which was based on falsely stated facts) in his own column, but that was not censured—he was an editor member of the PCC at the time.

The PCC has shrunk from trying to abate the jingoistic fervour whipped up by tabloids before Euro-finals, although this has been said to encourage football hooliganism. In 1996 it declined to censure violently anti-German headlines, of the "Let's Blitz Fritz" and "Bring on the Krauts" variety, on the specious reasoning that cl.13 prohibits racist treatment of individuals but not of national groups.[77] In 1998 it repeated that "nationalist fervour and jingoism" was inevitable before international sporting events. Thus it found emotionally acceptable the *Daily Star*'s proposition that "as we proved at Agincourt and Waterloo, a good kicking on their gallic derrières is the only language the greedy frogs understand".[78]

Financial journalism

The Press Council, in an effort to ward off requirements for financial journalists to register as "professional advisers" like other share tipsters, produced a code on this subject, beginning with the platitude "They should not do a deal of which they would be ashamed if their readers knew." Clause 14 spells out three basic rules: 14–0

14 Financial journalism

(i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.

(ii) They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest, without disclosing the interest to the editor or financial editor.

(iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they

[74] See "Sun cleared over Biggs", *Guardian*, July 4, 2001, p.6.
[75] Press Council, *The Press and the People*, p.146.
[76] PCC Report No.2, fn.16 above, p.9.
[77] PCC Report No.35 (1996), pp.22–24.
[78] *Waller v Daily Star*, PCC Report No. 42, July 29, 1998, p.9.

have written recently or about which they intend to write in the near future.

14–034 These rules, in fact, reflect the law relating to "insider dealings", which financial journalists should always bear in mind. Some newspapers insist on a much more rigid code, which requires that their financial journalists should not own shares or securities at all. Other newspapers, however, have connived for many years at share dealing by their tipsters, who sometimes tip off their editors. An insider-dealing scandal engulfed *The Daily Mirror* in 2000 when it emerged that the writers of its "City Slicker" column had been dealing extensively in the shares they tipped: they were dismissed for gross misconduct by the management and later prosecuted. But they claimed to have passed on advance information about their next "tip of the day" to both the editor Piers Morgan and the deputy editor, who were proved to have dealt at the time in these very shares, although they denied the allegations that they had done so as a result of a tip. The PCC tried to restore public confidence with an "investigation": a pathetic affair in which it made no attempt to cross-examine the editor over his dealings in shares, or to discover whether the journalist's allegations were true or false. ("The Commission does not find it necessary to choose between the conflicting versions.") The PCC condemned the two journalists (who had admitted misbehaviour and been dismissed) and made no finding against the editor other than that he had "failed to take sufficient care" to supervise them.[79] The incompetence and inefficiency of its investigation was exposed when the men were put on trial, and evidence emerged that the PCC had not discovered at the time of its enquiry. The scandal—and the PCC's inability to a proper inquiry—led to a proposal to bring business and city journalists within the statutory regulation of the Financial Services Authority.

Confidential sources

14–035 Clause 14 of the Code of Practice reads simply:

> **Journalists have a moral obligation to protect confidential sources of information.**

Although the Code is binding only on editors, this provision may be useful to journalists who seek editorial support to defy court orders requiring disclosure. An editor who disciplined or dismissed a journalist for refusing to disclose a source, even in disobedience to a court order, would thus be deserving of PCC censure.

Does the PCC work?

14–036 The PCC is a public relations exercise. It was established by newspaper interests as a means of convincing politicians and opinion formers that self-regulation can guarantee privacy and rights of reply

[79] PCC Report No. 50, July 26, 2000, pp.5–11 (*The Mirror*).

better than statutory provisions. The Press Council, established to serve the same purpose, was abandoned when it lost public confidence and had its pretensions to both discipline and defend the press derided by Calcutt. If the PCC suffers the same fate, the statutory tribunal recommended by Calcutt waits in the Westminster wings, as does the draft statute prepared by the Law Commission to enable victims of media infringement of privacy to recover damages. It has been the danger apprehended from these developments which spurred proprietors and editors to co-operate with the PCC through its first decade, obeying its dictates over coverage of the Royal princes and publishing its adjudications without complaint (although also without prominence). The Code continues to be breached as often as ever, but few victims complain (since they can achieve nothing) and the PCC does not accept complaints from unaffected parties or do any monitoring itself (except to keep an eye on coverage of the Royal Family). With the PCC as its fig leaf, the newspaper industry has used its considerable political clout to scupper efforts under both Tory and Labour Governments to introduce privacy laws: political leaders, desperate for tabloid support, praise "self-regulation" because that is a pre-condition for obtaining it. The wild card in this arrangement is the judiciary, armed with new powers under the Human Rights Act 1998. Unafraid of tabloid pressure, some judges are minded to develop a tort of privacy, or to extend breach of confidence to the same effect, and they may do so by using the PCC code provisions as the test (since they are drafted by editors, the press can hardly object if the courts take them seriously). Editors would then have fashioned a noose for their own necks, with (for example) the code prohibition on photographing people in places where they have "a reasonable expectation of privacy" being used as a basis not for another meaningless adjudication, but for an award of damages against the photographer and the newspaper, and an injunction on further publication.

The PCC was modelled on the Advertising Standards Authority, which had achieved considerable success in persuading Parliament that self-regulation worked better (and more cheaply) than statutory regulation of advertising content. However, the analogy falters:

- The ASA works because its rulings are backed by a severe sanction (advertisements held to breach of code will not be published again). The PCC has no sanction; it does not offer to compensate any victim, or require a censured editor to publish its censure with any degree of prominence, or to refrain from repeating the breach.
- The PCC has not solved the intractable problem that tabloids are entertainment-based and will continue to publish circulation-boosting stories irrespective of adverse adjudications. Calcutt recognised that the improbability of

all sections of the print media following PCC adjudications was the factor that would be most likely to fuel demands for statutory regulation.

- The PCC's refusal to monitor compliance with its code or even responses to its own adjudications is a fatal mistake. The ASA is the more respected precisely because it engages in monitoring and may act against breaches without the need to await a complaint from an interested member of the public. As Calcutt recognised, a monitoring exercise is essential to any code that purports to regulate intrusions into privacy, as victims (other than of notorious infringements) will be reluctant to give the matter further publicity by making a complaint.
- The PCC will face problems over its procedures in the event that it becomes judicially reviewable. Its evident desire to exclude lawyers and to operate informally, with nudges and winks transmitted along a network of editors, is not calculated to satisfy complainants or (inevitably) their legal advisers. Unsuccessful complainants feel that they have not been given a fair hearing when they are given no hearing at all, especially when disputed issues of fact are decided against them on the strength of written communications with newspaper representatives.

A problem once the PCC is perceived by the courts as having quasi-judicial status is the bias which might be apprehended from its membership. Its part-time chairman receives a large salary (reported to be £150,000 a year for working one day a week), paid for by a levy on the companies which own the newspapers complained against. His presence on an adjudicative panel might on this basis be challenged. More serious is the widespread frustration at the PCC's powerlessness. A report in 2003 from the Culture, Media and Sport Select Committee recommended that it should offer compensation to victims of press abuse and should increase the membership fees of regular transgressors. Without something resembling a sanction, it will remain widely perceived as ineffective.

14–037 The PCC does valuable but unpublicised work in mediating between "non-celebrity" complainants and newspapers, obtaining acknowledgments of error, corrections and apologies which provide some satisfaction to falsely maligned individuals. They could for the most part obtain this redress by contacting the editor (but they lack confidence) or having a lawyer contact the editor (but they lack money to retain one). The PCC serves a valuable function as an informal conciliator, leaning on newspapers to admit mistakes or oversights, and there is no reason why this service should not continue irrespective of whether a privacy law becomes available for victims of more serious intrusions. Regrettably, the PCC devotes much of its "annual review" to shrill propagandistic claims of the kind:

> "the application and observance of the Code are part of the culture of every news room and every editorial office . . . (the PCC) has clearly raised standards of reporting . . . most activities which brought newspapers and magazines into disrepute in the 1980s have long since vanished—and the PCC continues to ratchet up standards on the back of adjudications".[80]

On the contrary, privacy invasions of the 1980s have continued, and a vicious new development—the newspaper as vigilante, encouraging the lynch mob to visit alleged paedophiles at their published addresses and whipping up hatred against the youths who killed Jamie Bulger (putting their security at risk when they are released) makes it arguable that British press ethics are at their lowest ebb. There is no evidence that the PCC's self-regulation has been any more successful than the Press Council's. The only difference is that while the Press Council decisions—and the Press Council—were often vigorously condemned by the press itself, Lord Wakeham succeeded in persuading proprietors and editors that it is in their interests to support—i.e. not to criticise—the PCC. There is a queasy irony here for a British press which trumpets its commitment to free speech, because this wider public interest aspect of the PCC's relationship with the industry it affects to regulate has gone unremarked. That the PCC gets a "good press" is unsurprising, but an example of media hypocrisy nonetheless. Do editors and journalists, so quick to find fault with the performance of other public bodies, turn a blind eye to PCC failings because they have an economic and political interest in fostering a public perception of its success? The fact is that national newspapers report favourable adjudications as if they were as meaningful as court cases, and have never published a serious critical analysis of the organisation. After *The Sun* enraged public feeling (as whipped up by *The Mirror* and other competitors) by publishing an old photo of Sophie Rhys-Jones, bare at one breast, before her marriage to Edward Windsor, the PCC issued an immediate and overblown condemnation: "The decision to publish these pictures was reprehensible and such a mistake must not happen again." This was repeated as "news" by all newspapers, under portentous headlines ("Lord Wakeham's Statement") which presented it as a ruling which was bound to deter further privacy invasions.[81] Only the *Guardian* permitted itself a touch of editorial

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[80] PCC Annual Review 2000.

[81] Even a respected commentator like Roy Greenslade could proclaim, nonsensically, that this adjudication left the *Sun* editor "bleeding . . . the wounds might well prove fatal": "Bring Me Your Woes", the *Guardian*, June 7, 1999. However, there are occasional signs that a columnist realises that the emperor has no clothes: see Catherine Bennett, "The Waste of Space that is Lord Wakeham", the *Guardian G2*, July 5, 2001.

candour over this "smack on the wrist", and hinted at the truth: "The only time the PCC jumps is when Royalty complains".

The PCC has so far failed to raise the tone or the profile of debate over media ethics, although it has encouraged the development of procedures within newspaper offices (including the appointment of ombudsmen and "readers' representatives") that enable complaints to be answered quickly. Its adjudications are short and usually over-simple, reflecting only on editors, who do not appear discomforted by its statements that they have breached a code of practice. One fateful decision made in its first year was to take the *Sunday Sport* seriously and to treat it as a newspaper. The PCC embarked upon a solemn investigation into a front-page story entitled: "THIS NUN IS ABOUT TO BE EATEN. She's soaked in sauce, barbecued then carved up like a chicken . . . turn to pages 15, 16 and 17 if you dare." The editor of the *Sport* relished the complaint, describing his article as "pioneering investigative journalism at its best", which he was proud to have published. He dared the PCC to condemn him for exposing necrophilia in a Buddhist monastery in Thailand, "a country regularly visited by British tourists". The PCC rose to the bait, describing the story as "an extreme breach of the spirit of the Code of Practice" although it was outside its letter, since the Code does not purport to regulate matters of taste.[82] *Private Eye* is the only print journal which refuses to recognise the PCC, on the basis (says Ian Hislop) that certain editor-members of the Commission are themselves so morally questionable that no ethical judgment they make deserves to be recognised.

