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M. Cherif Bassiouni

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CRIMINAL LAW

TERRORISM, LAW ENFORCEMENT, AND THE MASS MEDIA: PERSPECTIVES, PROBLEMS, PROPOSALS*

M. CHERIF BASSIOUNI**

I. TERRORISM IN PERSPECTIVE

A. INTRODUCTION

Terrorism may be described as a strategy of violence designed to inspire terror within a particular segment of a given society.¹ Commonly associated with acts committed by ideologically and politically motivated individuals in order to achieve power,² terrorism is also committed by individuals who are not so motivated and by individuals acting on behalf of states in time of war and peace.³

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** Professor of Law, De Paul University College of Law; Secretary General, International Association of Penal Law, Paris; Dean, International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy. S.J.D., George Washington National Law Center, 1973; LL.M., John Marshall Law Institute, 1966; J.D., Indiana University, 1964.

¹ See Bassiouni, *Prolegomenon to Terror Violence*, 12 CREIGHTON L. REV. 745, 752 (1979) [hereinafter cited as *Terror Violence*]; Bassiouni, *An International Control Scheme for the Prosecution of International Terrorism: An Introduction*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 485 (A. Evans & J. Murphy eds. 1978) [hereinafter cited as LEGAL ASPECTS].

² *Id.*

³ During war, see, e.g., TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG (1947); Q. WRIGHT, HISTORY OF THE U.N. WAR CRIMES COMMISSION (1947); Bassiouni & Nanda, *War Crimes Prosecution*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW (M.C. Bassiouni & V.P. Nanda eds. 1973) [hereinafter cited as INTERNATIONAL CRIMINAL LAW]. For war-related acts of terror-violence, see also L. DAVIDOWICZ, THE WAR AGAINST THE JEWS 1933-1945 (1975); E. DAVIDSON, THE TRIAL OF THE GERMANS (1966); Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 207 (1979). For wars of independence, e.g., Biafra and Bangladesh, and for internal political control, see R. CONQUEST, THE GREAT TERROR: STALIN'S PURGE OF THE

The dramatic nature of so-called "terrorist" acts committed by ideologically motivated individuals in the last decade has caused such world wide concern that some regard it as *le mal due siècle*. Nevertheless, research has failed to probe this complex phenomenon sufficiently.⁴ Above all, there is no agreed upon analytical methodology for the appraisal of such conduct with a view to formulating appropriate measures for its effective prevention and control.⁵ The pervasive and indiscriminate use of such convenient labels as terrorism continues to obscure the field of inquiry.⁶ World attention often seems to focus only on individually perpetrated and ideologically motivated acts of terror-violence while other terror-inspiring common crimes and brutal acts of state-sponsored terror-violence go unnoticed.⁷

The overt fear inspired in the public by terrorist acts may be, in the absence of conclusive scientific data, attributable to the impact of media coverage. The general public seems to perceive individual terrorism, as opposed to state-sponsored terrorism, as a dangerous phenomenon af-

THIRTIES (1973); R. GAUCHER, *THE TERRORISTS: FROM TSARIST'S RUSSIA TO THE O.A.S.* (1978); S.T. HOMER, *VIET CONG REPRESSION AND ITS IMPLICATIONS FOR THE FUTURE* (1970); A. PARRY, *TERRORISM FROM ROBESPIERRE TO ARAFAT* (1976); *I.C.J. Report of Democratic Kampuchea*, 20 I.C.J. REV. 19 (June 1978); MacDermot, *Crimes Against Humanity in Bangladesh*, 7 INT'L LAW. 476 (1973).

⁴ Friedlander, *Terrorism and International Law: What Is Being Done?*, 8 RUT.-CAM. L.J. 383, 384 (1977). Although there are numerous studies on the subject, they lack analytic consistency and do not seem to have influenced decisionmakers and the general public.

