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International Panel: Comparative Approaches to Media Protection

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International Panel: Comparative Approaches to Media Protection

Moderator: Professor Joseph C. Sweeney
Panelists: Ben Caspit, LL.B.
          Andrea Hanlon, LL.B.
          David A. Schulz, Esq.


What I would like to do for the next few moments, and only a few moments, is to give you a brief overview of today's program.

The program will begin shortly with a panel discussion of comparative approaches to media protection. Then, the program will focus on the protection of reporter's sources in criminal trials, after which the symposium will turn its attention to a discussion of media access to the courtroom. Next, there will be a discussion of the indecency standard and its effect on the media. The final panel of the day, which I have the privilege to moderate, will feature federal and state judges speaking on the special role of the judiciary in protecting First Amendment freedoms.

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It's now my pleasure to introduce today's first moderator, Professor Joseph Sweeney.

PROFESSOR SWEENEY: We are looking into the question

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of the First Amendment and the media: a comparative law approach to protection of the media in different legal systems.

Twenty-nine years ago the Supreme Court applied the First Amendment to a libel action against a newspaper, the famous case of *New York Times v. Sullivan.* It changed the common law of libel forever. We can never go back to the way libel law was in England, Canada, Australia and America prior to *New York Times v. Sullivan.* That was twenty-nine years ago.

Twenty-five years ago the Supreme Court applied the same First Amendment rationale to an invasion of privacy action against a newspaper, the famous *Time Inc. v. Hill* case. In Richard Nixon's only appearance before the Supreme Court as an advocate, he lost. The result of these cases is that the press in the United States has extraordinary protections from the consequences of careless reporting.

In the panel we are having this morning, we are looking into the situation in other countries. Our panel will examine the problems encountered by the press under legal systems where there is no written constitution. That's the situation in Israel and the United Kingdom.

The press in those countries, however, is a vigorous press, some would say even vicious—witness the Queen's description of the past year as *annus horribilis* after the press got through with her children.

Now, the press protections are strong here, but there are some questions I would like our panelists to deal with. Our audience should also consider these as we go along. I have cut them down to five.

One, can the members of the general public control access of the press to private property when newsworthy events have occurred there?

Two, can the police control press access to a crime scene or crime witnesses?

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2. 385 U.S. 374 (1967).
Three, can the military control press access to military operations—for example, Vietnam, Grenada, or Desert Storm?

Four, moving away from the access question, how long does an event remain newsworthy so as to enjoy First Amendment protection? Can the press resurrect a sixty-year-old scandal and bring into the public spotlight someone who has avoided that spotlight for sixty years? In the United States, the answer is “yes.” What is the answer outside of this country?

And five, are publishers—not the press—protected when they change the names of participants in a newsworthy event and then publish a less-than-truthful story about the event? Less-than-truthful is a euphemistic way of saying that the press sometimes expands on the news for reasons other than public enlightenment.

Now, those are just some things for us to think about. Now it’s my pleasure to introduce our first speaker, Mr. David Schulz.

MR. SCHULZ: I was very excited when I got a call asking if I would participate in this symposium. It sounded like a great opportunity. There are all sorts of interesting issues to explore: theories of access and where they are going to take us, questions about regulation of the broadcast industry, re-regulation of the cable industry—fascinating topics.

I was asked if I would be willing to talk about what I have done regarding Albania. I thought, “Albania?” And to make matters worse I was going to be the first speaker at 9:00 a.m. Whatever happened to saving the best for last?

Actually, I think it was a stroke of brilliance to suggest Albania as our first topic, because what I did for Albania last year, working with the Central and East Europe Legal Initiative of the American Bar Association, was to serve as a commentator on their proposed press law, then under consideration by the democratic Parliament elected in the fall of 1991.

It was an exercise that required returning to basics in thinking about press regulation, freedom of expression, and what we hope to accomplish from it. Hence, it may be fitting to start with Albania, so we can talk about basics.

I didn’t know a lot about Albania when I started, so I turned,
of course to the *Fordham Law Review*, and I found out that Albania is the poorest country in Europe. It's reputed to have had the most closed boundaries of any country in the world for many years. For fifty years it pursued "orthodox Stalinism"—complete control of the government by the presidential figure. However, starting around 1990, like much of the rest of Eastern Europe, Albania sought to make the transition from one-party rule to constitutional democracy. Unlike many of the other countries in Eastern Europe, Albania held its free elections, not after a series of roundtable discussions as in Poland and elsewhere, but at the unilateral decision of the Communist Party. It had decided that this was the way to go.

The Communists won a slight majority in those first parliamentary elections, back in March 1991. That government only survived for four or five months and fell after the trade unions organized a general strike. Following a successor government, the first non-communist government was chosen in elections held in December 1991.

It is that government which drafted and proposed the press law that we were asked to consider. At the time, the country had about fourteen radio stations, nine television stations and forty-two newspapers, but of course, until the 1990s all of these were essentially controlled by the government—there was really only one channel of news. Albania is a country where in an election five years ago, the results were officially reported as: 100% turnout of qualified voters; with 1,830,653 voting for an unopposed slate; and, one against. Thus, it's not a country with a long tradition of open government, of nonconformity, or of criticism, at least in the political arena. It was in this context that they were attempting to draft a law that would implement at least some notions of free expression that go along with constitutional democracy.

By the way, I think I can safely state at the outset that the answer to the five questions that were posed by our moderator is "It's too soon to tell"—at least with regard to Albania. We'll come

back to those in a minute.

I would like to review the framework of the legislation that we were asked to look at and go through some of our comments to see what parallels or themes we can recognize in the Albanian approach and in our own. The first step is to show you some of the provisions so you can see where we think they wanted to be headed.

This was Article One: "In the Republic of Albania, the freedom of expression and the right of the individual to have and to get information and to inform are guaranteed by constitutional law. The activity of the press and all other means of public information is regulated by law." Not bad for a start. "The activity of the press and all other means of public information is regulated by law." Well, there are some real questions about what that means and I want to come back to that in a minute.

Let me also show you what Article Two provided: "Any kind of state, party, or individual censorship on the press and another state-owned or private means of public information is strictly forbidden." An absolute bar on censorship. Additionally, "No one has the right to exercise control over or exert pressure on the organs of the press and of public information and on the activity of journalists." Again, some pretty broad statements of basic press freedom.

The complete press law had twenty articles. The draft that we saw was actually a second draft referred to by the government as the "Journalists' Version," because they had already removed certain provisions in the original text. One was a provision that said "Only government, educational and scientific organizations have the right to distribute public information without prior approval." That was removed. Another was a provision that set forth certain

5. ALB. CONST. art. 1 (draft) (full text on file with FORDHAM ENT., MEDIA & INTELL. PROP. L.F.).
6. Id.
7. ALB. CONST. art. 2 (draft).
8. Id.
9. ALB. CONST. art. 22 (draft).
minimal disclosures required on every publication. In other words, it was a ban against anonymous distributions of information.

