3-16-2008

Free Press v. Fair Trials: A Comparative Study of Media Law and Ethics in the United States and Great Britain

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March 16, 2008

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Introduction

The sphere of media influence is changing yet again—and the laws that govern it are as well.

With the advent of telecommunications and the Internet, people now live in an increasingly globalized culture. The Information Age we reside in has wrought benefits for global communication. National boundaries, in their most traditional sense, are continually softening to allow in knowledge, cultures, and inevitable changes. With a myriad of data and media available for the taking, individuals with computer access can learn, share, and interact across the globe. In short, our world is shrinking, bringing us a multitude of possibilities.

Yet these developments in communication have also brought unexpected difficulties. Media standards differ from nation to nation; therefore, speech directed at an international audience, regardless of its place of origin, must take care to abide by the rules of many countries at once. This can present a dilemma for uninformed professionals, as virtually every branch of media can fall subject to foreign criticism for violating legal nuances. Last year, a book written by Americans but published in Great Britain about Islamic charities funding terrorism was pulped for violating England's strict libel laws.[1] Google's Chinese-language version must restrict search results to comply with the government censorship of certain topics.[2] In Sweden and Norway, advertisements targeting children are banned.[3] Educated individuals must be aware of these kinds of legal differences and learn how to communicate accordingly.

Such discrepancies have become particularly problematic for the administration of justice, since international reporting rights are so varied. One of the most pervasive examples of differences in pretrial speech has arisen in the wake of a British tragedy. On July 7, 2005, commuters on the London public transportation system faced a horrific reality. That morning, a series of terrorist bombs detonated on three London Underground trains and a public bus. The attacks, later dubbed the 7/7 bombings, shut down public transit, shocked British citizens, and marked the first major terrorist act on British soil in nearly twenty years. Fifty-two civilians and four suicide bombers were killed; more than seven hundred people were injured. The attacks rattled the United Kingdom and the rest of the world.

On the day of the bombings, national and international media aired constant reports of the attack and its aftermath. Many British television networks aired nonstop coverage of the 7/7 bombings. Some stations even cut all advertising for the full twenty-four hours following the explosions.

Understandably, widespread coverage of the facts surrounding the London bombings continued in subsequent weeks and months. When investigators identified the four suicide bombers from metro surveillance tapes, journalists freely revealed the men's names, family histories, and purported ties to the al-Qaeda terrorist network. Indeed, Mohammad Sidique Khan, Shehzad Tanweer, Hasib Hussain and Germaine Lindsay have become horrific household names in the United Kingdom after the events of July 2005.[4]

Nearly two years later, British law enforcement arrested several individuals "on suspicion of the commission, preparation, or instigation of acts of terrorism" in

conjunction with the bombings.[5] At least three remain in custody and await trial. British media have reported the identities and origins of the cleared individuals. Journalists in the United Kingdom took weeks to report similar information about the three remaining suspects. Days after the initial arrests, BBC News ventured only to disclose that three men had been detained, their whereabouts upon arrest, and their respective ages. These individuals who may have conspired in some of the worst acts of terrorism in British history maintained relative anonymity to citizens of the United Kingdom.

April 2007 brought somewhat unprecedented actions from law enforcement and media alike. BBC News released the names and origins of the three men indicted for their alleged participation in the bombings. Mohammed Shakil, Sadeer Saleem, and Waheed Ali were charged with conspiracy and detained until their preliminary hearings.[6]

This kind of press coverage may seem benign—perhaps lacking—concerning such an event of such magnitude. Yet what makes even this minimal reporting so significant is the fact that British law expressly limits media disclosure of defendant information prior to the commencement of a trial. Furthermore, neither journalists nor government officials released reports on people being investigated in the wake of the bombings, with the exception of cleared individuals. Until last year, the public has known little more than the actual events of the attack and the identities of the four suicide bombers. Most other information regarding the investigation has been confidential for almost two years.

This is quite different from the investigative reporting seen in nations like the United States. Unrelenting media coverage has followed terrorist acts on American soil,

such as the Oklahoma City and 9/11 bombings. As with the London attacks, networks broadcast constant reports of these events—perhaps most memorably with the on-air collapse of the Twin Towers on September 11. This kind of coverage seemed both newsworthy and relevant during these terrorist acts. Yet it is the media treatment of terrorism after the actual attacks, not during them, that sets British and American law apart.

American journalists covered the national investigations of the Oklahoma City and 9/11 bombings extensively in the months that followed. The media reported victims' stories, new developments, and suspects alike as matters of public interest. Within twenty-four hours of the Oklahoma City incident, news outlets had publicly identified Timothy McVeigh as the chief suspect. Leading up to his trial, media revealed details of the investigation, conversations with both prosecution and defense attorneys, and information about McVeigh's private life. Although cameras were not allowed inside the courtroom during the trial, journalists delivered written coverage throughout the McVeigh case.[7] International media organizations provided extensive material about the Oklahoma City bombing and its aftermath as well.

Conversely, few reports of suspects in the 7/7 bombings have appeared both domestically and worldwide. Coverage of this terrorist investigation has been minimal in comparison to that of Oklahoma City, which occurred ten years earlier. Lay people knew even the most minute details of McVeigh's persona in 1995, but the public has heard nothing substantial about the three London bombing suspects. How can two similar

tragedies of international interest receive such different news coverage in the Information Age?

Personal preferences of journalists in either country are certainly not to blame. Reporters in both the United States and Great Britain have demonstrated a commitment to communicating news—sometimes to a fault. The reason for the disparity in reporting after the London and Oklahoma City bombings lies chiefly in the legal standards of the two nations in question. Media law that balances the interests of the courtroom and the press determines each country's approach to pretrial media coverage.

Such a difference between the two nations may seem surprising—after all, the United States originated as a network of British colonies that gained independence in the 1700s. Moreover, the Founding Fathers of the U.S. Constitution based American law on the perceived strengths and shortcomings of British law. Strong Anglo-American diplomatic relations would further imply similarities in laws, rights, and values.

Discrepancies like this in journalism prove significant in today's globalized community. The treatment of pretrial press coverage mandated by one country's law may present a significant problem for journalism in other countries. Breaking news in one nation will likely become breaking news in another. Yet globally consistent reporting standards or laws simply do not exist. As a result, journalists must take care to not overstep other countries' legal boundaries in their coverage of international news. For example, even if American reporters did receive detailed information about the suspects in the London bombings, they would violate British law by disclosing these developments. However, as U.S. citizens, they may not feel any obligation to abide by

foreign law. Such dilemmas are only growing more frequent and complex. In a world of heightened connectivity, where should the media draw the line, if at all?

Journalists may find an answer in a thorough examination of the development of American and British media law. In order to understand today's standards in either country, one must first understand their two histories of courtroom press coverage. Although American and British law may share similar roots, they have evolved differently. In one, freedom of speech warrants the utmost protection; in the other, the assurance of fair trials trumps the public's right to know. Resolving this discrepancy is an arduous process that must look beyond the scope of the law for guidance.

In the United States, journalists work under a free press. The First Amendment explicitly guarantees freedom of expression to everyone, and, barring few mitigating exceptions, this rule holds in both writing and practice. People may communicate what they want, when they want, with little concern of censorship. The concept of free speech has been ingrained in American society for centuries, and it is central to modern journalism.

In the 1950s, however, freedom of the press began to outwardly clash with the interests of American justice. Reporters sensationalized trials before they even began, often tainting jury pools and hindering defendants' due process rights. The matter grew to problematic levels until a few Supreme Court rulings clarified the abilities of the lower courts to enforce restrictions against pretrial publicity. The few regulations against journalists in such situations are temporal and are designed to uphold the media's ability to disseminate newsworthy material.

Media law in the United Kingdom has evolved in quite the opposite manner. From the days of the first printed newspapers, journalists had complete freedom to report on matters of interest, like trials. As the country grew, however, periodicals became more competitive and aggressive in their coverage of provincial courtrooms. Courts began restricting reporting of certain kinds of cases to prevent the release of delicate information. These initial limitations censored things like divorce proceedings and juvenile cases, and they seemed fairly innocuous and beneficial to the public.

Yet the progression of British law proves that even the slightest restriction can open the door to countless others. Still perceiving a threat from the media, Parliament later proscribed the use of strict contempt charges to silence some journalists. This law has helped mitigate prejudicial pretrial reports, but it has had a chilling effect upon British media in the process. The result has been relative silence regarding anyone who may or may not eventually appear in court. Coverage of the 7/7 bombings—or the lack thereof—illustrates this point well. Despite the fact that important investigations have been underway for nearly two years, no media outlet will risk reporting anything about suspects in terrorist activity. Such information is of interest to the public, but British law hinders any significant coverage into the matter. In this light, the disparity between reporting of trials in the United States and Great Britain may shock some individuals. The flow of information differs in these two seemingly similar nations, and the discrepancy fosters problems in international journalism.

Furthermore, the fact that such different laws exist in two of the most powerful countries in the world begs speculation. Should freedom of speech prevail over fair

trials, or vice versa? Without cohesive international law, how can one appropriately balance these two core values? What system can individuals use to address this issues in international reporting and law?

Certainly, the answer must utilize and flesh out the letter of the law. This thesis will accordingly examine the legal frameworks of both nations in relation to pretrial publicity, addressing legal questions through an ethical optic.

The first two chapters outline the evolution of media law in both the United States and Great Britain. Chapter I traces the modern progression of restrictions for trial publicity in the United States, from pretrial speech to reports of ongoing proceedings. Chapter II tracks the historical shift in British law from open proceedings and reporting to contemporary contempt of court standards and pending judicial reform. The final chapter expounds upon the ethical foundations of both countries' laws and explores possible resolutions for the problems surrounding this aspect of international media law. The paper ultimately proves that, by evaluating legal issues through ethical standards, individuals can successfully balance the interests of the press with those of the administration of justice.

Chapter I
Striking the Precarious Balance: American Standards for Judicial Press Coverage

Throughout the past century, the interests of the American free press and the judiciary system have often conflicted in criminal proceedings. Journalists, in an attempt to cover big stories on short deadlines, often gravitate toward high-profile criminal matters. In doing so, though, media can pose a threat to the workings of the judicial

process.[8] Founded upon the Constitutional guarantee to "the right to a speedy and public trial, by an impartial jury,"[9] the American court system relies on the participation of unbiased, rational jurors. Yet given the unavoidable news coverage of crimes, courts frequently encounter difficulty in amassing jury pools untainted by the media's influence. Members of the government are thus compelled to ask the question no one dares to answer outright: in certain circumstances, does the Sixth Amendment right to a fair trial ultimately trump free speech guaranteed by the First?

To begin analysis of such a convoluted matter, one must understand the nature of both the legal and the media professions in the United States. The two are related in that they both work toward uncovering the truth, as well as in the sense that the manner in which they relay facts to their audiences can skew public perception of the issues at hand. With that said, however, the similarities between attorneys and journalists end here. Lawyers communicate carefully under the rules of the court, where information must be disclosed in a specific, orderly manner that supports or disproves the cases being tried. On the other hand, reporters objectively divulge whatever information they can find; whether they spread everything they know depends on their own ethical considerations and the demands of their readers. In essence, the two professions utilize opposite methods in achieving their goals. As a result, they butt heads with escalating frequency in American society.

In order to circumvent such difficulties at the local level, trial courts can implement any of ten set measures for preventing pretrial publicity and bias. First, judges should interview prospective jurors to check for any prejudice in a process known as voir

dire. Individuals demonstrating personal ties to or preconceived notions about either party should be dismissed from the case. To decrease media frenzy in cases with multiple defendants, judges may hold separate trials for each offender. Judges generally take steps to admonish members of the court and law enforcement against speaking about high-profile cases to the media; they also shield witnesses by warning them that they do not have any obligation to talk to the press. In regard to inappropriate attorney behavior, judges hold the right to impose the American Bar Association rules of conduct. Similarly, courts may request journalists' discretion in their reporting techniques and caution them against tainting the jurors with their coverage. Judges may opt to sequester a jury when journalists ignore their warnings. If these measures fail, courts can file to change a trial's venue (location) or venire (jury pool). Additionally, trial judges may move for continuance, or postponement, of a trial until media coverage fades to an acceptable level. The final and most drastic step is declaring a mistrial and closing current proceedings, which judges only resort to if the first trial proves exceedingly unfair.[9]

With such cases, trial participants or spectators have an additional code of conduct to abide by. The U.S. Department of Justice and the American Bar Association set federal standards for reporting on criminal cases.[10] Although the code holds some weight outside the courtroom, its stipulations are not binding; states set their own laws for regulating trials based on the ABA rules.[11] Consequently, since no one ever enforces the "rules" uniformly across the nation, the code stands only as set of guidelines for reporters who may or may not follow them at all. The regulations address how journalists and other members of the court should handle information that could spark bias. Journalists

pose the greatest problem to the progression of fair trials because they often reveal inappropriate or prejudicial information to the public about pending litigation. For example, in order to create the most appealing news stories they can, reporters often include facts that have no place in the trials. Forced confessions, prior criminal records, character flaws of a defendant, or mere speculation from "officials" do not qualify as admissible evidence in court.[12] From the media's standpoint, however, including details like these can add color and dimension to any news story and constitutes a matter of pubic interest. Nonetheless, the Justice Department frowns upon members of the press distributing this sort of irrelevant information, as it can sway a jury.

Despite these efforts to mitigate trial hype, the media still manage to interfere with the administration of justice as defined by the Constitution. Beginning in the early 1960s, the U.S. Supreme Court began establishing what currently stands as complex criteria to regulate judicial press coverage. The Court has ruled on numerous cases that determine what is acceptable in terms of pre- and post-trial publicity, as well as present coverage of ongoing trials.[13] Supreme Court case law, in a roundabout manner, designates how judges can identify and address juror bias.

While the news media was influential in shaping public opinion throughout the eighteenth and nineteenth centuries, pretrial press coverage never presented a significant problem for the judicial system until the 1950s. The expansion of technology and the media during that time permanently changed the face of the American press. News came faster and could reach more people than ever. As a result, media content shifted to include more sensational, entertaining segments along with standard news. Audiences

wanted more—more information, more drama—and the press complied. In matters of the court, then, journalists started to conduct their own investigations of criminal cases rather than merely reporting the trials' outcomes. In response, the Justice Department drafted an official statement in 1965 that became known as the Katzenbach Rules, named after Attorney General Katzenbach. The policy denounced the communication of any facts that could potentially sway a trial's ruling.[14] This decision mandated that only a defendant's identity, pending charges, and circumstances of his or her arrest be divulged; it warned any actors in the judicial process against revealing extraneous information to the media, including prospective evidence, witnesses, attorney arguments, and confessions. Still effective today, the Katzenbach Rules prevent members of the court from contributing to pretrial prejudice.[15] As with the ABA code of conduct, though, these rules are voluntary guidelines. Moreover, they only address constituents within the justice department—not journalists, members of the press, or any other third parties. Considering that the biggest problem with news coverage of criminal cases stems from the media, it seems somewhat ineffectual for the Attorney General to have addressed courtroom officials instead of journalists. While Katzenbach and his cohorts may have considered their policy a totally appropriate and functional method to combat prejudicial information, these rules have limited practical application today.

Limiting Media Coverage: The Early Years

Setting the stage for conflict, the first major case addressing pretrial publicity came to the attention of the Supreme Court during the press buzz of the '60s. In 1961,

the Court ruled on *Irvin v. Dowd*, a case in which a man convicted of murder claimed that he had received an unfair trial because of sensational news coverage in his local area.[16] Accused of killing six people in Indiana, Irvin was under extreme media scrutiny throughout the duration of his pretrial hearings. The defense moved for a change of venue, which the court granted to a neighboring county. However, considering the nature of Irvin's charges, press coverage proved equally problematic throughout the region. News stations across the state broadcast Irvin's juvenile record, previous convictions, and past military court-martial charges. Participants later testified that, due to the nature of press coverage of the case, the court encountered difficulty finding unbiased jurors during voir dire. Not surprisingly, the defendant was found guilty and was sentenced to death; he later petitioned for a new trial before an impartial jury. The Indiana Supreme Court affirmed the district court's decision and denied Irvin habeas corpus relief.[17]

The U.S. Supreme Court then took on the case and reversed, ruling that the lower courts had misinterpreted the issues at hand. First, the Court found that the unaddressed "build-up of prejudice" in the community barred Irvin from receiving a fair trial, and the change of venue had proven ineffective. Although a judge need not prove "that the jurors be totally ignorant of the facts and issues involved," the Supreme Court found evidence of bias within the locality that impeded Irvin's right to a fair trial.[18] Technically speaking, Justice Brennan ruled that prior courts had erred in denying Irvin's case as a federal question, explaining that "the opinion of the Indiana Supreme Court [was] more reasonably read as resting the judgment on the holding that the petitioner's constitutional claim is without merit. In this way, the State Supreme Court discharged its obligation to

'guard, enforce, and protect every right granted or secured by the Constitution of the United States.'"[19] Although the majority opinion focused mainly on procedural errors from the lower courts rather than the question of inappropriate media coverage, the Supreme Court nonetheless issued its first position on prejudicial publicity with this case. The *Irvin v. Dowd* holding thus made excessive pretrial speech a constitutional issue that warranted some sort of regulation, paving the way for future cases of a similar nature.

