The Terrorist Is A Star!: Regulating Media Coverage of Publicity-Seeking Crimes

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Abstract

Publicity-seeking crimes, including terrorism, almost by definition depend on the media for their effectiveness. Violence or threats of violence have long been deemed “newsworthy” by the media and publicity-seeking criminals have put this fact to full use. By attacking highly visible targets in a dramatic manner, publicity-seeking criminals guarantee themselves saturation news coverage. They make a shocking appeal to traditional news values by making full use of the news industry’s attraction to the dramatic, conflict-laden, and potentially tragic event. The media furthers the criminals’ objectives by publicizing an incident that was staged for the very purpose of obtaining media coverage. This has come to be called by many a “symbiotic relationship.”

Twenty-five years ago, when the bulk of this article was written, critics both within and outside the news industry had begun to voice an awareness, if not a concern, for the ease with which such criminals obtained publicity on both a national and international platform and it looked as if something might be done within the media establishments to thwart this manipulation of the press. Today, it is possible to look back and see that, in fact, nothing has been done and, so, individuals such as Osama Bin Laden and Seung-Hui Cho now use media establishments directly to spread their messages of hate, violence, and intimidation.

This article explores the psychology of terrorism and why it can hardly exist without the media and then turns to the American mass media and discusses why it needs titillating crimes for its existence. It then identifies and discusses the four main effects or harms of media coverage of publicity-seeking crimes and the media’s answers to these harms. Finally it suggests solutions and the effect the First Amendment to the United States’ Constitution has on those solutions.

The article is interesting for many reasons. In addition to its substantive coverage of a very critical issue in our time, it points out that publicity-seeking crime, including terrorism, is nothing new and that media coverage of it was a concern being discussed a quarter of a century ago. Written twenty-five years ago, it is eerily prophetic as to many issues. And, in its preface, it argues that despite an explosion of both broadcast technology and publicity-seeking crime since that time, there has been little development in the law in this area and there has been little to no coverage of it in legal journals. Finally, it asks the question “Why?” and challenges constitutional and media law scholars to return their attention to this critical issue.
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Michelle Ward Ghetti

“There is no need to cry in the wilderness when anyone so inclined can plead his case on national television…”

Preface

The following article, written twenty-five years ago, is remarkable for four reasons: (1) it points out that terrorism and/or publicity-seeking crime and the media coverage of it were concerns being discussed twenty-five years ago, (2) it is prophetic as to many issues, and, despite an explosion of both broadcast technology/coverage and publicity-seeking crime since that time, (3) there has been little development in the law in this area and (4) there has been little to no coverage of it in legal journals.

In the twenty-five years prior to the piece being written, approximately sixty incidents of non-state sponsored terrorism were documented within the United States or targeting United States citizens – more than there have been since 1982, although much of it was due to the racial unrest and anti-war sentiment in the United States at that time. By 1982, media coverage of

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1 Louisiana Outside Counsel Endowed Professor, Southern University Law Center.

2 Pohlmann and Foley, Terrorism in the 70’s: Media’s Connection, 61 NATIONAL FORUM 33, 34 (Summer 1981) quoting TIME magazine.

3 The following piece was written for a First Amendment course at Southern Methodist University School of Law in the fall of 1982 where the author was finishing the final thirty hours of coursework towards graduation at Louisiana State University Law School. Although receiving an almost perfect score in the class, it was rejected for publication as a comment in the Louisiana Law Review for being too controversial for a student piece.

4 See note ix, infra, for a listing of Terroristic crimes committed in America or against Americans in the twenty-five years prior to 1982. See also the various books, magazine articles, and law journal articles cited throughout the piece describing the discourse on media coverage of terrorism at that time.

5 See, e.g., the discussion of the expected impact of television news in the future at notes 35 through 39, infra.

6 See discussion at n. xv through xxiii.

7 See list of Terroristic crimes committed in the United States or against Americans since that time at notes xxiv through xxviii, infra. Actually Terroristic crime in the United States has decreased since 1982 although international terrorism has increased.

8 See discussion at n. xxix through xxxvii.

9 See discussion at n. xxxviii through xxxix.

10 1958: June 27: Thirty US Marines kidnapped by Communist guerillas on Cuba, near the US naval base at Guantanamo Bay. All are eventually released unharmed; October 12: Bombing of the Hebrew Benevolent Congregation Temple in Atlanta; 1961: May 1: First ever United States aircraft hi-jacked and forced to fly to
Communist Cuba by Puerto Rican born Abntulio Ramirez Ortiz; 1963: 16th Street Baptist Church bombing by a member of the Ku Klux Klan (KKK) killing four girls aged 11-14; November 22: President John F. Kennedy is assassinated; 1965: February 21: Black power leader Malcolm X shot dead during a public meeting in Auboan ballroom, in Harlem, New York City, United States; The KKK murders Viola Liuzzo, while transporting Civil Rights Marchers, New York Police thwart an attempt to dynamite the Statue of Liberty, Liberty Bell, and the Washington Monument by three members of the pro Castro Black Liberation Front (BLF); 1966: NAACP leader Vernon Dahme assassinated by KKK, August 1: Charles Whitman opens fire on students and faculty from the tower at University of Texas killing 14 and injuring 31; 1968: February 21: Delta Airlines DC8 hijacked to fly to Havana, Cuba for political asylum; April 4: Black civil rights activist Rev Martin Luther King shot dead in a hotel in Memphis by James Earl Ray; Spring: Students for a Democratic Society and Student Afro-American Society held a dean hostage at Columbia University; June 6: Senator Robert F. Kennedy assassinated by Jordanian terrorist, Sirhan Sirhan in L.A.; further terrorist threats received from Arab groups attempting to obtain Sirhan’s release; August: Abbie Hoffman threatened to spike the water of Chicago with LSD prior to Democratic Convention; August 28: John Gordon Meir, US ambassador to Guatemala is murdered by a rebel faction becoming the first ever American ambassador to be assassinated by terrorists; October 12: A US Army officer serving as an advisor to the Brazilian army is gunned down in his home, in San Paulo, Brazil by left wing guerillas, who falsely claim he is a Vietnam "war criminal"; 1970: August 24: the Army Mathematics Research Center on the University of Wisconsin-Madison campus was blown up resulting in one death; October 22: An antipersonnel time bomb explodes outside a San Francisco church, the Black Liberation Army (BLA) is suspected; September 4: American ambassador Charles Elbrick kidnapped in Brazil by left wing terrorists and freed after 15 terrorists were released from jail; 1970-1972: The Jewish Defense League (JDL) was linked with a bomb explosion outside of Aeroflot's New York City office, and a detonation outside of Soviet cultural offices in Washington. Also a JDL member allegedly fired a rifle into the Soviet Union's mission office at the United Nations; Conspiracy to blow up the Long Island residence of the Soviet Mission to the UN by JDL. 1971: The BLA is suspected (and in 2007 convicted) of shooting and/or bombing numerous police officers and/or cars and/or offices in various cities around the country and running a guerrilla warfare school in Georgia; 1972: January 27: Two policemen suspected murdered by members of the BLA; May 11: US Army headquarters in Frankfurt, Germany, attacked by Red Army Faction car bomb killing one American officer and injuring thirteen people; three more US servicemen injured in another Red Army Faction car bomb attack on the US Army headquarters at Heidelberg, Germany, later in the month; October 27: Police car bombing in Los Angeles claimed by Afro American Liberation Army (AALA); December: A travel agency in Queens, New York is bombed by FIN, a Cuban exile groups opposed to the government of Fidel Castro; December 11: New York City. The VA-Cuba Forwarding Company is bombed, FIN suspected; December 28: A Brooklyn, New York bartender is held for ransom by the BLA; 1973: January 7: Mark Essex, a former Black Panther, shoots nineteen people at a Howard Johnsons hotel in New Orleans and sets fire to the hotel; a New York City transit detective is killed and ten law enforcement personnel are shot, four by machine gun, during the year mostly in and around New York City by the BLA; two members of BLA are arrested with a car full of explosives; 1974: February 4: American heiress Patricia Hearst kidnapped by Symbionese Liberation Army terrorists and participated in a raid on the Hibernia Bank in San Francisco; March 1: Saudi Arabian embassy in Khartoum, Sudan, seized by Black September terrorists who murder two American diplomats; September 8: Bomb kills 88 on TWA Flight 841, attributed to Abu Nidal and his terror organization. December 11: bomb set off by the Puerto Rican nationalist group FALN in East Harlem; 1975: January 24: FALN bomb the Fraunces Tavern, killing four and injuring more than 50. April 19: FALN sets off four bombs within a forty minute period in Manhattan, New York injuring at least five people; December 29: Bomb explodes at New York's LaGuardia Airport, killing eleven and injuring 75, no arrests made and the reason for this attack remains unknown; 1976: September 10-September 11: Croatian Freedom Fighters hijack a TWA airliner from New York to Paris, police officer was killed and three injured by a bomb that contained their communiqués in a New York City train station locker, September 21: Chilean exile Orlando Letelier assassinated in Washington by Chilean government; 1977: February: Tony Kiritsis takes hostage in Indianapolis and holds him 36 hours all the while talking to radio talk show host, March 9: Three buildings in Washington, DC, including city hall, are seized by members of the militant African-American Muslim Hanafi sect and over 100 hostages taken, one bystander is killed, Marion Barry is shot in the chest; August 3: FALN bombs the offices of Mobil and a Defense Department building and warns that bombs were located in thirteen other buildings, including the Empire State Building and the World Trade Center, a bomb was later found in the AMEX building; 1978-1995: The Unabomber kills three and injures 29 in a string of anti-technology bombings; 1979: June 9: FALN exploded a bomb outside of the Shubert Theatre in Chicago, injuring five people; June 18: NATO's Supreme Allied Commander Europe General
such acts was being discussed within the media itself;\textsuperscript{xii} in general publications,\textsuperscript{xiii} and in higher education journals, both in the schools of journalism\textsuperscript{xiv} and in law.\textsuperscript{xv}

In 1982, the ability to cover publicity-seeking crime and broadcast it quickly and to large numbers of people was only in its infancy. Electronic news gathering (ENG) had only just begun.\textsuperscript{xvi} Satellite broadcasting technology, enabling broadcasts from a distance, had only been

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Alexander Haig (an American) escapes death after a German Red Army Faction bomb explodes under a bridge just after his motorcade has passed over it; November 4: Iran hostage crisis, a 444-day standoff during which student proxies of the new Iranian regime held hostage 66 diplomats and citizens of the United States inside the U.S. embassy in Tehran; November 15: Unabomber puts bomb on AA Flight 444 which fails to detonate, November: Greensboro massacre where KKK and Nazi group open fire on anti-KKK demonstration; 1980: March 15: armed members of FALN raided the campaign headquarters of President Jimmy Carter in Chicago and the campaign headquarters of George H. W. Bush in New York City, tying up hostages and vandalizing the offices and, later, sending threatening letters to delegates; June 3: A bomb destroys most of the exhibits in the Statue of Liberty story room, Croatian separatists are suspected; August 13: Air Florida flight from Key West to Miami, United States, hijacked by seven Cubans and flown to Cuba, six further US airliners were hijacked to Cuba over the next month; 1981: May 16: Puerto Rican Resistance Army place bomb in the toilets at Pan Am terminal at JFK airport; August 31: Large bomb explodes in the car park of the USAF base at Ramstein, Germany, injuring twenty people. The Red Army Faction claims responsibility; September 15: Red Army Faction terrorists make unsuccessful rocket attack on the car of US Army commander in West Germany; 1982: August 11: A bomb explodes on Pan Am Flight 830, enroute from Tokyo to Honolulu, killing one teenager and injuring 15 passengers; December 12: Anti-nuclear protestor holds eight tourists hostage in the Washington Monument, in Washington DC, United States, before he is shot dead by a police sniper. See http://www.southernct.edu/~seymour/cases/crimes/terror/terrorlist.htm; http://www.reference.com/browse/wiki/List_of_terrorist_incidents, last accessed September 15, 2007.

\textsuperscript{xii} The major forum for self appraisal was a myriad of meetings of journalistic organizations and associations during 1977. For a discussion of these panels and meetings, see Terry, \textit{Television & Terrorism: Professionalism Not Quite the Answer}, 53 \textit{Ind. L. J.} 745, 756-757 (1978) (hereinafter cited as \textit{Professionalism}). It is believed that the major impetus for the introspection was the an incident in 1977 in Indianapolis, Indiana whereby Tony Kiritsis took a banker hostage for 63 hours, all the while making calls to a radio talk show host who broadcast everything he said on the air, and then stood outside with the hostage, a sawed off shotgun wired to shoot him in the head, while making an emotional speech on live television.

\textsuperscript{xiii} See, e.g., \textit{What's Right, Wrong with Television News}, U. S. NEWS AND WORLD REPORT, March 16, 1981 at 45 (Interview with Walter Cronkite) and other articles cited herein.


\textsuperscript{xv} See http://en.wikipedia.org/wiki/Electronic_news_gathering. ENG originally referred to the use of point-to-point terrestrial microwave signals to backhaul the remote signal to the studio. In modern news operations, however, it also includes SNG (satellite news gathering) and DSNG (digital satellite news gathering). ENG is almost always done using a specially modified truck or van. Terrestrial microwave vehicles can usually be
developed in 1962, the United States had only placed its first geostationary satellite in space in 1974 and by 1979, the United States had only three geostationary satellite in space. Cable television was a recent invention with few people having access to it. Mobile phones had only just been introduced to journalism in the 1980s, and did not contain texting or imaging capabilities as they do today. Digital cameras were not created until the late 1990s. The internet was in its infancy, the IBM personal computer having only been created in 1981. The first twenty-four hour news channel, CNN, was only launched in 1980. And, of course, today, all major media outlets have websites.