NUJ CODE OF CONDUCT

14–038 The National Union of Journalists has a code with which all members are expected to comply. The code itself is impressive, although attempts to enforce it have been less so. No journalist has been expelled for breach of the code, and disciplinary hearings tend to be unsatisfactory for all concerned in that victims of unethical behaviour can only complain to the NUJ branch of which the offending journalist is a member. If any branch member is impressed by the complaint, he or she could formally begin disciplinary proceedings on behalf of the victim. This procedure is not satisfactory: it relies upon journalists to take up cudgels against their colleagues, and provides no assurance that the complaint will be dealt with either independently or impartially.

THE ADVERTISING STANDARDS AUTHORITY

14–039 In the United States, that bastion of freedom of expression as a result of the First Amendment, advertising—"commercial speech"—is accorded less protection and is regulated by a statutory body, the

[82] PCC Report, No. 2, July—September 1991, p.23.

Federal Trade Commission. That stringent regulation was in prospect in Britain in 1962 when the Moloney committee on consumer protection called for greater protection of consumers, through a watchdog independent of the advertising industry. Under that threat of statutory regulation, the industry turned to the then credible Press Council as a self-regulatory model which seemed to satisfy politicians and public alike. The Advertising Standards Authority (ASA) was established, with its guiding mission to ensure that advertisements are "legal, decent, honest and truthful" by ordering their removal from newspapers if they infringe the Advertising Code. Ironically, the Press Council was in due course condemned as a confidence trick which failed to inspire confidence, while the ASA went from strength to strength, becoming in turn the "code adjudicator" model chosen in 1991 for the PCC. Given the general acceptability of some restrictions on commercial speech, the ASA has not suffered very much public criticism. This is because (unlike the PCC) it has real power, derived from its agreement with newspapers and journals that they will not carry any advertisement it judges to have breached the Code, and from its power to refer persistent code-breakers to the Director-General of Fair Trading who has a statutory duty to obtain injunctions against false advertising. Even so, there are signs that the self-regulatory system for advertising does not fully satisfy the public interest: since the ASA can threaten no criminal sanctions, deceitful advertisers will "get away with it" for weeks or months until a complaint is upheld, and will not suffer a fine or any other sanction. The large and increasing number of justified complaints (there were 2,241 advertisements changed as a result of complaints to the ASA in 2005) may itself be an indication that self-regulation has failed to deter. There is also evidence that the cosy, industry-friendly arrangement, with its *grundnorm* that "NO ADVERTISEMENT SHOULD BRING ADVERTISING INTO DISREPUTE"[83] can operate to curb the free speech rights of protest groups who choose to advertise in order to make political points.

The Advertising Code, with its spin-off codes dealing with sales promotions, children, etc., is devised and amended by representatives of the commercial and professional bodies which comprise the advertising industry, sitting as the Committee of Advertising Practice (CAP). There is no lay participation: this trade body puts the sanctions in place and fosters awareness of the Code and the ASA procedure. The ASA purports to act as a tribunal at arm's length from the industry, although the fact that it shares a secretariat with CAP belies this outward impression. Both bodies are funded by a levy on advertising and marketing revenues, raised by the Advertising Standards Board of Finance (another industry body) in the

[83] Advertising Code (1999), Principle 2:4.

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The Press Complaints Commission: a study of ten years of adjudications on press complaints

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ABSTRACT *The Press Complaints Commission (PCC) is the self-regulatory body established by the UK newspaper industry to adjudicate readers' complaints. The PCC's code of practice is used to determine whether complaints should be upheld. Launched in 1991, the PCC has been in operation for more than ten years; this anniversary presented an ideal opportunity to conduct a statistical analysis of the commission's performance in dealing with readers' complaints. The study revealed that although the PCC handled more than 20,000 complaints in those ten years, it adjudicated on only 707, and upheld approximately 45 per cent (321). This is a relatively small number on which to judge the direction the PCC is taking in its ethical pronouncements and to assess whether there are any changes in the Council's approach over time. There are some clear indicators, however, that the PCC's performance is varied and that while its record on complaints about the coverage of minors is commendable, driven largely by its concern to protect the two princes, Harry and William, its record on other areas of major concern to the public, particularly discrimination, is poor. The PCC has certainly not regulated certain aspects of newspapers with sufficient vigour to satisfy many of its critics.*

KEY WORDS: *Press Complaints Commission, Press Complaints Self-Regulation*

Introduction

The Press Complaints Commission (PCC) celebrated ten years of operations in January 2001. It marked the event with a party for politicians, celebrities and senior publishers and editors, who attended, according to several commentators, in order to be seen rather than to celebrate the PCC's impact on press performance, which remains the subject of controversy ("[Prince] William has no business going to this tacky showbiz knees-up", *Daily Telegraph*, 7 February 2001; "Papers enjoy party at Last Chance Saloon", Matt Wells, *The Guardian*, 7 February 2001; "A-list stars shun PCC party", Lisa O'Carroll, *The Guardian*, 8 February 2001).

Some observers believe that the press has been better behaved since the death of Princess Diana ("Newspapers are better behaved, says *Sun* editor", Tom Leonard, *Daily Telegraph*, 12 March 2003) and it is certainly true that the PCC has faced far less controversy but whether this is because of the stronger code of practice that emerged in early 1998, or because of the absence of such an obvious circulation booster as Princess Diana, is difficult to establish. It may be that press attentions to her son will become overbearing and unreasonable when Prince William leaves university and with it the last protection that the PCC can offer under its existing code.

Several controversial invasions of privacy over the past two years, including stories about entertainer Zoe Ball, model Naomi Campbell, footballer Gary Flitcroft and the royal princes, have kept the issue of privacy firmly in the public eye and it is unlikely that anyone seriously believes that the tabloid press is less likely to invade privacy now than ten years ago. Since privacy is the issue that seems to generate most public concern, this is significant. The latest call for a privacy law has come in the UK's Culture, Media and Sport parliamentary Select Committee's fifth report published in

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June 2003 (Culture, Media and Sports Select Committee, 2003, p. 11), which recommends the UK government rethink its decision not to introduce laws on privacy.

The PCC came into existence in January 1991. It was a controversial birth conceived from the recommendations of the Calcutt committee set up by Margaret Thatcher's Conservative government in 1989 to examine privacy and related matters. (See Frost, 2000, p. 190; O'Malley and Soley, 2000, p. 89; Shannon, 2001, p. 35.) The committee was established in the wake of growing concerns about the invasive nature of some news media, combined with the ailing reputation of the Press Council, the predecessor self-regulatory press body (Robertson, 1983). Ironically, the Press Council had itself been aware of public concerns about its operation and following the appointment of a new chair, Louis Blom-Cooper, QC, it instigated a review and a series of reforms so sweeping that the National Union of Journalists (NUJ) decided to rejoin, having quit the body in protest at the council's ineffectiveness in 1980 claiming the council was "incapable of reform" (O'Malley and Soley, 2000, p. 79).

The Press Council was in the process of introducing these reforms in 1990 when the Calcutt committee published its report, recommending the introduction of privacy laws and the replacement of the Press Council with a press commission with statutory powers. Some newspaper publishers were so concerned about the proposals, that at the next meeting of the press council there was a motion to dissolve the council and replace it with a press complaints commission. This proposal answered several of the proprietors' concerns. First it was smaller, but also cheaper. Second it contained far fewer lay members and so would be easier to control. Third, appointments to the new body would be made by an appointments commission, thereby ending the system of representation from a variety of industry bodies, including journalists' trade unions. Fourth all industry figures on the new committee would be editors or "senior journalists". To date, no journalists apart from editors have ever been appointed. Fifth, it would deal only with complaints. This would end the need to campaign for press freedom, and to investigate the press's performance, activities that are more expensive and resource intensive.

Having initially accepted the inevitability of closure, Blom-Cooper rallied quickly on learning there was substantial opposition to the proposal, spearheaded by the NUJ, because of the proposed new body's intended "abdication of its role of defending press freedom" (Shannon, 2001, p. 35). The meeting to discuss the closure of the Press Council decided instead to keep the Press Council and press ahead with reform after the unions and the majority of lay members combined with some others to defeat the proposal for dissolution (Frost, 2000, p. 190). In June 1990, the government made clear its commitment to a Press Complaints Commission and the introduction of statutory press regulation if such a commission were not established (O'Malley and Soley, 2000, p. 89). The proprietors redoubled their plans to establish a commission and in late 1990 they made it clear they would refuse to fund the Press Council, which was then obliged to accept its own dissolution (Shannon, 2001, p. 36). The proprietors' groups set up an appointments panel comprising the chair of the PCC, three members nominated by the chairman and the Press Standards Board of Finance (Pressbof) chair (Frost, 2000, p. 206). This went against the Calcutt recommendation of an independent appointments commission set up by the Lord Chancellor (O'Malley and Soley, 2000, p. 88).

The PCC opened its doors in January 1991 with the former director of the Press Council, Ken Morgan, now at the PCC but with a new chair, Lord Oliver McGregor, who had chaired the last Royal Commission on the press in the 1970s and was the former chair of the Advertising Standards Authority. The new commission immediately courted controversy when the first complaint it dealt with was levelled against the newspaper edited by the chair of its new code of practice committee. Patsy Chapman, then Editor of the *News of the World*, had run stories about Claire Short, then a Labour backbencher, who had been attempting to outlaw the tabloid practice of publishing pictures of naked women, as exemplified by *The Sun* and its famous page 3 pin-ups (Shannon, 2001, p. 50).

The new commission also attracted criticisms from radical investigative journalist Paul Foot for being composed of "profs" and "toffs", a reference to the four lay members of the 16-member commission, who were either professors or members of the House of Lords (Shannon, 2001, p. 70). Controversy continued to dog the new commission throughout its early life and David Calcutt, QC was asked by the government to examine its performance. He reported in 1993 that the commission was failing and should be replaced by a statutory press tribunal (Gibbons, 1998, p. 281). Only the government's narrow majority, and therefore its vulnerable electoral position, prevented the commission's closure and the introduction of privacy laws (Browne, 1996, p. 147)

Lord McGregor's term of office ended in 1994, allowing Pressbof to appoint a chair that would be seen by government and industry alike to be friendly. It was an astute appointment. John Wakeham (by now a lord) had been Margaret Thatcher's chief whip and with his "talent for quiet manipulation" (Shannon, 2001, p. 177) soon enjoyed the support of editors, who seemed to be behaving more responsibly; he had lost no time in showing them where their best interests lay.

Wakeham handled the continuing rows about intrusion into the lives of celebrities (but especially royalty) with subtlety. He refused to be drawn into early debates about apparent breaches of the code and whereas McGregor had ranted at the press for invading Princess Diana's privacy and "dabbling their fingers in the stuff of other people's souls" (Frost, 2000, p. 196), Wakeham played a much quieter game, refusing publicly to stir the water but privately debating with editors and proprietors on their "best interests". This measured approach gave the PCC enhanced authority.

Princess Diana's death in August 1997 gave Lord Wakeham the occasion he needed to insist on a revamped code of practice, strengthening clauses on privacy and children to protect William and Harry, Princess Diana's sons: this more rigorous code was introduced in January 1998 (Shannon, 2001, p. 281; Gibbons, 1998, p. 284). Wakeham continued to chair the PCC for the remainder of the period of this study, although it is worth noting that he resigned in 2001 in order to defend his role in the Enron accounting scandal: he was replaced by Christopher Meyer.