Where do you begin in looking at some of these provisions—the statements of intent, the prohibitions on censorship—when trying to decide how they are going to work and what they mean? If you were following the American example to propose language for a statute, I suppose you would start by looking at the First Amendment. But it doesn’t really provide a great deal of guidance—it’s so bare-bones: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”

What do those words mean if you don’t have 200 years of Supreme Court gloss to guide you and to interpret them? The freedom of speech, or the freedom of expression, encompasses a lot of different attributes. Obviously we are out to protect the ability to communicate freely, to speak with other people. But, also implicit in that protection is the right to remain silent, which in certain circumstances may be distinct and equally important.

The right to receive communications from others should be protected as well. Whether you want to speak or not, you should have some enforceable right to hear what others have to say—the right to solicit and obtain information, to have access to certain types of information.

Also embodied, I think, in this notion of protecting freedom of expression is the right to hold a set of beliefs.

So, we have all these different notions of what we want to protect through the freedom of expression. These notions or values may or may not be something that you want to put into a press law, but they are at least something that you want to consider.

How do you go about doing this and where do you begin? I teach a First Amendment course here at Fordham called Mass Media Law. There is an exercise that we do at the beginning of the class each year, and it always amazes me that students who have grown up in our system pretty quickly reach a consensus about what it is that we are trying to accomplish by protecting freedom.

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10. U.S. CONST. amend. I.
of expression. It's sort of ingrained in us as we are growing up—part of our civic education. In this exercise we all play "philosopher-king" and we say, "Well, what are we trying to accomplish with freedom of expression?" By the time we are done with the discussion it usually gels down to around four or five things.

There are at least four different values, I think, that are embodied in the protection of freedom of expression, or that we hope to obtain through freedom of expression. One is the discovery of truth. This is the notion that, as Oliver Wendell Holmes put it, "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."11 The notion is that false ideas will be driven out by true ideas and that the only way to test the validity of an idea is allow it to be challenged. Whether it's scientific truth or political truth, whether it's a determination that the world is flat or round, no matter how true something is believed to be, you don't want to stifle dissent or stifle the expression of opposing views. That's one principle.

Another goal we hope to enhance through freedom of expression, I think, is meaningful self-governance. A participatory democracy, obviously, requires free speakers and open speech if it's going to function, both in terms of the electorate expressing its own views, and in terms of the elected communicating and understanding the desires of those whom they represent. This is something else that we want to obtain by creating a system of free expression.

A third general notion is the "safety-valve function" that's served by free expression. The idea is that allowing dissent and allowing expression is a way of avoiding more difficult turmoil. If people have the right to dissent you can avoid violence. Even if people don't agree with the decision, if they participated in the process and feel that their voices were heard, we can avoid other problems for society later on.

Fourth is the general notion of individual self-fulfillment. The idea that all people need to explore their own beliefs—to test them and to develop them by communicating them to others. This goes

to the importance we place on holding a set of values, opinions, and beliefs, and sharing those with others.

At least these four are all things we would hope to accomplish with a system of freedom of expression. If we set out and say, "Okay, these are certain goals we can agree upon," then I think we can ask, "Well, what does that mean about how we should draft the press law?" This is something some of you may be familiar with. Thomas Emerson, a former professor of mine at Yale, in his monumental work, *The System of Freedom of Expression*, went through this process and came up with certain axioms that he said we should follow.

One axiom is that if you want to accomplish these goals, any regulation of speech or of expression should be content-neutral. In other words, you can't have a marketplace of ideas if you decide ahead of time what's true or what's false. You must let people challenge their beliefs and the established truths of the day. If you are going to impose regulations, you can't start from the premise: "I am right and you are wrong." Anything that is restricting speech or restricting expression we want to be content-neutral.

Another thing Emerson said is that any time the government is going to step in and regulate or restrict speech, there should be a presumption against it. The government should have to explain why it's acting and justify what steps it wants to take. The burden should always be on those who want to restrict speech to show that such a restriction is essential for some equally compelling objective before you are going to allow them to cut back on the rights of expression.

With some of these thoughts in mind, let's look at the Albanian law. I think that one of the things we are going to find is that Albania—because of its political history, its ethnic rivalries that exist there, and its economic problems—faces questions that are both legitimate and very difficult—questions that illuminate its distance from the American system and the American set of assumptions.

We are going to see some of those questions play out in the way they have approached freedom of expression, the boundaries they are prepared to draw as to what would be protected and what wouldn’t be protected, and who is going to have the final say as to when speech can be restricted.

One of the first distinctions between the U.S. and Albania which is true of much of Eastern Europe and probably true—although I am by no means a comparative law scholar—of most of the civil law countries, is that there is a different notion of the hierarchy, or at least of the relative weight that’s given to individual rights and societal rights. We found that the Albanians were much more prepared to limit what we would consider individual rights of expression in order to protect certain societal interests. Whether it’s public health, public security, or public morality, they attach different weight to where they would draw that line and how they balance those values.

I had an opportunity last fall to tour several Eastern European countries, one of which was Hungary. I was struck when I was there—just by way of parallel—at the extent to which the Hungarian government was cracking down on what we would consider commercial speech. A law was enacted, I believe in the summer of 1991, that made it illegal to promote or advocate the use of tobacco on the grounds of public health. During the week we were in Budapest, they actually slapped a substantial fine on the Philip Morris Company, because it continued to display the Marlboro name and logo on the awnings of tobacco shops. This was deemed to be a misdemeanor and a violation of the law restricting the promotion of smoking. So I think that there is a different balance that’s drawn in much of Eastern Europe between individual rights and societal rights—or at least a different orientation manifests itself in certain provisions of the Albanian law.

Let’s go back. Let me show you, for example, Article Twelve. "In case the activity of the media runs contrary to crucial national interests or to the basic rights of the citizens as guaranteed by law they can be fined, suspended, or closed for good cause by the
courts. These organs have the right to complain before a court.”

This Article demonstrates some of what I was mentioning about the balance that they are prepared to strike. I think any First Amendment lawyer in this country would bridle at the notion that you could have a law that talks about an activity running contrary to “crucial national interests” without its being vague, overbroad, unduly restrictive, certain to lead to government censorship, and other inappropriate restrictions. Yet, this is a provision that the journalists in Albania, at least, were prepared to live with.

I think Article Twelve raises another issue between Albania and the United States—that is the whole notion of an independent judiciary. You can see that Article Twelve includes the right of the press to complain before a court if they are “fined, suspended, or closed.” But, Albania doesn’t have the tradition we have of an independent judiciary prepared to protect our individual rights. If you think about how the system of freedom of expression works in the United States it really depends very heavily on our independent judiciary, as well as on an independent and active bar that is willing to step in and defend the rights of individuals before the judiciary. That’s a tradition that does not exist in Albania.

So you see, while they have this in Article Twelve in the second sentence talking about the right to go before the court, at the same time, in the first paragraph they are willing to say that the determination of what runs contrary to national interests or to the basic rights of citizens is going to be decided “by law.” In other words, this is for the legislature to decide. You will see this issue arise in several other sections of the statute.