Since 1982, when the below piece was written, there have been at least five hundred twenty-two documented incidents of non-state sponsored terrorism throughout the world, thirty-seven on American soil or targeting American citizens or assets. Today, publicity

identified by their masts which can be extended up to 50 feet (15 m) in the air (to allow line-of-sight with the station's receiver antennas), while satellite trucks always use a larger dish that unfolds and points skywards towards one of the geostationary communications satellites.


xvii In 1980 only 15 million people had access to cable, and they were, generally, in rural communities receiving local broadcasts. See www.cablelj.org.facts_history.asp. By 1989, 59 million people had access. By 1995, there were 139 different cable channels available. Id. Today, 85% of all U.S. households have cable, satellite or other form of multi-channel reception. See www.emarketer.com/article.aspx?id=1004914. By the late 1980s, 98% of all homes in the United States had at least one television set. See Edinformatics.com/inventions_inventors/television.htm.


xx Internet Protocol (IP) and Transmission Control Protocol (TCP) were introduced in 1981 creating the TCP/IP protocol that much of the internet uses today. See www.wikipedia.org/wiki/Telecommunications#Radio_and_Television. Today, 1.173 billion people in the world use the internet (approximately 18%): approximately 70% of Americans, 12% of people in Asia, 40% in Europe, and 55% in Australia. See www.internetworldstats.com/stats.htm. Use of the internet in the United States grew 225% between 2000 and 2007. More amazing is that use of the internet increased 645% in Africa (3.6% use it), 495% in the Middle East (10.1% use it) and 509% in Latin America (19.8% use it). Id.

xxi See www.wikipedia.org/wiki/Personal_Computer.

xxii See www.wikipedia.org/wiki/United_States_television_news. Today, there are five 24-hour news channels on cable in the United States: CNN, Headline News, Fox News Channel, MSNBC, and CNBC, as well as some regional channels.


xxiv 1983: April 18: 63 people, including the CIA's Middle East Director, killed and 120 injured in a 400 lb suicide truck bomb attack on the US Embassy in Beirut, Lebanon. Responsibility claimed by Islamic Jihad. October 23: suicide truck bomb in Beirut, Lebanon destroys a US Marine Corps base killing two hundred and forty one Americans; Islamic Jihad claims responsibility; November 9: A time bomb consisting of several sticks of dynamite explodes at the United States Senate in response to the U.S. invasion of Grenada; a group known as the
Armed Resistance Unit claims responsibility. November 15: US Naval officer shot by terrorist group in Athens, Greece, when his car stopped at traffic lights; December 12: US Embassy in Kuwait targeted by Iranian backed Iraqi Shia terrorist who attempted to destroy the building with a truck bomb; attack was foiled by guards and device exploded in the Embassy forecourt killing five people; December 17: US Army Brigadier General James Dozier kidnapped from his home in Verona, Italy, by Italian Red Brigades terrorists; held for forty five days until Italian special forces rescued him; 1984: August: The Rajneeshee cult spreads salmonella in salad bars at ten restaurants in Oregon to influence a local election; 751 people were sickened and more than 40 hospitalized; 1985: October 11: Arab anti-discrimination group leader Alex Odeh killed when a bomb explodes in his California office; 1988: April 12: Japanese Red Army terrorist Yu Kikumura arrested at rest stop on New Jersey turnpike in possession of pipe bombs on his way to New York; 1990: November 5: Assassination of Meir Kahane, head of Israel's Koch party and founder of the American vigilante group the Jewish Defense League in a New York hotel lobby by early elements of Al Qaeda; 1993: January 25: Mir Aimal Kansi, a Pakistani, fires an AK-47 assault rifle into cars waiting at a stoplight in front of the CIA headquarters, killing two and injuring three others; February 26: World Trade Center bombing kills six and injures over 1000 people, by coalition of five groups: Jamaat Al-Fuqra/Gamaat Islamiya/Hamas/Islamic Jihad/National Islamic Front; June: Failed New York City landmark bomb plot; 1994: March 1: Rashid Baz kills Hasdic seminary student and wounds four on Brooklyn Bridge in New York City in response to the Cave of the Patriarchs massacre in Palestine; 1995: March 8: Terrorists in Karachi, Pakistan, armed with automatic rifles, murdered two American consulate employees and wounded a third as they traveled in the consulate shuttle bus. April 19: Oklahoma City bombing kills 168 people, 19 of them children; October 9: An Amtrak Sunset Limited train is derailed by anti-government saboteurs near Palo Verde, Arizona. One person is killed and 78 are injured; 1996: July 27: Centennial Olympic Park bombing, killing one and wounding 111; 1997: February 24: Ali Abu Kamal opens fire on tourists at an observation deck atop the Empire State Building in New York City, killing a Danish national and wounding visitors from the United States, Argentina, Switzerland and France before turning the gun on himself, handwritten note carried by the gunman claims this was a punishment attack against the "enemies of Palestine"; 1998: August 7: U.S. embassy bombings in Tanzania and Kenya, killing 225 people and injuring more than 4,000, by al-Qaeda; 1999: April 20: Eric Harris and Dylan Klebold kill thirteen students and a teacher and wound 24 others in the Columbine High School massacre; December 14: Ahmed Ressam is arrested on the United States–Canada border in Port Angeles, Washington; he confessed to planning to bomb the Los Angeles International Airport as part of the 2000 millennium attack plots; 2000: last of the 2000 millennium attack plots fails, as boat meant to bomb USS The Sullivans sinks; October 12: USS Cole bombing kills 17 US sailors and wounds 40 off the port coast of Aden, Yemen, by al-Qaeda; 2001: September 11: Attacks kill 2,997 in a series of hijacked airliner crashes into World Trade Center in New York City and The Pentagon in Virginia. A third plane crashes in Pennsylvania after an apparent revolt against the hijackers by the plane's passengers; by Al-Qaeda; October: Anthrax attacks on U.S. Congress and New York government offices, and on employees of television networks and tabloid; December 12: Jewish Defense League plot by Chairman Irv Rubin and follower Earl Krugel to blow up the King Fahd Mosque in California and office of Lebanese-American Rep. Darrell Issa, foiled; December 22: Richard Reid, attempting to destroy American Airlines Flight 63, is subdued by passengers and flight attendants before he could detonate his shoe bomb; 2002: May: Luke Helder injures 6 by placing pipe bombs in mailboxes in the Midwest; July 4: Egyptian gunman opens fire at an El Al ticket counter in Los Angeles International Airport, killing two Israelis before being killed himself; October: John Allen Muhammad and Lee Boyd Malvo conduct the Beltway Sniper Attacks, killing ten people in various locations throughout the Baltimore-Washington Metropolitan Area; 2004: August 28: Shahawar Matin Siraj and James Elshafay are arrested for plotting to bomb the 34th Street–Herald Square subway station in New York City during the 2004 Republican National Convention; 2006: March 3: Mohammed Reza Taheri-azar, an Iranian-born graduate of the University of North Carolina, drives an SUV onto a crowded part of campus, injuring nine; August 10: major anti-terrorist operation disrupts an alleged bomb plot targeting multiple airplanes bound for the United States flying through Heathrow Airport; August 30: An Afghani Muslim hit 19 pedestrians, killing one, with his SUV in the San Francisco Bay area; 2007: March 5: Rikers Island inmate offered to pay an undercover police officer posing as a hit man to heud New York City police commissioner Raymond Kelly and bomb police headquarters in retaliation for the controversial police shooting of Sean Bell; Seung-Hui Cho kills 33 people including himself in the Virginia Tech massacre; May 7: six men inspired by jihadist videos arrested in the US, in a failed homegrown terrorism plot to kill US soldiers; June 3: Thwarted homegrown Islamist terrorism plot to destroy the fuel supply system for JFK airport in New York City and cause a large amount of causalities by blowing up the connecting pipeline system that runs through densely populated neighborhoods. Additionally, according to Mark Potok, Director of the
seeking criminals – such as Osama Bin Laden\textsuperscript{xxvi}, the Virginia Tech shooter, Seung-Hui Cho\textsuperscript{xxvii} or Jack McClellan\textsuperscript{xxviii} - unabashedly use the media to carry their message directly to the world.

Since 1982, the lower federal courts have dealt with the balance between media and the First Amendment in only limited ways. They have dealt with the reporter’s privilege and found it insufficient to block the government’s access to phone records relevant to funding of terrorism\textsuperscript{xxix} or defendant’s access to videotaped interviews of terrorists,\textsuperscript{xxx} they have restricted media coverage of deportation proceedings where terrorism is involved,\textsuperscript{xxxi} and they have found no right of the media to imbed a journalist with the troops.\textsuperscript{xxxi} They have also dealt with civil claims against media alleging that the media outlet aided and abetted crime\textsuperscript{xxiii} or negligently caused harm to another person.\textsuperscript{xxiv} The Supreme Court has remained silent. The more interesting legal developments have been in the international arena with the United


}\textsuperscript{xxvii}\ See http://www.msnbc.msn.com/id/18185859/ for the package of correspondence express-mailed to NBC News during the two hours between the first and second shootings by Cho.

}\textsuperscript{xxviii}\ Jack McClellan is the self-admitted pedophile who ran a website with pictures of children and tips for other pedophiles. Fox News and others gave him an interview due to a Seattle newspaper report that Fox picked up on. See Katherine Noves, Judge Slaps Publicity-Seeking Pedophile With Restraining Order, 8/6/07 at technewsworld.com/story/c6ZrFiazgWTwHz/Judge-Slaps-Publicity-Seeking-Pedophile-With-Restraining-Order.xhtm.

}\textsuperscript{xxix}\ See \textit{New York Times Co. v. Gonzales}, 459 F.3d 160 (2\textsuperscript{nd} Cir. 2006).

}\textsuperscript{xxx}\ See \textit{McKevitt v. Pallasch}, 339 F.3d 530 (7\textsuperscript{th} Cir. 2003)


Nations and European Convention for the Protection of Human Rights and Fundamental Freedoms passing resolutions that affect media coverage of terrorism and three cases in international courts that affected media coverage of terrorism.

Very little has been published on media coverage of terrorism or publicity-seeking crime in the mainstream law journals or in books. Most of what has been published has been on the Freedom of Information Act. Interestingly, like the below paper, most of what has been published on the media’s connection to terrorism is student-authored.

See U.N. General Assembly Resolution 51/210 (1996), Measures to Eliminate Terrorism, PI(3)(c) and PI (4), GA Res 51/210 (12/17/96)


In 1982, could we have imagined that a terrorist such as Osama Bin Laden would directly use the media to spread his message of terror around the world? In the balance of constitutional rights and freedoms, is this the outcome desired? Why did the scholarly debate on this issue stop in the 1980s? Hopefully, this article might serve as a catalyst to stimulate other scholars – in both the legal and journalistic fields – to reconsider this very serious issue.

Introduction

“Terrorism” is a word which conjures up images of guerillas, foreign nationalists, and government overthrow. However, the term encompasses far more\(^1\) and for the purposes of this discussion includes all violence aimed at influencing the attitude and behavior of one or more target audiences, or, to coin a term, publicity-seeking crimes.\(^2\) In the past decade, the number of publicity-seeking crimes has escalated to a point where thousands of lives,\(^3\) 42% of them American,\(^4\) are taken each year and whole societies are held captive by one or more misguided individuals.

\(^1\) There is no generally accepted definition of terrorism. A common thread found in most definitions is the objective to receive the widest dissemination possible of the message, act, or identity of the perpetrators. See Research Study, “International and Transnational Terrorism: Diagnosis and Prognosis,” at pp 7 & 8, CIA Publication, April 1976 (hereinafter cited Research Study); VanderVat, Terrorism and the Media, INDEX ON CENSORSHIP, April, 1982 at 26; LEGAL & OTHER ASPECTS OF TERRORISM at 183 (Practicing Law Institute, NY 1979); M.C. Bassiouni, ed. INTERNATIONAL TERRORISM AND POLITICAL CRIMES at xi (Charles C. Thomas Publ., 1975). However, some criminal acts which would be labeled terrorism by many do not seek publicity. For example, state-sponsored terrorism, i.e. genocide, hopes to gain no publicity. See Bassiouni, Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, and Proposals, 72 J. CRIM. LAW & CRIMINOLOGY 1, 2, 7 (1981) (hereinafter cited as Perspectives.). See also, generally, Paust, International Law & Control of the Media: Terror, Repression & the Alternatives, 53 IND. L. J. 621 (1978) (hereinafter cited at “International Law”). Also, some criminal acts which seek publicity would not meet the criteria of some definitions of terrorism. Most definitions of terrorism require the objective of instilling fear in a targeted person or group of persons. Persons committing violent crimes just for self-glorification will not fit this element of many definitions. See generally, authorities cited within this footnote.

\(^2\) A wide variety of crimes could be committed in seeking publicity but the most common are: kidnapping (with threat of bodily harm), barricading hostages, bombings (letter, incendiary, and explosive), hijacking, assassination, and sniping. See, International Terrorism in 1978 at 4 (Fig. 5) (R.P 79-10149) (C.I.A. National Foreign Assessment Center, March 1979) (hereinafter Cited at “CIA Report”).

\(^3\) In 1968-1971, deaths from terrorist activities averaged 60 per year and injuries averaged 200 per year. By 1978, death and injuries were up to 450 and 400 respectively. See “CIA Report,” supra n. 3 at ii (Fig. 1). By 1980, death were at 1, 173. See As Violence Spreads: Is the U.S. Next?, U.S. NEWS AND WORLD REPORT at 32, 33 (Sept. 14, 1981) (hereinafter Cited at “CIA Report”).