Yet without a clear federal stance on the matter, publicity continued to present a threat to courtroom procedure in the years following *Irvin.* In 1963, the Supreme Court ruled on *Rideau v. Louisiana,* another instance of press coverage barring a defendant from receiving a fair trial. Implicated of committing bank robbery and murder in Louisiana, Rideau became the subject of yet another media frenzy. The local news station even broadcast the defendant's "confession," regardless of the fact that the majority of the tape's content was deemed inadmissible evidence in court. The court denied Rideau a change of venue, and a local jury soon found him guilty. Failing to address the biased community of jurors, the parish court erred further in ignoring the impact of prejudicial broadcasted material on this case. As the U.S. Supreme Court later ruled, the community could not possibly have provided Rideau with a fair trial due to the extent of local television coverage. In regard to the televised interview, Justice Stewart scornfully deemed that "any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."[20] The broadcast tainted citizens' views of Rideau based on a coerced conversation that would never have even appeared in trial. Rationalizing that television coverage generally reaches a much broader

demographic than newspaper stories, the Court found pretrial publicity of Rideau's case even more prejudicial than in Irvin's. In short, the inadmissible evidence had greater weight on the jurors than the facts of the case; the Court held that Rideau was stripped of his due process rights when the trial judge neglected to provide him with an objective jury "after the people of [Calcasieu Parish] had been exposed repeatedly and in depth to the spectacle of the petitioner personally confessing in detail to the crimes with which he was later to be charged."[21] The Supreme Court reversed Rideau's initial conviction[22]; however, the two dissenting Justices expressed very telling views on the future implications of this case. Citing the *Irvin* ruling, Justice Clark expressed his concern that the Court had created an unreasonable standard "to require that tribunal to be a laboratory, completely sterilized and freed from any external factors." Fearing that this case and its predecessor would unduly curb media coverage of such matters, he explained that petitioners should be held to a certain burden of proof to demonstrate "essential unfairness" in subsequent appeals.[23]

Influential in setting up the balance between the media and the judiciary, *Irvin v. Dowd* and *Rideau v. Louisiana* was merely a precursor to a case decided by the Supreme Court the following year. *Sheppard v. Maxwell*, later dramatized onscreen in "The Fugitive," presented blatant trial prejudice that established the judiciary's position on such publicity. Sam Sheppard, accused of murdering his pregnant wife, became the subject of media scrutiny in the weeks preceding and during his trial. As with *Irvin,* several inflammatory news pieces criticized Sheppard, revealing personal information about him that was irrelevant to the trial itself. When the proceedings began, journalists

filled the courtroom, published classified information about the police's investigation, and set up radio broadcasts in an adjoining room. Furthermore, members of the press repeatedly contacted Sheppard's jurors for quotes and interviews throughout the duration of the trial. The defense made multiple requests for continuance, change of venue, and even mistrial to circumvent the community-wide bias sparked by the media.[24]

Sheppard appealed his case, and the Supreme Court granted his writ of certiorari twelve years later. Finding media coverage of Sheppard's trial unspeakably prejudicial, the Court reversed his sentence and remanded the case to another court. More significant than *Sheppard's* individual holding, however, was the Court's admonishment of the trial judge's lackadaisical attitude toward the administration of justice. In a decision affirmed by eight of the nine members of the judiciary, Justice Clark discussed the appropriate actions that should have ensued to prevent such bias:

> "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."[25]

Sheppard reinforced the aforementioned standard that judges must invoke their authority to protect defendants' due process rights when necessary. The Justices went on to enumerate some of the measures previously defined, such as voir dire, jury sequestration, change of venue, and admonishing court participants as appropriate methods of handling prejudicial publicity in a trial.[26] The holding reasons that, although "the judge announced that neither he nor anyone else could restrict prejudicial news accounts," action must be

taken in certain cases, as "the courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[27] Although the Supreme Court by no means said that restricting speech is uniformly acceptable, the Justices essentially implied that a defendant's due process rights supersede those of the press in some situations.

The *Sheppard* ruling went a few steps further than any other cases of this nature. With *Irvin,* the Supreme Court began its examination of prejudicial trial publicity.[28] They acknowledged in *Rideau* that inappropriate media coverage could taint an entire community of jurors; they did not, however, give a clear explanation of courtroom protocol in such circumstances.[29] It can thus be deduced that the Court wanted to avoid the First and Sixth Amendment balancing act for as long as possible, and probably with just cause. When two components of the Bill of Rights conflict so drastically, the equilibrium is both precarious and difficult to strike. However, the Court eventually found that it could only put off the problem for a finite period. *Sheppard* illustrated an increasingly common dilemma in courtroom protocol that would reappear as the media's power over American public opinion grew; the Justices, aware of the magnitude of the situation, had no choice but to set some sort of First Amendment boundaries. The Supreme Court allowed for such measures to be taken but, in typical fashion, was vague in providing for specific situations that would merit judicial action. As Justice Clark wrote, the lower courts can employ their authority over the press only "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."[30] The particulars of what situations would call for such restraint, including media coverage

inside courtrooms, as explained in *Estes v. Texas*, remained to be determined by other jurisprudence.[31]

Beyond the basic measures discussed previously, a court's most far-reaching defense against prejudicial publicity lies in its ability to impose prior restraints on journalists. However, judges rarely can prove the validity of such limitations on the media. While *Irvin, Rideau,* and *Sheppard* stressed the importance of courts taking action to prevent unfair trials, these cases hardly cleared the path for substantial First Amendment restriction. The Supreme Court has proven much more likely to look favorably upon a district court granting a change of venue or censuring witnesses than a judge issuing a prior restraint on information pertaining to a trial. Only in infrequent circumstances can a judge successfully defend a prior restraint decision before a higher court.[32] Views on press limitations tend to vary among states and federal circuits. Certain jurisdictions may look more or less favorably upon such actions from lower courts, depending on the makeup of each judicial body. In terms of the U.S. Supreme Court, though, the Sixth Amendment only supersedes the First with prior restraints when trial publicity becomes a "clear and present danger."[33]

One important component of the Supreme Court's assessment of speech restrictions is the clear and present danger test. The term was first used during the World War I era in conjunction with the Espionage Act of 1917, which banned individuals from spreading information that could potentially impede the success of the American military. Justice Holmes explained that certain expression could be limited if it seemed "of such a nature as to create a clear and present danger that [it] will bring about the substantive

evils that Congress has a right to prevent." Most tellingly, he concluded that "it is a question of proximity and degree."[34]

Although the workings of Espionage Act at first may seem to offer little application in contemporary law, the clear and present danger examination has reappeared with considerable frequency in matters of the First Amendment. Judges continue to apply the same test of "proximity and degree" in modern cases, weighing the potential ramifications of barring controversial or inflammatory speech. The judiciary has adopted a five-part standard for determining the constitutionality of such restrictions. For practical purposes, "regulations that are not directed at restricting expression but that incidentally impinge on free speech, are constitutional if they are content-neutral, serve a substantial government interest, are narrowly written, and leave alternative channels of communication."[35] The clear and present danger analysis applies predominantly to the criterion of significant government interest. The government must prove that a message poses an overwhelming threat to American society in order to constitutionally restrict it. The common example of an individual shouting "Fire!" in a crowded building illustrates the test in simplest terms; speech is generally allowed and encouraged as long as it does not jeopardize the safety of others.[36]

Unfortunately, determining what speech actually presents a clear and present danger is almost never that straightforward. Courts on every level must evaluate the validity of restraints on free expression. In terms of the administration of justice, then, speech impeding an individual's right to a fair trial must constitute an immediate threat to proper courtroom proceedings. Cases like *Irvin, Rideau,* and *Sheppard* relied on

application of the original test in situations of invasive media presence. The Justices indicated this best with their ruling in *Sheppard,* holding that "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."[37] The Court majority established that the excessive press coverage surrounding the trial represented an endangerment to Sheppard's due process rights. Although the final decision did not specifically cite the clear and present danger test, its application can be inferred. As the influence of the media increases, though, this analysis may prove too simplistic to fully address the balance of due process and free speech.

Based on the murkiness surrounding such issues, Robert Hardaway and Douglas Tumminello propose that the federal government instate a specific, enumerated standard for preventing pretrial bias.[38] The *Sheppard* holding established the precedent for judges to take action against courtroom unfairness, as "the Court followed the totality of the circumstances approach used in *Estes* and *Rideau*, and presumed a reasonable likelihood of prejudice resulting from the extensive media exposure without requiring a showing that prejudice actually existed."[39] The authors point out that, although juror bias was fairly obvious in these three test cases, the Supreme Court overturned the initial rulings because trial judges failed to take appropriate measures against pretrial media. Finding this ruling legitimate but too unclear for realistic purposes, Hardaway and Tumminello suggest a far-reaching rule reminiscent of Miranda rights for such situations. They lament that the only existing solutions to media coverage endorsed by the Court inevitably conflict with free speech:

> "The most effective way to ensure an unbiased jury is through complete closure to the press and public. Of course, our common-law history provides for public criminal trials as a method of government accountability, and the presumption of openness now is a constitutional guarantee. Closely related is the inevitable clash between the First Amendment and the Sixth Amendment whenever pretrial publicity becomes an issue."[40]

The authors separate their proposal into four components, including full assessment of a case's "national notoriety," provisions for change of venue or sealing the courtroom altogether, and under what conditions can a defendant legitimately move for a mistrial. Chiefly troubling to Hardaway and Tumminello is the concept of trials garnering news and even entertainment attention; they define such cases as those receiving "pervasive and continuous national media treatment" through all outlets of communication. They explain that certain cases involving heinous crimes and public figures typically acquire widespread infamy and thus gain problematic coverage. The authors specify quandaries that could arise in court, such as tainted jury pools, the broadcasting of inadmissible evidence as per *Rideau*, or the fostering of "an inflammatory environment hostile to the defendant."[41] According to the authors, these circumstances should unquestionably merit change of venue, implementation of a judge's contempt powers, complete sealing of the courtroom, or even dissolution, of the trial, per the defendant's request.[42] Conceding that their proposal may have provided only an "imperfect solution," Hardaway and Tumminello nonetheless touch on a gap in Supreme Court case law; *Sheppard* and its related cases never outlined sufficient details for lower courts to apply.[43] As a result, these rulings were only the beginning of conflict between the First and Sixth Amendments.

Continuing the Fight for Speech

Perhaps second only to *Sheppard* as one of the best-known trial publicity cases, *Nebraska v. Stuart* solidified the Court's opinion on media restraints before or during a trial. Defendant Erwin Charles Simants faced six premeditated murder charges and understandably fell under press scrutiny. Anticipating problematic coverage of the case, a Nebraska trial judge enacted a gag order that prohibited all local newspapers, television stations, news wires, and other media outlets from publishing any versions of the defendant's confessions made to third parties throughout the course of the proceedings. The Nebraska Press Association sued, claiming that this action unjustly barred journalists' First Amendment rights. In an influential trial, the U.S. Supreme Court held that, while the Nebraska judge had a legitimate interest in curtailing press coverage, he imposed an unconstitutional limitation on the local media. They noted that the trial judge implemented the gag order without properly documenting his consideration of any of the other, less harsh measures cited in *Sheppard.*[44] Fully aware of the escalating nature of local prejudice, the Court reiterated that

> "In the overwhelming majority of criminal trials, pre-trial publicity presents few unmanageable threats to this important right. But when the case is a "sensational" one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment."[45]

Chief Justice Burger, lamenting that the conflict between the First and Sixth Amendments would only continue to increase, delivered the Court's unanimous opinion on both the Nebraska situation and future restrictions of the press.[46]

Nebraska thereby established a three-part standard for limiting journalists' coverage of trials. The Court cited *Irvin, Rideau,* and *Sheppard* as situations that called

for court intervention on a lesser scale.[47] In these cases, the trial judges disregarded the defendants' rights to due process in allowing virtual media circuses in court. The three judges in these matters failed to take proper action to circumvent pretrial publicity and thereby allowed biased jurors to make unfair convictions that the Supreme Court would later rule invalid. Such lack of foresight was a blatant violation of the Sixth Amendment; clearly, trial courts needed to become more stringent with the press. Yet the judge in question with *Nebraska* did take a harsher stance on the media in his courtroom by temporarily "freezing" speech, and the Justices found his actions excessively restrictive.[48] Where, then, should trial judges draw the line? If those in cases like *Sheppard* were too lax and *Nebraska* too severe, courts therefore must engage in a precarious balancing act to determine which cases deserve press limitation.

Chief Justice Burger, in an effort to clarify this muddled issue, delivered the criteria courts should adhere to when handling reporters. Before issuing a gag order, a judge must implement a watered-down version of the clear and present danger test by assessing three aspects of each case:

> "1. the nature and extent of pretrial news coverage; 2. whether other measures would likely mitigate the effects of unrestrained pretrial publicity; 3. the effectiveness of a restrictive order in diminishing the effect of prejudicial publicity."[49]

In *Nebraska,* the district judge could not demonstrate a sufficient threat from the press or the value of imposing such extreme restraints.[50] The Supreme Court decision issued in this case has subsequently proven difficult to apply throughout the years because it demands such a high burden of proof from the trial courts. The implication is that judges

should initially utilize the least restrictive measures before they turn to gag orders in order to ensure due process.

The *Nebraska* holding rendered crucial implications for members of the press and the judicial system. On one hand, this represented the first definitive standard that applied to both parties. This decision was the Supreme Court's foremost step toward a more tangible rule beyond the clear and present danger test. However, examination of the new standard reveals that, while *Nebraska* somewhat clarified the issue of prejudicial speech, it also created more problems for the courts. What would trial courts have to show to meet Chief Justice Burger's heavy burden of proof before implementing limitations on the press? The standard listed the factors a judge must consider when handling trial publicity, but it set a vague protocol that has been almost impossible to prove. For most cases, *Nebraska* has rendered prior restraints on courtroom coverage unconstitutional, offering the judicial system little help in addressing this difficult issue.

In this respect, the Court seems to have favored some of the rights guaranteed by the First Amendment throughout the years. As the Justices later expressed in *Gentile v. State Bar of Nevada,* "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."[51] Yet in 1975, they deliberately set a demanding standard to prevent lower judges from improperly "freezing" free speech in criminal trials. Few instances of prior restraint from the lesser courts have proven permissible since *Nebraska* in 1976. The Justices all held that, while the judicial system wholly relies on fair trials before unbiased jurors, American society demands a free press

to inform citizens about matters of public interest, including criminal cases. The Justices reasoned that individuals have a right to know about criminal proceedings on both local and national levels; thus, according to the Court, altogether banning media coverage of such cases would render consequences equally damaging to the public as infringing upon their due process rights.[52]

In recent years, however, the Supreme Court has acted more sympathetically toward judges who implement press restrictions in their courts. The threat posed solely by the media, as discussed in *Nebraska,* has sometimes proven less damaging than when members of the bar attempt to skew public opinion themselves. *Sheppard* and its predecessors tackled the problems surrounding biased media coverage, but no prior cases handled the issue of prejudicial speech from attorneys. *Gentile v. State Bar of Nevada,* decided in 1991, determined the constitutionality of a Nevada Supreme Court rule that barred lawyers from making statements outside the courtroom that could have "a substantial likelihood of materially prejudicing an adjudicative proceeding."[53] Information about the character or prior criminal records of clients would generally fall into this category. In a high-profile drug trafficking case, a Nevada defendant's attorney went so far as to hold a press conference after his client's indictment in an effort to counter pretrial publicity; the local news disseminated the information he presented at great length, stirring bias within the community. Although such action directly contradicted ABA standards, one could reason that, ethical considerations aside, an attorney may hope for a biased jury that clearly favors his or her client. What *Gentile* brought forth was another testing of limitations for prejudicial publicity of a different

nature. After the trial, the Nevada state bar disciplined the attorney in question for violating a law that prohibits counsel from making extrajudicial statements; he subsequently appealed these charges.[54]

The Supreme Court had already addressed potential obstacles with trial press coverage, and it simply shifted its focus toward members of the court in this case. The Justices eventually overturned the disciplinary charges, holding that the rule applied in *Gentile* had a strong basis, but its specific wording was too vague. In her concurrence, Justice O'Connor elucidated the matter best with "the view that (1) speech by lawyers who represent clients in pending cases may properly be regulated more readily than the press may be regulated; and (2) the "substantial likelihood of material prejudice" standard was constitutional," still holding that the particular rule at hand should be void.[55] The problem of pretrial exposure presents a problem from all sides of the courtroom. Considering the scope of influence that the media maintain today, the Supreme Court held that all parties involved in legal proceedings can sway public opinion by merely speaking to reporters, and they should avoid such action.

Nevertheless, some instances of prior restraints on judicial information have held before the higher courts. In 2000, the Court of Appeals for the Fifth Circuit rejected the Louisiana Insurance Commissioner's plea to overturn a gag order imposed on him during his own trial. In *United States v. Brown*, the Supreme Court confirmed that certain situations merit the limitation of free speech. Commissioner Brown, along with other state officials, faced various counts of fraud and conspiracy. Several of his co-defendants had previously been tried on other charges, and they openly manipulated media coverage

throughout the course of their hearings to garner public support. Concerned for the legitimacy of the trial at hand, the district judge issued a gag order preventing lawyers, parties, or witnesses from making "statements or information intended to influence public opinion regarding the merits of [the Brown] case."[56] The court briefly defined what could be considered acceptable speech prior to the trial and even lifted the gag order during the defendant's reelection campaign. However, Brown protested the restriction's reinstatement, claiming that it abridged his right to free speech. Typically, most defendants' complaints in trial publicity cases have centered upon the fact that such coverage would limit their rights to fair trials. Yet Brown, facing charges of conspiracy, fraud, and witness tampering, hoped to gain public sympathy by broadcasting his side of the story.[57] In this unusual case, the defendant wanted pervasive media coverage; a prior restraint would curtail his ability to influence the community and potential jurors through the press. Considering the atypical nature of the case, the trial judge stood by his restriction. The appellate court held, after evaluating Brown and his cohorts' prior actions, that the original gag order was constitutional.[58] His liberty to express himself posed a plausible danger to the trial, allowing the court to restrain Brown's speech throughout the proceedings.

Brown thus established an updated version of the *Nebraska* three-part standard (based on the Supreme Court's standards for curtailing free speech) that allowed for certain actions limiting extrajudicial speech. The court found the order valid because the judge demonstrated "a reasonably found substantial likelihood" that public statements could spark bias among jurors, the action taken was as unrestrictive as possible to secure

a fair trial, and the rule itself was "sufficiently narrowly drawn."[59] Given Brown's prior actions, postponing the trial or sequestering the jury would have had little effect on the overwhelming bias his media statements would have stirred. Furthermore, by explaining what would constitute acceptable public speech in the situation, the district judge issued a reasonable regulation.

In many ways, *Brown* turned the issue of media limitation on its head. Although the Supreme Court ultimately denied Brown's writ of certiorari, the case presented a new perspective on pretrial publicity. As previously mentioned, most earlier cases concerned the media abusing criminal trials in an effort to disseminate hot news stories. Press coverage in these situations had to pose a clear danger to court proceedings to actually warrant restriction. With *Brown,* though, the defendant himself posed the real threat to the proper administration of justice. The appellate court referred to this shift in the *Brown* ruling:

> "The cases endorsing some version of the 'clear and present danger' test all predated *Gentile* and did not consider the distinction-explicitly recognized in that case-between trial participants and the press for purposes of a trial court's ability to restrict the speech of those two groups."[60]

Litigants have grown keenly aware of the media's power in shaping public opinion, and the parties in court have begun utilizing press coverage to their respective advantages. With *Gentile,* the Court took the initial step in recognizing the potential impact of extrajudicial statements made by attorneys; however, the Justices took a roundabout route by accepting only the "substantial likelihood of prejudice" inherent in the lawyer's press conference without establishing it as the minimum constitutional standard.[61] *Brown* set a respective guideline based on the *Gentile* analysis for such situations—at least within the

Fifth Circuit Court of Appeals. The case never continued to the next level, meaning that without a written holding from the U.S. Supreme Court, the *Brown* implications stand only as quasi-official policy today. For the time being, the Court has suggested with its silence that such issues remain in the hands of each state and federal circuit to determine.