⁵ See M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM PUBLIC ORDER* (1961); McDougal, Lasswell & Chen, *A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1969). The efforts of the world community ever since the proposed 1937 Convention on the Prevention and Punishment of Terrorism, 19 LEAGUE OF NATIONS OFF. J. 23 (1938), have been aimed at a substantive international convention on "terrorism" without a clear definition of the term or understanding of its meaning and content. See Zlataric, *History of International Terrorism and its Control*, in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* 474 (M.C. Bassiouni ed. 1975) [hereinafter cited as *INTERNATIONAL TERRORISM*]. For the U.N.'s continued efforts in that direction as well as in the search for the "causes" of terrorism, see U.N. GAOR, Supp. (No. A/9028), U.N. Doc. A/C. 6L. 850 (1973); G. GUILLAUME & G. LEVASSEUR, *TERRORISME INTERNATIONAL* (1977); A.F. PANZERA, *ATTIVITA TERRORISTICHE E DIRITTO INTERNAZIONALE* (1978); Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L.J. 380 (1974); Franck & Lockwood, *Preliminary Thoughts Toward an International Convention on Terrorism*, 68 AM. J. INT'L L. 69 (1974).

⁶ Consider the diversity of meanings given the political offense exception in extradition. See M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 370-428 (1974); I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 166-98 (1971); Lubet & Czaczkes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & C. 193 (1980).

⁷ One need only compare media attention to the kidnapping and assassination of Italy's Aldo Moro to the relatively limited coverage of genocide in Cambodia and Vietnam in the past few years. See MacDermot, *supra* note 3. The exception that proves the rule is the Iranian seizure of the United States embassy in Tehran in November of 1979 and the seizure of diplomatic personnel. That ongoing crisis created by state-sponsored terror-violence received more coverage than any other single event in the history of media coverage of terrorism.

fecting society in a manner warranting exceptional action. The relatively limited social harm resulting from acts commonly denominated terrorism, when compared to the social harm caused by common crimes, indicates that this psychological impact is more significant than the acts of violence committed and that this impact may be more media-created than intrinsic to the acts. The role of the media likewise would explain in part the terrorist's choice of target and the manner of effecting the act; the terrorist tailors both to insure media dissemination of both the act and an underlying message to achieve terror-inspiring effect.

B. THE EMPIRICAL CONTEXT OF NON-STATE-SPONSORED INDIVIDUALLY PERPETRATED TERROR-VIOLENCE⁸

A statistical study of terrorism commissioned by the Central Intelligence Agency⁹ illustrates the problems associated with sensationalizing terrorist events. The significance of the study is closely tied to the likelihood that most people are unaware of how infrequent terrorist activity is in comparison to other types of crime.¹⁰ Researchers have shown that when people are asked to judge the frequency with which an event might occur, the availability of that event to their consciousness determines their estimate of frequency. By frequently focusing on terrorist events, television and other media probably engender the feeling in the viewing public that terrorist events are common and therefore more dangerous than they really are.

In addition to discussing potential media effects on terrorists and the public, the authors of the CIA report have drawn significant conclusions from the data based on appraisal of the following statistics: (1) the number of incidents of international terrorism and their geographic dis-

⁸ Most of the data that follows have been extracted from INTERNATIONAL TERRORISM IN 1978 (R.P. 79-10149) (CIA Nat'l Foreign Assessment Center, March 1979) [hereinafter cited as CIA REPORT]. See also Mickolus, *Statistical Approaches to the Study of Terrorism*, in TERRORISM: INTERDISCIPLINARY PERSPECTIVES 212 (Y. Alexander & S. Ginger eds. 1977).

It is noteworthy that the statistics presented here are mostly from areas of the world where a free press exists. This explains, at least in part, why some 90% of the reported acts of international terrorism occur in the Western World. It does not mean that terror-violence does not occur elsewhere, only that we do not know about it. The data also are based on an arbitrary judgment of what is international, and therefore they do not indicate the extent of national terrorism.

⁹ CIA REPORT, *supra* note 8, at 7. The study dealt only with individual terrorism having an international element. As reliable as this study may be, a caveat bears repetition:

[T]he [data] should be treated with caution. The sharp rise in recorded terrorist incidents over the past decade may reflect not only a real increase in such activity but also more comprehensive and systematic reporting by the press. On the other hand, many incidents probably have not been reported. . . . Moreover, the number of incidents under review is so small that inadvertent omissions or erroneous classification could have a numerically significant impact.