\(^4\) The most active arenas for publicity-seeking crimes are North America, West Europe, Latin America, and the Middle East. Together they account for approximately 90% of all such activity. North America is the site of approximately 9.7% of the incidents while the USSR and socialist East Europe account for only 0.4% of terrorism. See CIA REPORT supra n.3 at 2 (Fig. 3) and 7 (Table 1). Although only 9.7% of the incidents take place in American – a fact which is explained by geographic inconvenience, bureaucratic obstacles, familiarity and attitude toward America, see Violence Spreads, supra n. 4 at 33, Americans abroad are the most prominent targets of terrorism. 41.9% of the total casualties are American nationals. See CIA REPORT supra n. 3 at 4 (Fig. 5).
One of the problems of combating incidences of publicity-seeking crimes is media involvement. Violence or threats of violence have long been deemed “newsworthy” by the media. Publicity-seeking criminals have recognized this fact and put it to full use. By attacking highly visible targets in a dramatic manner, publicity-seeking criminals guarantee themselves saturation news coverage. They make a shocking appeal to traditional news values by making full use of the news industry’s attraction to the dramatic, conflict-laden, and potentially tragic event. The media thus furthers the criminals’ objectives by publicizing an incident that was staged for the very purpose of obtaining media coverage. This has come to be called by many a “symbiotic relationship.”

Critics both within and outside the news industry have begun to voice an awareness, if not a concern, for the ease with which such criminals obtain publicity on both a national and international platform. And yet, since 1977, when most of the self-appraisal and outside criticism dramatically increased, no real changes have been made. Although a number of self-regulating guidelines have been promulgated by various broadcasting organizations, it has been decided just what “newsworthy material” is may be an unattainable goal. The line between news and entertainment is becoming thinner and thinner. See, for example, the discussion in text at notes 32-40, infra. See also, Perspectives, supra n.2 at 25; VanderVat, supra n. 2 at 26.

See Perspectives, supra n. 2 at 14; Jaehnig, Journalists and Terrorism: Captives of the Libertarian Tradition, 53 IND. L. J. 717, 720 (1978) (hereinafter “Libertarian”).

See text at notes 32-40, infra.

See, e.g., Fenyvesi, Looking Into the Muzzle of Terrorists, QUIll, July-August, 1977 at 16 (competitiveness within the industry had placed the lives of hostages [he was one] in undue danger); Monday, What's Wrong With Our Arm, QUIll, July-August, 1977 at 19 (journalists should be better trained to understand and cover terrorists); Czeriejewski, Guidelines for the Coverage of Terrorism, QUIll, July-August, 1977 at 21 (formal guidelines and a more thoughtful study of the problem needed). The major forum for self appraisal though, was the myriad of meetings of journalistic organizations and associations during 1977. For a discussion of these panels and meetings, see Terry, Television & Terrorism: Professionalism Not Quite the Answer, 53 IND. L. J. 745, 756-757 (1978) (hereinafter cited as Professionalism.).

Nineteen seventy-seven (1977) saw a dramatic jump in the number of terrorist incidents, especially in America. However, the most likely cause for the critical attention given the problem that year was the manipulation of the media by theretofore unknown Anthony Kiritsis to gain live news coverage to express his personal grievances while holding a gun to the head of his hostage. See Professionalism, supra n. 9 at 750-752 and Libertarian, supra n. 7 at 717-718 for details of the event. Coincidentally, by 1977, seventy-five percent of commercial television broadcast stations had three new pieces of equipment, just invented in 1973, referred to as ENG (electronic newsgathering) equipment. They are: small, light video cameras (minicams), light, battery-powered video recorders, and the real technological breakthrough, a device called the time-base connector which converts the output of the lightweight video tape recorders into a picture with sufficient stability to be broadcast. See Professionalism, supra n. 9 at 749. These three pieces of equipment for the first time allowed instantaneous on-the-spot coverage of the news.

The following guidelines, included as a part of the CBS News Standards, became the model for most other guidelines that various news organizations adopted.

(1) An essential component of the story is the demands of the terrorist/kidnapper and we must report those demands. But we should avoid providing an excessive platform for the terrorist/kidnapper. Thus, unless such demands are succinctly stated and free of rhetoric and propaganda, it may be better to paraphrase the demands instead of presenting them directly through the voice or picture of the terrorist/kidnapper.
been the general consensus that the First Amendment bars any government regulation in this area. It is the thesis of this article that this may not be true in all cases. An analysis of the First Amendment as it applies to various forms of government regulation will follow the discussion of the problems created by publicity-seeking crimes and the media coverage thereof.

The Problem of Media Coverage of Publicity-Seeking Crimes

The objectives of terrorists, other than seeking publicity, are often coercion, extortion, disorientation and despair, provocation of unpopular countermeasures, and (with regard to the terrorists themselves) morale-building. M. Cherif Bassouini, a leading scholar on international terrorism, has identified four types of publicity-seeking criminals based on their motivation:

(2) Except in the most compelling circumstances, and then only with the approval of the President of CBS News or in his absence, the Senior Vice President of News, there should be no live coverage of the terrorist/kidnapper since we may fall into the trap of providing an unedited platform for him. (This does not limit live on-the-spot reporting by CBS News reporters, but care should be exercised to assure restraint and context.)

(3) News personnel should be mindful of the probable need by the authorities who are dealing with the terrorist for communication by telephone and hence should endeavor to ascertain, wherever feasible, whether our own use of such lines would be likely to interfere with the authorities' communications.

(4) Responsible CBS News representatives should endeavor to contact experts dealing with the hostage situation to determine whether they have any guidance on such questions as phraseology to be avoided, what kinds of questions or reports might tend exacerbate the situation, etc. Any such recommendations by established authorities on the scene should be carefully considered as guidance (but not as instruction) by CBS News personnel.

(5) Local authorities should also be given the name or names of CBS personnel whom they can contact should they have further guidance or wish to deal with such delicate questions as a newsman’s call to the terrorists or other matters which might interfere with authorities dealing with the terrorist.

(6) Guidelines affecting our coverage of civil disturbances are also applicable here, especially those which relate to avoiding the use of inflammatory catchwords or phrases, the reporting of rumors, etc. As in the case of policy dealing with civil disturbances, in dealing with a hostage story reporters should obey all police instructions but report immediately to their superiors any such instructions that seem to be intended to manage or suppress the news.

(7) Coverage of this kind of story should be in such overall balance as to length that it does not unduly crowd out other important news of the hour/day.

As reprinted in *Professionalism, supra* n. 9 at 776.

11 See Research Study *supra* n. 2 at 8. See also, *Perspectives, supra* n. 2 at 32, n. 124 for a list of 13 strategic objectives of terrorists that media coverage may help to fulfill.

(1) the common criminal motivated by personal gain, (2) the person acting as a consequence of a psychopathic condition, (3) the person seeking to publicize a claim or redress an individual grievance, and (4) the ideologically motivated individual. 13 This last category of individual is the one most frequently associated with the term “terrorism.” It has been noted, however, at least in the area of assassination, 14 that the emphasis may be shifting to individuals seeking self-definition 15 or self-assertion. 16 William R. Catton, professor of sociology at Washington University, observes that although “some of the groups so desperate for publicity want it as a presumed means of attaining political, economic, or nationalistic goals [instrumentally-oriented terrorists] 17 ...[others] appear to crave publicity for its own sake [expressly-oriented terrorists] 18 -- i.e., as an antidote to the ignominy of seeming superfluous in a world too vast to have otherwise noticed their existence” 19 [significance deprivation]. 20 If nothing else, commentators seem to agree on one thing: to these people, more conventional means of communication seem to be unavailable or ineffective. 21

Scattered, isolated incidents of violence by themselves are of little use to publicity-seekers in producing their objectives of fear, coercion, and publication of a cause or self-identification. Terrorists rely on the psychological impact of acts rather than their immediate destructive consequences. 22 To achieve such impact, publicity-seeking criminals need to publicize their acts as widely as possible. Since the mass media have the ability to confer importance upon an individual or an event merely by presenting it, 23 they play a major role in the spreading and intensification of the desired psychological impact. With the advent of increasing numbers of technological communicative advances, 24 publicity-seeking criminals

of Terrorism, 7 Akron L. J. 388 (1974); numerous other articles on war crimes, international extraction, and world human rights.

13 See Perspectives, supra n. 2 at 8.

14 See Restak, Assassin!, 89 Science Digest 78, 82 (1981).

15 Id.

16 See, Catton, Militants and the Media: Partners, in Terrorism, 53 Ind. L. J. 703, 707 (1978) (hereinafter cited as Partners,).

17 See, id. at 714.

18 See, id.

19 Id. at 710.

20 Id. at 707.

21 Id. at 705; Perspectives, supra n. 2 at 0; Restak, supra n. 15 at 82-83.

22 See Perspectives, supra n. 2 at 8


24 See Professionalism, supra n. 9 at 749; Perspectives, supra n. 2 at 14; Research Study, supra n.2 at 2 and 19.
are able to command the immediate attention of millions, enabling these criminals to work their felonious will on whole nations rather than just the hostages in their presence.25

The media has been described as a powerful source, sometimes more influential than government itself.26 In fact, Iranian Acting Foreign Minister Abol Hassan Banisadr, during the taking of American hostages from the U.S. Embassy in Iran, exemplified this attitude when he said, ‘Diplomats cannot solve this problem. We want to solve it through ‘newspaper diplomacy.’’"27 This influence through the media could be a good thing if only the actions necessary to get this attention and consequential influence could fall short of violence.

Unfortunately, this has not been the case. Williams Raspberry, a black columnist for the Washington Post, lamented on the use of violence as a means of gaining needed attention28 in the Watts Riots of 1965. He pointed out that the attention received during the violent riots that summer brought home to the black people and other poor people that they could command the attention of the press. They realized that riots, threats of disorder or demonstrations that had the prospect of getting out of hand always got the press out there. They found, for the first time, that this attention could lead to some positive gains for them and that was one of the reasons rioting flourished.29

Why, then, must violence be resorted to to gain the “needed attention”? Is it just an example of the age old maxim, “The wheel that squeaks the loudest is the one that gets the grease?”30 Or is there more to it?

American mass media - electronic (television and radio) and print (newspaper and magazine) - are commercial enterprises just as any other business. They exist and thrive by making profits. Profits are obtained from selling time or space to advertisers at rates determined by circulation or audience size.31 The larger the audience, the more each medium prospers. The availability of attention-getting content serves the audience attracting needs of the industry.32 The dramatic, often emotional events staged by publicity-seeking criminals make news, sell newspapers, and draw millions to the television set. This adds handsomely to

25 See Partners, supra n. 17 at 704.

26 See LEGAL AND OTHER ASPECTS OF TERRORISM, supra n. 2 at 183.

27 Tehran’s Reluctant Diplomats, TIME, Dec. 4, 1979 at 64, as quoted in Perspectives, supra n. 2 at 26, n. 97. See also, Pohlmann & Foley supra n. b at 34.

28 Raspberry also points out that when the riots began, reporters for the LOS ANGELES TIMES could not find a single clip on Watts in their newspaper’s morgue and that big city newspapers everywhere suddenly became painfully aware that they knew nothing about their own ghettos. See Pohlmann & Foley, supra n. 1 at 34.

29 Id.

30 Attributed to Josh Billings, American humorist (1818-1885).

31 Perspectives, supra n. 2 at 25.

32 Partners, supra n. 17 at 713.
the profits of media owners, advertisers, shareholders and employees (and no doubt to the job security of the journalists covering the event) \(^{33}\) and contributes to the overall “success” news reporting has seen in recent years. \(^{34}\)

The supposition that “news” is becoming a more popular form of television “entertainment” is illustrated by such articles as *The Coming Explosion in TV News*. \(^{35}\) Television tops all media in the number of people relying on it as their primary news source. \(^{36}\) Urban stations are doubling and tripling the time they devote to news and nonfiction features. \(^{37}\) Cable networks have already created one 24-hour news channel and are working on two more. \(^{38}\) In fact, a former news chief at CBS predicts that news will soon become the prime staple of the American viewing public. \(^{39}\) As the line between “news” and “entertainment” grows less and less visible and the commercial objectives of news carriers become more and more evident, publicity-seeking criminals can be expected to continue, if not escalate, their efforts to feed on this audience-attracting need.

In fact, according to a 1979 CIA report, \(^{40}\) the nature and intensity of publicity-seeking crimes will fluctuate widely in the future. \(^{41}\) The composition and character of such crimes will continue to change and increase in number although the regional patterns will stay the same. \(^{42}\) According to the CIA, representatives of affluent countries, particularly government officials and business executives, will continue to be the primary targets for assassinations and kidnappings although the majority of incidents will continue to be bombings and incendiary attacks. \(^{43}\) The CIA does voice a concern - as do others concerned with nuclear development \(^{44}\) - overcoming

\(^{33}\) VanDerVatt, *supra* n. 2 at 25.

\(^{34}\) *Partners, supra* n. 17 at 713.


\(^{36}\) *Id.*

\(^{37}\) *Id.*

\(^{38}\) *Id.* See also, *What’s Right, Wrong with Television News*, *U. S. News and World Report*, March 16, 1981 at 45 (Interview with Walter Cronkite).


\(^{40}\) See CIA Report, *supra* n. 3 at 1 & 5.

\(^{41}\) *Id.*

\(^{42}\) *Id.*

\(^{43}\) *Id.*

\(^{44}\) See *Partners, supra* n. 17 at 704. But see, *Violence Spreads, supra* n. 4 at 34. Mr. Jenkins feels that because terrorists are not bent on killing large numbers of people, because they fear that resorting to nuclear terrorism might alienate constituents, because nuclear terrorism could provoke public revulsion and because terrorists fear an unprecedented governmental crackdown, any suggestion of mass killing would probably not succeed. But see, *United States v. The Progressive*, 467 F. Supp. 990 (E.D. Wis. 1979) where a lower federal court considered the
present tactical and technological limitations may permit use of more sophisticated devices such as heat-seeking missiles and the like.  

The trend, as shown by the previous incident and death statistics, is on a dramatic incline. Professor Catton, in addition to his theory on significance deprivation in our growing society, feels that the faith of all people, but especially Americans, that any shortcomings of the present can be rectified in the future is waning. The combined effect of these feelings of insignificance, frustration with the system, and incompetence could lead to an increase in American based expressly - oriented acts. Brian Jenkins, director of the RAND Corporation program on political violence tends to agree. He feels that although the American political system has an enormous co-optive capacity, some “engines of terrorism” that did not exist in America in the past could be emerging. He pointed to the people’s perception of the economy and the development of single-issue politics as examples. These changing societal factors combined with the high rate of relative success achieved and the continued media saturation coverage indicate little hope of de-escalation.

potential for such nuclear destruction to outweigh any First Amendment rights. “A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.”  