Throughout its history the PCC has issued regular reports of its findings as well as an annual report. The total number of complaints received each year rose to a peak of 3023 in 1996 although the commission has adjudicated on fewer than 800 complaints in its first ten years. An examination of these complaints and the decisions made by the PCC provides an insight into the workings of the PCC and, perhaps more significantly, into how press self-regulation is intended to change the ways in which journalists work. It should also illustrate those areas where the PCC works as well as it claims, and those areas where it fails, as many of its critics believe.

The PCC and the Complaints Procedure: analysing the data

The method applied provides a statistical analysis of the PCC's regular reports, usually issued quarterly but occasionally in the early years either monthly or six-monthly, along with the Commission's annual reports issued since 1993. The annual reports show the total number of complaints received and the percentage of complaints made under each clause of the code of practice. The quarterly or monthly reports provide the adjudications on each complaint investigated by the PCC. Investigated complaints are the only cases adjudicated but form only a small portion of the total number of complaints received by the PCC: they are the only cases that illustrate the PCC's thinking on ethical matters. Every adjudicated complaint reported in the quarterly/monthly bulletins was entered in a database. The database listed the name of the complainant, whether they were well known, the name of the newspaper, the substance of the complaint, any particular comments made by the PCC and the number of the report in which the complaint was adjudicated. In addition each complaint was coded against the clause of the code of practice that it was alleged to have broken. The major change in the code of conduct, introduced in January

1998, following the death of the Diana, Princess of Wales, meant that complaints made after that time were adjudicated against a new code. However, the main thrust of the code did not change, only the ways in which the commission was able to interpret it. There was a clause on privacy, for example, in both the old and new code, but the new code adopted a much stronger position preventing some invasions that would have been possible with the former code.

The final outcome, as adjudicated by the PCC, was listed against one of the following categories:

- *Upheld.*
- *Upheld in part* (this usually means that the complaint fell under more than one element of the code and that while one or more elements were upheld, others were not).
- *Rejected* (occasionally listed as not upheld).
- *Not pursued* (that is by the PCC—there are several instances where, having accepted a potential breach of the code, the commission refused to adjudicate).
- *Resolved.*

It was decided to include a field called "well known", which would identify celebrities or well-known personalities, in order to see if the PCC was serving the ordinary person. The rich and famous, as is often pointed out, have a very different relationship with the media to ordinary people. They are also in a much better position to protect their rights through the courts ("Zeta Jones claims wedding picture victory", *Daily Telegraph*, 12 April 2003) or by more subtle means.

The difficulty with identifying someone as "well known", for the purposes of analysing data on PCC outcomes, is that it is such a subjective judgment. In an attempt to bring consistency to the decisions it was decided to apply the following criteria:

- TV actors, performers and presenters who would be recognised by a reasonably wide section of the community.
- Pop singers, musicians, producers, DJs and others who would be recognised by a reasonably wide section of the community.
- Film actors, directors, writers and any others who would be recognised by a reasonably wide section of the community.
- Celebrities from any artistic community who would be recognised by a reasonably wide section of the general community.
- Those who are well known or notorious from any walk of life but particularly including entertainment, business, academe, trade unions, politics and charities.
- MPs are listed as "well known" regardless of how well known they actually are.
- Councillors are only listed as "well known" if they would be recognised by some section of the general community (for instance, the Lord Mayor of London, Ken Livingstone). However, for a small provincial paper, the general community might itself be quite small and so the councillor might be well known in those circumstances.
- Royalty: where a complaint is made for a member of the royal family, it is usually made by the royal press office and so this is normally cited.

To ensure consistency of statistical display, the following rules were followed when identifying complainants:

- Where more than one person complained about the same story, a separate entry was made unless the complaint was clearly made jointly.
- Where complaints were made through a solicitor, the principal figure was used as the complainant, not the solicitors. It was normal for major celebrities such as Sean Connery or Elton John to complain using a solicitor.
- Any complaint involving more than one paper is listed as a separate complaint against each paper.

Findings: ten years of investigating complaints

Three main areas for consideration emerge from the data. The first is the overall performance of the PCC. How many complaints does it receive? Has its performance led to more or fewer complaints? What might this imply for self regulation? Is there any evidence that

the PCC is working effectively in the sense that it is obliging newspapers to behave more responsibly as the PCC itself claims? A second area for analysis concerns any possible implications of PCC operations for the direction of journalistic ethical perceptions. Are editors dealing with ethical matters differently now compared with 12 years ago? This is not just a matter of being more responsible, but possibly of dealing with certain types of ethical dilemma more rigorously than before. Finally, are there any particular areas where the PCC can be shown to be particularly effective or ineffective?

The PCC: numbers of complaints

The PCC received almost 23,000 complaints in its first ten years of operations (see Figure 1). The maximum number of complaints in a year was received in 1996 following the British tabloid coverage of the international football tournament, Euro96. Three hundred and six people (PCC, 1997, p. 6) complained about the racist remarks about the German football team after the England team were drawn to play them. However, to the embarrassment of the PCC, the complaints fell outside its own rules. It was obliged to issue a lengthy apology to explain why it was not upholding complaints about coverage that the public was concerned about and that members of the commission had condemned (Pinker, 2003). The PCC came to the conclusion that "the coverage—although shrill and poorly judged—in reflecting this partisan national support, was clearly not intended to incite prejudice directed at specific individuals on the grounds of their race" (PCC report 35, 1996, p. 24). However, it did ask its code committee to look again at the clause in its code of practice. The following year, 1997, also saw a fairly high number of complaints because of the death of Princess Diana and the controversy that caused.

It is necessary at the outset to deal with some anomalies in the statistics. According to the annual reports published by the PCC, 22,988 complaints were received between January 1991 and December 2000 (see Table 1). However, the monthly or quarterly bulletins recording PCC activity show that across the same period only 20,437 complaints had been handled, leaving a discrepancy of 2551 complaints (see Figure 2). According to the PCC, not all complaints were logged in the monthly bulletins early in the PCC's life: only the annual report logged all complaints. A spokeswoman for the PCC admitted that while the commission now focused strongly on the figures as a measure of performance, this was not a top priority in the early years. This was particularly true for Euro96 and the death of the Princess of Wales in 1997. Not all complaints were enumerated in the monthly bulletins, only the annual reports, and so the annual reports are more accurate for complaints received. However, the

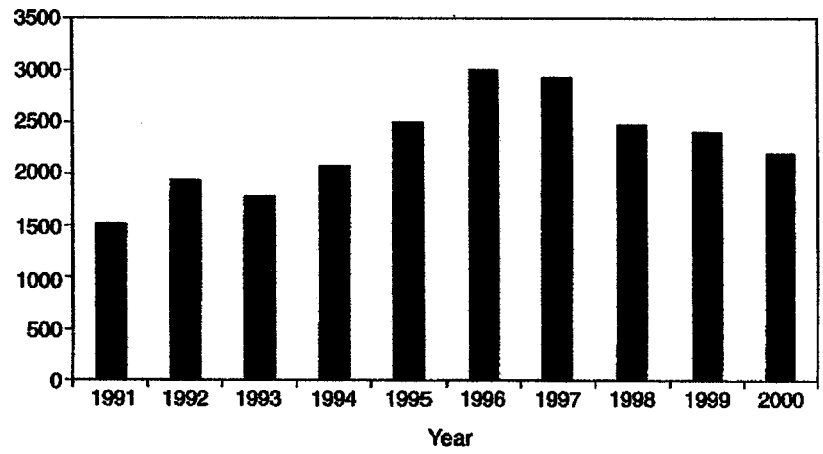

Figure 1. Total numbers of complaints to the PCC, 1991–2000.

Table 1. PCC decisions on complaints in annual reports 1991–2000

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	Total
Complaints received	1520	1963	1782	2091	2508	3023	2944	2505	2427	2225	22,988
No breach	347	584	704	914	1026	897	914	954	942	857	8139
Third party	0	107	114	87	77	146	335	205	0	0	1071
Resolved	72	182	231	356	413	393	514	555	650	544	3910
Unreasonable delay	46	64	97	85	91	110	93	112	0	0	698
Outside remit	137	232	447	427	800	1125	593	689	0	0	4450
Adjudication upheld	32	31	40	34	28	27	34	45	26	24	321
Adjudication rejected	28	49	57	54	35	54	48	41	23	33	422
Complaints concluded	662	1249	1690	1957	2470	2752	2531	2601	1641	1458	19,011

monthly reports deal with all adjudicated complaints and so it is safe to assume that, when dealing with adjudicated complaints and whether they were upheld or rejected, the monthly reports are more accurate.

The majority of complaints received were not adjudicated because they were outside the PCC's remit, disallowed because of delay, did not appear to breach the code, were third party complaints, concerned matters of taste, were resolved directly with the editor or were not pursued by the complainant (see Table 1). This means that fewer than one in 50 complaints made were upheld by the PCC, an average of 3.8 per cent of the complaints made being adjudicated and only an average 1.6 per cent of the total complaints per year being upheld. An average of only 71 complaints each year were adjudicated (the figures vary, with the exception of 1999, from a low of 61 to a high of 85). Compared with the old Press Council's average adjudication rate of 128 complaints a year (again this rate is very steady for the last eight years, varying from a low of 118 to a high of 172) (cited in O'Malley and Soley, 2000, p. 133). There is no obvious reason why the PCC should adjudicate only half as many complaints as its predecessor to uphold fewer than 2 per cent of complaints per year, which leads many critics to the view that the PCC exists merely to deflect criticism from the newspaper industry (O'Malley and Soley, 2000, pp. 178–80).

It is notable in Figure 3 that the PCC's adjudication rate (that is the percentage of complaints on which the PCC has decided to adjudicate together with its associated rate of upheld complaints) falls consistently during the first five years from a high of 6.19 per cent to a low of 2.41 per cent. In subsequent years it fluctuates between a low of 2.00 per cent to a high of 3.61 per cent. It is also curious to note that while the number of complaints adjudicated remain static over the years, the number of complaints received continues to increase. The PCC claims the low adjudication figures are because of its "Skill in successfully conciliating so many complaints" (PCC, 2001, p. 1) but this fails to explain why the numbers begin to rise again just as the number of total complaints starts to fall.

Number of Complaints per Paper

The Sun is the most criticised paper with 47 adjudicated complaints, 18 of which were upheld (see Table 2). It is closely followed by the *News of the World* with 39 complaints, 12 of which were upheld. This puts Murdoch's News International papers squarely at the top of the league of newspaper complaints. The *Mail on Sunday* and *Daily Mail* follow fairly closely. The *Sunday Times* heads the table for quality broadsheets, but although it is not the most complained about Sunday paper—the *News of the World* leads there—it does come ahead of the *Sunday People*. The *Daily Telegraph* and *The Times* lead the daily broadsheets, although the *Daily Telegraph*'s record is the worst.

Although *The Sun* and the *News of the World* top the league of newspapers receiving adjudicated complaints, only 30–40 percent of these complaints are upheld. Other papers, much lower down the league, such as the *Sunday Mirror* and *The Observer* have a considerably higher percentage of upheld complaints.