Let me show you Article Nineteen. It provides another example. “The journalist can make use of cameras or tapes anywhere and anytime”—I guess that’s not a great translation—“with the exception of the cases that are strictly defined by law as unsuitable for the use of the equipment.” Again, this is typical of many of the press laws in Eastern Europe and I think this goes to this issue of the lack of an independent judiciary. Albania has suffered for

13. ALB. CONST. art. 12 (draft).
14. ALB. CONST. art. 19 (draft) (emphasis added).
the last century under a system of government where the executive was in complete control and where judges could be controlled by the powerful executive. Albanians today are much more willing to trust the legislative body to define the scope of individual rights and to decide where the balance should be drawn between free speech or free press and other societal rights. They are not prepared to leave this to the judiciary. They have no trust in the judiciary and they are concerned about the ability of the judiciary to be controlled by the executive. So, in many instances you see these questions are left to the legislature to determine, rather than the judiciary.

If you recall, even back in Article One—that second sentence that we looked at earlier—the clear statement is that we have a guarantee of freedom of expression, but the activity of the press and the means of public information is to be regulated "by law." In other words, the legislature is going to determine how far freedom of expression goes and to what extent it can be regulated.

Much of the rest of the law deals with just such regulations. They touch a couple of different areas. One is economic regulation that we would find, I think, unacceptable here, but which is accepted in Albania.

Article Six, for example, makes a general statement that the press is economically independent of the government, an important statement coming from their system. Yet, the state still has authority—or an obligation, it would seem from the second sentence—to use its fiscal and economic mechanisms to promote the press and to provide necessary raw materials.

Well, what's going on here? Although the wording is a little ambiguous, it seems that in Albania we continue to have paper shortages and printing-press shortages. Professor John Paul Jones, who has been working on the Albanian Constitution and just got back from Albania recently, tells me that the government of Albania itself still has only one press. Several of the newspapers have

15. ALB. CONST. art. 6 (draft).
16. Id.
their own presses, but the government has only one press. It's used both for book publishing and official publications. This creates problems. For example, somehow Priscilla Presley's memoirs, *Elvis and Me*, made it into print in Albania early this year, but the legislature and the courts are six months behind in getting their bills printed and their decisions published!

This continues to be a real issue. Who controls the mechanisms of the press and the raw materials, the paper that they print on? You will see the current press law, at least the press law that was being debated last year, continues to recognize that those decisions are going to be in the hands of the government. Obviously, this gives the government continuing power to punish the press for statements with which they are unhappy.

The draft law exhibits throughout a great deal of tolerance and acceptance of government oversight. It is also reflected in Article Seven and Article Eight. I won't go through these with you in great detail, but Articles Seven and Eight basically set up a licensing scheme. If you are to be a journalist in Albania you have to get a license. Article Seven says the press will have the right of access to public information and that there will be no restriction on how the press disseminates this information, but you have to have a license. Article Eight sets the terms and conditions for obtaining a license. Again, as you can see, it does so in a way that would cause great concern here. The first part sets forth that you have to go to your local government and apply for a license. It tells you what information you are required to give the local government. The second half states that the local government will examine your request. They have to do it within thirty days. "If the local government considers the request inappropriate"—query as to what that means—"or contrary to the law," it can deny it.

So a great deal of authority continues to be vested in the government, both through economic means and through licensing, to

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17. ALB. CONST. art. 7 (draft).
18. ALB. CONST. art. 8 (draft).
19. Id.
control who is defined as a journalist, and therefore, who has rights of access to, and dissemination of, public information. I think this stems partly from a difficulty in conceiving of the press as an independent power base—a reluctance to accept the notion that certain rights should be turned over to the press, rights that the government can’t control or restrict or punish. I guess that’s not necessarily unique to Albania. We will be talking about courtroom access in a later panel today. Even in this country, judges continue to have a problem with the notion that the press has an affirmative right to come into their courtrooms, and to insist on access to certain information.

The point is that this conflict is not unique to Albania. This resistance from those in power to the notion that the press has certain rights independent of the government exists here as well.

These are some of the main differences. Albania has a system that is prepared to make certain broad statements of freedom of expression but continues to allow regulation and coercion in ways that we would deem unacceptable. They vest certain powers in an unvested judiciary but put primary authority in the legislature to define the scope of press rights. I question whether this legislative approach really is going to advance those objectives of freedom of expression that we talked about at the beginning. As to where things stand now, since we submitted our report on this law, we learned that late last spring a new government was elected. They went back to the drawing board. There is now a new version of the law—which I have not seen yet—which has been reduced to just four articles, and which is still being debated.

Albania is also still debating a constitution. I earlier mentioned Professor Jones, who is one of the American advisors who has been helping the Albanians. He tells us that the current draft of the Albanian constitution has certain provisions in it that also affect the press. Article Seventeen—which I think is borrowed from the British—so we have a great segue to our next speaker that will tell us if this is true or not—says that no law may be passed imposing prior restraints except to protect children or save human life.20

20. ALB. CONST. art. 17, pt. II (Jan. 23, 1993, draft) (full text on file with FORDHAM
Those are the exceptions that they would carve out.

Article Thirty-one of the current draft says that the press and the public can be excluded from part or all of a trial if their presence would jeopardize the public order or morals, national security, the privacy of litigants, or the interests of justice. Again, that provision reflects the sort of laundry list of interests that the Albanians seem prepared to find weigh more heavily than individual rights or press rights.

The Albanian Constitution is being debated. I understand it’s basically a synthesis of the European parliamentary model with an independent American-style judiciary. It was reported that one of the Albanian ministers was quite upset recently when he went to the Council of Europe, and one of the ministers there criticized the current Albanian draft constitution as a cheap copy of the U.S. Constitution and “insufficiently European.”

That suggests another dynamic here. Beyond the balance of public rights against private rights, an independent judiciary and the other questions we’ve been talking about, there is a great desire in Central and Eastern Europe to be identified as European. There is a great pull to be more in the European mold.

Along those lines, a German media law scholar was also asked to look at the press law. I understand that his advice to the Albanian government was that the law was much too lenient on the press, because it didn’t give the government sufficient authority to close down the press. I don’t know quite where that leaves us, when the Albanians look to American ideals and want to be more European.

Meanwhile, I guess old habits die hard, judging from what’s continued to happen in Albania even while this press law was being debated. Last summer, a TV reporter prepared an interview with the leader of the Democratic Party, who criticized the newly elected president. The reporter was fired and the interview did not air. A court ordered his reinstatement, but the television station

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said that it would refuse to rehire him.\textsuperscript{22}

Similarly, there was a reporter for a socialist party paper who criticized the President and the Parliament. He was arrested and his paper was banned. There also was a democrat who had been expelled from the democratic party and founded a new party and a new newspaper. The editor was arrested for lying and creating unrest during the campaign.\textsuperscript{23}

On the other hand, \textit{Helsinki Watch} reported that during the most recent elections the press coverage was more objective and more open than it had been in the past.\textsuperscript{24} So, I think that there is hope and there is a desire to move in the direction of more democratic institutions and a participatory democracy. We'll have to wait to see where it goes.