45 See CIA Report, supra n. 3 at 1 & 5.
46 See note 4, supra.
47 See text at notes 18-21, supra.
48 See Partners, supra n. 17 at 708.
49 See Violence Spreads, supra n. 4.
50 By “co-optive,” Mr. Jenkins means that the American political system can “incorporate an enormous diversity within its political system.” See Violence Spreads, supra n. 4 at 33.
51 Id.
52 Id. Mr. Jenkins contrasts “single-issue politics” against an overall anti-capitalist or nihilistic philosophy. He observed that we have already seen some willingness among single-issue movements to break the law but noted that that was not to the extent of doing serious violence to people of property. However, in November 1982, this point may have been reached when an anti-nuclear power advocate held the Washington Monument and its occupants hostage.

53 Terrorists have met with a high degree of success in accomplishing their objectives. In a study of 63 major kidnapping and barricade operations executed between early 1968 and late 1974, the RAND Corporation concluded that such actions were subject to the following probabilities of risk and success:

87% probability of actually seizing hostages
79% chance that all members of the terrorist team will escape punishment or death, whether or not they successfully seized hostages
40% chance that all or some demands will be met in operations where something more than just safe passage or exist permission was demanded.
What if this situation continues to exist? What are the consequences?

Professor Bassouini has determined four main effects of media coverage of publicity-seeking crimes: intimidation, imitation, immunization, and imperillization. Media coverage of publicity-seeking crimes often (1) enhances the environment of fear and coercion the terrorists seek to generate (intimidation factor); (2) encourages other individuals to engage in such conduct (imitation factor); (3) dulls the sense of outrage and contempt in the general public (immunization factor); and (4) endangers hostages lives and interferes with effective law enforcement (imperillization factor).\(^\text{55}\)

**Intimidation**

Considered alone, each publicity-seeking act is not nearly as ominous as it appears to be. More than twice the number of people who have died in terrorist incidents between 1968 and 1975 have died from asthma in a single year in the United States; ten times as many have died from influenza.\(^\text{56}\) By focusing on terrorist events and giving them a disproportionate amount of news coverage, the media engenders the feeling in the viewing public that such events are more common and, therefore, more dangerous than they really are.\(^\text{57}\) Media, particularly television, gives the effect of authenticity per se.\(^\text{58}\) It gives the criminal the auspices of power in a short time, with little effort, on a wide scale. In some respects, the modern “terrorist” is “created” by the media: they magnify and enlarge him and his powers far beyond its true magnitude.\(^\text{59}\)

\begin{align*}
29\% & \text{ chance of all compliance with such demands} \\
83\% & \text{ chance of success where safe passage or exit, for the terrorist themselves or for others, was the sole demand} \\
67\% & \text{ chance that, if concessions to the principal demands were rejected, all or virtually all members of the terrorist team could still escape alive by going underground, accepting safe passage in lieu of original demands, or surrendering to a sympathetic government, and} \\
100\% & \text{ probability of gaining major publicity whenever that was one of the terrorist’s goals.}
\end{align*}


\(^{54}\) See text at notes 6-7, infra.

\(^{55}\) See Perspectives, supra n. 2 at 18-19.

\(^{56}\) See Partners, supra n. 17 at 712.

\(^{57}\) See Perspectives, supra n. 2 at 3.

\(^{58}\) Id. at 21.

effect, television puts everyone at the scene of the crime, helpless to do anything, engendering feelings of anxiety and fear—the terrorist’s instruments of coercion. This public anxiety enhances the perceived power of the terrorist in his own eyes as well as the eyes of his peer group and others. This enhanced power often leads to imitation and the cycle repeats itself.

**Imitation**

According to leading sociologists, “among all the different ways one might behave in given circumstances, any particular way is more likely to be repeated when the circumstances recur if the previous time it was done it was followed by some gratifying experience.” This is referred to as the “operant conditioning model.” This can also occur as a result of vicarious reinforcement through observational learning. In other words, “[i]f a person observes another individual, with whom he more or less identifies, and sees that in certain circumstances a certain action by that other individual tends to be followed by an experience that is rewarding to that other person, the probability that the observer would behave in those circumstances in about the same way the observed person did is enhanced.” Therefore, if a would-be terrorist sees someone else’s terror-inspiring act succeeding (i.e. resulting in a gratifying experience) then the probability that the would-be terrorist will engage in similar acts is increased. If publicity is what these individuals seek, then receiving such publicity is gratifying and rewarding. By providing such a “reward” to publicity-seeking criminals, media is reinforcing and encouraging present and future terrorists. An excellent example of such a phenomenon took place during the Iran crisis. Shortly after the incident began, United States’ Embassies were attacked in Bangladesh, Libya, and Pakistan, basically following the steps of the successful Iranians.

60 *See Perspectives, supra n. 2 at 22.*

61 *See text at notes 63-76, infra.*

62 *See Partners, supra n. 17 at 713.*

63 *See Gerwitz, Mechanism of Social Learning: Some Roles of Stimulation and Behavior in Early Human Development, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 57-212 (D. Goslin ed. 1969). See also, Partners, supra n. 17 at 713. Professor Bassiouni terms this phenomenon a “psychological projection prediction syndrome.”*


65 *Partners, supra n. 17 at 714.*

66 *Id. In a related area, a number of studies have been conducted into the relationship between media and the rising crime rate. See SUBCOMMITTEE ON COMMUNICATIONS FOR THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 95th Cong., 1st Sess.; VIOLENCE ON TELEVISION (Comm. Print 1977); AMA, PROCEEDINGS OF THE HOUSE OF DELEGATES 280 (June 1976) (Res. No. 38); SEX AND VIOLENCE ON TV: HEARINGS BEFORE THE SUBCOMMITTEE ON COMMUNICATION OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 94th Cong., 2d Sess. at 7 (1976); Gerbner and Gross, Living With Television: The Violence Profile, 26 J. COM. 172 (1976). See generally, Perspectives, supra n. 2 at 23-24, notes 85-92.*

67 *See text at n. 29, supra.*

68 *See Perspectives, supra n. 2 at 26.*
Of course, the information on operant conditioning and vicarious reinforcement is theoretical and data on such social phenomenon will never be clear enough to convince all social scientists and all legal scholars. But, to quote former Surgeon General Jesse Steinfeld, “There comes a time when data are sufficient to justify action.”

There is a strong argument that the time is now. Ninety-three percent of police chiefs surveyed in a recent study felt like live television coverage of terrorist acts encouraged terrorism. Sixty-four percent of the general public surveyed in a 1977 Gallup poll believed detailed news coverage of terrorism encourages others to commit similar crimes. It is also suggested that terrorist groups conform to certain media stereotypes in their internal organizational structure, chain of command, choice of targets, time, place, and manner of action, and even in the attitudes of their members.

Professor Catton warns, though, that the distinction must be made between “instrumentally-oriented terrorists” and “expressly-oriented terrorists.” For instrumentally-oriented terrorists, publicity about their goals would be reinforcing but publicity about their actions and not their goals would not be reinforcing. For expressly-oriented terrorists, any publicity - even negative publicity - would be reinforcing. They seek publicity for its own sake, for self-identification. Any media attention provides relief from their “significance deprivation.”

Immunization

Constant and detailed coverage of publicity-seeking crimes has three less immediate and perhaps more subtle effects on society. First, it increases the level of public tolerance of such crimes and lessens the feeling of righteous indignation. This, one might argue, is good

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70 M. Sommer, Project on Television Coverage of Terrorism, reported in EDITOR & PUBLISHER, August 27, 1977 at 12.

71 Gallup, “Citizens Split Over Coverage of Terrorists,” LOUISVILLE COURIER-JOURNAL, April 28, 1977, Sec. A at 8, col. 1 as cited in Libertarian, supra n. 7 at 721. See also, Hendrick, “When Television is a School for Criminals,” TV GUIDE, January 29, 1977 at 4. After interviewing inmates at a Michigan prison, Hendrick reported that 90% of the inmates admitted that had “learned new tricks and improved their criminal expertise by watching crime programs.” Forty percent said they had attempted crimes they had viewed on television. Id. at 5.

72 See Perspectives, supra n. 2 at 18

73 See note 17, supra.

74 See text at note 18, supra.

75 See Partners, supra n. 17 at 714.

76 See Perspectives, supra n. 2 at 22.
because it thwarts the terrorist’s goal of intimidation by removing the shock factor. On the other hand, more persons will feel less constricted by conscience as a result of the lessening social opprobrium.

Second, the portrayal of all terrorists as crazies or as individuals and/or organizations beyond society’s means of control suggests to the public that there is nothing that can be done to solve the problem. The problem is explained away thus lessening the chance of actively seeking solutions and thereby increasing the probability that such acts will continue unhampered.

Third, repeated coverage of terrorist events tends to conceptualize the act. Instead of seeing an individual criminal, an individual victim, an individual policeman, the public perceives roles - i.e. terrorists, hostages, law enforcement agencies - being played in a huge chess game. The individual act becomes an event and the human dimensions become lost.

**Imperillization**

Ongoing coverage of hostage-taking incidents is the hotbed of the media coverage controversy and yet, the problems seen there are probably the most susceptible to legal solution. There are two general areas of conflict: (1) media dissemination of information tactically useful to the publicity-seeking criminal and (2) media interference with an effective law enforcement response.

Media dissemination of information. Media can serve as the “intelligence arm” of the criminal in many ways. Today, in most hostage situations, the criminal has a television or radio device within near proximity. By broadcasting police strategies, activities, plans, or the presence of hidden persons or escaping hostages, the media endangers the lives of the

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77 See Crenshaw, The Causes of Terrorism, 13 COMPARATIVE POLITICS 379, 386 (July 1981); Perspectives, supra. 2 at 22; Media Taken to Task for Terrorism Coverage, 66 ABAJ 1510 (December 1980).

78 See Perspectives, supra n. 2 at 22.

79 Id.

80 See text at notes 279-297 and 324-328, infra.

81 See Perspectives, supra n. 2 at 28-30.

82 Id. at 28.

83 For a discussion of the strategic, hollow immunity offer made to Anthony Kiritsis and the planned refutation almost broadcast along with the potential ramifications of such broadcast, see Libertarian, supra n. 7 at 717, 719 and 720, n.5.

84 For example, in the 1977 Hanafi Muslim takeover of three buildings and 135 hostages in Washington, DC, television cameras filmed a basket being lifted to the 5th floor where 11 people had evaded capture. Upon seeing this broadcast, the Hanafis tried to break the barricaded door to this room down. A tense 9 hour ordeal ensued but the police were finally able to free the people. See Perspectives, supra n. 2 at 29.
hostages, law enforcement personnel, and innocent citizens. They also assist the criminals in determining escape routes and repelling police assaults.

Media interference with law enforcement. The physical presence of the media often interferes with the law enforcement agencies at the scene that are trained to effectively handle such situations. The somewhat obtrusive equipment interferes with their free movement and attracts crowds which compound the risk and increase the burden on the police. Questioning by a multitude of reporters can often distract key personnel at critical moments. Direct media contact with the criminal can tie up telephone access, incite the criminal by use of inflammatory questions or phrases, goad the criminal into action to prove himself in the spotlight, and can have the effect of isolating a trained professional negotiator from the mediating process by increasing the role of the untrained media person. Police officials claim that the stampede of journalists to interview terrorists reinforces their sense of power and accomplishment. Often times the mere presence of the media encourages terrorists to remain barricaded or to demand a press conference so as to increase coverage?

Why then, with the multitude of bad consequences, do the media continue to grant such all-pervasive coverage to publicity-seeking criminals? The profit motive was considered earlier. The media, though, have what they consider more legitimate reasons for their continued coverage.

The media’s reasoning. The media defends its coverage of publicity-seeking crimes as being part of its historical role in the make-up of American society. The freedoms of expression and

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85 For example, during the 1977 hijacking of a Lufthansa jet, the media broadcast that the pilot was passing intelligence information to the police. Upon hearing this on their radio, the terrorists promptly executed the pilot. See Alexander, Terrorism, the Media and the Police, 32 J. INTL. AFF. 101 (1978) as cited in Perspectives, supra n. 2 at 29.

86 The 1977 Sommer survey showed that 79% of the police chiefs surveyed felt that live television coverage was a threat to hostages. See M. Sommer, supra n. 71 at 12.

87 See Perspectives, supra n. 2 at 29.

88 Those who have had experience with terrorists have discovered that one particular word – a trigger word – can turn a seemingly normal man into an irrational and abnormal one in an instant. See INSTITUTE FOR STUDY OF CONFLICT, TELEVISION, AND CONFLICT (1978) at 19-20. For example, during the Hanafi incident a media contact identified the Hanafi Muslims with the Black Muslims. Khaalis, the leader of the sect, became enraged and threatened to execute one hostage in retaliation until the reporter, following police advice, apologized. See Fenyvesi, Looking Into the Muzzle of Terrorists, QUILL, July-August 1977 at 17.

89 See Perspectives, supra n. 2 at 29.

90 Id.

91 Speech by Patrick Murphy, president of the Police Foundation, printed in FIELD ENTERPRISES, THE MEDIA AND TERRORISM 11 (1977) as cited in Libertarian, supra n. 7 at 723.

92 See Perspectives, supra n. 2 at 30.
of the press are usually justified in one or more ways. First, they are an essential process for advancing knowledge and discovering truth. Someone seeking knowledge and truth needs to hear all sides of a question and to consider all alternatives. Second, they are an essential element of self-governance. The governed must, in order to exercise their right to vote, be fully informed. These first two factors are commonly encompassed in the concept of the public’s “right to know.” Finally, they operate as democracy’s safety valve by substituting reason for force and providing a framework within which the conflict necessary to the progress of society can take place without destroying society.