David Smyth III agrees that trial courts must balance the preservation of free speech without unfairly limiting the rights of individuals. He goes beyond the *Sheppard* ruling in evaluating the effects of prior restraints on witnesses, taking the position that such orders may inhibit their rights more than preserving the sanctity of the trial. Smyth predominately looks to *Sheppard* in his study, concluding that the case's holding in no way declared gag orders the catch-all preventative measure against juror bias. Interestingly enough, he takes the side of the trial participants in his investigation, whereas most analyses cover either the trial court or the media's point of view. Noting that most courts prefer to impose limitations on witnesses and other parties rather than on the media—probably for fear of limiting the press's First Amendment rights—he deems this trend somewhat unfounded and only marginally helpful. Smyth reasons that judges should use the clear and present danger test before restricting a witness's or juror's speech; its high burden of proof protects courtroom parties much more than its newer, watered-down versions.[62] He bases this conclusion on the fact that most courts erroneously refer to *Sheppard* when considering gag orders, despite the fact that the case holding never actually stated that "speech restrictions are the least restrictive option for preserving a trial's fairness."[63] Additionally, he explains that judges' powers to curb extrajudicial speech outside their courtrooms are quite limited without "other statutory

basis;"[64] use of the old standard could simplify the problem for trial courts. One may consider *Brown* a perfect example of such a situation: had the judge only needed to prove clear and present danger of prejudicial speech in question, the original constraints imposed would have had completely different implications. However, while he allows that the *Brown* judge did provide a compelling reason to censor his high-profile defendant, Smyth cautions that "speech about the inner workings of government, including trials, lies at the core of the First Amendment, as it ultimately will make the voters in a democracy more savvy and wise. In any event, a judge's power to enjoin witnesses outside the courtroom is extremely narrow."[65] He essentially finds that, because courts must meet such high burdens of proof to validate their gag orders, such restrictions often generate problems rather than fixing pretrial bias at its origin.[66]

Regulating Press within the Courtroom

A new concern arises with press coverage of trials in progress. According to the Supreme Court, while pretrial publicity poses a greater threat to due process, the media can substantially impact cases that are already underway. In 1979, *Richmond Newspapers v. Virginia* determined the general public's right to attend courtroom proceedings.[67] A man convicted of murder in Virginia received three mistrials due to technicalities and juror misconduct. His fourth judge finally agreed to seal the courtroom in order to uphold the defendant's right to an efficient, effective trial. Shortly thereafter, Richmond Newspapers appealed the closure, claiming that it impeded their ability to freely report the news. The U.S. Supreme Court later deemed the courtroom closure

unconstitutional because it unduly overrode the press's First Amendment privileges. The trial judge did not take satisfactory steps to otherwise limit the unfairness he feared in court; shutting the proceedings altogether seemed excessive without documented investigation of potential damages,[68] unlike in the *Brown* situation. Furthermore, while the Bill of Rights does not specifically guarantee the public's right to attend criminal trials, the Court viewed it as implied by the First Amendment. As Chief Justice Burger wrote, the guarantees of free speech, free press, and public assembly ultimately suggest frank communication concerning matters of the government: "Plainly it would be difficult to single out any aspect of government of higher concern and importance than the manner in which criminal trials are conducted."[69] The Chief Justice explained that, based on historical tradition, the writers of the Constitution intended for open trials to safeguard against courtroom misconduct as well as to assure the public of the justice system's effectiveness. Additionally, the ruling clarified a defendant's constitutional promise to a "speedy and public trial" as including members of the general populace rather than simply court staffers. The Court held that only certain instances exhibiting an "overriding interest" could warrant sealing a courtroom completely.[70]

Other Justices wrote in their own opinions of *Richmond* that situations concerning national security, trade secrets, or rape victims may call for closed trials.[71] Three years later, however, the Supreme Court delivered a much clearer conclusion on these matters. *Globe Newspaper v. Norfolk County Court* challenged the constitutionality of a Massachusetts statute that banned members of the press and public from attending trials that included testimonies from minor sexual assault victims. This case arose when a

Boston journalist appealed to gain courtroom access during the proceedings of a man indicted for raping three underage girls. The judge denied his request based on the aforementioned statute. Upon later review, the U.S. Supreme Court held that, while the state of Massachusetts had a reasonable interest in preventing extra trauma to minor sex victims, the states could not justify a mandatory rule denying public access to trials.[72] As outlined in *Richmond Newspapers,* the public has a First Amendment right to attend trials and may only be prohibited from doing so when a judge can demonstrate a highly compelling need to close his or her courtroom. In issuing a blanket policy for all juvenile sex cases, the state government created a rule that was too broad and thereby invalid. The Court majority wrote that such delicate situations should be decided "on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim," depending on the victim's age, maturity, and psychological state, among other factors.[73] Furthermore, the statute was not only unreasonably broad but was also ineffective in preventing foreseen harm. As Justice Brennan concluded, information regarding minors' testimonies and identities would be available to civilians and reporters anyway via state public record.[74]

Together, *Richmond Newspapers* and *Globe Newspaper* demonstrated that, no matter how touchy the issue, few situations can validate barring the press and public from communicating the events of an ongoing trial. Although the method established in *Nebraska* is stringent, this standard seems to take a more moderate stance on the scale of press limitation than that of *Richmond Newspapers*. As evidenced by *Brown,* though, some cases can warrant compelling interest in issuing restraints on the media before a

trial starts.[75] While this may appear to be a contradiction from earlier precedent, the Justices have deliberated and presented convincing reasons for different standards addressing the coverage of ongoing trials. Standard pretrial information, including jury pools and litigation dates, falls into the category of public records and is thus considered acceptable for the media to disseminate. However, judges have a stronger basis for taking action against prejudicial publicity through various means, such as jury sequestration and employment of contempt powers, when a trial is underway. In essence, speech concerning present cases tends to receive more protection than communication about trials that have not yet begun. The unmistakable reason behind this policy centers yet again around the Sixth Amendment.

In balancing the First and Sixth Amendments, the Supreme Court's utmost concern has been to secure due process for all defendants. Although the Justices have never unabashedly barred free speech concerning trials, their decisions on such matters plainly balance the press's compelling interests in disseminating information against the individual's right to a fair trial. Their rulings on cases such as *Sheppard* and *Irvin* never admonished the reporters themselves as much as they focused on the appropriate measures that should be taken to conduct an orderly trial. Moreover, the Justices have not hesitated to hold that media coverage of certain cases spiraled out of hand and ultimately biased the general public.[76] Determined not to obstruct speech altogether, they designated practices that trial judges could utilize to limit prejudice within their localities; nonetheless, the members of the Supreme Court have taken the administration of justice seriously in their considerations of both issues.

Even in cases of obvious media misconduct, the Supreme Court has ruled that the rights of the press and the public to communicate must not be impeded unless they clearly prejudice jurors or otherwise obstruct a trial's fair conclusion. The 1965 ruling of *Estes v. Texas*, though, demonstrated that certain press coverage before and during a trial may be limited when it exceeds the boundaries of decency. Indicted by a Texas grand jury on swindling charges, Estes not only became the subject of "massive pretrial publicity" but also received an unprofessional trial in which members of the press overtook the courtroom.[77] As in *Sheppard,* the atmosphere during Estes' trial was that of a media extravaganza, with live radio and television broadcasts of the proceedings. Thanks to national news coverage, Estes' case gained notoriety prior to his actual trial; moreover, the press' presence in the courtroom was unacceptable. The Supreme Court found the Estes proceedings violative of the Sixth Amendment, arriving at a complex decision regarding the suitable scope of media presence during trials.[78]

Justice Clark expressed that although journalists should enjoy their due freedoms to attend and report on criminal trials, their actions must not infringe on the "absolute fairness of the judicial process."[79] The Court held that the media's overwhelming presence during Estes' trial violated the sanctity of the proper courtroom atmosphere that "must be maintained at all costs."[80] *Richmond Newspapers* granted the public access to trials, but individuals must maintain a serious, respectful demeanor to enjoy that privilege.[81] Additionally, the Court held that the Sixth Amendment only allows for a public trial—not the right to broadcast the trial as it ensues. The use of cameras and various broadcasting equipment in court set the tone for an inherently unfair trial.

Televising the proceedings would inevitably distract jurors and impede their ability to make impartial judgments, impair the quality of witness testimonies, sidetrack the judge, and create an awkward, unsuitable environment for all parties. The majority also exhibited concern about the impact of live broadcasts on the defendant, calling it "a form of mental—if not physical—harassment."[82] The excessive media attendance also compromised the workings of the attorney-client relationship, as the parties could not communicate freely without risking press coverage of their private conversations. Most importantly, the Court concluded that biased television coverage could render more damage than print news: "We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial."[83] Even in 1965, the Supreme Court realized the unmistakable impact of the media in formulating public opinion. Although the rights of the press must be upheld in order to maintain a free society, the Court recognized early that the media would pose a risk to the American justice system.

As the power of the media continued to grow, the dilemma surrounding the broadcasting of trials only increased. The Court's slim majority holding in *Estes* was all but overturned in 1981 with the decision of *Chandler v. Florida.* This highly publicized trial with multiple defendants received extensive state media attention both inside and outside the courtroom. Following conviction, the defendants argued that press coverage had infringed upon their right to a fair trial; the Florida Supreme Court denied review and revised the state judicial code to allow "electronic media and still photography coverage" of court proceedings, per trial judges' discretion. The U.S. Supreme Court affirmed upon

appeal, holding that the state's experimenting with radio, television and photographic coverage was constitutional.[84] The Court in a sense circumvented *Estes* in its ruling, explaining that the case did not render all coverage directly contradictory to due process. Chief Justice Burger delivered an opinion based almost entirely on *Estes'* dissenting opinions, noting that the defendants could not demonstrate sufficient evidence supporting the prejudicial nature of the media during their trial. He allowed that while the broadcasting of courtroom proceedings could create future problems, Florida's media policy represented no clear threat to the administration of justice at the time:

> "It is not necessary either to ignore or to discount the potential danger to the fairness of a trial in a particular case in order to conclude that Florida may permit the electronic media to cover trials in its state courts. Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. We are not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene."[85]

Essentially, the Court ruled to give televised trial coverage a second try. Unless a courtroom's atmosphere falls to a completely inappropriate level reminiscent to that of *Estes,* then, the Supreme Court has granted the media full access to active cases once again.

For better or for worse, the press's current freedom to report during ongoing cases thus stands virtually untouched. Pretrial speech still faces more limitations than trial coverage, but instances of valid gag orders remain exceedingly rare. Furthermore, coverage of criminal cases has only increased with time. The national scope of the media today leaves no issue of any importance untouched—or perhaps more appropriately, uncovered. Possibly the best instances of this phenomenon in recent years were the

scandalous, back-to-back trials of O.J. Simpson and Timothy McVeigh in 1997. Simpson's double murder and McVeigh's Oklahoma City bombing convictions both received extensive national attention. From the onset of their accusations to the trials themselves, it could be argued that the press's influence created statewide bias in each case. Moreover, it seemed that McVeigh took note of the absurd atmosphere in the Simpson courtroom and acted accordingly. After the Dallas Morning News reported his alleged confession, McVeigh moved to dismiss his case altogether based on prejudicial pretrial publicity. John Walton writes that, due to the changing nature of the mass media, courts must implement an updated standard for assessing each venire in such high-profile cases. According to Walton, *Irvin, Rideau,* and *Sheppard* set the precedent for acceptable voir dire examination. He concludes that if pretrial publicity contains any of the elements identified as prejudicial by these three cases, a judge should then utilize "nonclassic" measures to examine the jury pool, including analysis of local population dynamics and regional sensitivity.[86] Walton thus proposes his own "two-step inquiry" that could simplify the matter:

> "First, it sorts out the source and strength of attitudes that assist in determining whether a juror can put aside impressions and render a fair verdict. This determination is for the judge, not the juror, to make. Second, in the event that the judge cannot find impartial jurors, the information received may assist the decision to transfer or delay the trial."[87]

Essentially, the only way to combat pervasive regional or statewide bias, as in the Simpson and McVeigh trials, would be incorporating more extensive and potentially more controversial voir dire questioning. Contending that national prejudice cannot lie

far behind, Walton makes a compelling argument for what could become the new courtroom standard for handling pretrial bias.[88]

Regardless of the ever-changing nature of the media and the specifics of cases facing the perpetual dilemma of pretrial publicity, very little has changed since the days of *Irvin, Rideau,* and *Sheppard.* Scholars have suggested their ideas for remedying the conflict between the rights of the accused versus the rights of the press, but the fact remains that the Supreme Court has not taken sufficient steps to create a clear standard for such cases. The unpredictable nature of both media coverage and criminal trials does not easily lend itself to regulation. Although the federal government has traditionally opposed rigid restrictions that could ultimately limit individual rights, a form of such measures could arguably simplify things on all sides of the courtroom; defendants, prosecutors, witnesses, jurors, judges, and journalists alike would have a much clearer idea of how to conduct themselves during high-profile trials.

Without a true standard, then, the justice system frequently falls into a bizarre kind of guessing game in trials with widespread notoriety. At what point does judicial limitation of speech become unacceptable? When should due process supersede the rights of the press and individuals to speak their minds? Despite the fact that the Supreme Court's interests in preserving the Sixth Amendment have come before that of the First in select situations, free speech tends to win in the majority of these balancing cases. Yet even so, the line between the two can often be too close to call. Furthermore, the judiciary's reluctance to make a clear ruling on one Amendment over the other largely leaves the decision in the hands of the states. Every judge's implementation of restraints

on prejudicial speech truly depends on how he or she individually interprets the powers of the court. Judges must personally balance the interests of the free press and preserving order within their own courtrooms, and the result is an altogether disjointed federal standard. The American court system will thus rest in a state of limbo over pervasive pretrial publicity until the government establishes clear guidelines that can guarantee both First and Sixth Amendment rights.

Chapter II
Free Speech or Fair Judgment?
Media Law in Great Britain

Despite the fact that much of American law and policy stems directly from Great Britain, these countries' legal systems have evolved to incorporate dissimilar priorities, particularly regarding the roles of the mass media and judicial administration. While both the United States and Britain share the same base concern for balancing freedom of expression and fairness of trials, they have ensured these ideals quite differently. American courts often conclude that the right to a free press supersedes that of a completely unbiased trial in select situations, whereas the British tend to view excessive court publicity as a more significant threat to be mitigated. Courts throughout the United Kingdom have adopted a series of statutes over time that can severely limit the ability of the press to report on pending or ongoing proceedings.[89] A progression of acts and statutes that began in the nineteenth century established exceedingly powerful courts in England and Wales.[90] For centuries, justices in the lower courts have had the ability to deny public access to trials, meaning that neither laypeople nor members of the press can

attend certain proceedings. Even greater judicial authority was codified in 1981 with the Contempt of Court Act, which granted judges broad contempt powers to punish publishers of potentially prejudicial information. From the American point of view, such restrictions on the press may seem a bit extreme. However, in assessing both American and British media law, one must look toward the progression of each nation's legal system to evaluate their disparate policies. This section examines the current structure of the British judiciary, follows the evolution of national media law and courtroom practices, and explores some of the outcomes of the European Convention in terms of balancing fair trials and a free press in the United Kingdom.

Judicial Reform in the United Kingdom

The structure of the upper-level British courts actually bears little similarity to the United States' judicial branch. The House of Lords currently serves as the highest level of appeal for the courts of England and Wales. Although the House predominantly functions as a sort of figurehead court over the lower branches, its appellate role is still significant. However, change is underway for the House of Lords and the British judiciary. The Constitutional Reform Act 2005 has set plans in motion to establish a single Supreme Court of the United Kingdom that will render final authority on all appeals in England, Wales, Scotland, and Northern Ireland. Consequently, the Lord Chancellor will no longer serve as the judicial head of England and Wales. Scheduled for completion in 2008, the new Supreme Court was part of Prime Minister Tony Blair's constitutional reform program to curb longstanding disagreements over the separation of

state powers.[91] Several significant changes in the current judiciary will result from the CRA.[92]

One of the biggest ethical questions raised in British politics today has been the role of Lord Chancellor, head of the House of Lords. Appointed by the Sovereign, the Lord Chancellor presided over the judiciary until the ratification of the CRA. Over the past ten years, many critics have disputed how effectively one person could handle so many executive and judicial responsibilities: "During the latter decades it became evident not only that the Lord Chancellor's executive responsibilities had increased dramatically but also that the emphasis of the office had shifted—away from the judicial, toward the political."[93] Also in question has been the fairness of having one chief legislator ruling on the interpretations of his or her own laws. As one of the primary leaders in Parliament, Lord Chancellor exercises substantial influence over lawmaking in England; yet the same individual who drafts numerous state laws has had final judgment in the highest court of the land for centuries. As Lord Falconer, the Lord Chancellor, recently expressed, "it is surely not right that those responsible for interpreting the law should be able to have a hand drafting it."[94] Given the potentially dubious nature of the position, the ability of the Lord Chancellor to secure "judicial independence" has been reassessed with the CRA.[95]

Furthermore, the Act will create a Judicial Appointments Commission to oversee the appointment of judges. Critics of current judicial policies in England and Wales have noted the increasing influence that politicians hold over judges in all levels of litigation. CRA supporters strongly believe that the establishment of a Supreme Court for the United Kingdom as a whole will eliminate such concerns by further removing the highest

court from local politics. Much like the U.S. Supreme Court, the new court will operate without political influences from the states that make up Great Britain.[96]

The concept of a totally less constrained judiciary could drastically change the current legal system in Britain. Diana Woodhouse predicts that courts will change over the next few years; exactly in what manner they change will lie in the judges' interpretations of judicial independence. To begin, the Lord Chief Justice, not the Lord Chancellor, will now bear the responsibility of mitigating the influences of politicians and judges in securing proper justice. However, Lords Chancellor must still defend judicial independence within the state. A new statutory provision requires them to "respect the rule of law, defend the independence of the judiciary and discharge [their duties] to ensure the provision of resources for the efficient and effective support of the courts."[97] With a separate judicial body designed specifically to counteract impropriety in the legal system, current practices are bound to change. Woodhouse explains that, during this transitory period, judges must take on more personal responsibility.[98] More importantly, members of the new Supreme Court will need to take a public, proactive stance in defining judicial independence and its practical applications. Woodhouse presses that "the best defense for judicial independence…may be greater accountability and openness," maintaining that open reporting of courtroom practices would increase the justice system's credibility with minimal effort.[99] Statutory changes, she writes, will have little implications without basic ethical transparency. Essentially, without a standard of accountability for all courts, the Supreme Court for the United Kingdom may not succeed in positively reforming the judiciary.[100]