Id.

¹⁰ Kahneman & Wersky, *On the Psychology of Predication*, 80 PSYCH. REV. 273 (1973).

tribution; (2) the number of casualties and their nationalities; and (3) the categories of criminal acts comprising individually perpetrated terror-violence, and the trends in those activities.

Incidents: Where and How Many

Between 1968 and 1978, there were less than 3100 recorded incidents of terror-violence.¹¹ The total number of reported terrorist incidents in 1978 was 353.¹² This total rose from 279 incidents in 1977, yet remained below the 413 incidents in 1976. Characteristic of the 1970s, the 1978 figure indicates a persisting high level of terrorist activity relative to the overall level of recorded incidents during the later 1960s. The 1978 increase may be attributable to the expansion and exportation of Middle Eastern terrorist activity to Western Europe.¹³ Geographically, terrorist activity in 1978 continued trends of the last several years: the most active arenas for terrorist operations remained the industrial democracies of North America and Western Europe and the politically-tense atmospheres of Latin America and the Middle East. These regions were the scene of over ninety percent of all terrorist incidents in the decade spanning 1968 to 1978.¹⁴

Although the number of incidents in North America in 1978 declined to a level about one-half that of just two years ago,¹⁵ the tallies over the decade indicate a fairly consistent level of terrorist operations in the region. In the 1960s most incidents involved airplane hijackings¹⁶ claimed to have been committed for ideological reasons. The evidence indicates, however, that psychopaths committed some of the hijackings,¹⁷ while common criminals whose sole purpose was personal gain committed others. Among the many other ostensibly ideologically inspired incidents, few are truly characterizable as ideologically motivated, and even fewer had a specific political goal, although clearly the objective was frequently the dramatization of a particular claim or grievance.

In Western Europe there were 166 incidents during 1978.¹⁸ This

¹¹ CIA REPORT, *supra* note 8, at 1 (Fig. 2). These incidents were encompassed within, among others, the categories of hijacking; kidnapping; taking of civilian hostages; political assassination; bodily harm in the context of kidnapping and attempted assassinations; and bombings of public places and private residences.

¹² *Id.* at 7 (Table 1).

¹³ *Id.* at 1.

¹⁴ *Id.* at 2 (Fig. 3).

¹⁵ In 1978, 19 incidents occurred in North America. Over the 11-year period, the average was 26 incidents per year. *Id.* at 7 (Table 1).

¹⁶ See Evans, *Aircraft Hijacking*, in LEGAL ASPECTS, *supra* note 1, at 67.

¹⁷ See D. HUBBARD, *THE SKYJACKER: HIS FLIGHTS OF FANTASY* (1971).

¹⁸ CIA REPORT, *supra* note 8, at 7 (Table 1). The number of 1978 incidents in Western Europe was 166, compared to the average of 35 from 1968 to 1971. Increased activity in

number represents a marked increase over the level of incidents during the late 1960s and early 1970s. Terrorist events in Europe often are closely tied to internal political transformation along Marxist lines, as were the activities of the Italian Red Brigades and their German counterparts, such as the Baader-Meinhoff group. Other non-Marxist groups engaging in terrorism include the Basque, Irish, Corsican, Croatian, and Moluccan separatist movements.¹⁹

Consistent trends are more difficult to discern from the reported data on terrorist activity scattered throughout the rest of the world. Except for regions where terrorist incidents are rare and comprise only a small part of global international terrorism,²⁰ there appears to be no reliable pattern. The explosiveness of the political climates of Latin America and the Middle East has fostered terrorist activity in those regions at a level disproportionate to the size of their respective populations. Yet even though the situation in these regions has remained more or less constant, there have been marked fluctuations in the level of terrorist activity from year to year.²¹

Western Europe between 1972 and 1978 has raised the average to about 150 incidents per year, with never less than 100 for any given year during that time span. *Id.*

¹⁹ No comprehensive study is known to this author on the correlation between Marxist and non-Marxist movements. However, the legal literature and general information on this subject is abundant with respect to any one of these organizations and movements and supports this conclusion. See generally Y. ALEXANDER, *INTERNATIONAL TERRORISM: NATIONAL, REGIONAL AND GLOBAL PERSPECTIVES* (1975); A. BURTON, *URBAN TERRORISM* (1976); S. SARKESIAN, *REVOLUTIONARY GUERRILLA WARFARE* (1975); A. SCHMID & J. DE GRAFF, *INSURGENT TERRORISM AND THE WESTERN NEWS MEDIA: AN EXPLANATORY ANALYSIS WITH A DUTCH CASE STUDY* (1980); P. WILKINSON, *POLITICAL TERRORISM* (1975).