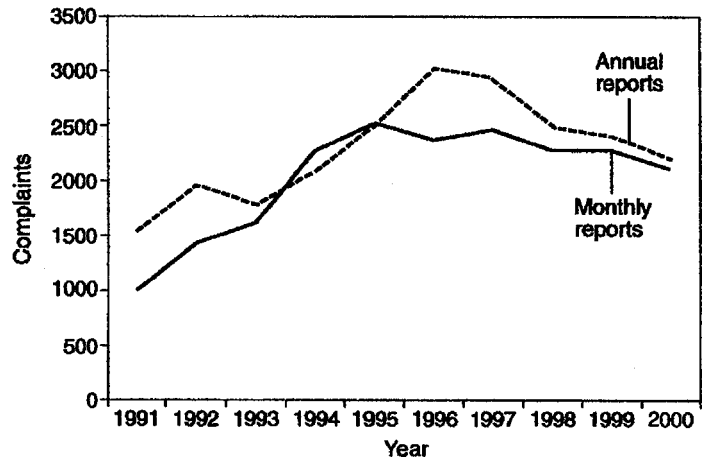

Figure 2. Comparison of complaints in the monthly and annual reports.

This figure rises to 100 per cent for the *Daily Sport* and *Sunday Sport*. This might suggest that readers are more willing to complain about *The Sun* or the *News of the World* than other papers. They might, perhaps, be more forgiving of *The Observer*, so that when they do complain the complaint is more likely to be justified. In the case of the *Daily Sport* and the *Sunday Sport* people's expectations may be low enough that they only bother to complain when the breach is outrageous. This is conjecture, of course, which would require an extensive programme of interviews with complainants to understand their motives and expectations.

Accuracy is still by far the most complained about element of the code of practice, according to the PCC's annual reports (see Table 3). More than 60 per cent of complaints concerned accuracy. A good number of these complaints concern simple mistakes and were cleared up after conciliation or by a correction or a letter to the editor. Consequently, the number adjudicated was only 41 per cent (423) of the total (see Table 3). Of these only 75 (34.1 per cent) were upheld (see Table 4). Privacy cases are the next most numerous, but these are of more significance in the sense that they seem to cause the greatest concern to the complainants. Despite the understandable reluctance of many complainants to raise an issue they had wanted kept private in the first place, more than 20 per cent (221) of the total adjudications concerned privacy, of which 34.1 per cent were upheld (see Table 4). Of all the main complaint areas, adjudications upheld approximately 35 per cent. The main exceptions were complaints about coverage of children, where 53.4 per cent were upheld, and discrimination, where only 15.8 per cent of the complaints were upheld (see Table 4).

Complaints about Coverage of Children

It has been clear for some time that the PCC has been particularly concerned about the media coverage of children, especially those with famous parents, such as the two princes and the children of Prime Minister Tony Blair. Consequently, the PCC has developed its code of practice extensively in this area. In the early 1990s, media scrutiny of Princess Diana spilled over into the lives of the two young princes and the PCC felt it appropriate to take a tough line against this intrusion. This coincided with the election of the first prime minister for many years to have a young family. Again the PCC felt justified in taking a strong line on press intrusion into the lives of children. This policy was strengthened further in 1997 following the death of Princess Diana. Fearing a massive increase in press intrusion into the princes' lives, especially as they were now in their teens, the code was developed to make press interference with children during their school years a breach of the code. This was later extended to cover

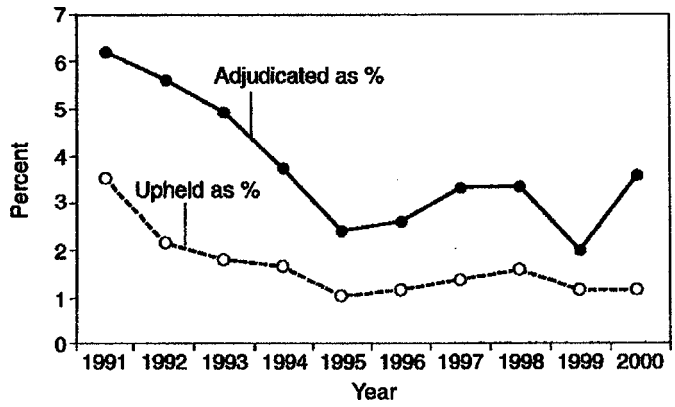

Figure 3. Adjudicated complaints.

university when Prince William left school. Editors have largely adhered to this requirement reasonably well, although there have been occasional and well-publicised breaches: Prince Harry being injured at school and his youthful dabbling with drugs and alcohol, as well as one or two stories about Prince William's social life at university. Editors' sensitivity here has reflected, at least in part, the strong line taken by the PCC. A full statement was issued by the PCC in 1999 (PCC report number 46, 1999, p. 5) giving guidance to editors on coverage of the royal princes, advising them to "continue to err on the side of restraint as the code dictates that intrusions into a child's privacy should only be on a matter of exceptional public interest" (ibid., p. 8).

Editors do seem to have been constrained by this and seem much more likely to refrain from identifying children in stories. The number of complaints about children, however, has risen steadily from 1.3 per cent to 4.6 per cent of all complaints received (see Figure 4). But analysis of adjudicated complaints reveals a very different picture with far more complaints about children being accepted for adjudication and the rate of upheld complaints being very high compared with other classifications (see Figure 4). On average over the ten years only 2.2 per cent of complaints were made about coverage of children but 8.2 per cent of adjudicated complaints concerned children and more than half of these were upheld (see Table 5). This higher rate of adjudicated and upheld complaints suggests that the PCC takes interference with the lives of children very seriously. In its statement about the two princes, the PCC says, "the purpose of the code is to ensure children receive the privacy they need in which to learn: learning means making mistakes, and that in turn means there is potential for mischievous reporting which would make any child's life at school intolerable" (PCC report number 46, 1999, p. 5).

Complaints about Discrimination

The other area of change is discrimination and particularly the reporting of race. The old Press Council banned the use of certain words it believed were offensive and prejudicial (for example "Chinky"). The PCC decided against banning the use of particular words used to denote race or ethnicity and also decided (in the early days at least) not to take complaints from third parties.[1] Only the person named in the story (or their representative) was empowered to complain.

The PCC received its highest number of complaints in 1996 following the coverage of Euro96. Three hundred and six people (PCC annual report 1996 ([PCC annual report 1997, p. 6]) complained about the allegedly racist press coverage of the German football team after England was drawn to play them. Not all of these complaints, however, could have been made as complaints

Table 2. Complaints against publications

Newspaper	A	B	C	D	E	F	G
The Sun	47	18	1	28	0	0	38.3
News of the World	39	12	5	21	1	0	30.7
Mail on Sunday	39	13	3	21	2	0	33.3
The Mirror	29	9	5	14	0	1	31.0
Daily Mail	28	6	0	22	0	0	21.4
Daily Star	25	9	1	15	0	0	36
Sunday Times	23	6	0	17	0	0	26.1
Evening Standard	22	5	1	16	0	0	22.7
Sunday People	19	8	1	10	0	0	42.1
Daily Express	19	5	2	12	0	0	26.3
Today	16	11	0	5	0	0	68.7
Sunday Mail	16	4	2	10	0	0	25
Sunday Mirror	15	10	1	4	0	0	66.7
Daily Telegraph	11	3	1	7	0	0	27.3
The Times	11	2	0	9	0	0	18.2
Daily Record	10	3	2	5	0	0	30
The Guardian	9	1	1	7	0	0	11.1
Daily Sport	8	8	0	0	0	0	100
Sunday Telegraph	8	2	0	6	0	0	25
The Independent	7	1	0	6	0	0	14.3
Independent on Sunday	7	2	0	5	0	0	28.6
The Observer	6	4	0	1	1	0	66.7
Sunday Mercury, Birmingham	6	4	1	1	0	0	66.7
The Sun, Scotland	6	1	2	3	0	0	16.7
Sunday Express	6	2	1	3	0	0	33.3
Bedfordshire on Sunday	6	5	0	1	0	0	83.3
Scotland on Sunday	6	2	0	4	0	0	33.3
Sunday Sport	6	6	0	0	0	0	100
Evening Times, Glasgow	5	1	0	4	0	0	20
Yorkshire Evening Post	5	1	0	4	0	0	20
Bristol Evening Post	4	1	0	3	0	0	25
Manchester Evening News	4	3	1	0	0	0	75
Bella	4	4	0	0	0	0	100
The News, Portsmouth	4	0	1	3	0	0	0
Standard Recorder	4	1	0	3	0	0	25
Evening Chronicle	3	1	1	1	0	0	33.3
Luton on Sunday	3	2	1	0	0	0	66.7
Evening News, Edinburgh	3	0	0	3	0	0	0
OK Magazine	3	1	0	2	0	0	33.3
Hello!	3	2	0	1	0	0	66.7
The Voice	3	2	0	1	0	0	66.7
Sunday Sun	3	1	1	1	0	0	33.3
Private Eye	3	2	0	1	0	0	66.7
Press and Journal, Aberdeen	3	0	0	3	0	0	0
Evening Post, Reading	3	3	0	0	0	0	100
The Journal (Newcastle)	3	1	1	1	0	0	33.3
PA	3	2	0	1	0	0	66.7
Business Age	3	3	0	0	0	0	100
Hertfordshire Mercury	3	1	0	2	0	0	33.3

A: Total number of complaints adjudicated; B: number upheld; C: number upheld in part; D: number rejected; E: complaints not pursued; F: complaints resolved; number of complaints upheld as a percentage of those adjudicated. The other 148 publications that had complaints adjudicated by the PCC had two or fewer adjudicated.

about discrimination. According to the PCC's annual report, only 6.8 per cent of the 3023 complaints made in 1996 concerned discrimination, making a total of 206 complaints. It is probable that many of the Euro96 complaints concerned taste and decency rather than discrimination. Whatever the category, to the embarrassment of the PCC, the complaints about

Table 3. All complaint by type according to PCC annual reports

	Code clause	Type of complaint received, 1991–2000, as % of total	Adjudicated complaints	Adjudicated complaints type as % of total
Accuracy	1	60.5	423	41.3
Privacy	3	13.6	221	21.6
Misrepresentation	11	2.8	60	5.9
Children	6	1.9	58	5.7
Harassment	4	7.2	57	5.6
Discrimination	13	6.3	38	3.7
Opportunity to reply	2	4.3	31	3.0
Intrusion	5	2.5	29	2.8
Comment	1	7.13	28	2.7
Payments	16	0.3	26	2.5
Innocent relatives	10	0.6	20	2
Hospitals	9	0.4	18	1.8
Listening devices	8	0.2	2	0.2
Confidential sources	15	0.2	4	0.4
Victim of sexual assault	12	0.3	7	0.7
Financial journalism	14	0.1	1	0.1
			1023	100

Note: Total complaints: 707. Many complaints are duplicated, covering two or more clauses of the code.

Table 4. Complaints adjudicated by type according to PCC monthly bulletins

Complaint type	total	Total as percentage	Complaints upheld	upheld as % of total
Accuracy	423	59.8	141	33.4
Privacy	221	31	75	34.1
Misrepresentation	60	8.5	20	33.9
Children	58	8.2	31	53.4
Harassment	57	8.1	22	38.6
Discrimination	38	5.4	6	15.8

Euro96 fell outside its code, as noted above. The PCC was obliged to issue a lengthy statement (see p. 105) (PCC report no. 35, 1996, p. 24) and concluded that there were no grounds for formally censuring any newspaper for a breach of the code, although "members of the commission reiterated that some of the coverage departed significantly from those journalistic traditions [of tolerance and fair play to others]" (ibid.). It is evident from the report that there was little consensus that the PCC had arrived at the right decision.