Regardless of the CRA's future consequences, comprehension of the principle of judicial independence is imperative to understanding the controversy that now surrounds English courts. Fundamentally comparable to the American rights to due process and a fair trial, "judicial independence is portrayed, traditionally, as a key feature of England's constitutional arrangements and as an essential characteristic of the rule of law; it is one of the pillars upon which these institutions and structures rest."[101] However, without an explicit statutory guarantee—or even definition—of this principle, it remains a somewhat nebulous concept subject to much interpretation. The lack of a clear explanation of judicial independence has led English courts to often make their own rules on the matter. Some critics argue that, as a result of their fairly unchecked powers, trial and appellate judges may unjustly impose rulings based on exterior political interests.[102]

Despite the fact that one of the CRA's main objectives is ensuring full justice for British citizens, the statute itself fails to specify what exactly poses a threat to the proper administration of justice or how to circumvent such problems. Judges face pressures from politicians in other branches of government, especially in the higher courts. Theoretically speaking, the Lord Chancellor acts to safeguard the subordinate courts "as both a link between the judiciary and politicians and a protector of judges and their independence."[103] In the practical sense, however, recent Lords Chancellor have largely failed to fulfill these duties. Woodhouse cites Lord Irvine in her article as a recent example of such behavior:

> "However, during the latter decades it became evident not only that the lord chancellor's executive responsibilities had increased dramatically but also that the emphasis of the office had shifted-away from the judicial, toward the political. This was confirmed by the central role in government assumed by Lord Irvine,

> lord chancellor from 1997 to 2003, which raised questions about the legality, under article 6 (1), of the role of lords chancellors as judges and, hence, about the constitutionality and efficacy of their being responsible for the defense of judicial independence."[104]

Furthermore, while the CRA will certainly shift some of the burden from the House of Lords to the Supreme Court, skeptics argue that such reform will effect little change without a clear model of judicial independence. Correct administration of this principle thus depends on individual judges to secure open and accountable justice.[105]

From Magistrates to the Supreme Court: Judicial Organization

In terms of more everyday legalities, though, no reforms are currently underway for the lower levels of the judiciary, whose decisions generally have greater implications for the media and private citizens. The appellate and trial courts below the Supreme Court of the United Kingdom have functioned in largely the same manner for centuries. There are many individual divisions of the British judiciary, all of which serve different functions.[106]

Directly subordinate to the House of Lords is the Supreme Court of Judicature of England and Wales, which will be dubbed the Senior Court after the adoption of the CRA. Its branches are divided into the Court of Appeal, the High Court of Justice, and the Crown Court, all of which handle different kinds of legal disputes.[107]

The purpose of the Court of Appeal is rather self-explanatory, as it makes final rulings on both criminal cases from the Crown Court and civil cases from the High Court. However, the process by which cases reach this appellate level is increasingly complex. The High Court takes on numerous different cases within its three divisions of Queen's

Bench, Chancery, and Family. Criminal appeals as well as substantial civil incidents appear before the High Court; its many sub-branches deliver decisions on a wide variety of issues, including domestic matters, wills and settlements, copyright violations, breaches of contract, corporate issues, and torts. For minor disputes, two hundred fifty County Courts rule on the majority of civil issues in England and Wales. The County Courts may also hear divorce and bankruptcy cases. Lesser civil disagreements generally receive quick hearings before a district judge in Small Claims Procedure. Finally, the Tribunals Service entertains petitions of previously administered decisions from various governmental departments. Immigration, social security, child support, and tax disputes often go before tribunals for affirmation or rectification. Appeals from Tribunals' or County Courts' decisions may go to the High Court or directly to the Court of Appeal, depending on the severity of the claims.[108]

From the criminal side, serious offenses immediately appear before the Crown (or State) Court, which handles indictable crimes as well as appeals of decisions administered by the lower courts. All trials in the Crown Court are presided over by a judge and a complete jury. Yet only ten percent of crimes in England ever reach the Crown Court at all. The majority of cases receive summary trials in one of four hundred Magistrates' Courts, whereby a panel of three selected officials from the local community administer brief rulings for petty crimes. The Magistrates' Courts may additionally hear select family proceedings and juvenile cases.[109]

What may surprise American critics is the fact that defendants in many criminal cases never have the opportunity to receive open trials by juries in Great Britain. The

controversies surrounding the Lord Chancellor and the Supreme Court of the U.K. pale in comparison with the frequent practice of summary judgment. The Justices of the Peace Act 1361 first established the judicial authority of the magistracy, proscribing that

> "In every County of England shall be assigned for the keeping of the Peace, one Lord, and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have Power to restrain the Offenders, Rioters and all other Barators…"[110]

While this Act provides for the persecution of criminals—a necessity for any organized society—its language implies the formation of a body more reminiscent of a police force than a court system. In the early years, Justices had the power to arrest, prosecute, and sentence any offenders in their locality, often without consultation from any other judicial actors. Although the Act of 1361 only set up the magistracy in England, Wales followed with its Justices in 1536. Both states' Magistrate Courts are still in effect today. Scotland and Ireland, by contrast, have never created such institutions.[111] The implications of the Act have changed considerably within the past seven hundred years. Law enforcement pursues criminals, attorneys defend them, and judges administer their rulings on today's criminal and civil offenses. However, some aspects of magisterial justice have stirred problems for the media throughout the history of England and Wales.

Early Tensions between the Press and the Judiciary

The modern conflict between the press and the courts is hardly a new one. When newspapers came into normal circulation in the eighteenth century, trials for local crimes received regular coverage. The first weekly newspapers delivered short, informational blurbs about cases of special interest. Most trial reports only published the brief facts of

the cases along with the magistrates' final decisions. However, as newspapers began releasing daily editions, the speed and scope of media communication notably increased. Public interest in breaking, engaging news intensified as well. Soon, journalists were not only writing about judges' rulings, but also about the preliminary hearings and the specific evidence for each case[112]—information that was neither public record nor appropriate for widespread dissemination before any trial's inception. Small papers in lesser populated areas would even go so far as to publish entire transcripts of "petty sessions," which typically were only attended by magistrates and their clerks. The magistrates initially enjoyed this increased coverage of their decisions because they perceived a sort of "deterrent value" in communicating their sentences to other potential criminals in the surrounding areas.[113]

This kind of pervasive press could prove highly detrimental to individuals' civic reputations. Although trial verdicts are made public record today, entire courtroom transcripts generally do not receive this kind of attention (barring cases involving famous people or high-profile crimes). Yet at the time, nearly every statement made in court could be publicized, regardless of its validity.[114] This practice posed a huge dilemma for defendants: "The courtroom is one of the few places where an English person can say '*J'accuse*' and have the accusation reported to the country."[115] Without discriminating between the facts and mere allegations of a case, journalists' extensive coverage of ordinary legal matters thus seems somewhat excessive, if not unwarranted.

However, the publication of such matters had another unforeseen effect. Journalists, as the only outside observers allowed in such proceedings, felt a sense of

"duty to watch over the local administration of justice."[116] It should be noted that, at the time, attorneys rarely were hired for small cases, and public defenders were entirely unheard of. Most defendants in magisterial courts entered alone and had little knowledge of the early English legal system. Thus, without the presence of any other individuals, magistrates essentially enjoyed unchecked authority in such proceedings. As a result, journalists took on a sort of monitoring role in summary cases. Given their increasing presence in magistrates' courts, reporters grew critical of the processes of the lower judiciary:

> "Journalists who went to courts to collect news became the first to recognize how arbitrary could be the magistrates' power of summary conviction and punishment, in a system of criminal justice which provided prosecutors but no defenders. Journalists were the first to concern themselves with the defence of the defenceless in the summary courts."[117]

Newspapers largely considered themselves the final guarantors of justice in each county, watching for potential errors or improprieties from the magistrates. Journalists in rural, less populated provinces took their surveillance roles particularly seriously because they perceived that magistrates in these localities had the most unrestricted power. Although law compelled the opening of summary proceedings in 1848 in an attempt to rectify the magistrate controversy, the precedent for extensive news coverage of such cases was well established by that point.

A statute that eventually became known as the Jervis Act of 1848 largely reformed the magisterial system. Aimed at both clarifying the role of summary judgment and quieting the press in judicial matters, the Act brought the press-judiciary conflict to volatile levels. The first portion of the Jervis Act defined the idea of "summary

conviction" and clarified how legal proceedings should transpire before the magistrates. It explained that if a defendant did not immediately plead to his or her charges, a Justice would then hear each party's version of the case and thereby reach a summary judgment on the matter. While the Act did succeed in establishing a more organized procedure for hearing each side of an argument, it also implied that individuals would only receive trials if they could not substantiate their innocence in pending charges. Essentially, the Jervis Act created "a need to prove innocence, a virtual presumption of guilt" for English citizens.[118] Such an idea runs quite contrary to American concepts of justice that guarantee a person innocent until proven guilty. Furthermore, this action was purposeful; legislators intended for the law to serve as a sort of deterrent for criminals rather than a form of protection for the innocent.[119]

It should be noted that, in spite of its many shortcomings, summary justice at least allowed individuals to state their positions and attempt to defend themselves in court. Such trials followed formal legal procedure. Legislators never intended for these proceedings to be the grounds for arbitrary sentencing by Justices.[120] In fact, similar practices exist quite commonly in modern judicial systems. Instances of quick, discretionary justice could arise with simple speeding tickets in traffic court or small claims civil court today. For practical purposes, this kind of proceeding is often the best option for minor matters. Summary justice is by no means an inherently bad idea; its main flaw arises from the fact that most people have neither the capacity nor the expertise to formulate a proper defense for themselves. This was particularly problematic in nineteenth century England, considering that the state did not guarantee legal

representation to defendants and that "neither the justices nor their clerk were required or expected to give a 'defendant' any help in defending himself, however ignorant or confused he might be."[121] Moreover, private citizens had virtually no access to evidence or witnesses to corroborate their cases in court. How could Justices then claim that they presided over fair trials if most defendants lacked adequate legal knowledge to represent themselves at all in summary proceedings? Many citizens' cases were thus tried by summary judgment to simplify such matters.

An often overlooked upside to the Jervis Act is the fact that it prescribed "that magistrates' summary sessions were to be open and public courts."[122] This represented a significant step in terms of England's judicial process. For the first time, public trials became mandated by statute, signifying the end of officially sealed courtrooms. In practice, however, the Jervis Act far from guaranteed any public presence at magistrates' hearings. Since Justices had full power to determine the time and location of the cases they presided over, they often opted to assemble randomly, failing to notify the public about the whereabouts of upcoming trials.[123] Essentially, they still managed to try defendants under secrecy in spite of the Act's stipulations.

The Criminal Justice Act 1855 attempted to rectify this practice without much success. Legislators codified that even "petty sessions" warranted public courtrooms, providing little leeway for magistrates to justify closed trials. The Act of 1855 additionally called for Justices to publicize upcoming hearings in a timely manner:

> "And a written or printed Notice of the Days and Hours for holding such Petty Sessions shall be posted or affixed, by the Clerk to the Justices of Petty Sessions upon the Outside of some conspicuous Part of the Building or Place where the same are held."[124]

Noticeably absent from this statute is any recommendation for the timeframe in which courts must report their schedules. In theory, Justices could give notice of impending trials minutes before they began. The 1855 Act's vague designation of where magistrates should post their court announcements was also problematic. Since many Justices of the Peace held sessions in various places rather than in a single county courtroom, finding a trial's exact location could prove quite difficult, even in small communities. In addition, the average citizen had little motivation to track down and attend these trials.[125] As a result, even statutory provisions could not realistically ensure open proceedings for most defendants in summary trials.

About twenty years later, the practice of summary judgment became even further ingrained into British law. The Summary Jurisdiction Act 1879 allowed for summary trials of more serious charges, including indictable crimes, upon consent of the defendant. Generally speaking, this Act only applied to the secondary stages of trials that had already been presented before a jury. In what seemed like a primitive version of today's plea bargaining, defendants agreed to charges "reduced to writing" and a prearranged plea.[126] Like the Jervis Act, the Act of 1879 also demanded that a case "shall not be heard, tried, determined or adjudged by a court of summary jurisdiction, except when sitting in open court."[127] Although the courts never went to the extent of employing summary justice in capital crimes, this Act nevertheless created more problems with justice administration in England and Wales. Defendants now had the statutory "privilege" to forego a jury trial and represent themselves, yet they often lacked the legal knowledge to understand the charges they pleaded to.[128] Furthermore, even if a few

laypeople were familiar enough with the law to defend themselves, they could not present evidence to support their arguments in any British courtroom. Only members of the bar, or attorneys, were allowed to submit evidence before a court at the time. Compounded with the already elusive nature of many trials in England, the Summary Judgment Act in many ways fostered more inequity in the justice system.[129]

Journalists' perception of such imbalance in the judiciary inevitably increased with these Acts. Unlike the general public, members of the press had a vested interest in attending and reporting on magistrates' trials. Considering the inconsistent nature of these summary hearings, journalists were often the only members of the general populace present during trials:

> "As long as the place and time of the justices' assemblies was in the least uncertain (and instances of private hearings arranged to suit magistrates have been noted as late as 1945) a reporter could be relied upon to make every effort to find out when the justices were meeting, and to attend, even if he alone represented the absent public."[130]

Most importantly, many reporters felt some sort of obligation to society to attend magistrates' trials. As some of the only individuals with sufficient time and resources to appear in court, journalists fulfilled a much-needed role. At this time, no public record existed in England; since Justices delivered their decisions orally in court, only those physically present knew the outcome of a trial. Consequently, if newspapers did not report on cases, the public may have never even heard of magistrates' rulings or sentences.[131] Journalists were well aware of the fact that they alone bore the burden of communicating the workings of the judiciary with the public, and they took this role seriously.

With these facts in mind, one can easily visualize the progression of tension between the media and the courts in England. The interests of these two institutions conflicted from the very inception of the press; increasing friction seemed inevitable as both bodies expanded. Magistrates largely enjoyed their unchecked authority within their communities, and they eventually objected to the press compromising their influence by reporting on every case tried. While it would be an exaggeration to say that all Justices abused their powers or tried to take advantage of the legal system, instances of judicial impropriety went unaddressed. As a result, it became routine practice for journalists to be "watching over the administration of justice in their localities, and criticizing when necessary."[132] The need for some sort of balance between the press and the judiciary was growing increasingly apparent by the turn of the century.

Yet in addition to the journalistic sense of duty, reporters had another, perhaps more practical, interest in courtroom coverage. Parliament eliminated the stamp tax on printed materials in 1855, meaning that newspapers could finally earn significant revenue. As expected, the end of taxation on paper goods meant a huge boom in weekly papers. The number of individual newspapers skyrocketed, sparking competition among news media.[133] Although they could now generate better profits than ever before, publications felt increased pressure to deliver exciting, valuable news to their audiences. Criminal cases provided perfect material for newspapers to meet these demands. Editors of local publications quickly recognized the news value of printing trial information, particularly in regard to sensational criminal cases.[134] This need for profitable news, in

combination with reporters' preexisting ethical considerations, escalated press coverage of trials to unprecedented levels within a short period of time.

What started innocently enough with the publication of judges' rulings in interesting cases eventually resulted in a media free-for-all at the end of the nineteenth century. Newspapers, eager to fill their pages with breaking stories, began publishing even more transcripts of trials.[135] While publishing such information may not seem to be detrimental to society, one must remember that such details are rarely disseminated through mainstream media to the general populace today. A distinction thus arises between court information simply being made available in government records and court information being publicized through the media.

Even more alarming was the fact that local publications began printing the names of accused individuals before their cases even went to trial.[136] Not surprisingly, the dissemination of pending charges proved detrimental to many citizens' reputations. Even if a defendant were found innocent in court, the widespread publication of his or her alleged offenses could irreparably damage that individual's public image. Crimes that would normally progress to jury trials could never be tried fairly under these circumstances because pretrial publicity would invariably taint the pool of potential jurors.[137]

Further complicating these issues was the influence of police officers in the courtroom. In the modern legal system, officers are usually responsible for initially finding evidence and providing testimony for pending cases. Yet in nineteenth century England, policemen had a much greater role in litigation than would ever be acceptable

under modern notions of Western justice. Officers often worked dualistically, functioning as both law enforcement and prosecution. As such, policemen could make pointed value assessments of defendants in court, which the media naturally published in depth:

> "For a policeman to say, of a man convicted of being drunk and disorderly, that he was 'too idle to work, and his wife was in the workhouse'; of a child thief that he was 'the cleverest pickpocket in the midland counties'; of a mother found guilty of neglecting her children that she was 'a drunken, idle, worthless woman' was commonplace, just as it was that such remarks should be printed, and even headlined, in a newspaper."[138]

Such practices during courtroom proceedings led summary sessions to eventually become known as "police courts," and quite appropriately. With such sharp judgments from testifying officers, infrequently attended trials before magistrates, and incessant press coverage, it can be argued that some British courts overlooked fundamental components of basic civic justice.

At this point, it seems nearly impossible to address the English judiciary without questioning how a system that permitted extensive summary rulings, the publication of minor offenders' identities and backgrounds, and "police courts" could properly ensure due process for its citizens. To be fair, the legal balance has been equally problematic in other countries—particularly in the United States. However, the pursuit of justice had arguably fallen by the wayside in many provincial English courts. Summary jurisdiction imposed by generally uneducated magistrates applied to the majority of civil and criminal cases.[139] Trials usually went unattended by anyone other than journalists, who in turn reported every detail of the defendants' identities, offenses, and proceedings. Even if defendants were found innocent and acquitted of all charges, pretrial publicity often

ruined their reputations. Clearly, the British system faced numerous judicial problems that the government could not ignore for long.

A noteworthy result of this combination of unchecked magistrate power and excessive publicity was a seemingly endless series of libel suits against individual newspapers. Although journalists were technically privileged to report on "public meetings" with the Newspaper Libel and Registration Act 1881, this statute established no provisions for reporting on courtroom proceedings.[140] Newspaper coverage became touchy—but hardly restrained—until Parliament finally codified basic journalistic privilege in 1881. Curiously enough, the Law of Libel Amendment Act allowed for publication of "fair and accurate reports" of trials, regardless of the eventual progression of a case or its outcome. While this statute helped British newspapers publish material with diminished fear of litigation, it also created more problems for defendants' rights to due process. Reporters could publish irrelevant evidence, refuted testimonies, and anything else presented in court, regardless of its validity or pertinence to the case.[141] This Act had potential to clarify journalists' roles in the judicial process, but instead, it only intensified existing courtroom bias.