What can we all learn from the Albanian experience? Just as the Albanians have reached out to Americans and Germans to help them prepare their new laws, we can watch what's going on in Eastern Europe and learn from the experience of their countries—as models to be imitated if they come up with successful innovations, as disasters to be avoided if that's the route they go, or simply as further evidence of human behavior that we can take into account as we try to revise our own institutions.

\textbf{PROFESSOR SWEENEY:} Our next speaker is Andrea Hanlon. She is here from a British law firm and will tell us about the press in Britain.

\textbf{MS. HANLON:} I have been asked to talk about the British approach to freedom of speech and protection of the press. I suppose the other side of that is the control and restriction of the press, which is more what is in the news in the United Kingdom at the moment. It has become a major issue and there have been several reports and inquiries into how to best regulate the press.

As we all know, Britain has no enshrined constitution. What has evolved is a framework of rules which deal with the rights and

\begin{footnotes}
\item [22.] Human Rights Watch, \textit{WORLD REPORT} 206 (1993).
\item [23.] \textit{Id.}
\item [24.] \textit{Id.}
\end{footnotes}
duties of the government to its citizens and vice-versa. The right to freedom of speech is really an inference drawn from the two major principles from which that framework has evolved: that subjects can do and say what they like, provided they do not break any substantive law or infringe the legal rights of anybody else; and, public authorities cannot do anything that they are not specifically authorized to do.

The doctrine of parliamentary sovereignty means that any "rights" which have evolved could, theoretically, be changed by the government of the day. In practice, however, certain rights, one of which is freedom of speech, have become so firmly enshrined and so highly prized that no government actually would legislate to infringe them. But what they may try to do, if it suits them, is chip away at these rights, and they have come up with various ways of doing that. This is one of the issues which has recently been considered in the U.K. and the one that was at the center of the Spycatcher cases, in which our firm was heavily involved, and in which the government attempted to use the law of confidentiality to gag the press.

I am not going to talk much about the breach of confidence aspects of the litigation today. I shall concentrate on the more general aspect of it: the privacy element, because while freedom of speech is more or less enshrined as one of our basic rights, what we do not have in the U.K. is any right to privacy, and that has lately become a big issue.

As I understand it, the American Constitution does recognize that an individual has an interest in not having his affairs known to others, or having his likeness shown to the public, and that anyone who infringes that right should be liable to the affected person. So, this right tempers the overall right of freedom of expression, and perhaps, tempers the actions of the U.S. media.

We don't have the same tempering effect in England, and there have been several recent examples which have made it even to your newspapers, mainly involving our Royals. There was the "Squidgygate" tape of conversations between Diana and James Gilby, there were the "Camillagate" tapes, and there were also the infamous photos of Fergie, amongst other things, having her toe
sucked by her "financial advisor."

There are also non-Royal examples, and the most noteworthy and ironic one of these was the reporting of telephone conversations between David Mellor and his mistress. Mr. Mellor was—at the time the conversations were reported anyway—Minister for the National Heritage, the government department which has overall responsibility for reporting on privacy and media intrusion. In these circumstances, the reporting of his private life became something of a wide issue. Following the scandal, he managed to hang on to his position for some time. However, later revelations forced him to resign. Incidentally, one of the stories which was reported was that he, too, had indulged in some "toe-sucking." So, I am waiting to see if Fergie is going to be in touch with him, since they have obviously got something in common.

Anyway, it is difficult for the people affected by these sorts of reports to go to English courts for relief—invasion of privacy is not a recognized cause of action. In fact, the Fergie photos were taken in France, which does recognize the right to privacy, and she sued and was awarded damages in France.

The lack of the right to privacy in England has been the subject of adverse judicial comment, and Lord Justice Leggett made statements in a couple of cases—one in 198725 and another in 199026—where he voiced the hope that this shortcoming in our law would soon be made good. Change is being discussed, but it has not yet come. It is against this background that the press has to operate.

It is only as recently as 1965 that the government refused to renew an ancient statute, the Licensing Act of 1662, which said that nothing at all could be published without government or church approval. Such a statute would never have come into existence here, I am sure. Since 1965, and much earlier in effect, there has been no censorship of the press in the U.K. The newspaper industry has been self-regulating. Until recently, any complaints following publication would be referred to the Press Council, which

was a nonstatutory body set up by the industry with two aims: its first aim was to promote the freedom of the press, and its second [was] to investigate any complaints relating to invasion of privacy or general bad conduct on behalf of the press. It seems to me that those two aims were always incompatible. In April 1989, following widespread concern that had existed for quite some time in Parliament and at-large, the government announced the establishment of a committee under the chairmanship of a leading barrister, David Calcutt, Q.C., which was to report on privacy and related matters.

The first report was published in June of 1990. The committee stated its basic position as being that freedom of expression should generally override the protection of privacy. Despite Mr. Justice Leggett’s comments—which had been made only a couple of months earlier—that the shortcomings in our law should be remedied, the committee was not in favor of any general right of privacy. Its stated view is that protection would be necessary for individuals in certain circumstances, but where such protection was to be given, it should be narrowly drawn and given by way of remedies aimed at particular abuses. The abuses the committee concentrated on were invasions of privacy and intrusion by the press onto private property, which touches on the question that Professor Sweeney asked us to consider.

What the committee proposed was the introduction of three new criminal offenses to cover such intrusions. The government considered the report. However, no legislation was forthcoming following its proposals.

A further recommendation, which was implemented, was that the Press Council should be replaced with a new body to be known as the “Press Complaints Commission.” This was set up. It is also non-statutory, and established and run by the newspaper industry itself, but unlike the previous body—the old Press Council—it is responsible only for adjudicating complaints. It does not have to uphold freedom of the press. It operates under a much more detailed code of practice, and its members are independently selected by an Appointments Commission.

It is still in existence, but under threat. In its first report, the
Calcutt Committee commented that this new body—the Press Complaints Commission—would be the last chance for the industry to make self-regulation work. It spelled out its threat—the sanction of statutory regulation—if the industry couldn’t sort itself out. It seems that it hasn’t; most of the examples that I mentioned earlier have occurred since the first report, and it was, in fact, the “Dianagate” or “Squidgygate” episode which led to the Calcutt Commission being reconvened.

A second report came out in January of this year. It concluded that the Press Complaints Commission was ineffectual and remained dominated by the industry despite the independent appointments system. The committee recommended the end of self-regulation with the establishment of a statutory complaints tribunal, which it hoped would have some nineteen powers suggested by the committee to enforce its very detailed code of practice. These powers would include the ability to place prior restraint on publication. Obviously, the power would only be available in limited circumstances. Such a proposal runs counter to all the ideals of the First Amendment. The tribunal would also be able to undertake investigations of any complaints and require the printing of corrections and apologies and replies. It could award compensation to victims and impose fines on the newspapers. Such fines would be up to 1% of the net annual revenue of a publication, so the tribunal would never be able to bankrupt a publication (as some libel actions have been able to do). However, the tribunal would also be empowered to award costs to victims.