The media feel that in fulfilling the above objectives, it is their duty to play the role of the uninvolved observer, to merely report information. In fact, a widely used reporting textbook advises the student of journalism that the effect of reporting the news is not the reporter’s concern, nor is preventing violence or determining the legitimacy of the grievance. Walter Jaehnig, a professor of journalism himself, terms this role the “libertarian tradition.” Libertarianism lacks a moral code or philosophy and promotes moral neutrality. When asked if a distinction shouldn’t be made between terrorist acts and civil disobedience and the coverage keyed to such a distinction, an editor of a major metropolitan newspaper answered that “…once we start making judgments of this sort…, I think media is…doing something far different from its basic role of simply informing.”

This idea is simply not true. First, it assumes that such judgments are not already being made. Every day editors and news producers decide what’s “newsworthy” and what’s not, how much coverage will be given, how it will be classified, how the headline will read, who will be


94 See Emerson, supra n. 93 at 6.

95 Id.

96 Id.

97 See Libertarian, supra n. 7 at 735.


99 See Libertarian, supra n. 7 at 732.

100 Id. at 739.

101 Id.

102 Statement by Ralph Otwell, editor of the CHICAGO SUN TIMES, during a panel discussion at National Convention of the Society of Professional Journalists as quoted in Libertarian, supra n. 7 at 741.
interviewed, how many reporters and cameras should be sent, and so forth. Second, with the instantaneous coverage permitted by the minicam, the individual decision of where one wants to go and what one wants to see has been taken away from the individual and put in the hands of the press. They have become the eyes and ears of the public – a conduit, a surrogate. Like it or not, the media has the responsibility of deciding for the public what they want to experience in their lives. The roles of the neutral, uninvolved observer and recorder of fact are antiquated ones if they even exist at all. Particularly in the area of coverage of publicity-seeking crimes, journalists today are often thrust into a life and death situation. Every reporter covering such an event must decide whether his actions are going to be governed by the interests of the hostages/victims, public authorities and the community at large, or the newsgathering and financial interests of his station or newspaper. Moral neutrality provides an insufficient basis for such decisions. Since the 1940’s, it has been argued that media’s freedom to report must be accompanied by the duty to report responsibly. Surely, responsible judgments must be made that distinguish between the war of ideas that is fought within the legitimate boundaries of freedom of speech and the conflicts that resort to violence and intimidation rather than verbal expression and intellect.

103 As Professor Catton put it, “Why have we less ‘right to be alerted’ by the media to each million tons of potentially climate changing CO2 added to the atmosphere, or each ton of radioactive waste added by the electric power industry...? When did the authors of the Bill of Rights decide it was violence committed by militants that we most needed to be informed about?” Partners, supra n. 17 at 715. See also, Perspectives, supra n. 2 at 2, n. 7 where Professor Bassouini notes the lack of coverage of state-sponsored terrorism, i.e., genocide in Cambodia/Vietnam, etc.

104 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1979). Instantaneous broadcasting largely eliminates the journalistic editing function. As Robert Faw, a CBS news reporter, once said, “(T)here’s absolutely no journalism that takes place in a situation like that. The reporter becomes a game show host....” Address to Indiana University Conference, West Germany and the United States: A Systems Comparison Analysis (April 1977) as quoted in Libertarian, supra n. 7 at 719, n.4.

105 A distinction must be noted here. A frequent argument by television producers is that the viewer could choose not to watch a violent or obscene show. This theory has never been really tested in the television context in the courts but has not fared well in the radio context. See FCC v. Pacifica Foundation, 438 U.S. 726 (1978). It is even less viable as it applies to television news. If the public has a right to know the day’s news, they have a right to not have to make a choice between viewing it with unnecessary violence, obscenity, etc. and not viewing it at all.

106 A distinction has been made, also, in the coverage of publicity-seeking crimes because the reporter, through his use by the criminal, becomes a news maker rather than just a reporter of facts. See LEGAL AND OTHER ASPECTS OF TERRORISM, supra n. 2 at 183.

107 See Libertarian, supra n. 7 at 724.

108 Id. at 739.

109 See COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947); F. Siebert, T. Peterson, and W. Schramm, FOUR THEORIES OF THE PRESS (1956); C. Mann, Personnel and Property of Transnational Corporations, LEGAL ASPECTS OF INTERNATIONAL TERRORISM (ASIL 1978); Libertarian, supra n. 7 at 740.
An additional purpose or role of the free press, as perceived by Justice Stewart and others, is to act as an additional check on the three official branches of government. In fact, the press has come to be termed the “Fourth Estate.” This, arguably, is an important role the media does play. But the coverage of publicity-seeking crimes is not related to the functioning of any one of our three branches of government. Even if the criminal’s purpose is to draw attention to what he considers a defect in our governmental system, he must be made to understand there are many non-violent ways for his protest to be heard within the legitimate parameters of free speech. He has no constitutional right to express himself in violent ways at the expense of innocent people, yet the media nearly guarantee him just such a right. In addition, there are other ways for the media to provide him a forum for expression and to inform the public about an individual’s grievances with our government in ways that do not publicize these violent acts.

The media also express a concern over the possible loss of credibility in the eyes of the public if they withhold any information. They fear the public will question what other types of information might be being withheld, suspect collusion with governmental agencies, and so forth. This again assumes that the public trusts that the media now present all the facts in an unbiased way. In a recent national survey, Barbara Walters, Dan Rather, and Roger Mudd - all leading journalists - were the top three least trusted news personalities of the year. Evidently, the public does not “trust” all journalists now. Even so, the credibility problem can be overcome in three ways. First, if the public is told the reasons and purposes behind the limited coverage - and legitimate reasons they are - they will understand (and probably agree with) the suppression of some news. Second, if the media is only responding to our working within legitimate laws regulating coverage, they can hardly be held responsible for limited

111 Id. See also, Stewart, Or of the Press, 26 Hastings L. J. 631, 634 (1975).
112 Id. See also, Legal and Other Aspects of Terrorism, supra n. 2 at 183.
114 See text at notes 307-312, infra.
115 See text at notes 308, 322, infra.
118 Id. at 42.
119 See text at notes 242-246, 272-278, 294-297, 310-314, infra.
coverage and accused of collusion. Finally, a total blackout is unnecessary (if not illegal).\footnote{See text at notes 208-246, infra.} As argued later in this article,\footnote{See text at notes 323-329, infra.} limited access and perhaps restraints on publicizing life-endangering information prior to the culmination of the event would still allow the public to stay informed and yet alleviate some of the problems related to media coverage of such crimes.

The media also argue that they serve worthwhile and necessary functions while covering publicity-seeking crimes in that they squelch rumors,\footnote{See Libertarian, supra n. 7 at 735; Legal and Other Aspects of Terrorism, supra n. 2 at 187; VanderVat, supra n. 2 at 26; Perspectives, supra n. 2 at 47.} they can be an effective bargaining tool for the negotiator to use to obtain release of hostages,\footnote{See Perspectives, supra n. 2 at 31.} and they can provide law enforcement agencies with otherwise unavailable tactical and intelligence information.\footnote{Id.} They also argue that lack of coverage will provoke these criminals to even more visible forms of violence which can’t be ignored,\footnote{See VanderVat, supra n. 2 at 26; International Law, supra n. 2 at 671.} instill in the public a false sense of security,\footnote{See VanderVat, supra n. 2 at 26.} and fulfill the propaganda objective of terrorists by illustrating that democratic states are not really free.\footnote{Id.  See also, speech by Ralph Otwell, editor of the Chicago Sun Times, printed in The Media and Terrorism (Field Enterprises) at 24 and quoted in Libertarian, supra n. 7 at 24.}

These are legitimate observations. In answer, however, it must be remembered that were the media not there to begin with, in all likelihood neither would be the terrorists; the immediacy of rumors usually only affect the immediate area and can be dissipated with minimal coverage; and in a trade-off between giving tactical information to the terrorists which would endanger lives and getting tactical information from the terrorists, not many would choose the latter.\footnote{See, e.g., police survey documented in text at n. 71, supra, where 65% of the police chiefs felt live coverage endangered hostage lives and 100% felt live coverage should be discontinued.} Also, as has been previously argued,\footnote{See text at note 78, supra.} saturation coverage has the same effect on possible escalation in forms of violence as does lack of coverage and media created anxiety is “functional rather than dysfunctional” only when it prepares individuals to confront danger realistically\footnote{See Mendelsohn, Socio-Psychological Perspectives on the Mass Media and Public Anxiety, Journalism Q. (1963) at 514.} which current coverage doesn’t do.\footnote{See text at notes, supra.} And, again, a no-win situation is created by the terrorist: choose your propaganda—my grievances or your purported lack of freedom.
Again, this propaganda objective is truly only fulfilled by a total blackout which is not suggested here. Other restraints, given legitimate and compelling purposes behind them, are justifiable.

**Solutions.** What, then, can be done? A number of suggestions have been made by both law enforcement officials, government and the media. However, very little else has been done. These suggestions can be divided into two basic groups: non-content related and content-related.

**Non-content related suggestions:** The most often recommended and probably most viable suggestion is to limit the media’s access to the crime scene. Possibilities include setting up a “broadcast area” near police lines for bulletins and interviews, setting up a “briefing area” for off-the-record information where no cameras or recording equipment would be allowed, establishing a police hotline which would be updated continuously, appointing an official police spokesperson to give periodic briefings, and restricting direct contact with the criminal during an ongoing crime. Another non-content related suggestion is to restrict the use of cameras and lighting or allow only lone camera shots. Finally, some suggest limiting the number of reporters allowed on the scene by using pool reporters to cover activities on behalf of all news organizations and agencies. One journalist, himself having been held hostage,
proposed that a committee of editors in the city experiencing the incident be empowered to declare and enforce a “news emergency” under which certain rules of the profession be suspended and where protecting or, at least, not endangering the lives of hostages would be top priority. Anyone violating this rule would be subject to disciplinary action by his employer.\textsuperscript{144} Another suggestion not regulating the actual on the scene activities of the press is that the law enforcement agencies offer training to media representatives in handling hostage situations. It is felt that through this educative process the media would become more aware of the problems and be better able to understand the police requests made and consequently be more apt to follow them.\textsuperscript{145}

Content-related suggestions

The content-related suggestions can be further divided into two more groups: limitations on what information is released and requirements of what information should be released.

Limiting information. Suggestions to limit information include: Police tactical information which could prejudice the lives of hostages or potential victims\textsuperscript{146} should not be released;\textsuperscript{147} any inflammatory or aggravating information should be delayed until the incident is over;\textsuperscript{148} sensationalism should be avoided;\textsuperscript{149} reports should be confined to police disseminated information only, at least until the incident is over;\textsuperscript{150} “how to” information relating to terrorist tactics should be avoided;\textsuperscript{151} and the name of any individual or group claiming responsibility for a bombing should be withheld.\textsuperscript{152}

Some suggest that because one of the underlying causes of publicity-seeking crimes is that more conventional means of communication seem unavailable,\textsuperscript{153} the media should provide

\begin{itemize}
\item\textsuperscript{144} See speech by Charles Fenyvasi printed in \textit{Field Enterprises, The Media, and Terrorism} 28, 30 (1977).
\item\textsuperscript{145} See \textit{Professionalism}, supra n. 9 at 775.
\item\textsuperscript{146} An example of endangering the life of a potential victim rather than a hostage is the news media broadcast that the armed vest worn by President Ford could only be pierced by a Springfield 303 rifle bullet. See Elkins, \textit{Caging the Beasts}, printed in \textit{Political Violence and the Role of the Media: Some Perspectives}, 1 Pol. Comm. and Persuasion 79, 98 (1980).
\item\textsuperscript{147} See \textit{Task Force}, supra n. 60 at 729.
\item\textsuperscript{148} \textit{Id.} See also Mann, supra n. 109 at 672.
\item\textsuperscript{149} \textit{Id.}
\item\textsuperscript{150} See \textit{Cullinane}, supra n. 132 at 46.
\item\textsuperscript{151} \textit{Id.}
\item\textsuperscript{152} \textit{Id.}
\item\textsuperscript{153} \textit{See VanDerVat, supra} n. 2 at 27; \textit{Partners, supra} n. 17 at 705. See also text at note 22, supra.
\end{itemize}
access to representatives of minority and non-establishment points of view. One suggestion is to set aside one hour per week for presentation of messages by the public to be apportioned on a first come-first served basis and/or a representative spokesperson system.

**Providing information.** Most authorities agree that at least the media should strive to give a balanced treatment of the phenomenon. They should provide information from official sources in answer to the criminal’s self-serving statements. They should give follow-up coverage of the incident; for example, they should cover the law enforcement and judicial responses to the criminal. Some feel that media has the responsibility to educate the public concerning the impropriety of taking innocent lives in order to publicize demands and grievances, the relative infrequency of such acts, the legitimate needs of law enforcement in a democratic society, and the non-romantic aspects of terrorism. The media do indeed contribute to the problem of publicity-seeking crime. Is it not too much to hope that they would also contribute to its solution?

Perhaps it is too much to expect of the media. Since 1941, the media have been urged to police themselves. And yet, it took a flurry of incidents in 1977 to even get some “guidelines” proposed and randomly adopted. Western media officials are now aware of the dangers inherent in the coverage of publicity-seeking crimes but the competitive pressures are strong, “professional” judgment may be unattainable, and the industry is fragmented in nature and therefore hard to control from within.

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154 See Perspectives, supra n. 2 at 50; Pohlmann & Foley, supra n. b at 35; Professionalism, supra 9 at 773-774.

155 41 RAD. REG. 22d 1311, 1335 (P & F) (1977) as cited in Professionalism, supra n. 9 at 773-774.

156 See TASK FORCE, supra n. 60 at 729; Mann, supra n. 109 at 672; Perspectives, supra n. 2 at 27; Libertarian, supra n. 7 at 740; INTERNATIONAL LAW, supra n. 2 at 672. Note, however, that however balanced the coverage is, the pervasive influence remains. Any publicity – whether it put them in a good light or not – is gratifying to an expressly-oriented terrorist. See Partners, supra n. 17 n. 60 at 729.