Foundations of Press Restriction

The Act of 1881, however, was the only statutory guarantee of any sort of journalistic privilege in England for more than a century. Despite the press's high notions of civic duty, few individuals with pending trials actually benefited from such reporting. In lieu of the trial publicity boom, neither the Justices nor the general population

welcomed members of the media in court at this point. Recognizing years of conflict between the press and the courts, Parliament passed the Regulation of Reports Act 1926. The Act prohibited the release of divorce proceedings in an effort to protect people's privacy.[142] At the time, newspapers commonly printed entire discussions of couples' marital problems and negotiations, and legislators recognized the impropriety of this practice. Journalists charged with violating the Act of 1926 would receive summary conviction under a Justice, who "could sentence a 'proprietor, editor, master printer or publisher' to be fined, or imprisoned, or both."[143] It should be noted that the Act did not actually restrict public access to divorce courts; rather, it only limited the ability to communicate information about such proceedings to a widespread audience.[144] This statute represented the first official constraint on the British press, and although it did not yet apply to magistrates' courts, the Act's influence would emerge in later legislation.

Six years later, Parliament passed similar legislation to protect children appearing in juvenile court. The Children and Young Persons Act 1933, designed to limit journalists from revealing juvenile defendants' identities, prohibited the publication of any information "calculated to lead to the identification of young offenders."[145] This altogether broad specification left much leeway for interpretation; while its implications were clear, it failed to specify exactly what kind of material would violate the statute. Journalists could not disclose juvenile offenders' names—but could they print the defendants' ages, locations, or charges? One could deduce that legislators purposely tailored the Act ambiguously to deter reporters. As with the Regulation of Reports Act,

individuals accused of violating the 1933 Act faced summary conviction, which proved a powerful deterrent.

One interesting aspect of the Children and Young Persons Act was an often-unnoticed provision that allowed Justices to decide whether juvenile publicity could be appropriate in certain situations. Basically, this meant that Justices could permit and even mandate publication if coverage somehow benefited their agendas:

> "Juvenile courts were prepared to make use of newspapers' services when the publicizing of a juvenile's identity was desired. It said that the court could dispense with the prohibition on identification if 'satisfied that it is in the interests of justice to do so.'"[146]

It may seem rather curious that legislation aimed at securing the rights of minors would contain such a flagrant loophole. In short, juveniles' identities only received protection when the Justices saw fit. Furthermore, the same magistrates arbitrarily declaring whether defendants' names deserved privilege would, in turn, arbitrarily sentence reporters for violating court orders. Parliament never rectified this obvious problem in the 1933 Act, but other members of government did. Two years after the Act's codification, the office of Home Secretary and the Newspaper Society reached an ethical agreement to protect the privacy of child defendants.[147] This mutual understanding actually rendered more effective results than the statute itself because it caused most English newspapers to voluntarily cease publication of juvenile criminals' identities.[148]

The final codified prohibition against disclosing information on civil proceedings came with the 1937 Act, and its ramifications far exceeded those of the 1926 and 1933 Acts. Although the Regulation of Reports Act ensured confidentiality for separated couples, it only affected matters in the divorce courts, not in the magistrates'. In England

and Wales, nearly all domestic cases must initially appear in the magistrates' courts before proceeding to the higher courts. As such, magistrates heard the vast majority of civil suits, and they had the same interests as the divorce and juvenile courts in protecting each party's identity. Central to lawmakers' concern was the fact that the press profited immensely from the shock value of many civil cases. Moreover, since the inception of the 1926 and 1933 Acts, journalists covered domestic matters from the lower courts with increasing frequency: "Naturally newspapers…were making increased use of stories from the police courts once the supply from the higher courts was cut off."[149] Again, legislators recognized the need for some sort of reform. In response, they passed the 1937 Act, "remarkable as containing one of the few attempts ever made to assess the influence of publicity upon the administration of justice."[150] This Act created the first domestic courts that operated separately from the criminal courts. Moreover, unlike its predecessors, this statute completely sealed domestic courtrooms to the public and declared that a maximum of three magistrates could rule on such cases.[151]

The 1937 Act had little effect on members of the general public, who rarely attended civil trials anyway. Reporters, on the other hand, deeply felt the implications of this law. Not only were they now prohibited from observing domestic sessions, but they were also banned from disclosing any evidence about these cases prior to trial.[152] Such a policy may seem fair to protect private citizens in court. For moral reasons, most newspapers in the United States voluntarily refrain from publishing such information about private citizens, and some British publications adhere to similar standards. Yet

regardless of ethical considerations, the codification of this Act signified the first of many restrictions on the British press system.

The next two decades brought continued reform for both the lower courts and the press in England. Due to various complaints about these two entities in the early twentieth century, the British government launched official investigations of each body. The Royal Commission on Justices of the Peace, conducted from 1946-1948, was the first of the two inspections. This committee looked into allegations of misconduct from the magistrate courts, particularly concerning many Justices' lack of qualification.[153] What the commission found most disturbing was the fact that "the bulk of new justices at the time of the appointment know very little about the duties they are to perform."[154] Many Justices of the Peace were appointed solely on the basis of political or personal favoritism rather than actual aptitude. The report went on to recommend that "a failure to act judicially is a reason for censure."[155] Basically, the findings of the Royal Commission signified an end for magistrates' unchecked authority. Certain proposals from the report, such as the end of "police courts" and defendants' rights to plead guilty or not guilty in summary courts, were eventually codified into statutory law over the ensuing years.[156]

While such restrictions on the magistrates' courts brought noteworthy changes to the British judicial system, the implications of the 1947 Royal Commission on the Press proved equally important. Like the Royal Commission on Justices of the Peace, this committee explored complaints about the press overstepping the boundaries of decency in reporting on certain cases. By this time, many of the small, provincial newspapers had been replaced by daily national papers, which competed heavily with one another for

readers. Printed media covered everything from magistrates' hearings to more significant jury trials. Noting with concern that these papers increasingly capitalized on criminal proceedings and sensationalism to garner public interest, the commission prescribed the establishment of the General Council of the Press.[157] Beginning with its creation in 1953, the Council served as a sort of professional association for journalists. It accepted public complaints and suggestions about the press over the next decade, making recommendations to newspaper staffers and to the public. The General Council of the Press, comprised entirely of reporters and editors, really served as an ethical advisory board during this period of turmoil. Although it held that reporters had a civic "duty" to write about trials, the Press Council also maintained that "the duty to report the general outline of a case does not entail a duty to repeat its abhorrent elements."[158] These findings, while somewhat vague, indicated the overall agreement that the relationship between the media and the law needed to change. State actors and press agents alike felt the tensions that later set the stage for statutory restriction of free speech.

Modern Limitations

After the Royal Commissions on Justices of the Peace and the Press brought the tension between the courts and the media to lawmakers' attention, the British government responded with fitting measures. The first of many modern press restrictions, the1967 Act, banned media reporting of "committal proceedings."[159] In England, committal hearings represent the initial step in criminal prosecution, wherein a magistrate decides before an open courtroom whether the Crown Court has sufficient evidence to indict a

defendant.[160] While such mundane proceedings would seem to be of little relevance to journalists, newspapers habitually published reports of these preliminary hearings, regardless of whether the charges actually held. Papers took particular interest in charges for capital crimes.[161] Newspapers occasionally went so far as to disclose potential evidence for future jury trials. Such conduct obviously threatened defendants' rights to fair trials. To address this issue, a review committee was created in 1957 to determine whether justices should continue holding preliminary proceedings in public. The resulting Tucker Report, named after the committee chairman, held that committal proceedings should still be open to the public.[162] However, the report also advised an official restraint on the British press:

> "Nevertheless the Tucker Report did recommend that there should be a restriction on the publication of such reports, because…the system of reporting committal courts when then existed was believed to create an atmosphere prejudicial to the accused, and thus seriously impaired public confidence in the administration of justice."[163]

Parliament later implemented the Tucker Report's recommendations in the 1967 Criminal Justice Act. The 1967 Act essentially revamped the committal process by allowing for either oral or written committals. Both options only allowed journalists to report on the "bare details." Journalists could only release more in-depth facts of a case if a defendant in an oral committal specifically requested to lift normal press restraints.[164] This generally meant that any preliminary information would be "given in open court, in the hearing of the public and of newspaper reporters; but newspapers are unable to use it, unless the restriction on publicity has been lifted."[165] The 1967 Act did succeed in diminishing

possibly inappropriate press coverage of initial hearings. However, as modern policies have reflected, the Act hardly rectified the friction between the courts and the press.

Only a few years after the Supreme Court of the United States ruled on the constitutionality of pretrial restraints on the American press in *Nebraska Press Association v. Stuart*, English Parliament passed the Contempt of Court Act 1981. Initially "intended to be a liberalising Bill," the Act established clear specifications for what kind of media coverage would be permissible in criminal and civil proceedings. It accordingly described what situations merit contempt charges for journalists.[166] Under what has become known as the "strict liability rule," reporters and publishers may be held liable for releasing any prejudicial material, regardless of their intentions in printing the information. Individuals charged with contempt in such situations may receive unlimited fines and a maximum of two years in jail.[167]

In order for strict liability to apply, any case of excessive pretrial publicity must pass a three-part test. First, prejudicial material must be publicized to "the public at large," meaning that it qualifies as obviously public communication. Private messages therefore do not receive strict liability.[168] Secondly, the communication must pertain to "active" proceedings. The judiciary may consider a criminal case active upon arrest, issuance of a warrant, formal indictment, or oral charges; in civil cases, the mere scheduling of a hearing makes a case active. A trial typically ceases to be active when a justice or jury issues a verdict.[169] The final—and most significant—requirement for strict liability in trial reporting is widely known as the substantial risk rule, which applies to "…publication which creates a *substantial risk* that the course of justice in the

proceedings in question will be *seriously impeded or prejudiced*. This is a double limbed test and both limbs must be satisfied."[170] In addition, the judiciary has deemed substantial risk "a risk which is more than remote or minimal" to the administration of justice.[171] With a rule reminiscent of the Nebraska three-part standard, England's strict liability policy focuses solely on the prejudicial potential of pretrial publicity rather than the actual ramifications of the published material.

In addition to establishing the three-part test for strict liability, the 1981 Act also offers a few defenses for contempt charges. First, a reporter accused of contempt may claim innocent publication, meaning that he or she did not realize or have reason to believe that proceedings had become active at the time of publication.[172] However, this only serves as a limited argument. To claim innocence, journalists must prove that they took "reasonable care" in checking the status of such cases prior to distributing prejudicial information.[173] Although this is a high burden of proof, it can be legitimately asserted in certain situations. A journalist may also declare contemporary reporting, which implies that the publication in question merely disclosed known facts of current proceedings. Nevertheless, section four of the Act maintains that "if the media exceed this boundary and begin to comment in their reports of the proceedings, or to seek out and report extraneous events, s 4 will not provide a defence. Trial by newspaper will not be permitted."[174] The final and most common protection against contempt charges is incidental discussion in good faith. Never intending to chill public communication altogether, Parliament provides for this third defense:

> "A publication made as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under

> the strict liability rule if the risk or impediment or prejudice to particular legal proceedings is merely incidental to discussion."[175]

While the Act never specifies exactly what constitutes a matter "of general public interest," it does leave enough room to believe that reports of significant news should receive some protection. However, the virtually nonexistent description of coverage made in "good faith" has largely left this stipulation to the Attorney General's review.[176] In short, while this third measure has definitely benefited the media, it has somewhat muddled courts' contempt powers in practical application.

A handful of cases throughout the late 1990s have further illustrated a more modern treatment of the strict liability standard. Again, it should be observed that in England, even some of the most important judicial holdings generally do not alter the overall interpretation of law. Unlike in the United States, wherein the three branches of government equally split their powers, the British system remains divided so that Parliament administers all laws, and the courts simply enforce them. The high courts, however, have provided invaluable insight into what provisions like the Contempt of Court Act really mean for civilians.

Essentially, modern contempt rules and their stipulations would have little significance without clear examples of their applications. The Queen's Bench court finally clarified what material could pose "serious impediment or prejudice" with *AG v. Unger* in 1998. In this particular case, a housekeeper was charged with two counts of theft after stealing from her employer. Even though the proceedings were active, a local newspaper printed full stories about the charges and the defendant's intention to plead guilty. Since the defendant had already stated openly that she would plead to the charges,

the newspaper maintained that its articles posed no threat to her trial. Upon review, the Queen's Bench agreed, holding that the publication of a person's premeditated, vocalized plea did not pose a substantial risk.[177] Justice Brown ruled that a news publication must "materially affect the course of a trial; or require directions from the court 'well beyond more ordinarily required and routinely given to juries'; or create at least a 'seriously arguable' ground for appeal on the basis of prejudice" to stir serious prejudice.[178] Using an example of published material that did not threaten a trial, *AG v. Unger* indicated an instance when journalists could freely report such information without risking contempt of court. This holding certainly helped define injurious news content across Great Britain because it established a better defined standard for discerning impediment and prejudice, the two central ideas behind the substantial risk policy.

On a concurring note, possibly the clearest example of what constitutes unacceptably prejudicial content lies in *AG v. Mirror Group Newspapers and Others*.[179] In this case, the Queen's Bench ruled on whether several newspapers could be charged with contempt for their reporting. Preceding the double assault trial of Geoffrey Knights, the boyfriend of a famous television personality, the media began publishing a slew of stories concerning Knights' violent personality and prior convictions. Many of these reports were totally inaccurate, printing delicate information about the couple's relationship problems and exaggerating the extent of his victims' injuries. As a result, Knights called for a stay of proceedings to mitigate pervasive pretrial publicity.[180] The trial judge granted the stay, and the Attorney General subsequently filed contempt charges

against each of the offending publications for impeding the administration of justice under the strict liability rule.[181]

Applying the substantial risk test, the Queen's Bench assessed *Mirror Group Newspapers* based on a new series of criteria. To begin, the courts have to examine each case separately, ignoring all other contempt cases that have preceded it. Likewise, in determining whether to hold the media in contempt, the court must study each individual publication and its treatment of damaging information.[182] Basically, only the most blatant publishers of prejudicial coverage should receive punishment; news sources that merely touch on these issues cannot face the same charges as those that pervasively disseminate sensationalized journalism. However, a publication cannot escape contempt liability simply because other media have similarly covered injurious content. Most importantly, the Queen's Bench ruled that lower courts must consider the immediate effects of prejudicial material on prospective jurors and ordinary citizens, along with "the residual impact" of such content on a local jury pool.[183] This final measure, the so-called "fade factor," generally garners the greatest consideration. Citing a previous contempt ruling, the court explained that "the staying power and detail of publicity, even in cases of notoriety, are limited."[184] Essentially, *Mirror Group Newspapers* demonstrated that British courts must compare the initial impact of prejudicial content against its long-term consequences when imposing contempt powers.

As in America, legal standards for television coverage vary somewhat in England and Wales. *AG v. Independent Television News Ltd and others* demonstrated that broadcast journalism may be subject to less liability for contempt than print. When two

Irishmen were arrested for allegedly murdering a police officer, the local news aired a photograph of one of the suspects and revealed that he was an IRA terrorist and convicted murderer. This particular report actually appeared nine months before the trial itself; the news station omitted details concerning the defendant's prior convictions from all future broadcasts. Reasoning that a televised report has a lesser impact than a printed article, the Queen's Bench cleared ITN of all contempt charges:

> "Judging the position at the time of publication, although the information conveyed was very noteworthy, in view of the brevity of the broadcast and its ephemeral nature, the relatively small circulation of the offending articles in the London area, and the all-important factor of the lapse of time between publication and the likely date of the trial, the court was not satisfied that there was a substantial risk that the course of justice in the trial of the two accused would be affected."[185]

This transient nature of television is crucial to understanding the implications of the Contempt of Court Act. In order to pose a true threat to a trial, media coverage must not only be pervasive but also ingrained in public opinion. Therefore, a quick audio byte on the evening news receives more protection than an article printed in a fixed medium.

Strict liability proves equally stringent in trials that have already begun. If nothing else, courts tend to be even less permissive of publicity surrounding current cases. In such situations, judges often choose to stay the proceedings and subsequently file contempt charges, as with *Mirror Group Newspapers.* In 1998, the Queen's Bench ruled on a similar case, *AG v. Birmingham Post and Mail Ltd,* which illustrated that media can be held fully liable for publishing prejudicial stories, regardless of their release dates. In *Birmingham Post,* a group of individuals were being tried for murder. During their trial, a newspaper ran an article suggesting that an infamous gang had committed the

crime. Although the report did not identify the defendants by name, it implied that they were involved in disreputable organized crime. In reality, though, the individuals had no connections to a gang of any sort.[186] The trial judge closed the proceedings altogether and filed contempt charges against the Birmingham Post. In the Queen's Bench court, Justice Simon Brown upheld the contempt decision. However, he designated, "the fact that the trial judge decides to stay proceedings in the light of media coverage during the trial will not of itself be determinative of contempt. However, it will operate as a 'telling pointer' if an application for contempt is subsequently made."[187] He explained that if other efforts to mitigate prejudicial publicity are unsuccessful, staying the trial is the next step. Nonetheless, it should not directly follow that postponed proceedings will render contempt sentences for the offending media.[188] Again, strict liability must be decided on an individual basis, apart from the specific time of publication.

The Contempt Act certainly had huge implications for media professionals in England. However, it only codifies treatment of intentional, strict liability contempt.[189] Other causes for contempt of court are still regarded as common law, and administration of these decisions falls almost entirely into the hands of the government.[190] It should thus be noted that the Contempt Act makes no mention of intentional contempt, a charge which exists under common law. In such situations, the prosecution must prove that an individual specifically and deliberately has disseminated material for the sole purpose of impeding justice in a particular trial. What many people find rather unsettling about common law contempt is the fact that proceedings must only be "imminent"—not active—for liability to apply to the press. In essence, journalists must speculate when a case

will actually go to court before publishing potentially questionable material. While these common law charges only apply to rare instances of intentional contempt, they can pose a substantial risk to media practitioners. Years earlier, the Phillimore Committee of 1974 had explained that such vague criteria for contempt critically impede free speech:

> "A particular cause for anxiety on the part of the press is the uncertainty as to the time when the law of contempt applies…The view was pressed on us that these uncertainties have an unfortunately inhibiting effect upon the press and that it is of great importance to those who are concerned with public communication to be give more definite guidance."[191]

Without a clear timeframe, reporters have had no idea when they should cease coverage of a case to avoid liability. Additionally, individuals accused of deliberate contempt do not have a right to be tried by a jury at all.[192] Common law contempt currently applies to all British media. This means that journalists can theoretically be held in contempt for publishing information about a crime prior to any formal arrests or convictions.[193]

Although the widely-used system of British contempt certainly has its shortcomings, many scholars believe that this method succeeds in guaranteeing fair trials to all citizens. Stephen J. Krause writes that strong contempt laws effectively protect the administration of justice. Allowing that people have criticized British practices for unduly chilling free speech, he cites the importance of prioritizing the right to a fair trial in all circumstances:

> "The British acknowledge that although a free press plays a vital role in exposing both judicial corruption and the various inequities of the legal system, it oversteps its bounds when sensationalism masquerading as journalistic zeal endangers a criminal defendant's right to a fair trial."[194]

He goes on to suggest that the American legal system could greatly benefit from adopting a form of British contempt law. He deems American measures for securing justice, such

as voir dire, change of venue, and change of venire, improper and largely ineffective. For Krause, a firm policy against prejudicial publicity is the best deterrent.[195] In sum, he fundamentally asserts that Great Britain is fully justified in emphasizing the importance of fair trials over that of free speech when the government must balance the two.