Calcutt looked again into the question of physical intrusion onto private property, and once again, proposed three new criminal offenses which would carry fines of up to five thousand pounds. One proposed offense is entering onto private property without consent, which I think is aimed at members of the tabloid press in England who have a habit of camping on the doorsteps of news-worthy figures and harassing them as they go on with their daily lives. So, the first offense is aimed at preventing this. The second proposed offense covers placing or using a surveillance device on private property without consent, which is aimed obviously at bugging. The third covers taking photographs or recording voices of
individuals on private property without consent.

These offenses would be subject to defenses of justification if the defendant could show that there was a just excuse for behaving in the way that he had. For example, if he could show that the material was obtained for the purposes of preventing or exposing crime, or for protection of public health and safety—the usual sort of safeguards that exist to promote freedom of expression over protection of the individual where matters of public policy or national security are at stake.

The committee further stated that the high court should be able to grant injunctions preventing publication of material obtained by one of the new offenses, and that individuals affected by such behavior should have a right to take legal proceedings against the publication.

It also went on to recommend that the government give further consideration to the introduction of a tort of infringement of privacy which, at the time of its first report, the committee had felt was unnecessary. You can see that the second report was quite hard-hitting. It is still being considered and has caused considerable debate. Obviously, the media is horrified and is completely up in arms about the proposals.

Calcutt, in anticipation of their reaction, actually said in the conclusion to his report that "[his] recommendations are not designed to suppress free speech or to stultify a vibrant and dynamic press. They are designed principally to ensure that privacy . . . is protected from unjustifiable intrusion and protected by a body in which the public, as well as the press, has confidence." Whether it does that or goes further will, no doubt, continue to be debated.

The government’s reaction—as far as we can tell—is that it is opposed to statutory regulation of the press. The new Heritage Secretary—that’s David Mellor’s replacement—made a House of Commons statement following publication of this second report in which he seemed to accept the case for criminal offenses to deal with the problems of physical intrusion, phone-tapping, and long-lens photography. He seemed also to accept that the creation of the new tort should be considered. His department is due to pro-
duce its select committee report on privacy and media intrusion at the end of March. The government will study that report before making its next move.

There are various rumors circulating in the English media at the moment, and one I read just at the end of February was that, despite Calcutt's urgings towards the introduction of a tort of infringement of privacy, MPs [Members of Parliament] are not keen on this. They are more attracted to a defined law of harassment which would prevent people in the news being "door-stepped" in the way I described before. How it will turn out, I am not quite sure.

The select committee has stressed that it is not really concerned with the problem of celebrities being "door-stepped." Their concern is for ordinary people who, for whatever reason, become the subject of media attention. They heard evidence from two otherwise unnewsworthy people—the widows of two soldiers killed in Northern Ireland in quite public circumstances. These women were besieged by tabloid journalists following the event. This deeply concerned the committee. Further evidence was given by a royal maid wrongly accused by newspapers of stealing letters belonging to Princess Anne (and written by her now-husband). She was similarly besieged. (It seems that it is impossible to keep the Royals out of this arena—although Prince Charles and Camilla Parker Bowles did refuse to give evidence to the select Committee following "Camillagate!") The feeling seems to be that "ordinary people" should be protected from the excesses of the media whilst public figures should accept it.

Recent rumors are that the select committee is considering a compromise between the status quo of nonstatutory regulation and the statutory tribunal proposed by Calcutt, through the appointment of a media ombudsman who would have the ability to fine newspapers and award compensation to the complainants. Quite what transpires remains to be seen.

In the meantime, it seems that the judiciary is taking matters
into its own hands. There was a case only last month in which the Court of Appeal—while it didn’t dispute that there was no tort of harassment or invasion of privacy in English law—relying on a Canadian decision, held that notwithstanding the fact that the plaintiff had no proprietary interest in her parents’ home, she could sue under the tort of private nuisance with respect to harassing telephone calls made to her there. Since the basis of the tort of nuisance is interference with property, it was previously necessary for a plaintiff to show that he or she actually had a proprietary interest in the property.

The Canadian case extended the tort to cover the wife of the owner of property and said she had the right to restrain harassing telephone calls made to the matrimonial home. The English court in last month’s case felt that it was entitled to take the same approach in relation to a plaintiff living at home with her parents. The judicial comment was that the court had, at times, to consider earlier decisions in the light of changed social conditions. In the light of this statement, it is possible that the tort of private nuisance could be used, prior to the introduction of any new tort—albeit in limited circumstances—to restrain the excesses of the press.

Again, the problem of the celebrity-status person versus the ordinary person arises. At present there is no distinction in English law between the way the two are treated. I think American law does make some distinction, and it seems to me that it is probably a sensible distinction; celebrities put themselves up to public scrutiny and should expect to be scrutinized. However, this is not anything that has, as yet, been fully considered in the U.K.

I have not gone into the defamation aspect in great detail. The differences between U.K. and U.S. defamation laws were dealt with recently in a New York Supreme Court case, *Bachchan v. India Abroad Publications Inc.* The American court refused to enforce a libel judgment obtained in England against a news agency which was based in New York. In its judgment, the court highlighted the

significant differences that exists between the U.K. and U.S. jurisdictions. It ruled that the protection of free speech and the press embodied in the First Amendment would be seriously jeopardized if the award were enforced.

I think the fundamental difference between the way we go about things is that a plaintiff suing for defamation in England has to show only that the words complained of related to him personally, were published by the defendant, and bear a "defamatory meaning." There is no strict definition of defamatory meaning, but it covers words tending to injure the plaintiff's reputation in the minds of right-thinking people (whoever they may be).

English law, therefore, assumes the falsity of the statement that is being complained of, and the defendant either has to prove that the words were not defamatory or has to rebut the presumption of falsity by pleading justification which puts the issue of truth to the jury.

We almost always have trial by jury in defamation cases, although jury trial is not usual in other civil actions in the U.K. In defamation cases then, it is the jury which decides the level of damages, and if an unsuccessful justification defense is mounted, it can lead to a very high award incorporating an element of aggravated damages. Again, it is quite unusual to have such inflated damages awards in the U.K., but defamation is one of the areas where it can happen. The issue of whether damages should be left to juries has also been the subject of recent debate.

Other available defenses to defamation claims are privilege—whether absolute or qualified—to cover those times when people have a duty to say the things they do. For example, in Parliament and in court cases, also available is the defense of "fair comment" for which it is necessary to prove: A) that the facts reported were true, and B) that the way the defendant commented upon them was fair and accurate. There are also some statutory defenses, but in almost all cases, the onus of establishing the defense is on the defendant, which is the reverse of the position under U.S. law. This difference is, I think, the main reason the U.S. court would not enforce the U.K. libel award.
The distinction in both the privacy and the defamation aspects seems to mean that it is easier for the media here to report the news, and easier in the U.K. for individuals to use defamation laws to silence their enemies. One of the principal users of our defamation laws was Robert Maxwell who, whenever anybody tried to comment on his doubtful activities, would resort to the use of libel to stop them. And it works.