The PCC code has embodied a clause on discrimination since it first began receiving complaints in 1991. The average number of complaints received by the PCC (between 1993 and 2000) relating to discrimination is 6.45 per cent of received complaints, but only 5.4 per cent of the total complaints adjudicated concern discrimination and only 15.8 per cent (six cases) of these were upheld (see Table 6). The figures reveal that not only has there been a steady rise in the number of complaints about discrimination year on year, but that this rise in numbers has outstripped many other areas for complaint.

This steady rise in discrimination complaints from 1.7 per cent of the total in 1993 to 10.6 per cent in 2000 shows that the number of complaints has been rising in real terms (see Figure 5). With an average of 6.3 per cent over the ten years, there should have been approximately

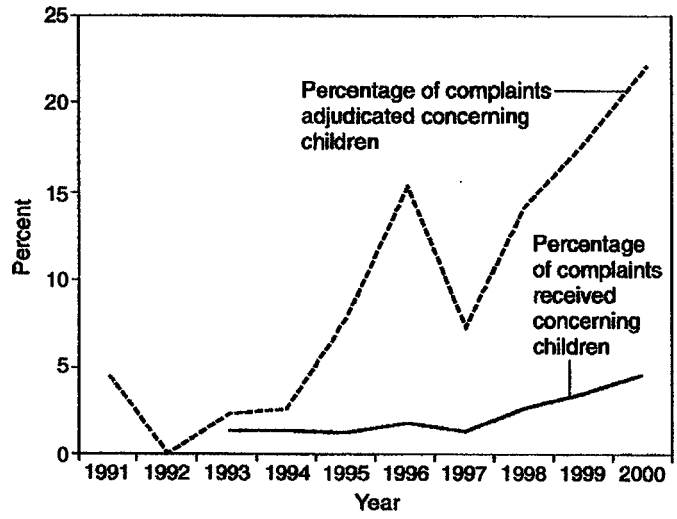

Figure 4. Comparison of increase in adjudications of complaints concerning children compared with increase of complaints.

Table 5. Complaints about children

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Total child complaints as %			1.3	1.3	1.2	1.8	1.3	2.6	3.5	4.6
Adjudicated complaints as %	4.4	0	2.3	2.5	7.8	15.4	7.2	14.1	17.8	21.8
Adjudicated complaints upheld as %	66.7	0	0	0	100	70	66.7	40	62.5	33.3

Table 6. Discrimination complaints

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Discrimination as % of total complaints			1.7	1.7	7.8	6.8	6.2	9.9	6.9	10.6
Discrimination as % of adjudicated complaints	5.9	4.8	1.1	5	3.1	12.3	6.0	5.6	6.7	5.4
Complaints upheld as % of adjudicated complaints	25	25	0	50	0	12.5	20	0	0	0

1440 complaints based on the grounds of discrimination, but the PCC has adjudicated on only 38 (or 5.6 per cent of the adjudicated complaints), six being upheld. Three of these concerned discrimination against gay people with the remainder focused on discrimination against people suffering mental ill health. The 38 complaints on the grounds of discrimination included 16 focused on race, five on homosexuality, eight on mental illness, two around unspecified sexual preferences, four on religion and three on physical deformity.

The significant and rather dramatic finding here is that not a single complaint of discrimination on the grounds of race or ethinicity has been upheld by the PCC. Since 42 per cent of

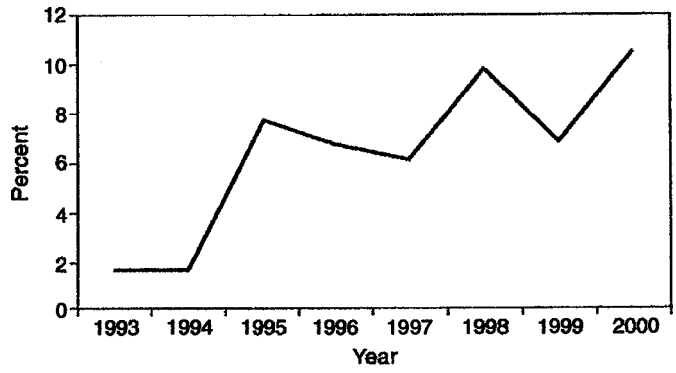

Figure 5. Annual complaints on discrimination (percentage).

the adjudicated complaints concerned race, it is reasonable to assume that at least this many of the complaints made also concerned race (in fact with several hundred complaints made about Euro96, it is likely to be significantly higher). This would suggest that approximately six hundred complaints have been made in ten years on the grounds of race discrimination.

The PCC believes that the purpose of the discrimination clause "is to protect *individuals* from prejudice—not to restrain partisan comment about other nations" (PCC report number 42, 1998, p. 9). On this account, it would be discriminatory to say a particular man deserves a good kicking because he is French and it "is the only language the greedy frogs understand" but not discriminatory to say that all French people need a good kicking because "it is the only language the greedy frogs understand" (PPC report number 42, 1998, p. 9). It is a subtlety that has angered many complainants and led a UK parliamentary Select Committee to call on the PCC to take a more proactive stance on matters of discrimination (Culture, Media and Sport Select Committee, 2003, 32, p. 75).

Press Complaints Commission report number 40 (last quarter of 1997) offers an interesting example of a complaint of discrimination on the grounds of race, made by a senior student adviser of the University of Essex. She complained that the *Mail on Sunday* was both inaccurate and discriminatory in an article headed "D-day in war on student fraud". She complained that a story about "'bogus students' making false claims for university grants ... was illustrated by several examples of people recently convicted of this kind of fraud". She complained that while all the examples and pictures of those convicted of fraud were black Nigerians, pictures of three unnamed white people were captioned "Model students: bogus applicants may squeeze them out" (PCC report no. 40, 1997, p. 18). The PCC said in its adjudication, "the commission did not find that the piece contained any prejudicial or pejorative reference to the men's race. Clause 15 does not proscribe reference to a person's nationality."

In a further complaint, this time for breach of clause 1 (accuracy) the *Folkstone Herald* was found to be in breach of the code for publishing a story about police raiding a house and arresting six refugees which was accompanied by a picture of police in riot gear taken during another incident (PCC report no. 47, 1999, p. 11). The PCC reminded editors in its adjudication "of their responsibilities in covering such topics and of the danger that inaccurate and misleading reporting may generate an atmosphere of fear and hostility which is not borne out by the facts".

But in a complaint about *The Sun* and a series of articles about asylum seekers, from a number of sources, including Dr Evan Harris, MP, there was considered to be no breach of either accuracy or discrimination. The complainants particularly objected to "phrases such as 'scrounging Romanian gypsies'" and a "reference to asylum seekers as 'flotsam and jetsam' and to statements such as 'our land is being swamped by a flood of fiddlers' and 'how long before we kick the whole lot out?'"

(PCC report no. 50, 2000, p. 21). The PCC in its adjudication claimed, "although some of the views expressed may have been offensive to some readers, these were clearly presented as matters of opinion and did not focus on individuals". But it went on to say, "discrimination has no place in a modern society and the commission would censure most heavily any newspaper found guilty of racist reporting" (ibid.)

In yet another case, the *Daily Star* printed a leader under the heading "Frogs need a good kicking" which said that "the way in which the French had 'grabbed the lion's share of World Cup tickets is typical of their slimy continental ways ... As we proved at Agincourt and Waterloo, a good kicking on their Gallic derrieres is the only language these greedy frogs understand" (PPC report number 42, 1998, p. 9). The complaint was not upheld because the "code is not intended to stop such robust comment" (ibid.)

- Consequently, according to the PCC, a story is not discriminatory if it:
- uses robust language (that might be offensive to some);
- is not about a particular individual;
- concerns the nationality of the subject;
- and is not significantly inaccurate.

If, of course, the story is inaccurate, then it would still not be discriminatory, merely inaccurate. This criticism has not gone unnoticed by the PCC and its then acting-chair Professor Robert Pinker who suggested,

> The editors' Code is designed to protect individuals—and the issue of discrimination is no different. That is why it contains tough rules on the reporting of someone's race, colour, religion, sex or sexual orientation, mental or physical disability. It makes clear that the press must avoid publishing such details unless they are relevant to the story and it also protects individuals from prejudicial or pejorative reference to any of these facts. (Pinker, 2003)

Conclusions

The PCC makes two main claims about its activities. The first is that self-regulation works and that the PCC is a "first-class complaints handling organisation" that "deals with complaints quickly and effectively" (PCC, 2000, p. 2) and the second is that the PCC "changed the entire culture of British newspapers and magazines" by raising "standards through its adjudications and decision" (PCC, 2000, p. 2).

There is no evidence for either of these claims in the data gathered from the PCC's own reports. The PCC adjudicates very few cases and in many of the landmark cases the PCC has found itself unable to support the complainant or indeed take any particular line of guidance. Each British tabloid newspaper faces an average of only one or two upheld complaints a year despite the hundreds of complaints made against national daily and Sunday newspapers each year; 97 per cent of complaints are "resolved" without recourse to an adjudication. Even when papers publish adjudications, these are typically given little prominence (Gibbons, 1989, p. 284). The number of complaints made has been steadily decreasing since 1996. Until then, the increase in complaints had been hailed by the PCC as evidence that "the public not only knows about the PCC and it procedures but also has confidence in the commission to deliver results" (PCC, 1996, p. 3). Now the fall was hailed as a success for self-regulation. Embarrassingly for the PCC, since 2001 the number of complaints has started to rise again. All of this seems to support—and strongly so—the claims of a number of critics that the PCC was "designed to stave off assaults on the interests of the proprietors as well as to, in effect, act as a mechanism for rejecting the vast majority of complaints they received" (O'Malley and Soley, 2000, p. 3).

Criticism of the PCC is particularly keen with regard to complaints about discrimination. Many complaints have been made about stories reporting refugees and so-called bogus asylum seekers and yet none was upheld. Only six discrimination complaints were upheld during the entire ten years of the study. Complaints of this type continue to flood in and the number has risen significantly over the past three years (Pinker, 2003).

The PCC's insistence that only discrimination against individuals breaches the code and that complaints about racism affecting groups of people are really a matter of taste and decency, and therefore not something on which it can adjudicate, begins to look perverse at a time when there is considerable public concern about perceived racism in some reporting of asylum seekers, the Iraq war and terrorism. The PCC's policy of refusing third party complaints constitutes an anomaly identified by the Culture, Media and Sport Select Committee:

> A further beneficial reform ... would be consideration by the PCC of a new and more explicit approach to the acceptance of certain third party complaints ... We believe that this is as important in issues of prejudicial and pejorative references to minority groups as it is on privacy matters. (Culture, Media and Sport Select Committee, 2003, 31 p. 74)

The one area of work where the PCC can claim success concerns reporting on the individual welfare of children. There is no doubt that newspapers now take the reporting of children and their right to grow up and make mistakes outside the spotlight of media attention much more seriously than ten years ago. The idea that children should not be in the news solely because they have famous parents would not have crossed a journalist's mind 15 years ago. Now it is not unusual to hear journalists say that they can't use a story because it would mean naming a child.

Note

[1] Bob Borzello, a London-based campaigner opposing racial discrimination, complained regularly to the Press Council about stories he believed were racially prejudicial. By ruling out third party complaints, the PCC prevented such campaigners unable from using this method of attacking the press.