Also crucial to the understanding of media law in England and Wales is the principle of open justice. Current policies demand that all trials be conducted publicly, with the exception of particular situations that warrant closed proceedings. Certain extenuating circumstances may allow for private hearings:

> "[Open justice] must give way when the public interest dictates a degree of privacy. The names of rape and blackmail victims, for example, are suppressed in the interests of mitigating their pain and encouraging other victims to come forward. Family disputes are heard in private when details might damage the children of a disrupted marriage. Postponement of publication of certain evidence in criminal trials is justified on occasions when it might cause irredeemable prejudice to other trials."[196]

While such delicate situations certainly deserve tactful coverage, it has become increasingly common for courts to ban media altogether from attending or reporting on some cases. Another exception to open justice occurs when journalists can attend a trial but must omit certain details from their news stories, such as victims' identities. Occasionally, the press can disclose full reports of trials but are subject to a temporary publication ban. This frequently happens in committal proceedings, wherein magistrates review preliminary evidence that could affect the outcome of the actual trials if publicized.[197] Additionally, Parliament may enact statutes to limit public access to certain circumstances.

On a totally different note, some justices opt to hear short cases in private purely for convenience purposes. Journalists can still report on these preliminary proceedings as long as their reports do not threaten future trials. Members of the press can additionally request to sit in on some of these hearings; justices generally allow them to attend unless they have a substantial interest otherwise.[198] Again, courts have to materially prove that their decisions to close proceedings are absolutely necessary. They must announce closures publicly and, if requested, provide evidence for their actions.[199] Either way, courts must demonstrate an overwhelming interest to justify closing their proceedings altogether.

Hope for a Freer Press?

The ratification of the Human Rights Act 1998 further changed British media law. Created in conjunction with the European Convention of Human Rights, the English government finally codified the Act in 2000.[200] The Convention was actually established after World War II to maintain human rights and democracy throughout Europe, but it has grown much more significant since the creation of the European Union. In 1951, the Convention established seventeen fundamental rights for all Europeans, including the right to life, the right to a fair trial, freedom of thought, conscience and religion, freedom of expression, and the right to effective remedy for violations of the Convention. The Convention also founded the European Court of Human Rights, commonly known as the Strasbourg Court, to enforce these designated freedoms.[201]

As it currently stands, statutory law ensures thirteen of the freedoms set by the Convention. Additionally, any breaches of these rights must be examined on a case-by-case basis. Lawmakers must evaluate possible conflicts with the Convention through four main criteria: "the interference must be prescribed by law; it must serve a legitimate purpose; it must be necessary in a democratic society; and it must not be discriminatory."[202] Fundamentally, any legal clashes with the Convention must perform a vital function in society that justifies violating one of the rights. If a non-government entity infringes upon these freedoms, however, it may be subject to pay a monetary remedy, forfeit problematic material with the "delivery up" sanction, or cease the action in question under court injunction.[203]

Although Britain ratified the Convention upon its conception, the government never included it in national law. Thus, British citizens could not dispute potential Convention rights violations to their government because the Crown did not guarantee them. Furthermore, the courts had no prior responsibility to adhere to these rights or Strasbourg jurisprudence in their rulings.[204] As part of the European Union, though, the United Kingdom has finally opted to raise the status of both the Convention and the Strasbourg Court into domestic law. Upon ratification of the Act, the Lord Chancellor clarified its most practical implications:

> "Legislation should be construed compatibly with the Convention as far as possible. Where the courts cannot reconcile legislation with Convention rights, Parliament should be able to do so…Public authorities should comply with Convention rights or face the prospect of legal challenge."[205]

This decision has rendered major changes for the media, both benefiting and occasionally diminishing the rights of the press.

To British media, Article 10 of the Human Rights Act has rendered one of the country's greatest victories for free speech. As codified in domestic law, 10(1) rules that "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."[206] These rights, at first glance, appear to echo the same principles guaranteed by the United States' First Amendment. Article 10 sets the legal framework for a democratic, open press; however, its *de facto* limitations prove that freedom of expression in Great Britain and in America are two markedly different ideals.

The Act provides for several exceptions to freedom of expression under Article 10(2), which grants "strictly construed" restrictions to 10(1).[207] The government may thus limit speech in order to protect national interests, conflicting rights of the Human Rights Act, and the power of judges.[208] A person must demonstrate an immediate necessity to restrict communications that fall into these categories: "Social needs found 'pressing' usually relate to ensuring fair trial or defeat of terrorism or protecting the public from racial violence, but even these important needs are not overriding: they must be urgent, and the restriction must rationally serve to advance them.[209] The Act has thus provided for increased freedom of reporting, despite the fact that it does not provide for an all-inclusive approach to journalism. However, it does mark the first codification of a newly liberated British press.

In terms of the media and open justice, two principle components of the Act have continually clashed with each other. Article 8's guarantee of the right to private life and

Article 10's security to freedom of expression conflict just as much in Britain as do their American counterparts. Since "neither of these rights is absolute,"[210] people are generally forced to balance these two interests. Understandably, news coverage of private events, such as those preceding interesting trials, may violate Article 10 but also receive protection under Article 8. Before the ratification of the Act, such a problem would never have occurred. Article 6, which asserts individuals' right to fair trials, has also proven problematic in conjunction with Article 10. As in the United States, fair trials must somehow balance with freedom of the press.

Even with its many criteria for safeguarding against unnecessary charges, British contempt law will undoubtedly need to change to accommodate these issues. Joanne Armstrong Brandwood argues that British media law, in protecting the sanctity of its trials, falters in its limitations of speech. Despite protecting trial participants, free expression unduly suffers:

> "While it is clear that British contempt law does prevent the dissemination of a great deal of prejudicial publicity, generally avoiding American-style 'trial by newspaper,' critics charge that both the definition of contempt and the extent of the public affairs exemption are unworkably vague. Wide discretion granted to authorities increases both the uncertainty for publishers and the dangers of selective enforcement. This has a chilling effect on free speech, and, not surprisingly, the amount of information published in Britain about the courts and criminal cases noticeably has declined since 1981."[211]

Moreover, she argues that much of the pretrial bias that courts fear so much could be eliminated with thorough juror examinations and limited attorney speech concerning delicate information prior to trials. Such simple solutions could at once ensure individuals' rights to receive fair trials and still allow the press to function effectively.[212] Brandwood explains that the media play a vital role in public awareness, which is

necessary for the administration of justice. The contempt laws essentially hinder "the effectiveness of the press as a guarantor of individual liberties," a major factor in securing people's rights. Brandwood additionally notes that, under current pressure from the European Convention, the United Kingdom will soon be forced to reevaluate contempt polices, particularly in conjunction with Article 10.[213] She argues from a very Americanized point of view, finally attesting that freedom of expression warrants the utmost respect, and no law or practice should compromise it unless absolutely required.

Criticisms aside, the Human Rights Act has benefited the media by reducing the prevalence of contempt charges. Under European Convention standards, "A successful prosecution for contempt of court is a restriction on freedom of expression…The risk or prejudice caused by a publication to the proceedings in question must accordingly be realistically evaluated in every case."[214] Although Article 10 does not expressly permit all publications under the pretext of free expression, it has created the first substantial recognition of speech under British law. At the very least, restrictions on speech must now fulfill an obvious, legitimate purpose. Unlike in the greater part of the twentieth century, when reporters faced contempt charges for virtually anything, such action now only serves as a final recourse.

Matters that have gone to trial since the ratification of the Human Rights Act 1998 are beginning to demonstrate the effects of this legislation in practice. *A Local Authority v. PD and another,* a case before the Family Division in 2005, stands as an example of the judiciary upholding freedom of expression. This suit arose over an injunction that prohibited the media from disclosing any new information relating to a defendant and his

family before his case went to trial. In this situation, a man was arrested for allegedly murdering his wife and dismembering her body. The couple had a young daughter, and she was placed in the care of a foster family after her father went to prison. While the father awaited his trial, a Family Division court summoned the girl's grandmother and interim family to determine with whom the girl should permanently live. The judge ruled to postpone judgment on the matter and, in the interest of protecting the child, added an order prohibiting "the publishing in any newspaper or broadcasting in any sound or television broadcast or by any means of any cable or satellite programme service or public computer network" of any identifying information about the girl or her family in connection with the father's trial.[215] Concerned journalists immediately questioned this decision, and the court subsequently overturned the initial ruling.[216] Another judge, determining on the validity of this order, eloquently balanced Article 8's right to privacy with Article 10's right to free speech:

> "Neither Article has as such precedence over the other. Secondly, where the values under the two Articles are in conflict, intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test."[217]

Weighing these criteria against the proportionality test, which requires that all restrictions on free speech legitimately serve the interests designated in 10(2), the judge found this particular order unfounded. He reasoned that it would be impossible to shield a child from information that would certainly surface later during criminal proceedings. The court's interest in protecting the girl from the truth was insufficient to justify banning reporters from doing their jobs properly.[218] It should be noted that British law, under the

Children Act, has generally restricted the media in such matters, favoring the protection of children's interests.[219] Consequently, the fact that the judiciary deemed the orders in this case unjust represented a highly significant victory for free speech and Article 10.

The treatment of media law has indisputably progressed since its beginnings in the fourteenth century. The press has gone from enjoying largely unchecked freedom in reporting legal cases to facing harsh contempt charges for publishing prejudicial information. As indicated in *A Local Authority v. PD*, the changes stipulated by the Human Rights Act 1998 have certainly helped secure freedom of expression.[220] However, the full effects of this legislation remain to be seen. The Constitutional Reform Act will likely expedite this process once the Supreme Court for the United Kingdom opens, as this court aims to handle more constitutional issues and guarantee judicial independence. Lawmakers have agreed that these areas have not received due attention from the House of Lords, and they hope to address such shortcomings with their reforms.

The Human Rights Act and the Constitutional Reform Act both suggest that the British government has ultimately recognized the need for judicial overhaul. As a member of the European Union, the United Kingdom as a whole must reevaluate its policies in accordance with those of other member nations. The Human Rights Act was a major step toward reform, as lawmakers addressed Britain's new obligations to abide by European Convention standards. Yet in comparison with other countries, the British judiciary has still seemed to fall a bit short. In the instance of media law, journalists have certainly gained more legal freedom to report on the courts, but they are hardly ensured completely free speech. Article 10 has left much open for interpretation, and reporters

can still face contempt charges for disclosing certain kinds of information. However, the new Supreme Court may finally clarify the rights of the media to report on pending cases. Whatever the outcomes of the Human Rights and Constitutional Reform Acts, though, the nation is currently in a state of transformation, and critics must simply wait to analyze the consequences of these changes as they materialize over the next several years.

Chapter III
Consequences and Duties:
Rectifying Legal Discrepancies with Ethics

Critical observation suggests that the United States has long favored freedom of speech over judicial restriction, whereas Great Britain currently limits the press but stands to possibly change within the next few years. Such extensive analysis of the evolution of media law in both the American and British systems may clarify each nation's position, but it nonetheless leaves many questions unanswered. American law indicates that free speech is an inalienable right for every citizen, only to counter that the courts may limit the actions of journalists if they demonstrate "reasonable likelihood" to prejudice a trial.[221] What constitutes this vaguely defined criterion of reasonable likelihood? Conversely, British courts' rigid contempt powers have challenged journalists for more than thirty years. What will become of these rules in response to the European Convention's Human Rights Act, which guarantees equal rights to fair trials, privacy, and free expression?[222] Furthermore, exactly what kind of behavior merits contempt charges in either country? Is there a specific standard of care that journalists must adhere to in their coverage of high-profile trials?

Ideally, a uniform system of international law beyond diplomatic recommendations would rectify legal differences among nations. A moderate policy incorporating aspects of both American and British media law could provide effective guidance for international journalists. This law would guarantee freedom of speech and the right to fair trials by providing clear guidelines for government restriction. Substantial risk of prejudice would be considered, as in the United States, in conjunction with the British notion of the fade factor. Pretrial publication of material that would be inadmissible in court, like confessions and speculation, would be frowned upon. Coverage of high-profile defendants would only be permissible under narrowly tailored rules, as in *United States v. Brown.* However, longstanding media limitation of the facts of cases should not occur, especially once trials have begun. Occurrences like the 7/7 bombings should be covered within reason. The ideal law would likely model the Human Rights Act in assuring that neither the right the fair trials or free expression supersedes the other and that governing bodies must display compelling interest in breaching these freedoms. Countries violating these provisions would be held internationally accountable.

In a perfect world, this standard could easily rectify problems in international media. Yet unless enforceable world law becomes reality, these ideals will not realized. Governments often clash with journalists over their news coverage, and one party inevitably loses. In March 2008, anti-Chinese protests began in Tibet, a region that has historically conflicted with the Chinese government. Chinese police used brutal force to silence the demonstrations; several protestors, officers, and civilians were injured in the violence. American and British correspondents quickly arrived in the area to report on the

situation, despite the Chinese government's efforts to conceal the incident. Journalists from BBC News and CNN began their coverage of violence in Tibet, only to find their satellite news transmissions blocked.[223] China has censored information domestically for years; Internet searches in China for news about the situation in Tibet yield nothing but broken links and bad connections.[224] However, the Chinese government surpassed its normal boundaries in impeding communication among foreign news sources. Officials later claimed that they found Western news reports too one-sided, favoring Tibet in their stories. [225] Whether the government's action was justified or not, it shut down coverage when reporters chose to ignore the host country's standards. This incident exemplifies what can happen in the absence of widely accepted media law. Journalists can act independently of a host country's policies, but they may not be successful in their coverage, especially in situations where governments take control over free speech.

The best answer to these issues stems from simple ethics. It is impossible to wholly discredit or defend either American or British media law, as both nations' judiciaries offer significant benefits and major pitfalls. Moreover, no conscientious citizen of today's increasingly globalized society can totally disregard the positions of the press or the courts in either country. Consequently, the most valuable method of dealing with the legal discrepancies between the United States and Great Britain must reach somewhere beyond the letter of the law. Judicial constraints can admonish or limit individual actions, but they cannot provide positive advice for what people should do in difficult situations. Professional ethics can. Thus, ethical theory will most effectively help

concerned journalists choose their actions in correctly addressing prejudicial coverage in high-profile legal cases.

American Utilitarianism

Careful analysis reveals that American law predominantly rests upon Consequentialist theory, and it is easy to understand why. The United States is a fairly young nation in comparison to its contemporaries across the globe. Therefore, when Thomas Jefferson, James Madison, Alexander Hamilton, and the rest of the Founding Fathers famously drafted the U.S. Constitution in the late 1700s, they literally had centuries' worth of historical references from predominantly Western European countries at their disposal. The Fathers could look to the governments of England, France, the Netherlands, Germany, and the like for ideas. Furthermore, they formulated their opinions about effective governance from their experiences as colonists alone in a new world. Early Americans also were not afraid to question authority or tradition, as many proved in the Revolution.[226] This basic historical background does more than simply recount how the Constitution came to stand as the law of the United States. In looking back at these first American citizens as they painstakingly debated over the minutia of their Constitution, one can truly grasp the consequence-based thought of these national lawmakers.

Consequentialist, or teleological, ethics focuses primarily on the end result of a decision. This theory simply states that an ethical choice will render positive results and minimize damages in a particular scenario. Consequentialists, therefore, are not bound by

societal rules or perceived duties. Instead, they make choices by "listing the alternatives, evaluating their possible consequences, and then analyzing each option in light of its impact on others."[227] This kind of decision-making undoubtedly characterizes the actions of the Founding Fathers. They examined the British laws imposed upon the colonists in terms of their benefits and weaknesses. Rather than preserving British laws and traditions, the first American lawmakers essentially started over, gleaning the best practices from their collective bodies of political knowledge. Although the Founding Fathers engaged in fierce debate while drafting the Bill of Rights, they ratified this collection of their political values and knowledge into the law of the United States.

Application of the First Amendment continues along Consequentialist lines and goes further to utilize utilitarian values in its assurance of free speech. Utilitarianism, a vein of teleological theory devised by John Stuart Mill, posits that ethical decisions yield beneficial results for the largest amount of people.[228] In this approach, choices should not only produce positive consequences, but they should also ensure "the best outcome for the greatest number of people."[229] In short, the ends justify the means.

Consequentialist theory directly reflects upon modern treatment of the First Amendment, particularly in regard to trial press coverage. Courts must take an adaptive approach to mitigating pretrial publicity by weighing the outcomes of their decisions. Generally speaking, each case involving widespread courtroom publicity must be evaluated separately in terms of likely bias. Courts promise to uphold journalistic freedom and the public's right to information, thereby maximizing favorable results for most people, while mitigating the effects of such publicity on a defendant's due process

rights. The measures established to limit trial bias correspondingly aim to minimize harm for defendants.

Utilitarian thought has continued to dominate American media law, especially in relation to the increasing scope and influence of the press. In a more modern example, the Supreme Court established preventative measures to mitigate negative consequences of publicity in *Sheppard v. Maxwell*. Thanks to the First Amendment, local press enjoyed complete liberty to cover Sheppard's case and the hysteria surrounding it, thereby prejudicing potential jurors. As a result, the defendant absolutely could not receive a fair trial within that jurisdiction. The Supreme Court later evaluated the consequences of the lower courts' decisions and found them unacceptable. In this situation, allowing such pervasive coverage may have served people's curiosity, but it did not create valuable public information and hindered a man's due process rights. The Justices then designated specific actions for courts to minimize such risks and foster the greatest good for all parties.[230] These measures protect justice and additionally allow for a free flow of information, ideally benefiting everyone involved. Moreover, they are non-obligatory, meaning that judges may implement them as they choose when evaluating each case.