²⁰ During 1968-78, terrorist activity in the U.S.S.R. and socialist Eastern Europe represented 0.4% of total worldwide incidents, while Sub-Saharan Africa was 3.7%, Asia 5.6%, and Oceania 0.6%. CIA REPORT, *supra* note 8, at 7 (Table 1). On the question of hijacking in the U.S.S.R. and Eastern Europe, see Zwirboul & Chupilov, *La Capture Illicite d'Aeronefs*, 47 REVUE INTERNATIONALE DE DROIT PENAL 295 (1976), and the reports of Buchala (Poland), Plawski (Poland), Dolensky (Czechoslovakia), Antoniou and Iliescov (Rumania), and Filipovic (Yugoslavia) in that issue.

²¹ Latin America witnessed 61 incidents of terrorism in 1978, in comparison to 46 such events in 1977, 105 in 1976, and 48 in 1975. CIA REPORT, *supra* note 8, at 7 (Table 1). The Mideast was somewhat more consistent, reporting 61 incidents in 1978. *Id.* Mideast terrorist activity is almost exclusively related to the Palestinian-Israeli conflict. See M.C. Bassiouni, *The Palestinian's Right to Self-Determination and National Independence* (A.A.U.G. Information Paper No. 22, Dec. 1978). Such activity in Latin America is, by contrast, essentially of internal political origin, despite some exportation to other countries in the region for broader ideological reasons. The two regions may be crucially different since terrorism in the Mideast is a product of a known conflict, which can be expected to abate with the advent of a just and peaceful solution, while the multiplicity of sources in Latin America would seem to preclude that prospect and even exacerbate the problem. It is also noteworthy that the aggregate of reported Mideast incidents in 11 years is 492, or 16% of worldwide activity. CIA REPORT, *supra* note 8, at 7 (Table 1). That figure may be misleading, however, as the arbitrary, fine line between incidents of local and international character may exclude some incidents of non-international importance. Furthermore, these statistics "exclude the

Victims: Who and How Many

In 1978 the number of fatalities resulting from terrorist incidents doubled from the previous year's level while injuries remained constant.²² Although it is not clear whether the high levels of the mid-1970s will recur in the near future, the number of victims remains at levels significantly higher than those of the late 1960s and early 1970s.²³

A comparison between victim nationality²⁴ and regional distribution of incidents reveals that, while the percentage of Middle Eastern and Western European victims corresponds to the level of terrorist activity in each region, no such correlation exists in Latin and North America. Latin America has been the site of 26.6% of all terrorist incidents over the eleven-year period from 1968 to 1978,²⁵ but its nationals comprised only 13.9% of the victims.²⁶ Conversely, only 9.7% of all incidents occurred in North America during the same period,²⁷ but its nationals comprised 41.9% of total casualties.²⁸ One factor partially explaining this discrepancy is that North American nationals are frequently the victims of Latin American terrorist events.

Criminal Acts: What Kinds and What Trends

For statistical purposes, government analysts reduced the kinds of terrorist incidents to ten categories: kidnapping, barricade-hostage, letter bombing, incendiary bombing, explosive bombing, armed attack, hijacking, assassination, theft, break-in, and sniping.

Bombing, both incendiary and explosive, has been utilized the most by terrorists, accounting for over 60% of all worldwide incidents during the eleven years.²⁹ Letter bombing, having reached a 1972 peak of ninety-two incidents, dwindled to five incidents in 1978.³⁰ Except for

assassinations and cross-border operations associated with the Arab-Israeli conflict, unless those incidents either victimized noncombatant nationals of states outside the principal area of conflict or became the object of international controversy." *Id.* at 7.