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U.S. Supreme Court

SHEPPARD v. MAXWELL, 384 U.S. 333 (1966)

384 U.S. 333

SHEPPARD v. MAXWELL, WARDEN.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.
No. 490.
Argued February 28, 1966.
Decided June 6, 1966.

Petitioner's wife was bludgeoned to death July 4, 1954. From the outset officials focused suspicion on petitioner, who was arrested on a murder charge July 30 and indicted August 17. His trial began October 18 and terminated with his conviction December 21, 1954. During the entire pretrial period virulent and incriminating publicity about petitioner and the murder made the case notorious, and the news media frequently aired charges and countercharges besides those for which petitioner was tried. Three months before trial he was examined for more than five hours without counsel in a televised three-day inquest conducted before an audience of several hundred spectators in a gymnasium. Over three weeks before trial the newspapers published the names and addresses of prospective jurors causing them to receive letters and telephone calls about the case. The trial began two weeks before a hotly contested election at which the chief prosecutor and the trial judge were candidates for judgeships. Newsmen were allowed to take over almost the entire small courtroom, hounding petitioner, and most of the participants. Twenty reporters were assigned seats by the court within the bar and in close proximity to the jury and counsel, precluding privacy between petitioner and his counsel. The movement of the reporters in the courtroom caused frequent confusion and disrupted the trial; and in the corridors and elsewhere in and around the courthouse they were allowed free rein by the trial judge. A broadcasting station was assigned space next to the jury room. Before the jurors began deliberations they were not sequestered and had access to all news media though the court made "suggestions" and "requests" that the jurors not expose themselves to comment about the case. Though they were sequestered during the five days and four nights of their deliberations, the jurors were allowed to make inadequately supervised telephone calls during that period. Pervasive publicity was given to the case throughout the trial, much of it involving incriminating matter not introduced at the trial, and the jurors were thrust into the role of celebrities. At least some of the publicity deluge reached the jurors. At the very inception of the proceedings and later, the trial judge announced that neither he nor anyone else could restrict the prejudicial news accounts. Despite his awareness of the excessive pretrial publicity, the trial judge failed to take effective measures against the massive publicity which continued throughout the trial or to take adequate steps to control the conduct of the trial. The petitioner filed a habeas corpus petition contending that he did not receive a fair trial. The District Court granted the writ. The Court of Appeals reversed. Held:

1. The massive, pervasive, and prejudicial publicity attending petitioner's prosecution prevented him from receiving a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. Pp. 349-363.

(a) Though freedom of discussion should be given the widest range compatible with the fair and orderly administration of justice, it must not be allowed to divert a trial from its purpose of adjudicating controversies according to legal procedures based on evidence received only in open court. Pp. 350-351.

(b) Identifiable prejudice to the accused need not be shown if, as in Estes v. Texas, 381 U.S. 532 , and even more so in this case, the totality of the circumstances raises the probability of

prejudice. Pp. 352-355.

(c) The trial court failed to invoke procedures which would have guaranteed petitioner a fair trial, such as adopting stricter rules for use of the courtroom by newsmen as petitioner's counsel requested, limiting their number, and more closely supervising their courtroom conduct. The court should also have insulated the witnesses; controlled the release of leads, information, and gossip to the press by police officers, witnesses, and counsel; proscribed extrajudicial statements by any lawyer, witness, party, or court official divulging prejudicial matters; and requested the appropriate city and county officials to regulate release of information by their employees. Pp. 358-362.

2. The case is remanded to the District Court with instructions to release petitioner from custody unless he is tried again within a reasonable time. P. 363.

346 F.2d 707, reversed and remanded.

F. Lee Bailey argued the cause for petitioner. With him on the brief were Russell A. Sherman and Benjamin L. Clark.

William B. Saxbe, Attorney General of Ohio, and John T. Corrigan argued the cause for respondent. With Mr. Saxbe on the brief was David L. Kessler, Assistant Attorney General.

Bernard A. Berkman argued the cause for the American Civil Liberties Union et al., as amici curiae, urging reversal. With him on the brief was Melvin L. Wulf.

John T. Corrigan and Gertrude Bauer Mahon filed a brief for the State of Ohio, as amicus curiae, urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution. 1 The United States District Court held that he was not afforded a fair trial and granted the writ subject to the State's right to put Sheppard to trial again, 231 F. Supp. 37 (D.C. S. D. Ohio 1964). The Court of Appeals for the Sixth Circuit reversed by a divided vote, 346 F.2d 707 (1965). We granted certiorari, 382 U.S. 916 (1965). We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment.

I.

Marilyn Sheppard, petitioner's pregnant wife, was bludgeoned to death in the upstairs bedroom of their lakeshore home in Bay Village, Ohio, a suburb of Cleveland. On the day of the tragedy, July 4, 1954, Sheppard pieced together for several local officials the following story: He and his wife had entertained neighborhood friends, the Aherns, on the previous evening at their home. After dinner they watched television in the living room. Sheppard became drowsy and dozed off to sleep on a couch. Later, Marilyn partially awoke him saying that she was going to bed. The next thing he remembered was hearing his wife cry out in the early morning hours. He hurried upstairs and in the dim light from the hall saw a "form" standing next to his wife's bed. As he struggled with the "form" he was struck on the back of the neck and rendered unconscious. On regaining his senses he found himself on the floor next to his wife's bed. He rose, looked at her, took her pulse and "felt that she was gone." He then went to his son's room and found him unmolested. Hearing a noise he hurried downstairs. He saw a "form" running out the door and pursued it to the lake shore. He grappled with it on the beach and again lost consciousness. Upon his recovery he was lying face down with the lower portion of his body in the water. He returned to his home, checked the pulse on his wife's neck, and "determined or thought that she was gone." 2 He then went downstairs and called a neighbor, Mayor Houk of Bay Village. The Mayor and his wife came over at once, found Sheppard slumped in an easy chair downstairs and asked, "What happened?" Sheppard replied: "I don't know but somebody ought to try to do something for Marilyn." Mrs. Houk immediately went up to the bedroom. The Mayor told Sheppard, "Get hold of yourself. Can you tell me what

happened?" Sheppard then related the above-outlined events. After Mrs. Houk discovered the body, the Mayor called the local police, Dr. Richard Sheppard, petitioner's brother, and the Aherns. The local police were the first to arrive. They in turn notified the Coroner and Cleveland police. Richard Sheppard then arrived, determined that Marilyn was dead, examined his brother's injuries, and removed him to the nearby clinic operated by the Sheppard family. 3 When the Coroner, the Cleveland police and other officials arrived, the house and surrounding area were thoroughly searched, the rooms of the house were photographed, and many persons, including the Houks and the Aherns, were interrogated. The Sheppard home and premises were taken into "protective custody" and remained so until after the trial. 4

From the outset officials focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, Dr. Gerber, the Coroner, is reported - and it is undenied - to have told his men, "Well, it is evident the doctor did this, so let's go get the confession out of him." He proceeded to interrogate and examine Sheppard while the latter was under sedation in his hospital room. On the same occasion, the Coroner was given the clothes Sheppard wore at the time of the tragedy together with the personal items in them. Later that afternoon Chief Eaton and two Cleveland police officers interrogated Sheppard at some length, confronting him with evidence and demanding explanations. Asked by Officer Shotke to take a lie detector test, Sheppard said he would if it were reliable. Shotke replied that it was "infallible" and "you might as well tell us all about it now." At the end of the interrogation Shotke told Sheppard: "I think you killed your wife." Still later in the same afternoon a physician sent by the Coroner was permitted to make a detailed examination of Sheppard. Until the Coroner's inquest on July 22, at which time he was subpoenaed, Sheppard made himself available for frequent and extended questioning without the presence of an attorney.

On July 7, the day of Marilyn Sheppard's funeral, a newspaper story appeared in which Assistant County Attorney Mahon - later the chief prosecutor of Sheppard - sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From there on headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. Under the headline "Testify Now In Death, Bay Doctor Is Ordered," one story described a visit by Coroner Gerber and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, the Coroner wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. The officers questioned him for several hours. On July 9, Sheppard, at the request of the Coroner, re-enacted the tragedy at his home before the Coroner, police officers, and a group of newsmen, who apparently were invited by the Coroner. The home was locked so that Sheppard was obliged to wait outside until the Coroner arrived. Sheppard's performance was reported in detail by the news media along with photographs. The newspapers also played up Sheppard's refusal to take a lie detector test and "the protective ring" thrown up by his family. Front-page newspaper headlines announced on the same day that "Doctor Balks At Lie Test; Retells Story." A column opposite that story contained an "exclusive" interview with Sheppard headlined: "`Loved My Wife, She Loved Me,' Sheppard Tells News Reporter." The next day, another headline story disclosed that Sheppard had "again late yesterday refused to take a lie detector test" and quoted an Assistant County Attorney as saying that "at the end of a nine-hour questioning of Dr. Sheppard, I felt he was now ruling [a test] out completely." But subsequent newspaper articles reported that the Coroner was still pushing Sheppard for a lie detector test. More stories appeared when Sheppard would not allow authorities to inject him with "truth serum." 5

On the 20th, the "editorial artillery" opened fire with a front-page charge that somebody is "getting away with murder." The editorial attributed the ineptness of the investigation to "friendships, relationships, hired lawyers, a husband who ought to have been subjected instantly to the same third-degree to which any other person under similar circumstances is subjected . . . ." The following day, July 21, another page-one editorial was headed: "Why No Inquest? Do It Now, Dr. Gerber." The Coroner called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium; the Coroner presided with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel, and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three-day inquest but were not permitted to participate. When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room by the Coroner, who received cheers, hugs, and kisses from ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes. 6 At the end of the hearing the Coroner announced that he "could" order Sheppard

held for the grand jury, but did not do so.

Throughout this period the newspapers emphasized evidence that tended to incriminate Sheppard and pointed out discrepancies in his statements to authorities. At the same time, Sheppard made many public statements to the press and wrote feature articles asserting his innocence. 7 During the inquest on July 26, 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 28, 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." After calling Sheppard "the most unusual murder suspect ever seen around these parts" the article said that "[e]xcept for some superficial questioning during Coroner Sam Gerber's inquest he has been scot-free of any official grilling . . . ." It asserted that he was "surrounded by an iron curtain of protection [and] concealment."

That night at 10 o'clock Sheppard was arrested at his father's home on a charge of murder. He was taken to the Bay Village City Hall where hundreds of people, newscasters, photographers and reporters were awaiting his arrival. He was immediately arraigned - having been denied a temporary delay to secure the presence of counsel - and bound over to the grand jury.

The publicity then grew in intensity until his indictment on August 17. Typical of the coverage during this period is a front-page interview entitled: "DR. SAM: `I Wish There Was Something I Could Get Off My Chest - but There Isn't.'" Unfavorable publicity included items such as a cartoon of the body of a sphinx with Sheppard's head and the legend below: "`I Will Do Everything In My Power to Help Solve This Terrible Murder.' - Dr. Sam Sheppard." Headlines announced, inter alia, that: "Doctor Evidence is Ready for Jury," "Corrigan Tactics Stall Quizzing," "Sheppard `Gay Set' Is Revealed By Houk," "Blood Is Found In Garage," "New Murder Evidence Is Found, Police Claim," "Dr. Sam Faces Quiz At Jail On Marilyn's Fear Of Him." On August 18, an article appeared under the headline "Dr. Sam Writes His Own Story." And reproduced across the entire front page was a portion of the typed statement signed by Sheppard: "I am not guilty of the murder of my wife, Marilyn. How could I, who have been trained to help people and devoted my life to saving life, commit such a terrible and revolting crime?" We do not detail the coverage further. There are five volumes filled with similar clippings from each of the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954. The record includes no excerpts from newscasts on radio and television but since space was reserved in the courtroom for these media we assume that their coverage was equally large.