Nebraska Press Association v. Stuart took these ideas even further. When the Nebraska Press Association challenged a judge's gag order as unfairly restrictive, the Supreme Court concurred. Again, the Justices considered the possible consequences of allowing press coverage against the interests of the trial court. They determined that, rather than expressly favoring the rights of the court over the rights of the press, the two must balance differently in every case. Encouraging cooperation between the media and

the bar, the Justices established the Nebraska three-part standard and ruled that "judges possess adequate tools short of injunctions against reporting for relieving that tension. To be sure, these alternatives may require greater sensitivity and effort on the part of judges…but that sensitivity and effort is required in order to ensure the full enjoyment and proper accommodation of both First and Sixth Amendment rights."[231] By creating measures to protect the interests of both parties, the Supreme Court fostered a compromise that produced the most favorable results for the most people. According to *Nebraska,* individual judges must therefore apply Consequentialist thought and weigh each outcome before implementing any measures against the press.[232]

These two examples are defensible under the notion of "the public's right to know." This core ethical concept, although somewhat nebulously defined, is arguably one of the most important reasons for government protection of free speech. Jeffrey Maciejewski and David Ozar argue that the idea of citizens' right to information is a cornerstone of American democracy. Without a guarantee of open communication, people could not formulate their own opinions, elect their representatives, or interact properly. According to the authors, he right to information has thus become an implied right in the United States,[233] based on the positive consequences it produces and negative effects it prevents. Furthermore, the authors warn journalists to be mindful of the potential consequences of utilizing their freedoms:

> "Journalists and other organizations who employ appeals to the public's right to know need to assure their audiences that their appeal to this moral standard (even when its meaning has been clearly formulated and its basis clearly defended) is made only after the situation has been fully and carefully examined from the perspective of the professional standards of journalistic practice."[234]

If members of the press are free to publish most material, no matter how controversial, they still must demonstrate a certain standard of care in their coverage. Maciejewski and Ozar reason that, although journalists are expressly guaranteed their rights to speak freely, they must nevertheless follow core ethical guidelines.

Great Britain's Categorical Imperative

British media law takes another ethical perspective. This disparity explains how two countries with such strong historical relations now implement somewhat opposite stances on journalism. Great Britain has evolved to utilize a deontological, or duty-based, legal philosophy. By this line of thought, people should always uphold established moral standards, ignoring the possible outcomes. Individuals who subscribe to this approach "are sometimes referred to as 'nonconsequentialists' because of their emphasis on acting on principle…without regard to the good or bad consequences of their actions."[235] Immanuel Kant, one of the world's best-known deontologists, expounded upon this ethical theory with his categorical imperative. Kant's ideas basically posit that the same morality should apply to everyone and benefit the greater interests of society. Great Britain has, in a sense, come to incorporate these absolutist principles in its treatment of the press.

Although British reporters initially enjoyed great liberty to cover virtually any topic, they were eventually restricted from the courts. Lawmakers had no complaints about trial publicity until it became an obstacle to the administration of justice. Reasoning that due process and courtroom coverage could not coexist, members of Parliament felt a

superior duty to uphold justice. The sanctity of trials has therefore become a sort of categorical imperative in the United Kingdom. Kantian, rather than Consequentialist, thought has driven the modern treatment of media law in England and Wales. With this approach, the responsibility to abide by a certain duty supersedes all other competing interests. Namely, courts can restrict all kinds of pretrial press because some of it could hinder the course of a trial.

The Contempt of Court Act most clearly illustrates this duty-based ethical perspective. Despite the fact that this "liberalising bill" defined the elements of unacceptable media coverage, it nevertheless laid the foundation for overarching judicial contempt powers. Under this law, courts can prosecute reporters for publishing any content that could be even remotely prejudicial, regardless of the initial intent or aim of the printed material.[236] Judges have a moral obligation to hold fair trials, and any other competing interests thereby become secondary. The notion that every individual should receive due process is indeed a noble principle. However, the means of moral imperatives cannot always justify their ends. Today, the Contempt Act allows journalists little leeway to cover trials, which in turn has a chilling effect on British media. Reporters, fearing hefty fines and jail time, often choose not to report on such matters at all. When drafting this bill, members of Parliament likely considered upholding principles of justice as their primary concern, rather than focusing on all the possible consequences of increasing courts' contempt rules.

Nearly ten years ago, *AG v. Mirror Group Newspapers and Others* illustrated the breadth of English contempt powers. When Geoffrey Knights, famous only for dating a

television starlet, was charged with assault, the media inaccurately printed stories that discredited his character and publicized his previous legal offenses. Such information depicted Knights in a false light that could have adversely affected his upcoming trial. Noting a strong concern for due process, the Attorney General held these publications in strict liability contempt and designated new criteria for assessing such situations. This ruling implied that judges should consider the "fade factor" of an article before holding a reporter in contempt. However, other than a simple stay of proceedings, no lesser methods of mitigation were discussed.[237] The Attorney General concentrated mostly on the core idea that the publicity could be prejudicial rather than on the extent of the damage. This case stated that judges should consider their actions before executing contempt charges, but without other tools to limit bias, there is little middle ground.[238] Altogether, the press is not free when up against the core moral values of justice.

This case and the many others like it do not indicate a total disregard for the interests of the press. However, they do show the overall absolutism of British courts in respect to their trials. As Kant emphasized, "although individuals should be free to act… they have a responsibility to live up to moral principles."[239] If the media do not uphold the principles of fair justice, they will eventually suffer the consequences. British law additionally has regarded these principles much more dutifully and rigidly than American law. Still, these Kantian ethics appear to be shifting toward a more relativist approach. Since the Human Rights Act passed in 1998, Great Britain has had a secondary obligation to uphold the principles enumerated in this act, which includes freedom of speech. Even

if British thought continues along its largely deontological path, it must thereby accept the importance of all these rights set by the European Convention.

One of the greatest examples of this gradual change lies in *A Local Authority v. PD and another*. When a young girl found herself in the middle of a brutal family tragedy with her father accused of murder, a judge mandated that no medium could publish information about the girl or her family before the case was tried. Upon review, a higher court found the judge's actions unwarranted and unduly restrictive of free expression. The final decision prescribed a balancing test courts should apply when two components of the Human Rights Act conflict.[240] This case demonstrated that, although British authorities still tend to make ethical decisions based on moral obligations, they certainly consider the rights mandated by the European Convention. These duties ultimately hold greater weight than the myriad possible ramifications of such situations.

Presently, there are no set criteria for how the courts of Great Britain should strike the balance between traditional contempt laws and the provisions of the Human Rights Act. The foundation of the new Supreme Court of the United Kingdom will likely play a key role in clarifying such matters. While the highest court will not open until 2009, plans are already in motion to increase the ethical accountability of the judiciary, thus departing somewhat from the rigidity of older policies. For example, the Times recently reported that, in an effort to increase transparency, the Supreme Court will permit the broadcasting of all cases on national television.[241] However, the British Justice Secretary still maintains that cameras should be excluded from all jury trials.[242] Changes such as

this will undoubtedly spark a shift in current judicially practices—and hopefully, they will simplify the balancing process for lower judges as well.

With such changes in the works, one could argue that the American preservation of free speech is equally deontological as the British assurance of due process. Furthermore, with judicial reforms underway in Great Britain, the two nations seem to be reaching a point of convergence. However, the chief distinction between these countries' policies lies in the execution of their judicial principles. While American judges do have the power to charge journalists with contempt, it is truly a last resort in extenuating circumstances. Instead, courts in the United States use the aforementioned measures against prejudicial publicity based on the perceived consequences of each situation. This practice is distinctively Consequentialist. On the other hand, British contempt powers are the commonplace standard for mitigating trial publicity. Generally speaking, press coverage is quite black and white; either it is prejudicial, or it is not, and contempt charges will be distributed accordingly. Although the judicial reforms in the United Kingdom are changing the dynamics of these practices, they remain Kantian at base.

Seeking Common Ground

Journalists or even civilians processing information on an international scale must therefore be aware of the discrepancies in media law across all borders. However, keeping track of the various minutiae of other countries' laws and practices can prove exceedingly difficult. As if understanding the judicial systems of a foreign nation weren't daunting enough, governments are constantly passing reforms, reevaluating diplomatic

relations, and so forth. For example, both the Constitutional Reform Act 2005 and the establishment of the Supreme Court of the United Kingdom will inevitably change the judicial environment in Britain. Even beyond the United States and Great Britain, though, how can a person realistically deal with the many legal divergences across the globe?

In dealing with such different modes of moral reasoning, the best approach ultimately takes the form of Aristotle's golden mean. Though they may employ dissimilar practices, both American and British media law raise significant points that merit thorough consideration. Since American lawmakers are hesitant to place even minimal limitations on free speech, journalists in the United States may seem to enjoy excessive leeway to report on certain cases. Yet Americans fear the slippery slope of restrictions, wherein one ban on speech would lead to another—and then another. The British have taken a opposite path by placing speech limits on topics of extenuating natures. The names of rape victims and juvenile offenders are typically kept secret in accordance with the public interest. Likewise, the privilege to speak freely, the protection of citizens' privacy, and due process rights are all of utmost importance in a functional, modern society. It would prove too difficult to argue for the utter superiority of any of these values. Accordingly, journalists should look to Aristotle and seek a middle ground in their coverage of international matters.

Many of the renowned thinkers of ancient Greece utilized virtue theory in developing their distinct philosophies. Unlike utilitarian or Kantian perspectives, this line of thought focuses more on overall character building than on designated principles.[243] Aristotle spearheaded this concept with his teachings, particularly his definition of the

golden mean. In its most basic interpretation, this theory states that an individual should seek a moderate balance between two unfavorable extremes. In his Nicomachean Ethics, Aristotle explained his metaphor of the middle ground in decision making:

> "That moral virtue is a mean, then, and in what sense it is so, and that it is a mean between two vices, the one involving excess, the other deficiency, and that it is such because its character is to aim at what is intermediate in passions and in actions, has been sufficiently stated."[244]

He further posited that, by recognizing these basic rights and wrongs, people can increase their capacity for ethical reasoning.

It is important to note that the golden mean is not literally the exact middle between two countering ideas; rather, it is a reasonable, correct choice made in a complex situation.[245] Several contemporary ethical interpretations seem to oversimplify the meaning of Aristotle's theory, reducing it to the actual median point in an argument. This kind of construal often appears in teachings of journalistic ethics. Critics regard such analysis as a total divergence from the philosopher's original intentions. Stanley Cunningham scorns such practices in media ethics and looks to the real significance of the golden mean. Rather than pitting two extremes—like rampantly prejudicial press coverage and no reporting whatsoever—against each other, Cunningham sees the Aristotelian model as virtuous, informed decision-making.[246] The golden mean essentially originated because "Aristotle constantly situated the virtuous act (or inner emotional state) not as something middling, let alone as a compromise between two competing evils, but rather as reason-based behavior that is right in itself, something we choose for its own sake, something that inherently owns the quality of moral excellence."[247] If applied correctly, Cunningham believes that the golden mean can prove

invaluable for reporters. However, today's interpretations must align with Aristotle's original meaning for the theory to have any real weight.

What makes this theory so applicable to media law is the fact that it centers on the decisions of the individual. Express limitation or unquestioned freedom are simply too generalized to practically apply in most situations, regardless of the nations of people they affect. Beyond his myriad philosophical musings, Aristotle always returned to the same concept of personal responsibility: "Now if it is in our power to do noble or base acts, and likewise in our power not to do them, and this was what being good or bad meant, then it is in our power to be virtuous or vicious."[248] In this vein, citizens must examine their own actions in regard to national laws instead of debating the positive or negative points of American and British policies. According to Aristotle, virtuous conduct thus transcends legal constraints; individuals are wholly responsible to act ethically or not.

The idea of developing moral character over a period of time may appeal to thoughtful individuals upon first glance. However, the application of virtue theory is easily said but quite difficult to accomplish. Aristotle himself recognized this shortcoming of his own theory, noting that ethical behavior sounds simple, "but to do this to the right person, to the right extent, at the right time, with the right motive, and in the right way, that is not for every one, nor is it easy; wherefore goodness is both rare and laudable and noble."[249] To aid journalists and civilians alike in this arduous process, internal policies, legal considerations, and national reforms have aimed to simplify decision-making in both the United States and Great Britain. While these trends hardly

represent legal convergence between the two nations, such efforts certainly indicate that the golden mean can viably exist for journalists on an international scale.

In the United States, freedom of the press may receive extensive protection, but internal restrictions work to curb its potential excesses. Professional societies, unions, and trade associations are key players in American society. Most of these organizations uphold written ethical guidelines that apply to all members. For media practitioners, such standards include truth, fairness, conflicts of interest, and public welfare. While infringement of these codes of conduct may not result in legal punishment, unethical behavior is nonetheless regarded quite seriously. Offending members may be barred from professional organizations for breaking certain rules.[250] Institutional codes function in a similar manner by guiding the actions of employees in an organization. These regulations tend to uphold the same kinds of values as professional codes of conduct, although they do hold greater weight. Professionals who breach institutional policies are generally reprimanded and may be fired from their jobs. These codes certainly help outline the core values of associations or organizations; their only weakness lies in the fact that they tend to focus too much on generalized morality, failing to guide individuals on more complex issues. Nevertheless, behavioral standards do contribute to ethical decision-making, as they provide base principles but ultimately allow people to make their own choices.[251]

American courts have also facilitated Aristotelian methods in mitigating negative effects of the press. As enumerated in *Sheppard,* rather than barring pretrial reporting altogether, courts employ several measures to lessen potential prejudices. Judges, not journalists, determine the exact implementation of these provisions. Although judges do

act as government officials when they impose such limitations, they must nevertheless make these decisions individually. This practice sparks ethical thinking for an entirely different set of people. When judges carefully consider appropriate means to secure due process without unfairly restricting the press, they employ the kind of thinking that would ideally lead to attaining the golden mean.

British efforts have developed much more recently, but they are no less effective than corresponding American policies. As aforementioned, the most significant reforms in Great Britain are currently taking shape in response to the Human Rights Act of the European Convention. The solidification of the European Union has essentially forced Britain, a country that never actually codified rights to this extent, to guarantee certain freedoms to its citizens in writing. The Act has since brought Great Britain closer to that elusive point of moderation that links total freedom of speech and rigid restriction in the courtroom. A need for individualized balancing similar to that of the United States will likely occur as the nation adjusts to these legal changes. Since the Human Rights Act lists many freedoms that may conflict with one another from time to time, British officials and civilians must also measure the significance of specific values more than ever before.

The addition of the Supreme Court of the United Kingdom will certainly contribute to this shift as well. Finally, each judicial body of the United Kingdom will answer to a single court with uniform principles. Where better to apply the golden mean than in the highest court of the land? Disparate procedures and poor codification of policies created a murky system of justice for centuries. Aimed to eliminate such problems and increase ethical practices, the new court will soon function to foster balance

and virtue among the lower bodies. The Supreme Court will act as a much-needed clarifying entity for England, Wales, Scotland, and Ireland.[252] Combined with the Human Rights Act, this reform has the potential to positively shape Great Britain into a model of Aristotelian justice.

Yet these examples, no matter how significant their end results on their respective nations are, represent merely a swatch of the greater picture. Furthermore, while the golden mean does rectify pertinent questions in American and British media law, is it enough to help journalists overcome differing international standards? If applied correctly and considered carefully, they can, according to Michael Perkins. After researching a multitude of human rights policies, he found numerous, express provisions that protect free speech across the world. Many international laws denote a broad sense of journalistic ethics, often codified in conjunction with principles of fairness, independence, and responsibility. Noting that "human rights provide currently the only available set of standards for the dignity and integrity of all people," Perkins tracks the history of globalized ideals of peace and unity back to the beginning of UNESCO and similar organizations.[253] However, he interestingly remarks that many international treaties that guarantee free speech are limited by regional customs. Cultural pluralism ultimately makes wholesale free speech impossible across the globe, as certain countries regard expression and the press quite differently.[254] These observations shed light on such quandaries journalists may face in foreign reporting, as "the international law protecting freedom of expression and freedom of the press provides a cross-culturally reliable foundation from which to launch a consideration of universal principles in journalism

ethics."[255] Perkins reasons that reporters can incorporate these ideals into the foundation of their professional endeavors while still maintaining awareness and sensitivity toward other cultures. By finding a just commonality between two principles, Perkins' conclusion wholly integrates the golden mean.

Without global standards, then, ethics provides the most effective foundation for worldwide reporting. Moderate ethical resolutions incorporating the golden mean are the best ways to address conflicts in international journalism. In the case of the United States and Great Britain, both legal bodies deliver compelling arguments and display shortcomings. The decision of whether to publish sensational material about a pending trial is an ethical one, and journalists and government officials alike should examine each situation on an individual basis. Reporters must additionally respect the fundamental right of every person to receive a fair trial before an impartial judge or jury. Freedom of speech is privilege that cannot justify extensive impairment of other equally significant rights. Since they lack worldwide legal guidance, media practitioners must utilize their own ethical principles of conduct. Appropriate coverage for one situation may not apply to another, but ethical consideration of the problem may guide journalists accordingly.

Conclusion
What It All Means

The issues surrounding media restrictions before or during criminal trials are complex. The legal and ethical solutions to these problems are multifacted, and they are often wrought with ambiguity. While the "correct" method for dealing with trial publicity

likely means something different to every person, striking a balance between the American and British systems is key to upholding both justice and freedom of speech.

American media law can be quintessentially lax when it comes to matters of the court. The Supreme Court has continuously recognized the dangers of allowing pervasive coverage of legal cases. Prejudicial or accusatory publicity of a pending case can wreak havoc on a defendant's ability to receive a fair trial. Furthermore, it seems that with each year, the American press has grown further emboldened in its coverage of high-profile trials. From the beginnings of problematic reporting with *Irvin v. Dowd* and *Rideau v. Louisiana,* Justices wavered about imposing definite restrictions on the press. *Sheppard v. Maxwell* represented a turning point when the Supreme Court finally introduced specific measures judges could take to mitigate potential jury bias sparked by controversial publications. These preventative steps are still in effect today, but they are not extensive enough to comprise a significant constitutional limitation on speech.

The Court created valuable rules for lower court judges to follow with *Nebraska Press Association v. Stuart* a few years later. This ruling established a three-part standard for determining the constitutionality of gag orders and other limitations. Judges must assess the nature of the speech, whether lesser measures would suffice to mitigate the damage, and the overall effectiveness of the proposed restraint. The ruling certainly clarified the decision-making process for judges, but it demands such a high burden of proof that it has largely functioned as a liberalizing mechanism for journalists. *United States v. Brown*, one of the more recent determinants of pretrial news coverage, tailored these established methods. By conceding in this case that certain situations of extreme

media exposure necessitate legal limits, the Fifth Circuit Court of Appeals gave judges more leeway with which to handle the press.

The rulings of *Nebraska* and *Brown* are still important in American media law. In fact, they largely form the basis of current judicial practices in such situations. However, the vagueness of these decisions often creates problems for American judges, who know they can use the *Nebraska* test to determine appropriate steps and can probably defend their actions with *Brown*. In the courtroom, though, "probably" is not always enough to justify restricting speech. Realistically speaking, how many judges want to risk imposing limits on the press without having clear standards to follow? The result is a largely unchecked body of journalists across the nation who can report as they please, regardless of the consequences. Most reporters in the United States are obligated to follow professional standards, but nothing exists to concretely ensure their obedience. The lack of ethical observance and respect many journalists have for the administration of justice can be noted during the course of any high-profile trial. From O. J. Simpson to Timothy McVeigh, reporters have inappropriately disclosed important information throughout these trials, and they continue to do so now. American standards do not adequately address these problems. If media law cannot, ethical foundations must somehow handle these concerns.