There are proposals in existence for reform of defamation procedure, but they are aimed at reducing the complexity, length, and cost of trials; not at any change in the substantive law. In these circumstances, it seems unlikely in this and in privacy matters, that we shall see any changes in English law that will be designed further to enhance our right to freedom of expression. Rather, in the U.K. at the moment, it is the individual's rights on private property which is the main concern.

Earlier, I mentioned Spycatcher. I won't go now into the government's attempts to use the law of confidentiality in order to gag the press. The extensive litigation about Spycatcher considers this in great detail—and if anybody is interested in that, I have left with the organizers a very detailed outline of the issues that arose as a consequence of Spycatcher, its publication, and the newspapers' reporting of its publication. If anybody wants a copy of it, they should speak with the organizers.31

PROFESSOR SWEENEY: Now, we move from Albania and the U.K. to our guest from Israel, Mr. Caspit.

MR. CASPIT: Good morning. First I would like to speak about a slight error that was made before. Ma'ariv is not the biggest paper in Israel, unfortunately. It is number two now. So, we try harder. There are two major Israeli dailies; so there is no one behind us. This is the current situation.

I won't speak today about the general daily life of an Israeli reporter. I would be happy to answer any questions about it later. I also did not plan to speak about private scandals of political leaders in Israel. I will be more than happy to answer later questions

31. On file at the FORDHAM ENT., MEDIA & INTELL. PROP. L.F.
about this issue as well. Unfortunately, we don’t have a royal family in Israel—but we did have a prince once. It was the late General Moshe Dayan who had a huge amount of sex scandals that were not reported by the Israeli media.

Today we have another “prince,” so-called. I think most of you know his name. It is Benjamin “Bibi” Netanyahu. He is going to be the Likud party leader, and he used to be the Israeli Ambassador to the United Nations. We had just our first private scandal regarding this honorable man—it is called in Israel “Bibigate.”

I can assure you and Ms. Hanlon that the Israeli press reported anxiously, and covered viciously, and daily, all the scandals of the Royal family. I think our last weekend magazine had four pages about the latest on the Princess Di tape.

The general attitude in Israel presumes that there are three types of policies regarding freedom of press and democracies. There are those states like Norway, Sweden, Denmark and others which allow complete freedom of press and put no limit on access to sources of information of any kind. There are states like the United States and Britain, and maybe others, which only limit freedom of press in times of war—even small local conflicts like the Grenada conflict, the Falklands crisis, and events like these.

The third kind are states which stand in the unique situation of constant struggle and war—or the first stages of political and democratic existence. In this group, you find states like India, maybe the Philippines, and regretfully Israel. Before discussing the subject of freedom of the press in Israel, I would like to begin by underlining a few basic principles regarding the legal system in Israel. First, as you all know, Israel is a democracy. Since its birth in 1948, Israel has been in a constant state of war. We call our democracy, “democracy wearing uniform.”

Although there is no constitution in Israel, the legal system cherishes and protects a few basic democratic values. These values are considered as guidelines—superlaws of the young Israeli democracy. One of these basic superlaws and guidelines, maybe the most important of them, is the freedom of speech and press.

The freedom of speech and press and the public’s right to get
information about public matters is, as I just said, a basic principle and a guiding value in the Israeli democracy and legal system. These basic principles in Israel enjoy a special status.

The Israeli Supreme Court, wishing to safeguard and protect democracy which stands upon, among other things, the public's right to free information, called the freedom of speech and the freedom of press the heart and soul of the Israeli democracy. Still, obviously, freedom of press and speech cannot be completely unlimited in a state like Israel. It often collides with other basic principles.

One of them, the one that I am going to talk about today, is national security. It is clear that democracy depends on national security. It is also a basic value that protects one’s life and assures the very existence of the community and state. As the Israeli Supreme Court stated: The right to live precedes the right to express one’s opinion.

Thus, every democracy seeks to balance these conflicting interests. In Israel, with its security problems and constant state of war, this conflict is magnified. In a very disturbing survey which was held a few years ago, 58% of the Israeli public said they thought freedom of press in Israel endangers the national security of the state.

The main restriction on freedom of press in Israel is military censorship, and this is my issue today. This institution is a relic of British rule that had existed in pre-Israel Palestine. According to these rules, a censor may ask to see just about anything before publishing. If he considered it dangerous to national security, he could very well disallow its publication. For example, if he were to adhere strictly to this rule, my newspaper would have to run every article that they send even from here—even a review of tonight’s Knicks-Jazz basketball game in Madison Square Garden—by the censor. According to those rules, the censor’s jurisdiction is almost unlimited. He can punish without any litigation or any legal process. He can shut down newspapers for a period of time, even confiscate printing machines.

In reality, the situation is not as bad as it sounds. The censor
demands to see only materials which are related directly to national security. So, I can write this evening whatever I want about Patrick Ewing. According to an agreement between the Committee of Editors of Israeli Press and the censor, he waived his authority to apply this British rule and to punish without due process.

Through the years there has been a reduction of the censor's authority. The agreement between the Committee of Editors and the censor improves constantly towards the freedom of the daily press. This agreement, however, does not apply to all the media. For example, weekly magazines, local newspapers, even foreign press like American networks and The New York Times and Washington Post are not included in this agreement.

Now, I would like to give you some examples. On October 5th, 1973, most of the military correspondents in the Israeli press knew about the huge Egyptian and Syrian force build up along the southern and northern borders of Israel. Yakov Arez, then the military correspondent of Ma'ariv and now my editor-in-chief, wrote a long article about the imminent danger of war. The military censor disallowed most of this article from being published.

Two days later the Yom Kippur War broke out, and Israel was surprised by its enemies and almost lost the war. This surprise cost Israel more than 3,000 lives. Most of them died because of the lack of warning, alert, and the delay in army reserves recruitment.

This couldn't happen today. The current approach of the censor is to allow any material, with the sole exception of items that clearly endanger national security or supply the enemies' intelligence services with important information. This is in contrast to the previous attitude which protected not only the immediate security of Israel, but also things like the nation's morale.

In 1985, a group of Arab terrorists hijacked a civilian bus near Ashekelon. It's a city in southern Israel. Israeli commandos, while negotiating with the terrorists, raided the bus, freed the passengers, and killed the terrorists. The day after, the daily Hachadachot published on its front page a photograph that was taken by one of its photographers on the scene. Hachadachot was not part of the agreement in those days between the Committee of Editors and the
censor. It was independent. The photo showed one of the terrorists captured alive and being taken away by an Israeli general. This photo wasn’t approved by the censor. In fact, the censors never laid an eye on it. The photo proved that the prisoner was taken alive and killed afterwards without a trial, which caused a huge scandal in Israel.