II.

With this background the case came on for trial two weeks before the November general election at which the chief prosecutor was a candidate for common pleas judge and the trial judge, Judge Blythin, was a candidate to succeed himself. 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. The selection of the jury began on October 18, 1954.

The courtroom in which the trial was held measured 26 by 48 feet. A long temporary table was set up

inside the bar, in back of the single counsel table. It ran the width of the courtroom, parallel to the bar railing, with one end less than three feet from the jury box. Approximately 20 representatives of newspapers and wire services were assigned seats at this table by the court. Behind the bar railing there were four rows of benches. These seats were likewise assigned by the court for the entire trial. The first row was occupied by representatives of television and radio stations, and the second and third rows by reporters from out-of-town newspapers and magazines. One side of the last row, which accommodated 14 people, was assigned to Sheppard's family and the other to Marilyn's. The public was permitted to fill vacancies in this row on special passes only. Representatives of the news media also used all the rooms on the courtroom floor, including the room where cases were ordinarily called and assigned for trial. Private telephone lines and telegraphic equipment were installed in these rooms so that reports from the trial could be speeded to the papers. Station WSRS was permitted to set up broadcasting facilities on the third floor of the courthouse next door to the jury room, where the jury rested during recesses in the trial and deliberated. Newscasts were made from this room throughout the trial, and while the jury reached its verdict.

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. Sheppard was brought to the courtroom about 10 minutes before each session began; he was surrounded by reporters and extensively photographed for the newspapers and television. A rule of court prohibited picture-taking in the courtroom during the actual sessions of the court, but no restraints were put on photographers during recesses, which were taken once each morning and afternoon, with a longer period for lunch.

All of these arrangements with the news media and their massive coverage of the trial continued during the entire nine weeks of the trial. The courtroom remained crowded to capacity with representatives of news media. Their movement in and out of the courtroom often caused so much confusion that, despite the loud-speaker system installed in the courtroom, it was difficult for the witnesses and counsel to be heard. Furthermore, the reporters clustered within the bar of the small courtroom made confidential talk among Sheppard and his counsel almost impossible during the proceedings. They frequently had to leave the courtroom to obtain privacy. And many times when counsel wished to raise a point with the judge out of the hearing of the jury it was necessary to move to the judge's chambers. Even then, news media representatives so packed the judge's anteroom that counsel could hardly return from the chambers to the courtroom. The reporters vied with each other to find out what counsel and the judge had discussed, and often these matters later appeared in newspapers accessible to the jury.

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. Pictures of Sheppard, the judge, counsel, pertinent witnesses, and the jury often accompanied the daily newspaper and television accounts. At times the newspapers published photographs of exhibits introduced at the trial, and the rooms of Sheppard's house were featured along with relevant testimony.

The jurors themselves were constantly exposed to the news media. Every juror, except one, testified at voir dire to reading about the case in the Cleveland papers or to having heard broadcasts about it. Seven of the 12 jurors who rendered the verdict had one or more Cleveland papers delivered in their home; the remaining jurors were not interrogated on the point. Nor were there questions as to radios or television sets in the jurors' homes, but we must assume that most of them owned such conveniences. As the selection of the jury progressed, individual pictures of prospective members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. One newspaper ran pictures of the jurors at the Sheppard home when they went there to view the scene of the murder. Another paper featured the home life of an alternate juror. The day before the verdict was rendered - while the jurors were at lunch and sequestered by two bailiffs - the jury was separated into two groups to pose for photographs which appeared in the newspapers.

III.

We now reach the conduct of the trial. While the intense publicity continued unabated, it is sufficient to relate only the more flagrant episodes:

1. On October 9, 1954, nine days before the case went to trial, an editorial in one of the newspapers criticized defense counsel's random poll of people on the streets as to their opinion of Sheppard's guilt or innocence in an effort to use the resulting statistics to show the necessity for change of venue. The article said the survey "smacks of mass jury tampering," called on defense counsel to drop it, and stated that the bar association should do something about it. It characterized the poll as "non-judicial, non-legal, and nonsense." The article was called to the attention of the court but no action was taken.

2. On the second day of voir dire examination a debate was staged and broadcast live over WHK radio. The participants, newspaper reporters, accused Sheppard's counsel of throwing roadblocks in the way of the prosecution and asserted that Sheppard conceded his guilt by hiring a prominent criminal lawyer. Sheppard's counsel objected to this broadcast and requested a continuance, but the judge denied the motion. When counsel asked the court to give some protection from such events, the judge replied that "WHK doesn't have much coverage," and that "[a]fter all, we are not trying this case by radio or in newspapers or any other means. We confine ourselves seriously to it in this courtroom and do the very best we can."

3. While the jury was being selected, a two-inch headline asked: "But Who Will Speak for Marilyn?" The front-page story spoke of the "perfect face" of the accused. "Study that face as long as you want. Never will you get from it a hint of what might be the answer . . . ." The two brothers of the accused were described as "Prosperous, poised. His two sisters-in law. Smart, chic, well-groomed. His elderly father. Courtly, reserved. A perfect type for the patriarch of a staunch clan." The author then noted Marilyn Sheppard was "still off stage," and that she was an only child whose mother died when she was very young and whose father had no interest in the case. But the author - through quotes from Detective Chief James McArthur - assured readers that the prosecution's exhibits would speak for Marilyn. "Her story," McArthur stated, "will come into this courtroom through our witnesses." The article ends:

> "Then you realize how what and who is missing from the perfect setting will be supplied.
>
> "How in the Big Case justice will be done.
>
> "Justice to Sam Sheppard.
>
> "And to Marilyn Sheppard."

4. As has been mentioned, the jury viewed the scene of the murder on the first day of the trial. Hundreds of reporters, cameramen and onlookers were there, and one representative of the news media was permitted to accompany the jury while it inspected the Sheppard home. The time of the jury's visit was revealed so far in advance that one of the newspapers was able to rent a helicopter and fly over the house taking pictures of the jurors on their tour.

5. On November 19, a Cleveland police officer gave testimony that tended to contradict details in the written statement Sheppard made to the Cleveland police. Two days later, in a broadcast heard over Station WHK in Cleveland, Robert Considine likened Sheppard to a perjurer and compared the episode to Alger Hiss' confrontation with Whittaker Chambers. Though defense counsel asked the judge to question the jury to ascertain how many heard the broadcast, the court refused to do so. The judge also overruled the motion for continuance based on the same ground, saying:

> "Well, I don't know, we can't stop people, in any event, listening to it. It is a matter of free speech, and the court can't control everybody. . . . We are not going to harass the jury every morning. . . . It is getting to the point where if we do it every morning, we are suspecting the jury. I have confidence in this jury . . . ."

6. On November 24, a story appeared under an eight-column headline: "Sam Called A `Jekyll-Hyde' By Marilyn, Cousin To Testify." It related that Marilyn had recently told friends that Sheppard was a "Dr. Jekyll and Mr. Hyde" character. No such testimony was ever produced at the trial. The story went on to announce: "The prosecution has a `bombshell witness' on tap who will testify to Dr. Sam's display of

fiery temper - countering the defense claim that the defendant is a gentle physician with an even disposition." Defense counsel made motions for change of venue, continuance and mistrial, but they were denied. No action was taken by the court.

7. When the trial was in its seventh week, Walter Winchell broadcast over WXEL television and WJW radio that Carole Beasley, who was under arrest in New York City for robbery, had stated that, as Sheppard's mistress, she had borne him a child. The defense asked that the jury be queried on the broadcast. Two jurors admitted in open court that they had heard it. The judge asked each: "Would that have any effect upon your judgment?" Both replied, "No." This was accepted by the judge as sufficient; he merely asked the jury to "pay no attention whatever to that type of scavenging. . . . Let's confine ourselves to this courtroom, if you please." In answer to the motion for mistrial, the judge said:

> "Well, even, so, Mr. Corrigan, how are you ever going to prevent those things, in any event? I don't justify them at all. I think it is outrageous, but in a sense, it is outrageous even if there were no trial here. The trial has nothing to do with it in the Court's mind, as far as its outrage is concerned, but -
>
> "Mr. CORRIGAN: I don't know what effect it had on the mind of any of these jurors, and I can't find out unless inquiry is made.
>
> "The COURT: How would you ever, in any jury, avoid that kind of a thing?"

8. On December 9, while Sheppard was on the witness stand he testified that he had been mistreated by Cleveland detectives after his arrest. Although he was not at the trial, Captain Kerr of the Homicide Bureau issued a press statement denying Sheppard's allegations which appeared under the headline: "`Bare-faced Liar,' Kerr Says of Sam." Captain Kerr never appeared as a witness at the trial.

9. After the case was submitted to the jury, it was sequestered for its deliberations, which took five days and four nights. After the verdict, defense counsel ascertained that the jurors had been allowed to make telephone calls to their homes every day while they were sequestered at the hotel. Although the telephones had been removed from the jurors' rooms, the jurors were permitted to use the phones in the bailiffs' rooms. The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. The bailiffs sat in the room where they could hear only the jurors' end of the conversation. The court had not instructed the bailiffs to prevent such calls. By a subsequent motion, defense counsel urged that this ground alone warranted a new trial, but the motion was overruled and no evidence was taken on the question.

IV.

The principle that justice cannot survive behind walls of silence has long been reflected in the "Anglo-American distrust for secret trials." In re Oliver, 333 U.S. 257 , 268 (1948). A responsible press has always been regarded as 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. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for "[w]hat transpires in the court room is public property." Craig v. Harney, 331 U.S. 367, 374 (1947). The "unqualified prohibitions laid down by the framers were intended to give to liberty of the press . . . the broadest scope that could be countenanced in an orderly society." Bridges v. California, 314 U.S. 252, 265 (1941). And where there was "no threat or menace to the integrity of the trial," Craig v. Harney, supra, at 377, we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

But the Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." Bridges v. California, supra, at 271. And the Court has insisted that no one be punished for a crime without "a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power." Chambers v. Florida, 309 U.S. 227, 236 -237 (1940). "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." Pennekamp v. Florida, 328 U.S. 331, 347 (1946). But it must not be allowed to divert the trial from the "very purpose of a court system . .

. to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." Cox v. Louisiana, 379 U.S. 559, 583 (1965) (BLACK, J., dissenting). Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in Marshall v. United States, 360 U.S. 310 (1959), we set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence "for it is then not tempered by protective procedures." At 313. At the same time, we did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." At 312. Likewise, in Irvin v. Dowd, 366 U.S. 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

> "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 . . . ." At 728.

The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in Patterson v. Colorado, 205 U.S. 454, 462 (1907):

> "The theory of our system is 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."

Moreover, "the burden of showing essential unfairness . . . as a demonstrable reality," Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942), need not be undertaken when television has exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later to be charged." Rideau v. Louisiana, 373 U.S. 723, 726 (1963). In Turner v. Louisiana, 379 U.S. 466 (1965), two key witnesses were deputy sheriffs who doubled as jury shepherds during the trial. The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that,

> "even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association . . . ." At 473.

Only last Term in Estes v. Texas, 381 U.S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." At 542-543.

And we cited with approval the language of MR. JUSTICE BLACK for the Court in In re Murchison, 349 U.S. 133, 136 (1955), that "our system of law has always endeavored to prevent even the probability of unfairness."