²² Between 1968 and 1978, international terrorism caused 2,102 deaths and 5,078 injuries. CIA REPORT, *supra* note 8, at ii (Fig. 1). Deaths and injuries due to terrorist incidents in 1978 amounted to approximately 450 fatalities and over 400 injuries. *Id.*

²³ Injuries for the years 1968-71 averaged about 200 per year and fatalities averaged about 60 per year. *Id.* For the years 1974-76, injuries averaged about 845 per year and fatalities averaged about 375 per year. *Id.*

²⁴ In a substantial number of cases the nationality of the victim is that of the state in which the incident took place, but no extensive data is available on the subject.

²⁵ CIA REPORT, *supra* note 8, at 7 (Table 1).

²⁶ *Id.* at 4 (Fig. 5).

²⁷ *Id.* at 7 (Table 1).

²⁸ *Id.* at 4 (Fig. 5).

²⁹ *Id.* at 6 (Fig. 6).

³⁰ *Id.* at 8 (Table 3).

assassination, which appears to fluctuate greatly year to year,³¹ the remaining types of criminal acts have been utilized consistently by terrorists in their operations.

The CIA study suggested the following trends for the future of international terrorism:³² (1) The nature and intensity of terrorist violence will fluctuate relatively widely; (2) the composition and character of the groups engaged in international terrorist activity will continue to change and increase in number; (3) regional patterns of victimization and location of operations will remain unchanged; (4) representatives of affluent countries, particularly government officials and business executives, will continue to be the primary targets for assassination and kidnapping; and (5) the majority of incidents will continue to involve bombings and incendiary attacks, although overcoming present tactical and technological limitations may permit use of more sophisticated devices such as heat-seeking missiles and similar "stand-off" weapons.³³

The foregoing shows that the actual harm resulting from international terrorism in its present manifestations is not quantitatively significant when compared to other crimes, nor is it a threat to civilization or to the survival of some states as has been proposed. However, the number, frequency, and intensity of terrorist acts within the national context are far more significant than those characterized as "international."³⁴ Internal rather than international terrorism produces the greatest quantitative harm, and state-sponsored terror-violence is exceedingly more harmful and more threatening to the stability of world order than non-state-sponsored individual or small group terror-vio-

³¹ In 1968 and 1969, less than ten assassinations were perpetrated by terrorists. The number of assassinations in 1973, 1976, 1977, and 1978 were, respectively, 18, 48, 23, and 29. *Id.* at 8 (Table 3). However, this does not include political assassinations that do not have an international element.

³² *Id.* at 1, 5.

³³ See also Jenkins & Rubin, *New Vulnerabilities and the Acquisition of New Weapons by Non-Government Groups*, in *LEGAL ASPECTS*, *supra* note 1, at 221.

³⁴ For example, Italy has suffered an estimated 4800 kidnappings in the last five years, and the number of persons killed in bombings in the Irish conflict in the last five years is estimated at more than two thousand, while those killed in the Basque conflict in Spain exceeded 200 in the last two years, and political kidnappings and assassinations in some South and Latin American nations since 1970 have been in the thousands. In Brazil in 1979 some 976 persons were assassinated. If one is to also include in this category the consequences of major internal conflicts, such as in Lebanon where between 1977 and 1979 an estimated 70,000 casualties occurred, or the conflict in Cyprus which between 1976 and 1978 is estimated to have produced 15,000 casualties, then the quantitative significance of this aspect of the phenomenon increases significantly. Furthermore, if one considers the consequences of state-sponsored terrorism as has occurred in Biafra and Bangladesh, where each conflict took an estimated toll of one million lives, and the estimated three million Cambodians killed by the Pol Pot regime of Democratic Kampuchea between 1977 and 1979, and the untold number of persons killed or expelled from Vietnam and Cambodia, the quantitative results are staggering. [The author drew the above summary from a number of new sources.—Ed.]

lence. Nevertheless, the public perceives individual terrorism in its international manifestations as the more serious threat, and some states regard internal individual terrorism as the more threatening factor to their existence and effective functioning. Both reactions tend to produce inordinate overreactions which may bring about stricter laws to combat terrorism and even repressive measures that threaten democratic institutions. In non-democratic systems such measures may simply become a means for further oppression and, ironically, state-sponsored terrorism. In either case, terrorism affects the quality of life, destabilizes social, economic, and political institutions, precipitates a climate of fear and unrest,³⁵ and finally disrupts minimum world public order. To achieve these ends, the terrorist seeking power relies on the psychological impact of his acts rather than their immediately destructive consequences.