Great Britain experiences the opposite problem. Unlike in the United States, journalists in England and Wales have virtually no freedom to report on pending cases. Journalists can barely print the names of defendants in high-profile crimes. The 7/7 Bombings shut down citywide transportation in London and horrified people across the

globe. Several individuals were arrested and indicted for allegedly participating in this terrorist attack, and the British media have taken nearly two years to disclose these facts. Fear from the courts' relentless contempt of court charges has prevented journalists from reporting relevant information on a matter of international interest.

When newspapers were first sprouting up in provincial England, reporters could basically print anything they wanted, no matter how offensive or prejudicial. They frequented courtrooms to gather stories, publishing information about the most mundane of cases. They revealed charges against defendants who were later pardoned, personal details of divorces, and the identities of juvenile offenders. Such coverage was not only distasteful, but it also damaged the reputations of innocent individuals. Recognizing the extent of damage caused by the press, Parliament began enacting a steady succession of statutory restrictions against the news media. Unfortunately, what started with the best of intentions later led to exceedingly stringent limitations on speech.

The Contempt of Court Act 1981 significantly curbed the freedoms of British journalists. It codified the idea of strict liability contempt, which is the highest offense of this nature. Judges must use a three-part test similar to that prescribed in *Nebraska* to determine strict liability by assessing whether the speech in question is publicly disseminated, relates to active proceedings, and poses a considerable risk to a trial's outcome. The potential of material to prejudice a trial is the chief concern in this test, and it can be quite difficult to defend against this allegation. There are no checks on court authority or lesser suggested measures to mitigate press coverage. The Contempt Act has thus rendered a sort of chilling effect on British speech. Because reporters can be arrested

for printing anything deemed remotely prejudicial, they err on the side of caution and avoid communicating such information at all. British media are typically silent about pretrial investigations, and their silence is just as detrimental as American journalists' pervasive coverage.

Change may be underway in Great Britain, but it is too soon to judge where the balance will fall for that country's journalists and courts. The upcoming opening of the Supreme Court of the United Kingdom will create a united high court for Scotland, Ireland, England, and Wales. The new court has the potential to simplify the appellate process and clarify ambiguous laws. Additionally, the Human Rights Act 1998 expressly guarantees the right to a fair trial and freedom of speech. Although recent court rulings have indicated a shift toward more moderate media law, there is no clear indication of how these changes will materialize. Thanks to the influence of the European Union, Great Britain appears to be heading in the right direction. Observers must simply wait to discover what these advances will mean for British media law.

For the time being, though, the United States and Great Britain lie on opposite sides of a complicated issue. Concerns for freedom of speech and due process are significant, and neither should wholly take precedence over the other. Furthermore, the governments of both countries have proven reluctant to enact sweeping reforms. Without world law codifying press restrictions and freedoms, journalists must make their own decisions about internationally reporting on high-profile trials. Rather than simply considering their free speech rights at home, media practitioners must evaluate defendants' rights to fair trials in their host countries.

Media coverage of terrorist attacks over the past decade has illustrated the positive effects of ethical decision-making in journalism. When members of Al-Qaeda bombed New York's Twin Towers in 2001, American reporters disclosed vivid details of the attacks and their corresponding federal investigations. Within days, Osama bin Laden and Al-Qaeda were implicated in the attacks, and their names were revealed to the world. In this situation, American journalists' free speech protection allowed them to cover 9/11 as they pleased. Because there are no restrictions on coverage of such matters in the United States, international media could freely report on 9/11 as well. In this instance, British and American media communicated comparable information to their audiences.

In the case of the 2005 London bombings, however, British media were restricted from revealing the names of the main terrorist suspects. Disclosing the identities of people implicated in the attacks would have constituted a violation of British law, inevitably resulting in contempt of court charges and potential jail time. The only people the media could legally identify in connection with the 7/7 bombings were the dead suicide bombers and people cleared from the investigation. Nearly two years after the initial attacks, the four living suspects were finally named by BBC News.

Investigators and journalists surely knew some, if not all, of the 7/7 suspects. British media were legally obligated to maintain their silence. However, American journalists could easily have disclosed the names of the alleged attackers to their audiences. Reporters in the United States would have faced no legal consequences for telling everything they knew. Yet they unanimously refrained from publicizing that information. In the two years following the London bombings, the New York Times only

reported that four anonymous suspects had been found. They disclosed information about the investigation along the same timeline as their British counterparts, revealing the names of the suicide bombers and, later, the freed suspects. The New York Times also waited until the BBC News reported the names of the four living suspects.

In this case, American media demonstrated a high regard for ethical standards in their coverage. While they legally could have disclosed everything they knew, journalists in the United States stepped back and complied with British standards. They effectively balanced their own interests against the needs of their British counterparts, implementing the golden mean in their decision-making. The result was respectful, responsible journalism on both sides that media practitioners should model in the future. The existence of today's multimedia world should inspire and facilitate this kind of global cooperation, as journalists have better access to international laws and heightened communication among other media outlets worldwide.

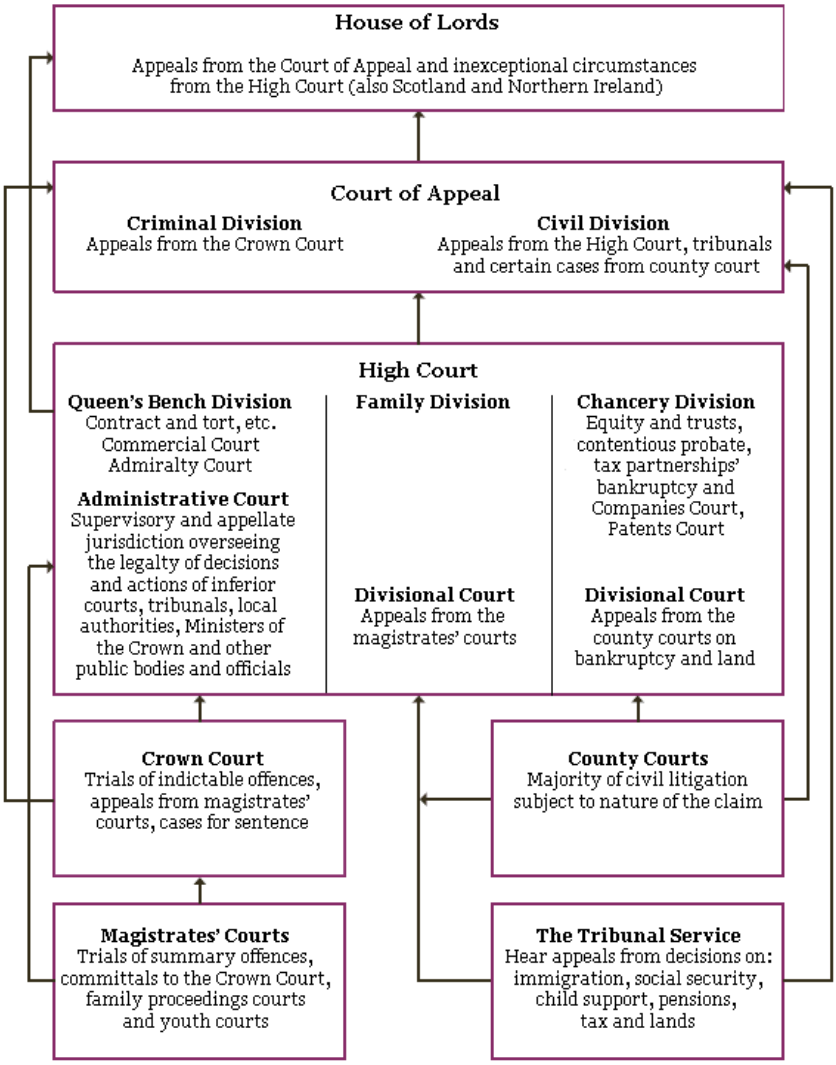
The media must utilize ethical foundations to cover international stories. There is no globally applicable legal framework for reporting, and the best solution for journalists lies in ethics. If media practitioners carefully consider the sanctity of trials in other countries as well as their own interests in reporting, they can produce ethical and beneficial news coverage. By examining cases on an individual basis, reporters in the United States, Great Britain, and elsewhere can effectively balance free speech with the interests of the court. Moderate ethical decision-making can resolve the issues between the press and the administration of justice, finally improving the understanding and application of media law and ethics on an international scale.

Appendix A
Judicial Changes Resulting from the CRA

	Prior to the Constitutional Reform Act 2005	**After the Constitutional Reform Act 2005**
Highest judicial authority	House of Lords	Supreme Court of the United Kingdom
Head of the Judiciary of England and Wales	Lord Chancellor	Lord Chief Justice
Appointment of Justices in England and Wales	Lord Chancellor, Department for Constitutional Affairs	Judicial Appointments Commission
Head of the House of Lords	Lord Chancellor	Lord Chancellor
Speaker of the House of Lords	Lord Chancellor	Lord Speaker

Source: Constitutional Reform Act, 2005, c. 4, s 18, 23, 61 (Eng.).

Appendix B
Divisions of the British Judiciary



Source: Judicial Commissions Office, *Judiciary of England and Wales*, *at* http://www.judiciary.gov.uk (2007).

Endnotes

1. Donadio, Rachel, *Libel Without Borders*, N. Y. Times, *at* http://query.nytimes.com/gst/fullpage.html? res=9A06E4D71139F934A35753C1A9619C8B63 (Oct. 7, 2007).
2. *Google censors itself for China*, BBC News, *at* http://news.bbc.co.uk/2/hi/technology/4645596.stm (Jan. 25, 2006).
3. Fonda, Daren, *Kill the Messenger?* Time, *at* http://www.time.com/timemagazine/article/0,9171,994391,00.html?promoid=googlep (June 7, 2004).
4. *Image of bombers' deadly journey*, BBC News, *at* http://news.bbc.co.uk/2/hi/uk_news/4690149.stm (July 17, 2005).
5. *Three charged over 7/7 bombings*, BBC News, *at* http://news.bbc.co.uk/2/hi/uk_news/6529643.stm (April 5, 2007).
6. *Court hearing for 7 July suspects*, BBC News, *at* http://news.bbc.co.uk/2/hi/uk_news/6534315.stm (April 7, 2007).
7. Scott, Janny, *With No Cameras in Court, Trial Didn't Mesmerize*, N. Y. Times, *at* http://query.nytimes.com/gst/fullpage.html?res=9D06E1D6133DF937A35755C0A961958260 (June 4, 1997).
8. Kent R. Middleton & William E. Lee, The Law of Public Communication 435-492 (2006).
9. U.S. Const. Amend VI.
10. See Middleton, supra note 8, at 435-492.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Irvin v. Dowd, 366 U.S. 717, (1961).
17. Id.
18. Id.
19. Id.

20. Id.
21. Rideau v. Louisiana, 373 U.S. 723, (1963).
22. Id.
23. Id.
24. Sheppard v. Maxwell, 384 U.S. 356, (1966).
25. Id.
26. Id.
27. Id.
28. Irvin, supra note 16.
29. Rideau, supra note 21.
30. Sheppard, supra note 24.
31. Estes v. Texas, 381 U.S. 532, (1965).
32. United States v. Brown, 250 F.3d 907 (5th Circ. 2001).
33. T. Barton Carter et al.,The First Amendment and the Fourth Estate: The Law of Mass Media 71-76 (2001).
34. Id.
35. Middleton, supra note 8, at 91.
36. Id.
37. Sheppard, supra note 24.
38. Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 Am. U.L. Rev. 39, (1996).
39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
44. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, (1976).
45. Id.

46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
51. Gentile v. Nevada, 501 U.S. 1030, (1991).
52. Nebraska, supra note 44.
53. Gentile, supra note 51.
54. Id.
55. Id.
56. Brown, supra note 32.
57. Id.
58. Id.
59. Id.
60. Id.
61. Gentile, supra note 51.
62. David D. Smyth III, *A New Framework for Analyzing Gag Orders Against Trial Witnesses*, 56 Baylor L. Rev. 89, (2004).
63. Id.
64. Id.
65. Id.
66. Id.
67. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, (1980).
68. Id.
69. Id.
70. Id.
71. Id.
72. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, (1982).
73. Id.

74. Id.
75. Brown, supra note 32.
76. Sheppard, supra note 24.
77. Estes, supra note 31.
78. Id.
79. Id.
80. Id.
81. Richmond, supra note 67.
82. Estes, supra note 31.
83. Id.
84. Chandler v. Florida, 449 U.S. 560, (1981).
85. Id.
86. John A. Walton, *From O.J. to Tim McVeigh and Beyond: The Supreme Court's Totality of Circumstances Test as Ringmaster in the Expanding Media Circus*, 75 Denver U.L. Rev. 549, (1998).
87. Id.
88. Id.
89. Geoffrey Robertson & Andrew Nicol, Media Law 1-3 (2002).
90. Id.
91. Ben Mitchell, *Lord Phillips takes on top judiciary role,* Legal Week, Apr. 6, 2006.
92. Appendix A.
93. Diane Woodhouse, *United Kingdom The Constitutional Reform Act 2005—defending judicial independence the English Way*, ICon 5 1 (153), (2007).
94. James Lumley, *Falconer brushes aside Supreme Court Critics*, Legal Week, Feb.12, 2004.
95. Woodhouse, supra note 93.
96. Constitutional Reform Act, 2005, c. 4, s 61 (Eng.).
97. Id. at c. 5, s 17.
98. Woodhouse, supra note 93.

99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
106. Appendix B.
107. Judicial Commissions Office, *Judiciary of England and Wales*, *at* http://www.judiciary.gov.uk (2007).
108. Id.
109. Id.
110. Marjorie Jones, Justice and Journalism 7 (1974).
111. Id. at 7-13.
112. Id.
113. Id. at 24.
114. Robertson, supra note 89 at 404.
115. Id.
116. Jones, supra note 110 at 26-28.
117. Id.
118. Id. at 23.
119. Id.
120. Id. at 35-38.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id.

127. Id.

128. Id.

129. Id.

130. Id. at 40.

131. Id. at 43.

132. Id. at 39.

133. Id. at 44-48.

134. Id.

135. Id.

136. Id.

137. Id. at 53.

138. Id. at 92-94.

139. Id. at 61-64.

140. Id.

141. Id. at 68.

142. Id. at 73-78.

143. Id.

144. Id.

145. Id.

146. Id.

147. Id.

148. Id.

149. Id.

150. Id.

151. Id.

152. Id.

153. Id. at 92-97.

154. Id.

155. Id.

156. Id.

157. Id. at 100.

158. Id. at 103.

159. Id. at 105-109.

160. Id.

161. Id.

162. Id.

163. Id.

164. Id. at 116-118.

165. Id.

166. Sallie Spilsbury, Media Law 351-354 (2000).

167. Id.

168. Id.

169. Id.

170. Id.

171. Id.

172. Contempt of Court Act, 1981 (Eng.).

173. Spilsbury, supra note 166, at 362-363.

174. Id.

175. Id.

176. Id.

177. Attorney-General v. Unger, 1 Cr App Rep 308, (Q.B. Div'l Ct. 1998).

178. Id.

179. Attorney-General v. Mirror Group Newspapers Ltd. and others, 1 All E.R. 456 (Q.B 1997).

180. Id.

181. Id.

182. Spilsbury, supra note 166, at 355-358.

183. Id.

184. Mirror Group Newspapers, supra note 179.

185. Attorney-General v. Independent Television News Ltd., 2 All E.R. 370, (Q.B. 1995).

186. Attorney-General v. Birmingham Post & Mail Ltd., 4 All E.R. 49, (Q.B. 1998).

187. Id.

188. Id.

189. Robertson, supra note 89, at 376.

190. Id.

191. Spilsbury, supra note 166, at 366.

192. Robertson, supra note 89, at 376.

193. Id.

194. Stephen J. Krause, *Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial,* 76 B.U.L. Rev. 537, (1996).

195. Id.

196. Robertson, supra note 89, at 405-409.

197. Id.

198. Id.

199. Id.

200. Spilsbury, supra note 166, at 3-5.

201. Id.

202. Id. at 16-19.

203. Id. at 33-45.

204. Id. at 5-6.

205. Id.

206. Robertson, supra note 89, at 35-39.

207. Id.

208. Id.

209. Id.

210. Spilsbury, supra note 166, at 15.

211. Joanne Armstrong Brandwood, *You Say 'Fair Trial' and I Say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U.L. Rev. 1412 (2000).
212. Id.
213. Id.
214. Spilsbury, supra note 166, at 368-369.
215. A Local Authority v. PD and another, EWHC 1832 (Fam. 2005).
216. Id.
217. Id.
218. Id.
219. Robertson, supra note 89, at 442-444.
220. A Local Authority, supra note 215.
221. Sheppard, supra note 24.
222. A Local Authority, supra note 215.
223. Matthew Davis, *China cracks down on protest news*, BBC, March 18, 2008.
224. Id.
225. Id.
226. John Ferling, Adams vs. Jefferson: The Tumultuous Election of 1800 18-56 (2004).
227. Louis Day, Ethics in Media Communications: Cases and Controversies 63 (2006).
228. Id.
229. Id. at 58.
230. Sheppard, supra note 24.
231. Nebraska, supra note 44.
232. Id.
233. Jeffery Maciejewski & David Ozar, *Natural Law and the Right to Know in a Democracy*, 20 J. Mass Media Ethics 121-128 (2005).
234. Id.
235. Day, supra note 224, at 61.
236. Contempt of Court Act, supra note 172.

237. Mirror Group Newspapers, supra note 179.

238. Id.

239. Day, supra note 224, at 58.

240. A Local Authority, supra note 215.

241. Frances Gibb, *High drama of appeals at new supreme court may go out on television,* Times, Oct. 22, 2007.

242. Id.

243. Aristotle, Nicomachean Ethics, 2.9, *at* http://classics.mit.edu/Aristotle/nicomachaen.html (last visited March 2, 2008).

244. Id.

245. Day, supra note 224, at 64.

246. Stanley Cunningham, *Getting it right: Aristotle's 'Golden Mean' as theory deterioration*, 14 J. Mass Media Ethics 1 (1999).

247. Id.

248. Aristotle, supra note 240.

249. Id.

250. Day, supra note 224, at 46-47.

251. Id.

252. Department for Constitutional Affairs, *Constitutional Reform: a Supreme Court for the United Kingdom, at* http://www.dca.gov.uk/consult/supremecourt/supreme.pdf (July 3, 2003).

253. Michael Perkins, *International Law and the Search for Universal Principles in Journalism Ethics*, 17 J. of Mass Media Ethics 1-14 (2002).

254. Id.

255. Id.