The decision to disregard the censor rules was taken knowingly by the editors of Hachadachot. It was not a mistake. They thought the right of the public to this information was more important than abiding by the law. In response, the censor issued a warrant closing Hachadachot for four days. In my opinion, this response would not happen today.

In December 1988, the weekly Ha’avir—it’s something like the Tel Aviv Village Voice—I guess it’s actually a duplication—applied to the Israeli High Court of Justice. Its plea was to allow the publication of an article which criticized the head of Israeli’s famous Mossad, the intelligence service of Israel. It was the first article ever in the Israeli press about the head of the Mossad or the Mossad itself.

The censor, of course, disallowed this article claiming it endangered national security. The high court ruled in favor of the paper, and stated that the censor may use his authority only if there is “clear and present danger” to the very existence of the state. This narrowed even more the already limited authority of the censor.

And finally, I would like to quote the chief military censor of Israel. He said: “The jurisdiction of the censor is not directed against newspaper readers or TV viewers but against the intelligence services of the enemy and against them only.”

When the censor decides to disallow an article he does it to save life and for this purpose only.

PROFESSOR SWEENEY: Now we have some time to hear from [the audience]. I do plan to ask my questions later on, but I think I should allow you [first to ask any questions you may have of us].

Yes, sir?

AUDIENCE MEMBER: My question is for Mr. Caspit. Are
you familiar with Internet—the computer network—computer communications network on an international level?

MR. CASPIT: Yes.

AUDIENCE MEMBER: Are you aware of whether the censor takes any actions with respect to communications on the Internet, which is to say an alternative medium in which all of the things which might be banned in newspapers could easily flow unless they were in some way controlled?

MR. CASPIT: You are talking about material that comes from Israel?

AUDIENCE MEMBER: Yes, emanating from people in Israel and being put out into the computer communications environment.

MR. CASPIT: The censor should see anything that any foreign correspondent—any correspondent stationed in Israel—is sending anywhere internationally. I can tell you that there is a rumor that Israeli correspondents use their colleagues abroad and they leak information to them about something that they know that the censor will not approve. So, the item is published in the Miami Herald or The New York Times. It happened a few months ago. Then, Israeli papers can immediately publish it because it was published abroad.

I am not familiar with what’s happening in Internet. So, I cannot say.

AUDIENCE MEMBER: Okay, but this other point you bring up does raise a question about the actual efficacy of the arrangements and what the censor or the censorship arrangement is really accomplishing.

MR. CASPIT: Yes, it’s a very good question. The latest was this—I don’t know if you heard about it, this terrible training accident in a military base in southern Israel. All the Israeli correspondents, including myself, knew what really happened there, and what the soldiers were practicing, too. They were practicing to kill one of the Hezbollah leaders. The accident occurred, and five or four of them were killed—shot by accident. We couldn’t publish anything. Then the Miami Herald and later The New York Times and other papers published it here without letting the censor see the
material before the correspondents in Jerusalem sent the information. Again, a huge scandal was in Israel, and the censor eliminated the credentials of these correspondents for a few days. This is the worst thing that the censor does to foreign correspondents nowadays. But it is a very common method to go like this and not obey the censor.

PROFESSOR SWEENEY: I think another side of that may be the situation at the time of the romance between King Edward VIII and Mrs. Wallace Warfield Simpson. No British paper would publish a word about the King’s romance with a divorced woman. The American press, however, was full of it. Then, of course, this was before the aviation industry connected Europe and America. So, the biggest sales from the passenger ships that called in England were the American newspapers relating all the stories about the King and his divorced fiancee.

MS. HANLON: I don’t think the situation would be the same now.

PROFESSOR SWEENEY: Would the situation be the same now? That’s a good question when you consider those newspapers that would be sold in Britain from America were then five days old. Now, with the jet, the newspapers are the same day.

MS. HANLON: But I don’t think the problem would occur. The British press would be in there first.

PROFESSOR SWEENEY: Okay. Do you have some more questions?

AUDIENCE MEMBER: The delay between a censor exercising his power and the court ruling that a censor had exceeded his authority—is that a long delay, or does the system try to expedite those claims?

MR. CASPIT: It’s not a long delay. I will tell you the mechanism of this censor. In the evening when we are going to close the newspaper and we are approaching the deadline, all the items that are related to national security are sent to the censor’s office in Tel Aviv. Only an officer sits there, not a chief censor. Many times it is not a very professional officer, and he decides if the articles can be published or not.
The relationship between the censor and the paper is very family-oriented. The editor can call the censor by telephone immediately at home, argue with him, negotiate and bargain, and claim that this is not at the expense of national security and a compromise can be made. If not, you can go to the court the next morning, and the court decides within one or two days. So, it is very fast. If not, you can go to the foreign press. This is illegal, but rumor says that correspondents, not papers, do it.

AUDIENCE MEMBER: When an issue is taken to the court, what's the standard by which they evaluate whether something is a threat to national security? What standard do they impose?

MR. CASPIT: We are talking about the High Court of Justice, not any other court. They get all the material—everything. They hear the censor and they hear the representatives of the paper. As the justice has stated lately, they will act in favor of the censor only if the material is endangering life, or an immediate "clear and present danger" to the national security.

For example, we can't publish anything about nuclear power sources because it's dangerous to national security. But if today, my sources are telling me that the Syrians and the Egyptians are building forces along the borders and there is an imminent danger of war, the censor will disallow it. So, during these years, the censor's authority has been narrowed in a huge way.

PROFESSOR SWEENEY: Yes?

AUDIENCE MEMBER: The political unrest in connection with organizations like Peace Now and similar organizations in Israel is not at all suppressed. All of their involvement in politics is freely reported, and it's not seen as a problem of security?

MR. CASPIT: Yes. As I believe was said here, the Israeli press, as long as you are not talking about pure military items [or] about national security items, is vicious and aggressive against government. I think the Israeli press had a major part in the Likud's defeat in the last election. The press is very left-wing oriented. I think a very large percentage of Israeli correspondents are left-wing, close to Peace Now. They print anything they want and the attacks on Israeli political leaders are really vicious. I
think that they are more vicious than the press here in the United States.

Even in the last days of the American elections, when people wrote about and talked to Mr. Bush, they had basic honor towards him. This type of respect does not exist in Israel, and did not exist towards Prime Minister Shamir. They called him names in the press. They wrote whatever they wanted to. The only limits are on items connected with national security—and things that happen in the occupied territories, which I didn’t talk about. It is not really a limit. It is more a kind of censorship, and I really didn’t talk about it.

PROFESSOR SWEENEY: Yes, sir?

AUDIENCE MEMBER: This is a short observation which might be helpful to people here. Sometimes one is asked what constitutes a journalist or a member of the media and, in looking at the provisions of the Albania Constitution which Mr. Schulz very ably showed us, I am reminded that if you were in New York and wanted to say that you were a journalist, you would have to go through the police department. You would have to submit three articles, after which you would be given press credentials.