157 See TASK FORCE, supra n. 60 729.

158 Note, however, that the current statistics of success and failure would be a deterrent to future criminals. See note 54, supra.

159 See Mann, supra n. 109 at 740.

160 See Professionalism, supra n. 9 at 747; Cooper, Terrorism and the Media, 24 CHITTY’S LAW J. 226 (Sept. 1976); Perspectives, supra n.2 at 46; Pohlmann and Foley, supra n.1 at 35.

161 The first quarter of 1977 saw more than the usual number of publicity-seeking crimes: February 8 through February 10 – Anthony Kiristis held a mortgage company president hostage for 63 hours gaining a live news conference to state his views; February 14, Frederick Cowan held two captives in a New York factory then committed suicide; March 7 through 9, Cory Moore took two captives gaining a telephone call from President Carter; March 9 through 11, Hanafi Muslims took three Washington, D.C. buildings and 134 hostages. See Professionalism, supra n. 9 at 743.

162 See note 12, supra.

163 See RESEARCH STUDY, supra n. 2 at 30. See also, text at notes 166-172, infra.
The competitiveness of news organizations,\textsuperscript{166} their fear of being “scooped“ by the opposition\textsuperscript{167} and their aforementioned quest for larger audiences and prestige\textsuperscript{168} combine to encourage rather than discourage escalated reporting techniques and sensationalistic coverage. Many police officials, in fact, believe that it is the competition between newsmen, inspired by their respective news organizations that lie at the root of the problem.\textsuperscript{169} An individual reporter who might refrain from covering a particular event for personal ethical reasons will more often succumb to the subtle persuasion of potential career enhancement.\textsuperscript{170} Network policies of recruitment and advancement assure that newsroom policies rather than philosophical principles succeed in network news.\textsuperscript{171} Newspaper staffers also conform to newsroom policies due to the somewhat more subtle factors of socialization within the job environment and esteem for superiors.\textsuperscript{172} Reporters are seeking to establish the reputation of being first with the news and first with the viewers. Neither factor is conducive to operating a self-regulated industry. Neither is either factor conducive to responsible reporting.

The media industry argues that they are a profession and that like any other recognized profession—e.g. doctors or lawyers—should be allowed to regulate themselves. However, journalists are not now and have never been truly considered “professionals.”\textsuperscript{173} They have no intense period of specialization; they, in fact, abhor responsibility for their judgments and actions;\textsuperscript{174} they tend to place greater emphasis on economic gain rather than personal service; they have no comprehensive self-governing organization; and they have no true Code of Ethics

\textsuperscript{166} See Professionalism, supra n. 2 at 30. See also, text at notes 173-175, infra.

\textsuperscript{165} See, e.g., Nebraska Press Association v. Stewart, 427 U.S. 539, 550 (1976). See also, text at notes 176-180, infra; Libertarian, supra n. 7 at 727.

\textsuperscript{166} See \textit{Research Study," supra n. 2 at 30; What’s Right, Wrong with Television News, U.S. News and World Report, March 16, 1981 at 45 (interview with Walter Cronkite); “Libertarian” supra n. 7 at 726 & 736; Perspectives, supra n. 2 at 25.

\textsuperscript{167} See Pohllmann & Foley, supra n. 1 at 35; Professionalism, supra n. 9 at 768, n. 87; Crisis Cop Raps Media, More, June 1977 at 19; Perspectives, supra n. 2 at 25.

\textsuperscript{168} See Perspectives, supra n. 2 at 25; text at notes 32-40, supra.

\textsuperscript{169} See Crisis Cop Raps Media, supra n. 167 at 19; “Libertarian” supra n. 7 at 726.

\textsuperscript{170} See Breed, Social Control in the News Room, in Journalism 64-67 (A. Kirschner and L. Kirschner, eds.) (1971); Libertarian, supra n. 7 at 25.

\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} See Professionalism, supra n. 9 at 760-761.

\textsuperscript{174} See text at notes 97-102, supra.
subject to clarification and interpretation by the courts. In truth, there is no reason to expect the industry to be “professional” enough to regulate themselves.

Finally, self-regulation itself is an almost impossible task given the vast number of organizations nationwide with no central authority. The National Association of Broadcasters (NAB), which most television stations belong to and which has been instrumental in regulating such areas as the family viewing hour, is the nearest thing in the industry to a central authority; however, membership is not mandatory. Even the Supreme Court has openly recognized the problems inherent in fragmented self-imposed restraints. Reporters from distant places are unlikely to be guided by their own standards and state courts have real practical difficulties in controlling newspaper or broadcasters outside of their jurisdiction.

All of this being true, still no one outside of government has seriously considered anything more than self-regulation. Why?

The First Amendment.

“Congress shall make no law…abridging freedom of speech or of the press….”

The First Amendment has stood as a bar to government regulation of the media for 200 years. Yet, as Thomas Emerson has observed, “[t]he outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.” Despite the apparent unequivocal command of the First Amendment, a majority of the Court has never supported the absolutist approach of interpretation. Whole areas or forms of expression have been held outside the scope of constitutional protection. Even with regard to

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175 Factors from a list of eight criteria relevant to deciding if an occupation is a profession as found in McLeod & Hawley, Professionalism Among Newsmen, 41 JOUR. Q. 529, 530 (1964).
176 See Libertarian, supra n. 7 at 727 and 736; Nebraska Press Association v. Stewart, 427 U.S. 539 (1976)
177 See M. Franklin, ed., CASE AND MATERIALS ON MASS MEDIA LAW at 550 (Foundation Press, N.Y. 1982)
178 Id.
180 Id.
181 U.S. CONST. Amend. I.
183 Only Justices Black and Douglas have subscribed to a literal interpretation of the First Amendment. See Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black, J., dissenting).
184 “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an
protected speech, the Court frequently uses a balancing approach weighing the government concern involved in the regulatory scheme against the speaker’s, writer’s and/or society’s interest in the expression. \(^{185}\) Within this balancing approach, the Court has on occasion found that certain categories of speech required a lower level of protection. \(^{186}\) Nonetheless, the First Amendment continues to maintain a somewhat preferred position in constitutional analysis, \(^{187}\) and when the press uses it as their shield or sword it could be a potent and valuable weapon.

There are two basic types of government interference with First Amendment freedoms: content-related and content-neutral. \(^{188}\) Content-related regulation pertains to controlling what is said while content-neutral regulation applies to the manner in which it is said or, as applied to the press, the manner in which the information is received. The importance of the distinction is that normally the government bears a heavy burden in overcoming the presumption that content-based regulation is unconstitutional while the interests are more evenly balanced if a content-neutral regulation is at issue. \(^{189}\)

A few words should be said at this point concerning the unique status of the electronic media (television and radio). The Supreme Court has been willing to recognize a limited distinction between printed and electronic media. \(^{190}\) Rationales for the different treatment of the broadcasting industry include: (1) airwaves are in the public domain and, as such, the grant of a license is a privilege, not a right; (2) due to a scarcity of airways, some regulation must occur so as to guarantee the public an uncluttered, comprehensible broadcast; \(^{192}\) (3) the unique

\(^{185}\) See M. Franklin, supra n. 177 at 34.


\(^{188}\) See Tribe, AMERICAN CONSTITUTIONAL LAW 580, 582 (1978); Perspectives, supra n. 2 at 36.

\(^{189}\) See Perspectives, supra n. 2 at 36.


\(^{191}\) See Comment, The First Amendment and Regulation of TV News, (hereinafter cited Regulation of TV News) 72 COLUMBIA L. REV. 746 (1972); Perspectives, supra n. 2 at 45. A licensed broadcaster is “granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.” Columbia Broadcasting Service v. FCC, 453 U.S. 367, (1981) quoting Office of Communication of the United Church of Christ, 359 F. 2d 994, 1003 (1966).

\(^{192}\) See Regulation of TV News, supra n. 191 at 765-766; Perspectives, supra n. 2 at 45.
power of the medium;\textsuperscript{193} and (4) the pervasive and intrusive nature of the medium.\textsuperscript{194} The Court has upheld\textsuperscript{195} regulation of the broadcasting medium by the Federal Communications Commission (FCC) who has been empowered by the Communications Act of 1934\textsuperscript{196} to grant renewable licenses on the basis of a “public interest, convenience, or necessity” standard.\textsuperscript{197} Although the FCC has no power of censorship nor power to interfere with the right of free speech,\textsuperscript{198} the Commission is specifically directed to consider the demands of the public when promulgating rules and regulations\textsuperscript{199} and prescribing restrictions and conditions\textsuperscript{200} upon obtaining a grant,\textsuperscript{201} renewal,\textsuperscript{202} or modification\textsuperscript{203} of a license. However, although there are numerous legal areas of content-regulation by the FCC and Congress,\textsuperscript{204} the Commission has

\textsuperscript{193} See Regulation of TV News, supra n. 191 at 765-766; H.R. Rep. No. 349, 92nd Cong., 1st Sess. 61-63 (1971); Perspectives, supra n. 2 at 45.

\textsuperscript{194} H.R. Rep. No. 349, 92nd Cong., 1st Sess., 61-63 (1971); Perspectives, supra n. 2 at 45; 395 U.S. at 387; 438 U.S. at 748. Other distinctions can be drawn between broadcasting, particularly television, and the print media: (1) the reader of a newspaper can at any time go directly to what interests him and skim or ignore the rest; in broadcasting, the choice is made for the listener by the broadcaster: the speed, content and sequence are fixed; (2) the role of sound: written messages are not communicated unless they are read, and reading requires an affirmative act; an ordinary habitual television watcher could avoid messages only by the affirmative act of frequently leaving the room, changing the channel, or doing some other such affirmative act; (3) a person who knows he is appearing on television may alter his behavior because of it; and (4) television is not neutral; it represents a coherent world of images and messages serving its own institutional interest. See Franklin, supra n. 177 at 716-717.


\textsuperscript{198} 47 U.S.C. § 326.

\textsuperscript{199} 47 U.S.C. §303.

\textsuperscript{200} 47 U.S.C. §326.

\textsuperscript{201} 47 U.S.C. §307(a) & §309(a).


\textsuperscript{203} Id.

\textsuperscript{204} For example,


2) airing of rigged quiz shows forbidden, 47 U.S.C. §509

3) obscenity – Palmetto Broadcasting Co, 33 FCC 250 (1962) aff’d sub nom


5) defamation – Trinity Methodist Church, South v. Federal R.C., 62 F.2d 850 (D.C. Cir. 1932) cert. denied, 288 U.S. 599 (1933) (denial of license renewal)
never taken action against a license on the basis of improper news reporting, and the Supreme Court, when confronted with news-related issues, has failed to distinguish between the two mediums. It is only within the last ten to fifteen years that the broadcasting industry, particularly news reporting, has grown to have such a pervasive influence on our society. Our government, including the Supreme Court, has not assimilated this change into their constitutional analysis quite so quickly. However, the basis for a valid distinction regarding news reporting is there and should never be forgotten.

There are actually four forms of control over the media the government has used: prior restraints, subsequent punishments, access restrictions, and FCC regulations. With each type of restraint, the analysis differs.

Prior restraint

Considered the most pernicious form of regulation, prior restraints are extremely hard, if not impossible, for the government to justify. A prior restraint is considered, in many ways, to be more inhibiting than a subsequent punishment or an access restriction: “It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; and the dynamics of the system drive toward excesses, as the history of censorship shows.” The true “muscle” in a system of prior restraints is the fact that once an injunction is issued, the party against whom it is issued must obey the injunction until it is stayed, vacated, or reversed on appeal and should he be held in contempt, he is usually not permitted to assert the invalidity of

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6) Fraud contests–KWK Rad. Stat., Inc. 34 FCC 1039 (1963) (license revocation)
7) Illegal lotteries – WRBL Radio Station, Inc. 2 FCC 687 (1936); 18 U.S.C. 1302 (1970)
8) Harmful medical advice–KFKB Broadcasting Assn v. FRC, 47 F. 2d 670 (D.C. Cir. 1931)(denial of license renewal)
9) Gambling information–Community Broadcasting Service, Inc., 20 FCC 168 (1955) (denial of license renewal)
10) No mechanically reproduced production of news or other material “in which element of time is of special significance” made without announcement of such–47 CFR 73.118, 73.288 & 73.653 (1971).