V.

It is clear that the totality of circumstances in this case also warrants such an approach. Unlike Estes, Sheppard was not granted a change of venue to a locale away from where the publicity originated; nor was his jury sequestered. The Estes jury saw none of the television broadcasts from the courtroom. On the contrary, the Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case. The judge's "admonitions" at the beginning of the trial are representative:

> "I would suggest to you and caution you that you do not read any newspapers during the progress of this trial, that you do not listen to radio comments nor watch or listen to television

> comments, insofar as this case is concerned. You will feel very much better as the trial proceeds . . . . I am sure that we shall all feel very much better if we do not indulge in any newspaper reading or listening to any comments whatever about the matter while the case is in progress. After it is all over, you can read it all to your heart's content . . . ."

At intervals during the trial, the judge simply repeated his "suggestions" and "requests" that the jurors not expose themselves to comment upon the case. Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers. See Estes v. Texas, supra, at 545-546. The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

The press coverage of the Estes trial was not nearly as massive and pervasive as the attention given by the Cleveland newspapers and broadcasting stations to Sheppard's prosecution. 8 Sheppard stood indicted for the murder of his wife; the State was demanding the death penalty. For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both Chief Prosecutor Mahon and Judge Blythin were candidates for judgeships. 9

While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that "judicial serenity and calm to which [he] was entitled." Estes v. Texas, supra, at 536. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some 20 reporters staring at Sheppard and taking notes. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that jurors were allowed to make telephone calls during their five-day deliberation.

VI.

There can be no question about the nature of the publicity which surrounded Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for the Ohio Supreme Court:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a `Roman holiday' for the news media, Sam Sheppard stood trial for his life." 165 Ohio St., at 294, 135 N. E. 2d, at 342.

Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public. 10

Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigation and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a "Jekyll-Hyde"; that he was "a bare-faced liar" because of his testimony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. At one point, a front-page picture of Mrs. Sheppard's blood-stained pillow was published after being "doctored" to show more clearly an alleged imprint of a surgical instrument.

Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comment about the case, including the incidents we have previously summarized. In these circumstances, we can assume that some of this material reached members of the jury. See Commonwealth v. Crehan, 345 Mass. 609, 188 N. E. 2d 923 (1963).

VII.

The court's fundamental error is compounded by the holding that it lacked power to control the publicity about the trial. From the very inception of the proceedings the judge announced that neither he nor anyone else could restrict prejudicial news accounts. And he reiterated this view on numerous occasions. Since he viewed the news media as his target, the judge never considered other means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influence. We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial and so do not consider what sanctions might be available against a recalcitrant press nor the charges of bias now made against the state trial judge. 11

The carnival atmosphere at trial could easily have been avoided since the courtroom and courthouse premises are subject to the control of the court. As we stressed in Estes, the presence of the press at judicial proceedings must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged. 12 Bearing in mind the massive pretrial publicity, the judge should have adopted stricter rules governing the use of the courtroom by newsmen, as Sheppard's counsel requested. The number of reporters in the courtroom itself could have been limited at the first sign that their presence would disrupt the trial. They certainly should not have been placed inside the bar. Furthermore, the judge should have more closely regulated the conduct of newsmen in the courtroom. For instance, the judge belatedly asked them not to handle and photograph trial exhibits lying on the counsel table during recesses.

Secondly, the court should have insulated the witnesses. All of the newspapers and radio stations apparently interviewed prospective witnesses at will, and in many instances disclosed their testimony. A typical example was the publication of numerous statements by Susan Hayes, before her appearance in court, regarding her love affair with Sheppard. Although the witnesses were barred from the courtroom during the trial the full verbatim testimony was available to them in the press. This completely nullified the judge's imposition of the rule. See Estes v. Texas, supra, at 547.

Thirdly, the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion. 13 That the judge was aware of his responsibility in this respect may be seen from his warning to Steve Sheppard, the accused's brother, who had apparently made public statements in an attempt to discredit testimony for the prosecution. The judge made this statement in the presence of the jury:

> "Now, the Court wants to say a word. That he was told - he has not read anything about it at all - but he was informed that Dr. Steve Sheppard, who has been granted the privilege of remaining in the court room during the trial, has been trying the case in the newspapers and making rather uncomplimentary comments about the testimony of the witnesses for the State.

> "Let it be now understood that if Dr. Steve Sheppard wishes to use the newspapers to try his case while we are trying it here, he will be barred from remaining in the court room during the progress of the trial if he is to be a witness in the case.
>
> "The Court appreciates he cannot deny Steve Sheppard the right of free speech, but he can deny him the . . . privilege of being in the court room, if he wants to avail himself of that method during the progress of the trial."

Defense counsel immediately brought to the court's attention the tremendous amount of publicity in the Cleveland press that "misrepresented entirely the testimony" in the case. Under such circumstances, the judge should have at least warned the newspapers to check the accuracy of their accounts. And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test came directly from police officers and the Coroner. 14 The story that Sheppard had been called a "Jekyll-Hyde" personality by his wife was attributed to a prosecution witness. No such testimony was given. The further report that there was "a `bombshell witness' on tap" who would testify as to Sheppard's "fiery temper" could only have emanated from the prosecution. Moreover, the newspapers described in detail clues that had been found by the police, but not put into the record. 15

The fact that many of the prejudicial news items can be traced to the prosecution, as well as the defense, aggravates the judge's failure to take any action. See Stroble v. California, 343 U.S. 181, 201 (1952) (Frankfurter, J., dissenting). Effective control of these sources - concededly within the court's power - might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See State v. Van Duyne, 43 N. J. 369, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. Being advised of the great public interest in the case, the mass coverage of the press, and the potential prejudicial impact of publicity, the court could also have requested the appropriate city and county officials to promulgate a regulation with respect to dissemination of information about the case by their employees. 16 In addition, reporters who wrote or broadcast prejudicial stories, could have been warned as to the impropriety of publishing material not introduced in the proceedings. The judge was put on notice of such events by defense counsel's complaint about the WHK broadcast on the second day of trial. See p. 346, supra. In this manner, Sheppard's right to a trial free from outside interference would have been given added protection without corresponding curtailment of the news media. Had the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom - not pieced together from extrajudicial statements.

From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. 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. And appellate tribunals have the duty to make an independent evaluation of the circumstances. 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 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.

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. The case is remanded to the District Court with instructions to issue the writ and order that Sheppard be released from custody unless the State puts him to its charges again within a reasonable time.

It is so ordered.

MR. JUSTICE BLACK dissents.

Footnotes

[Footnote 1] Sheppard was convicted in 1954 in the Court of Common Pleas of Cuyahoga County, Ohio. His conviction was affirmed by the Court of Appeals for Cuyahoga County, 100 Ohio App. 345, 128 N. E. 2d 471 (1955), and the Ohio Supreme Court, 165 Ohio St. 293, 135 N. E. 2d 340 (1956). We denied certiorari on the original application for review. 352 U.S. 910 (1956).

[Footnote 2] The several witnesses to whom Sheppard narrated his experiences differ in their description of various details. Sheppard claimed the vagueness of his perception was caused by his sudden awakening, the dimness of the light, and his loss of consciousness.

[Footnote 3] Sheppard was suffering from severe pain in his neck, a swollen eye, and shock.

[Footnote 4] But newspaper photographers and reporters were permitted access to Sheppard's home from time to time and took pictures throughout the premises.

[Footnote 5] At the same time, the newspapers reported that other possible suspects had been "cleared" by lie detector tests. One of these persons was quoted as saying that he could not understand why an innocent man would refuse to take such a test.

[Footnote 6] The newspapers had heavily emphasized Sheppard's illicit affair with Susan Hayes, and the fact that he had initially lied about it.

[Footnote 7] A number of articles calculated to evoke sympathy for Sheppard were printed, such as the letters Sheppard wrote to his son while in jail. These stories often appeared together with news coverage which was unfavorable to him.

[Footnote 8] Many more reporters and photographers attended the Sheppard trial. And it attracted several nationally famous commentators as well.

[Footnote 9] At the commencement of trial, defense counsel made motions for continuance and change of venue. The judge postponed ruling on these motions until he determined whether an impartial jury could be impaneled. Voir dire examination showed that with one exception all members selected for jury service had read something about the case in the newspapers. Since, however, all of the jurors stated that they would not be influenced by what they had read or seen, the judge overruled both of the motions. Without regard to whether the judge's actions in this respect reach dimensions that would justify issuance of the habeas writ, it should be noted that a short continuance would have alleviated any problem with regard to the judicial elections. The court in Delaney v. United States, 199 F.2d 107, 115 (C. A. 1st Cir. 1952), recognized such a duty under similar circumstances, holding that "if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that."

[Footnote 10] Typical comments on the trial by the press itself include:

> "The question of Dr. Sheppard's guilt or innocence still is before the courts. Those who have examined the trial record carefully are divided as to the propriety of the verdict. But almost everyone who watched the performance of the Cleveland press agrees that a fair hearing for the defendant, in that area, would be a modern miracle." Harrison, "The Press vs. the Courts," The Saturday Review (Oct. 15, 1955).
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> "At this distance, some 100 miles from Cleveland, it looks to us as though the Sheppard murder case was sensationalized to the point at which the press must ask itself if its freedom, carried to excess, doesn't interfere with the conduct of fair trials." Editorial, The Toledo Blade (Dec. 22, 1954).

[Footnote 11] In an unsworn statement, which the parties agreed would have the status of a deposition, made 10 years after Sheppard's conviction and six years after Judge Blythin's death, Dorothy Kilgallen asserted that Judge Blythin had told her: "It's an open and shut case . . . he is guilty as hell." It is thus urged that Sheppard be released on the ground that the judge's bias infected the

entire trial. But we need not reach this argument, since the judge's failure to insulate the proceedings from prejudicial publicity and disruptive influences deprived Sheppard of the chance to receive a fair hearing.

[Footnote 12] The judge's awareness of his power in this respect is manifest from his assignment of seats to the press.

[Footnote 13] The problem here was further complicated by the independent action of the newspapers in reporting "evidence" and gossip which they uncovered. The press not only inferred that Sheppard was guilty because he "stalled" the investigation, hid behind his family, and hired a prominent criminal lawyer, but denounced as "mass jury tampering" his efforts to gather evidence of community prejudice caused by such publications. Sheppard's counterattacks added some fuel but, in these circumstances, cannot preclude him from asserting his right to a fair trial. Putting to one side news stories attributed to police officials, prospective witnesses, the Sheppards, and the lawyers, it is possible that the other publicity "would itself have had a prejudicial effect." Cf. Report of the President's Commission on the Assassination of President Kennedy, at 239.

[Footnote 14] When two police officers testified at trial that Sheppard refused to take a lie detector test, the judge declined to give a requested instruction that the results of such a test would be inadmissible in any event. He simply told the jury that no person has an obligation "to take any lie detector test."

[Footnote 15] Such "premature disclosure and weighing of the evidence" may seriously jeopardize a defendant's right to an impartial jury. "[N]either the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against [Sheppard]." Cf. Report of the President's Commission, supra, at 239, 240.

[Footnote 16] The Department of Justice, the City of New York, and other governmental agencies have issued such regulations. E. g., 28 CFR 50.2 (1966). For general information on this topic see periodic publications (e. g., Nos. 71, 124, and 158) by the Freedom of Information Center, School of Journalism, University of Missouri.

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