Now, you might write a terrific article, but the next year you might be denied a renewal of your press credentials if you didn’t come up with three additional published articles. So, this might help put in perspective some of those provisions of the Albanian constitution, which, at first blush, might sound quite draconian. How do you get a license to write?

MR. SCHULZ: That actually relates directly to the next panel. The New York shield law was adopted at a time when there were lots of counter-cultural publications. The legislature, in its infinite wisdom, didn’t think that those sort of publications should qualify for the privilege under the shield law. So, there is actually a statutory definition of what constitutes a publication whose employees are eligible to invoke the shield law.

PROFESSOR SWEENEY: I think the Albanian law regarding the licensing of the press has a reflection of what UNESCO was trying to do some years ago in its discussion on an international
press law whereby the press would be licensed in order to keep the third world dictatorships in power.

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AUDIENCE MEMBER: As Europe moves towards the reality of the EEC, is there any kind of movement towards a uniformity of defamation law among the European countries?

MS. HANLON: Not towards uniformity. Article Ten of the European Convention deals with freedom of expression, but it is not, as such, incorporated into each member state’s law. Article Ten sets out the general principle that everyone has the right to freedom of expression and that this fundamental right can only be restricted if “prescribed by law” and “necessary” in a society on specified grounds. Again, the grounds cover, for example, national security and public health and safety. If a defendant feels a U.K. court has restricted his rights in breach of Article Ten, he can actually take the case to the European Court for its ruling, which can override the rulings of the English Courts. That happened in Spycatcher. The details of that are set out in the note that the Forum has a copy.32

AUDIENCE MEMBER: Mr. Schulz touched on this a little bit when discussing the guarantees of the press to access things such as paper and ink, but do the other panelists believe there is anything that can be learned in the United States from the foreign examples? Are there perhaps things we would want to co-opt into our practices to protect the freedom of the press and the media?

MR. SCHULZ: Something struck me in looking at how the Albanians approach press regulations. They start from a somewhat different model of the press and its role because virtually all the newspapers that exist there today are aligned with a political party. So their perception of the press is that it plays the role of advocate. It’s assumed that this is the role of the press. They don’t look to the press for unbiased reporting. They accept the advocacy model and have no sense that the press should be purely a truth sayer. In the United States, we often hold the press to a standard of being

32. On file at the FORDHAM ENT., MEDIA & INTELL. PROP. L. F.
unbiased, of providing access for differing points of views, of telling us the truth.

All of this leads to an interesting argument about whether one can ever have an unbiased publication. Is *Time* magazine really presenting an unbiased view of the world, or are they feeding you everything through a filter, implicitly or explicitly? Furthermore, the model from which you start might affect how you draft your laws, what sort of activity you tolerate, and what types of regulation you are prepared to impose.

PROFESSOR SWEENEY: In our own history, many of the early newspapers were, in fact, political party organs. In other countries, specifically in France, almost every newspaper is, admittedly, connected with a political party.

Let me answer the questions that I started with and I’ll do this as quickly as I can. First, can the members of the general public control the press’s access to private property when a newsworthy event has occurred? [For example], in this country where trespass law is still vigorously enforced, the press’s access is limited. So, my answer to that question would have to be a maybe. We have an Appellate Division opinion in which CBS was held liable in trespass for the intrusion into a restaurant, Le Mistral, after it had been placed on what was known as the cockroach list which *The New York Times* used to report the health department violations by restaurants.33

Contrast that case with a subsequent case in the Second Circuit where, during the 1977 mayoral campaign, the candidates attempted to keep the press away from their headquarters because some of ABC’s employees were on strike.34 The candidates didn’t want to be crossing the picket lines into their headquarters, thus, they denied ABC employees the right of access to their headquarters.35

The Second Circuit said that premises once dedicated to public

speech cannot be closed to the press. So, in that sense trespass law recedes when premises have been dedicated to a First Amendment concern.

Can the police control access to the crime scene where a murder or assault has occurred, or can the police control access to witnesses? As to the crime scene, [yes]. There is a Supreme Court case involving KQED-TV in San Francisco which had aired allegations of prison abuses. KQED wanted access to the [county jail] and the prisoners. The Supreme Court concluded that the news media has no constitutional right of access to the county jail.

As to witnesses, that's another story. It would not be possible to control the press's right of access to witnesses. Therefore, of course, the police sequesters the witnesses as best they can to prevent the press from having access to them.

Can the military control press access to military operations? I remember a fascinating book some years ago called The First Casualty by Knightly. The title of the book came from a quotation, "The first casualty of war is truth." In other words, the military has always been accustomed to spoon-feeding the press what they wanted the press to hear. That certainly was the situation with respect to Vietnam, where the military was satisfied with holding a daily briefing for the press, but they did very little to control the access of the press to military operations. Perhaps, that was the reason that the evening TV news brought down Lyndon Johnson and disrupted every university in this country.

In Grenada, the "press pool" approach was tried with the idea of keeping most of the press on Navy ships, thereby keeping them away from the military operations. In Operation Desert Storm, however, the military had the active cooperation of the Saudi government—which is not known to favor press freedoms. The press is always going to have to fight to find out what the military is doing and whether the military is screwing up.

How long does an event remain newsworthy? In the U.S., the

36. American Broadcasting Cos., 570 F.2d at 1083.
case law tells us indefinitely. The Scottsborough "victim" case involved a situation where TV was able to portray a person sixty years after the incident had happened.\textsuperscript{38}

Lastly, are publishers protected when they change the names of the participants? In privacy situations, yes, because New York state privacy law is statutory and the defendant must have used the plaintiff's name, portrait or picture for the plaintiff to recover.\textsuperscript{39} Of course, the plaintiff also has to be alive in order to sue.

In libel, though, the story is different. The plaintiff can attempt to prove that the person portrayed in the story is the plaintiff even though his or her name has been changed.\textsuperscript{40}

MR. SCHULZ: Yes. You can't have a lot of lawyers in the room without them trying to get the last word in. I have two quick comments. On this issue of access to private property under the common law of trespass, there may be an exception based on implied consent through custom and usage that would allow access. In Prah\textit{l} v. Brosame,\textsuperscript{41} the Wisconsin Supreme Court suggested that reporters might be allowed to accompany police onto private property to cover newsworthy events if there is such implied consent. That may be an exception that would get you in under certain circumstances.

As for the access to crime scenes and institutions discussed in \textit{KQED}, I think there is at least an argument to be made that in light of the later Supreme Court case recognizing a First Amendment right of access, the continuing vitality of that line of cases is questionable. There may be an argument that an enforceable right to gain access to crime scenes and other areas exists under certain circumstances.

\textsuperscript{39} N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1992).
\textsuperscript{40} Pring v. Penthouse Int'l, Ltd., 695 F.2d 438 (10th Cir. 1982), \textit{cert. denied}, 462 U.S. 1132 (1983).
\textsuperscript{41} 343 N.W.2d 826 (Wis. 1983).