205 See Regulation of TV News, supra n. 191 at 748.
208 State federal courts commonly provide that a single appellate judge may stay the order of a lower court. See Franklin, supra n. 177 at 62.
the underlying order.\textsuperscript{209} The Fifth Circuit has noted, however, that the media present special problems in contempt proceedings.\textsuperscript{210} It has recognized that timeliness of the publication of news is sometimes all important.\textsuperscript{211} Thus, “where the publication of news is sought to be restrained, the incontestable inviolability of the order may depend on the immediate accessibility of orderly review.”\textsuperscript{212} “[N]ews‐men are citizens, too. They too may sometimes have to wait. They are not yet wrapped in any immunity or given the absolute right to decide with impunity whether a judge’s order is to be obeyed or whether an appellate court is acting promptly enough.”\textsuperscript{213}

\textit{Near v. Minnesota}\textsuperscript{214} was the first case involving press censorship and prior restraint to come before the Supreme Court. Chief Justice Hughes, writing for the majority, noted, “The chief purpose of the First Amendment’s guarantee is to prevent previous restraints upon publication.”\textsuperscript{215} However, he also suggested that the prohibition against prior restraints is not absolute,\textsuperscript{216} noting that limitations on First Amendment protection might be recognized in the following situations: (1) to “prevent actual obstruction to recruiting services or the publication of the sailing dates of transports or the number and location of troops” (troopship exception);\textsuperscript{217} (2) to enforce the “primary requirements of decency” against obscene publications;\textsuperscript{218} (3) to protect the community “against incitements to acts of violence and the overthrow by force of orderly government;”\textsuperscript{219} and (4) to enjoin “against uttering words that may have all the effect of force.”\textsuperscript{220}

Forty years later, in the “Pentagon Papers” case,\textsuperscript{221} the Supreme Court was still unwilling to declare an absolute ban against prior restraints.\textsuperscript{222} Although rejecting by six to three the

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\item[\textsuperscript{209}] See, id. at 60.
\item[\textsuperscript{210}] See United States v. Dickinson, 465 F. 2d 496 (5th Cir. 1972).
\item[\textsuperscript{211}] Id., 465 F.2d at 512.
\item[\textsuperscript{212}] Id.
\item[\textsuperscript{213}] Id.
\item[\textsuperscript{214}] 283 U.S. 697, 51 S.Ct. 625 (1931).
\item[\textsuperscript{215}] Id., 283 U.S. at 714, 51 S.Ct. at 630.
\item[\textsuperscript{216}] Id., 283 U.S. at 716, 51 S.Ct. at 631.
\item[\textsuperscript{217}] Id.
\item[\textsuperscript{218}] Id.
\item[\textsuperscript{219}] Id.
\item[\textsuperscript{220}] Id.
\item[\textsuperscript{222}] Id., 403 U.S. at 714, 91 S.Ct. at 2141.
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government’s effort to restrain the publication of classified materials on the Vietnam War, the Justices, in their concurrences and dissents, discussed the times when prior restraint might be permitted. Justice Brennan would uphold the troop/ship exception as the only exception. Justices Stewart and White would uphold a prior restraint where disclosure would “surely result in direct, immediate, and irreparable damage to our Nation or its people.” Justices Marshall, White, Stewart and Burger felt that a prior restraint might be okay had Congress legislated it but that it is “inconsistent with the concept of separation of powers” for the “Court to use its power of contempt to prevent [certain] behavior.” Justice Blackmun subscribed to a system of balancing.

Near concerned a total restraint on a future publication by a newspaper while the Pentagon Papers case involved publishing material about an event that was history. Nebraska Press Association v. Stewart provides a case more directly analogous to a terrorist situation in that it involved only a temporary restraint on publication and an urgent ongoing situation in the context of pre-trial publicity. Even so, the Court decided that other alternatives were available and therefore a resort to prior restraints was unconstitutional. It should be noted, however, that the Court went through a detailed analysis of the record considering the nature and extent of the pretrial news coverage, alternative measures, how effective a restraining order would be, and the precise terms of such an order. A four prong test can be deduced from the court’s analysis and was enunciated by Justice Powell in his concurrence. A prior restraint may issue only when there is a showing that (1) there is a clear threat to the governmental interest, (2) “such a threat is posed by the actual publicity to be restrained,” (3) “no less

223 Id., 403 U.S. at 726-727, 91 S.Ct. at 2147-2148.
224 Id., 403 U.S. at 729, 91 S.Ct. at 2150.
225 Id., 403 U.S. at 741, 91 S.Ct. at 2155.
226 Id., 403 U.S. at 761, 91 S.Ct. at 2165.
227 427 U.S. 539, 96 S.Ct. 2791 (1976)
228 The temporariness of the order did not persuade the Court. In fact, it noted that in New York Times Co. the burden on the Government was not reduced by the temporary nature of a restraint. 427 U.S. at 559. The Court also discussed the nature of delay in the news industry concluding that the element of time is important if the press is to “fulfill its traditional function of bringing news to the public promptly.” 427 U.S. at 560-561. The Court also expressed a skepticism about any measure which “would allow government to insinuate itself into the editorial room of this Nation’s press.” 427 U.S. at 560-561 quoting Miami Herald Publishing Co v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring).
229 Id., 427 U.S. at 542, 96 S.Ct. at 2795.
230 Id., 427 U.S. at 570, 96 S.Ct. at 2808.
231 Id., 427 U.S. at 562-570, 96 S.Ct. at 2804-2808.
232 Id. 427 U.S. at 571, 96 S.Ct. at 2809 (Powell, J. concurring).
restrictive alternatives are available "and(4) " previous publicity and publicity from unrestrained sources will not render the restraint inefficacious."\textsuperscript{233}

Closely related to prior restraints are the “clear and present danger”\textsuperscript{234} and “national/state security”\textsuperscript{235} cases. The “clear and present danger” doctrine originated during the World War I era in Schenk v. United States\textsuperscript{236} and concerned subversive advocacy. The original test was “…whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”\textsuperscript{237} Subsequent cases have added a requirement of immediacy.\textsuperscript{238} As stated in Landmark Communications v. Virginia,\textsuperscript{239} “the [clear and present danger] test requires a court to make its own inquiry into the imminence and magnitude of danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State’s interests should also be weighed.”\textsuperscript{240}

As one can see it is hard to distinguish between the requirements necessary to overcome a prior restraint\textsuperscript{241} and the requirements of the clear and present danger test. Appropriately, it has been suggested that the clear and present danger test (i.e. suppression is all right if the harm sought to be avoided is specific; the suppression sought to be suppressed is likely to cause that harm; and the threatened harm is imminent)\textsuperscript{242} is the framework for the Supreme Court’s analysis of most content-related speech.\textsuperscript{243}

Although the Supreme Court has long realized that the “State has [a] necessary interest in …preventing the community from being disrupted by violent disorders endangering both persons

\begin{notes}
\item[233] Id.
\item[236] 249 U.S. 47, 39 S.Ct. 247 (1919).
\item[237] Id. 249 U.S. at 52, 39 S.Ct. at 249.
\item[240] Id., 435 U.S. at 843, 98 S.Ct. at 1543.
\item[241] See text at n. 231, supra.
\item[242] See Perspectives, supra n. 2 at 38.
\item[243] Krattenmaker & Powe, supra n. 25 at 1183-93.
\end{notes}
and property," it is unlikely that prior restraints or regulations relating to the intimidation, imitation, and immunization factors will be allowed. They lack immediacy of danger and sufficient empirical data to link the broadcast to the harm. However, dissemination of information highly likely to jeopardize the lives of hostages or victims is a specific harm of a very grave nature which is sure to result if the publication of the information is not suppressed. It is highly likely that a narrowly drawn regulation affecting such dissemination would be constitutionally permissible.

Subsequent Punishment

Although the Court seems adamant about its refusal to authorize prior restraints except under the most compelling situations, it seems to have no difficulty with the concept of criminal or civil sanctions. In the Pentagon Papers case, Justices Stewart, White, Marshall, and Burger expressed the idea that Congress had the power to enact specific and appropriate laws and that they would have no difficulty sustaining convictions under such laws. However, the precedents dealing with content regulation by criminal or civil sanction are few and distinguishable.

245 See text at n. 57-62, supra.
246 See text at n. 63-76, supra.
247 See text at n. 77-80, supra.
248 See Krattenmaker & Powe, supra n. 2 at 1193-1196 and Perspectives, supra n. 2 at 39.
251 Id., 403 U.S. at 730, 91 S.Ct. at 2149.
252 Id. 403 U.S. at 734-739, 91 S.Ct. at 2151-2154.
253 Id. 403 U.S. at 743, 91 S.Ct. at 2156-2158.
254 Id. 403 U.S. at 751, 91 S.Ct. at 2160.
Most recently, in *Smith v. Daily Mail Publishing Co.*, the Court held that a state interest of the highest order was necessary to punish publication of truthful information lawfully obtained. The statute in that case, punishing dissemination of the name of juvenile offenders, was held unconstitutional. Although finding the state interest of protecting the reputation of juveniles not compelling enough, the Court makes strong mention of the fact that the statute did not truly serve that state interest because by punishing newspapers only, it allowed dissemination by other sources. It noted, too, that although other states had the same interest, they had found an alternative way of accomplishing their objective. Very possibly, had the statute included all media in its prohibition and had the Court found no alternative means, the statute would have passed constitutional muster.

Civil action against the media is, again, a fairly undeveloped area, and usually deals with the electronic media. The cases tend to fall into two main categories: (1) where the content of the broadcast has an immediate impact on the viewer (direct harm), and (2) where the viewer of the broadcast engages in conduct that harms a third party (indirect harm). The direct harm cases entail a factual situation where the viewer tries something he has seen done on television, has heard on the radio, or read in a book and consequently harms himself. The clear and present danger doctrine has been the analytical framework used by the court in these few cases, although the test seems to turn on a reasonable man/likelihood of harm analysis.

The indirect harm cases encompass the controversial “influence of television violence” and imitative crime cases. Incitement to violence is the test being used and, so far,

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257 *Id.* 443 U.S. at 103, 99 S.Ct. at 2670.

258 *Id.* 443 U.S. at 104-105, 99 S.Ct. at 2671-2672.

259 *Id.* 443 U.S. at 105, 99 S.Ct. at 2672.

260 See *Franklin, supra* n. 177 at 221.

261 See *Walt Disney Production, Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981). See also *DeFilippo v. National Broadcasting Co.*, 1980 WL 336092 (R.I. Super 1980) (unpublished opinion). It is generally held, often as a result of “Printer’s Ink Statutes,” that publishers are not liable for harm caused readers by advertisements unless the editor knew of the danger created by the advertised product. See *Franklin, supra* n. 177 at 225. Perhaps the same standard should be used with news reporting. Publishers will not be liable for harm caused by publication of a terrorist event (remember terrorists are using the media for publicity just as any vendor is) unless the editing reporter knew such publication was dangerous – either to the public at large (such “knowledge” at this date would be hard to prove) or to specific individuals (hostages or potential victims).


263 See, e.g., *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979) where a 15 year old convicted of killing his 83 year old neighbor claimed that between 5 and 15 he had become desensitized to and intoxicated by violence because of extensive viewing of televised violence and that the network had incited him to duplicate the acts he saw on television. The trial judge dismissed to complaint. See also, *Franklin, supra* n. 177 at 232.
empirical data proving the causal link seems to be the missing factor in holding a station liable. However, in a recent California Supreme Court case, a radio station was held liable for a death caused by a teenage driver who was speeding to find a moving radio van and driver who was offering prizes to the first to find them. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner.

Particularly in ongoing situations involving hostages or potential victims, media reporters should be able to predict with a reasonable degree of certainty that a harmful act is likely to result from certain broadcasts. That the act is physically perpetrated by a third party should make the media no less culpable. Media corporations should be held financially responsible for harm caused to innocent victims through the fault of the media’s employees. They profit from the broadcast of the incident and in a just and fair system, that profit should be made available to compensate the victim of the activity. However, either a new judicially created tort theory of recovery or an adoption of a statute may be needed.


265 See Olivia N. V. National Broadcasting Co., 126 Cal. App. 3d at 495. See also, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Appellant’s counsel in Olivia N. defined incitement as “telling someone to go out, encouraging them, directing them, advising them.” 126 Cal. App. 3d at 491, fn. 1. See also Franklin, supra n. 177 at 227, fn 1.


268 In Weirum, the court emphasized that the youthful contestant’s reckless behavior was “stimulated” by the radio station’s broadcast, and that the broadcast repeatedly and actively encouraged listeners to speed to announced locations. 15 Cal.3d at 47.

269 See Predictable Harm, supra n. 264 at 671.

270 See 15 Cal. 3d at 47.

271 See Predictable Harm, supra n. 264 at 680-681.

272 Id. at 671.

273 “Any person, partnership, joint venture, or corporation that produces any work designed to be shown to the public will be liable for the physical harm caused to a member of the public as a result of the showing of that work if: (a) it is shown by clear and convincing evidence that the proximate cause of plaintiff’s injuries was a reaction by some member of the public to viewing the work; (b) it is shown by clear and convincing evidence that the act that was reproduced was excessively violent in fact; and (c) the producers knew or should have known that the depiction of this violent act created a probability of its being reproduced in society.” Predictable Harm, supra n. 264 at 679-680.
Any statute, criminal or civil, must be narrowly and precisely drawn. It must show a compelling necessity for regulation and that the government’s objective cannot be achieved through any alternative means. The regulation must be specific enough to withstand overbreadth, vagueness, and possible equal protection analysis, and to put the affected actors on fair and sufficient notice that their conduct is illegal. It should allow only limited official discretion. A statute too vague or indefinite, in form or as interpreted, will be considered void on its face.

Access Restrictions

It has been repeatedly held that “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” However, in recent cases, the inquiry has begun to turn on what information the public should have access to. Furthermore, the role of the press seems to be evolving into that of a surrogate for the public. The most recent cases have involved access to prisons and access to court proceedings. Both areas deal with public institutions; however, the Supreme Court has upheld regulations related to media access to prisons while holding unconstitutional restraints

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274 The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. See Winters v. New York, 333 U.S. 507, 515, 68 S.Ct. 665, 670 (1948).


276 Id.

277 See Perspectives, supra n. 2 at 41.

278 333 U.S. at 509, 517, 68 S.Ct. at 667, 671.

279 See Media and Terrorist Activity, supra n. 173 at 79, 81.

280 333 U.S. at 509.


285 See cases cited at note 281, supra.
on trial coverage. Distinctions and similarities can be drawn between the two and history seems to be the biggest factor.

Historically, trials have been public. The Supreme Court has found that public trials are more than a guarantee to the defendant but are necessary to a proper functioning of our political system. Where the public goes, so goes the press. Historically, the public has not had access to prisons; therefore, regulating media access would not be discriminatory against the press, but would merely eliminate a special privilege the press has vis-à-vis the public. Similarly, restricting media access to the scene of a publicity-seeking crime would surely be within constitutional bounds. The Supreme Court has specifically said, “Newsmen have no constitutional right of access to scenes of crime or disaster when the general public is excluded.”

Except to know whether or not they are in immediate danger, the public has no real interest in the details of a crime - other than that morbid interest in the tragedy of others on which our society seems to thrive. Therefore, the press, having no greater access rights than the general public, could constitutionally be restricted in their access to publicity-seeking crimes and criminals.

In considering alternative measures available in the trial case, the Court found that the State rather than the media had viable alternatives to choose from for fulfilling its goal and that those alternatives were less restrictive than refusing access to the media. In the prison cases, however, the Court noted that the media, rather than the government, had alternative means to fulfill its goals of getting information about prison conditions such as interviewing recently released prisoners, legal advisors, doctors, and others who were in and out of the prisons. In much the same way, and for many of the same reasons, it is the press rather than the government who has alternative means to achieve their goals in a publicity-seeking crime situation. Information can be obtained from police officials during the incident and from released victims, hostages, and the criminals themselves after the incident.

The Court also considered the gravity of the threatened harm. Although expressing that fairness of trial was a concern of the highest order, the Court also has noted that pretrial publicity

286 See cases cited at note 282, supra. Note, however, that no case in either of these areas has drawn a majority: Richmond Newspapers had six concurrences, one dissent and one justice took no part in the decision; Nebrask Press had six concurrences; Gannett had three concurrences, four concurrence in part and dissent in part; Pell had three dissents and one concurrence and dissent; Saxbe had four dissents; Houchins had one concurrence, two justices took no part and three dissents.

287 See Richmond Newspapers, Inc., 448 U.S. at 573, 100 S.Ct. at 2825.

288 See Pell v. Procunier, 417 U.S. at 831, 94 S.Ct. at 2808.

289 Branzburg v. Hayes, 408 U.S. at 684-685, 92 S.Ct. at 2658; Pell v. Procunier, 417 U.S. at 834, 94 S.Ct. at 2810; Prahl v. Brosamle, 98 Wis.2d 130 (C.A. Wis. 1980) (related to civil suit regarding trespass on plaintiff’s property to cover a crime).

290 448 U.S. at 580-581, 100 S.Ct. at 2829.

291 417 U.S. at 848, 94 S.Ct. at 2814.
did not always result in an unfair trial. In addition, the result of an unfair trial could be cured through a reversal, although the Court noted that this was not the best remedy. The harm threatened in the prison cases, however, was personal physical violence and once perpetrated could never be undone. The Court was concerned with the fact that press attention made certain inmates virtually public figures within the prison society gaining them a disproportionate degree of notoriety and influence among their fellow inmates. These inmates tended to become a source of substantial disciplinary problems. This fact, combined with the substantial security needs in an environment with such a large capacity for violence was considered compelling state interests by the Court. This is a strong point in favor of the constitutionality of restricted media access during publicity-seeking crimes.

The Court has never ruled directly on the problems with obtrusive equipment and the sheer numbers of reporters although restrictions on numbers have been allowed if a reasonable basis for selective classification is given. It seems, however, that in a case where such equipment and crowd of reporters could directly jeopardize lives in an on-going situation, restrictions on the use of cameras, the number of reporters, the type of cameras, telephone access, helicopter coverage, and such would be constitutionally permissible.

FCC Regulation

As has been detailed previously, the Supreme Court, at least in areas other than news coverage, has been willing to make a distinction between the printed and electronic media. It

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292 Nebraska Press Association v. Stuart, 427 U.S. at 555, 96 S.Ct. at 2801. See also Richmond Newspapers v. Virginia, 448 U.S. at 564, 100 S.Ct. at 2820 referring to Nebraska Press.

293 Id.

294 817 U.S. at 822-823, 826-827, 848-849.

295 Id.

296 Note, however, that at least one Justice has expressed an opinion on restrictions of media equipment. Justice Stewart, concurring in Houchins v. KQED, refers to “effective” access: “A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail’s sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.” 438 U.S. at 17. The plurality opinion, however, upheld the restriction against the use of cameras and tape recorders on the monthly tours. 438 U.S. at 5, 16. See also, Sigma Delta Chi v. Speaker, Maryland House of Delegates, 270 Md. 1, 310 A.2d 156 (1973); Garrett v. Estelle, 556 F.2d 1274 (5th Cir. 1977).


298 See text at notes 83-92, supra.

299 One suggestion might be to limit the number to only those trained in terrorist events.

300 See text at notes 190-207, supra.
is time for that distinction to flow over into the area of news broadcasting. News broadcasting poses unique problems not present in the traditional free speech case and certainly inconceivable to the framers of the Constitution. It is pervasive, becoming less and less edited, and gives the impression of “authenticity per se.”

In addition to the above, the media wields unprecedented power. And yet, access by the average citizen is extremely limited. As John F. Kennedy once said, “Those who make peaceful evolution impossible, make violent revolution inevitable.” In other words, those who make peaceful evolution possible, make violent revolution unnecessary. If publicity is what these criminals so desperately desire, why should the media be allowed to force them to violence to attain such publicity? Shouldn’t those with full control of all the resources be made to share those resources, which are supposedly part of the public domain, to a small extent with the public?

Although the Court has never recognized a general right of public access to the airwaves, it has recognized a limited right to reasonable access under the Fairness Doctrine. The Fairness Doctrine is a requirement placed on radio and television broadcasters that adequate coverage be given to public issues and that such coverage must be fair in that it accurately reflect the opposing views. This must be done at the broadcaster’s own expense and initiative if sponsorship and suggestions are available from no other source. A number of years ago a

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302 Buckley v. Valeo, 424 U.S. 1, 50, 96 S.Ct. 612, 649, n. 55 (1976); Columbia Broadcasting v. Democratic National Committee, 412 U.S. 94, 101, 93 S.Ct. 2080, 2086 (1973). Television and radio have a greater impact than any other media. The public places heavy reliance on television as its primary source of information concerning public events. The psychological impact of television news is said to be far different from that of the printed press. Whereas a newspaper account provides a narration of an event, television news frequently purports to present the event as it actually occurred, with the impression conveyed to the viewer that he himself is perceiving the event. H.R. Rep. No. 349, 92nd Cong., 1st Sess. 61-63 (1971); Regulation of TV News, supra n. 191; The Coming Explosion in TV News, supra n. 36 at 46.

303 See Partners, supra n. 17 at 704.


305 See Libertarian, supra n. 7 at 719.

306 See Perspectives, supra n. 2 at 21.

307 See note 28, supra.

308 See Perspectives, supra n. 2 at 12.


310 Id. at 453 U.S. at 400, 101 S.Ct. at 2832.

proposal was made by the FCC\textsuperscript{312} that would have allowed broadcasters to opt for a public access to the airwaves system in lieu of complying with the commission’s traditional standard for the Fairness Doctrine. Under the proposal, a broadcaster would presumptively be in compliance if four conditions were met: (1) one hour per week should be set aside for spot announcements and lengthier programming which would be available for the presentation of messages by members of the general public; (2) half of this time should be allotted on a first come-first served basis on any topic whatsoever, (3) both parts of the allocation scheme should be “nondiscriminatory as to content with the licensee”; and (4) the broadcaster would still be required to ensure that spot messages or other forms of response to “editorial advertisements” are broadcast.\textsuperscript{313} This proposal should be reappraised by the FCC and considered as a mandatory access rather than an option to the broadcasters in hopes that given a less violent opportunity at mass communication, many publicity-seeking criminals could be placated.\textsuperscript{314}

The FCC is empowered to prescribe restrictions and conditions on obtaining a license based on a public interest, convenience, or necessity standard.\textsuperscript{315} It is also possible, but not very likely, that television and radio licensees could be restricted in their coverage of publicity-seeking crime that relates to sensationalism, publication of “how to” information, and publication of the names of groups or individuals claiming responsibility for various crimes based on a public interest justification. However, it must be remembered that the FCC has no power of censorship nor any power to interfere with the right of free speech,\textsuperscript{316} so just how far the regulations can go is probably limited by the same standards mentioned in the prior restraint, subsequent punishment, and access restrictions areas.

**Conclusion**

In summation, then, what can be done? The problems created by media coverage of publicity-seeking crimes are, again, that: (1) unbalanced media coverage enhances the environment of fear and coercion the terrorists seek to generate,\textsuperscript{317} (2) such coverage may encourage other individuals to engage in such conduct,\textsuperscript{318} (3) such coverage will dull the sense of outrage and contempt in the general public;\textsuperscript{319} and (4) such coverage can endanger hostage’s lives and interfere with effective law enforcement.\textsuperscript{320}

\textsuperscript{312} 41 RAD. REG. 22d 1311 (P & F 1977). See also, Professionalism, supra n. 9 at 773-774.

\textsuperscript{313} 41 RAD. REG. 22d at 1335 (P & F 1977). See also, Professionalism, supra n. 9 at 773-774.

\textsuperscript{314} See Perspectives, supra n. 2 at 30; Pohlmann & Foley, supra n. b at 35; VanderVat, supra n. 2 at 27.


\textsuperscript{316} 47 U.S.C. §326.

\textsuperscript{317} See text at notes 57-62, supra.

\textsuperscript{318} See text at notes 63-76, supra.

\textsuperscript{319} See text at notes 77-80, supra.

\textsuperscript{320} See text at notes 81-92, supra.
Unfortunately, little can be done about the first three concerns within the parameters of the First Amendment, with the possible exception of the imitation factor. The courts have been unwilling to accept the imitation reasoning when applied to civil suits based on television viewing.\textsuperscript{321} However, with publicity-seeking crimes, the additional factor of gratification is added\textsuperscript{322} and the sociological data is a bit more developed and accepted.\textsuperscript{323} Were the Court to accept the information and related data on operant conditioning and vicarious reinforcement, it is possible that some form of prior restraint or subsequent punishment might be allowed. It is also doubtful that any prior restraint or subsequent punishment would be allowed in the other two areas because there is no empirical data proving such results. However, it is possible though not probable, that in the public interest the FCC could require its licensees to provide balanced coverage of the phenomenon in the form of follow-up coverage relating to the sanctions imposed against the terrorist; information from official sources in answer to the criminal’s self-serving statements; information concerning the relative infrequency of such acts; the impropriety of taking innocent lives; the non-romantic aspects of terrorism; and information emphasizing the individuality of the people involved. Of course, an additional aspect of FCC regulation includes the aforementioned mandatory access requirement under the Fairness Doctrine and promulgation of other restrictions and conditions to obtaining a license.\textsuperscript{324}

By limiting media access to the scenes of on-going crimes, as discussed later,\textsuperscript{325} all three concerns could be lessened in impact. By not showing the actual crime being perpetrated on the screens of viewer’s living room television sets, feelings of anxiety and fear could be lessened. By not showing the criminals in the act of committing the crime, much of the gratification is removed from the act for the criminal and for those who might imitate him. Again, by not continually showing the gory details as they happen, the viewing public becomes less immunized against the atrocities of crime. The reasons for limiting access are not related to the intimidation, imitation, or immunization factors but are based on the safety of potential victims. However, as long as the regulation is justified by a sufficient state interest, any overflow benefits are a windfall.

When media coverage becomes an immediate threat to the lives of potential victims of publicity-seeking crimes, it is very possible that finely tailored government regulation is possible in all four forms: prior restraints, subsequent punishment, access restrictions, and FCC regulations.

First and foremost, the Government should require that on the scene coverage should be limited to only those reporters who have had training in terrorist situations. Such selective

\textsuperscript{321} See cases cites at notes 259 and 261, supra.

\textsuperscript{322} See text at notes 63-67, supra.

\textsuperscript{323} Id.

\textsuperscript{324} See text at notes 195-205, supra.

\textsuperscript{325} See text at notes 326-329, infra.
access could be supported as long as it furthers a compelling governmental interest identified by narrowly drawn standards. Secondly, all suggestions made regarding broadcast areas, briefing areas, police hotlines, police spokespersons, direct contact with criminals during ongoing situations, and so forth could be justified based on the fact that the public has no need or right to be at the scene and the press has no more rights than the public, the lack of governmental alternatives in dealing with the problem, and the gravity of the harm.

It is quite possible that prior restraints could issue to restrain a newsman from publishing information such as police strategies, activities, or plans or the presence of hidden persons or escaping hostages. Such publication would “surely result in direct, immediate, and irreparable damage to [our Nation’s]… people.”

However, it is more likely that subsequent punishment would meet with less resistance. The state interest in saving lives is of compelling importance, there are no less restrictive alternatives (as long as access is also being limited), and it would apply to all media. It is very likely that civil sanctions would be allowed in these situations. Media reporters, especially those trained in terrorist tactics, should know what information, if released, would endanger lives. Such knowledge should make them and their respective employers liable for any harm caused because of their actions.

Three of the purposes for constitutionally guaranteeing freedoms of expression and of the press were 1) the advancement of knowledge and discovery of truth, as an essential element of self governance, 2) the provision of a safety valve by substituting reason for force and 3) the providing of a framework within which the conflict necessary to the progress of society could take place without destroying society. Media coverage of publicity-seeking crimes thwarts all three objectives.

As to the purpose of advancement of knowledge, in the technological world of today, the majority of the public is informed through television news. Should a person decide that he or she does not want his or her children to watch a publicity-seeking crime as it takes place - a decision which, given the chance, most persons would probably make - he must completely give up his constitutionally guaranteed source of information (since he has no control over the sequence of the news). Secondly, by giving publicity and gratification to these criminals,  

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327 See text and notes 137-144, supra.
328 See discussion in text and notes 279-292, supra.
330 See text at notes 267-271, supra.
331 See text at notes 93-96, supra.
332 See note 37, supra.
newspersons are encouraging substitution of force for reason - which is a complete contradiction to the very purpose they serve. And, finally, instead of providing a framework within which conflict can take place without destroying society, they provide a framework within which to destroy society.

To paraphrase Justice Frankfurter,\(^{333}\)

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence…must be traced to causes more deeply embedded in our society than [television news coverage]. Only those lacking responsible humility will have a confident solution for problems as intractable as [publicity-seeking crime]. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State’s power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues….Every power may be abused, but the possibility of abuse is a poor reason for denying [a state] the power to adopt [appropriate] measures….\(^{334}\)

There is a problem created by the media’s coverage of publicity-seeking crimes. Surely there is a solution. Government should be allowed to experiment with remedies - with the judiciary system an every present watchdog - until such solution can be found.


\(^{334}\) Id.