Because the actual destructive consequences of terrorism are less than those of other types of crime, it is not advocated that there be reduced concern about the phenomenon. This article intends to convey a sense of perspective, and to lay a foundation for the proposition that the media's created impact plays a more significant role in the public's perception than otherwise recognized. That role is not due exclusively to improper or improvident media coverage of such incidents, but also to insufficiently addressed psychological phenomena. Thus a key word used in the media may after repeated usage evoke not only its literal meaning, but also bear a factually unfounded connotation serving as a prediction about the event with which it is associated. Such an effect tends to increase the various psychological effects of terror-violence by their ready recall and projected impact. It should be borne in mind that very little data is available on the subject of terrorism and the mass media. To that extent, therefore, it is difficult to determine what legislative policy should be developed and what specific measures are necessary to control it.

C. CLASSIFICATIONS OF PERPETRATORS AND THE LEGAL CONTEXT OF THEIR ACTS

Terrorists undoubtedly act from complex motives. Although rigid classification of their motivation must be therefore somewhat artificial, it is nevertheless useful for analytical purposes to identify four basic categories: (1) common criminals motivated by personal gain; (2) persons acting as a consequence of a psychopathological condition; (3) persons seeking to publicize a claim or redress an individual grievance; and (4) ideologically motivated individuals.³⁶

³⁵ See *Terror Violence*, *supra* note 1.

³⁶ See *id.* at 755-56. See also *THE MEDIA AND TERRORISM 6* (1977) (from a seminar spon-

The last category more than the others seems to fascinate writers, terrify the public, and intrigue the media.³⁷ Seeking to confer upon themselves a special status by virtue of their purported adherence to higher political or ideological values, these actors, however, engage in no more than common crimes seldom justified by the ordinary principles of criminal responsibility.³⁸ The ideologically motivated offender seeks to accomplish an ideological or political objective by means which are unlawful, presumably because no other effective legal means are available to accomplish his goal.³⁹ That proposition has become the cornerstone of an entire rationalization process for the use of violence. The contemporary ideologically motivated offender frequently claims to be acting in self-defense, by reason of necessity, or under compulsion. In some instances the perpetrator claims to be the victim of a system which left him no viable alternative.

These claims appear valid only for those willing to give the system some color of legitimacy. Others who simply regard the system as illegitimate claim that their resort to violence is equivalent to measures taken by duly constituted authorities against outlaws. Accepting the premise of illegitimacy, the logic of this justification is flawless. As values and perceptions change, so does the concept of terror-violence. Thus, what is terrorism to some is heroism to others.⁴⁰

Ideologically motivated actors frequently perceive themselves as "justice-makers." They consider their action, even when abhorrent to them, to be dictated by circumstances beyond their control or conditioned by the limitations imposed upon them by virtue of their inherent political weakness. The gradual transformation which such individuals

sored by *The Chicago Sun-Times* and *Chicago Daily News*) (remarks of M. Cherif Bassiouni). See generally F. HACKER, *CRUSADERS, CRIMINALS, CRAZIES: TERROR AND TERRORISM IN OUR TIME* (1977).

³⁷ See *Terror Violence*, *supra* note 1, at 759-65; Cooper, *Terrorism and the Media*, 24 CHITTY'S L.J. 226 (Sept. 1976); Paust, *Internal Law and Control of the Media: Terror, Repression, and the Alternatives*, 53 IND. L.J. 621 (1978).

³⁸ M.C. BASSIOUNI, *THE LAW OF DISSENT AND RIOTS* 57 (1971).

³⁹ See Bassiouni, *Ideologically Motivated Offenses and the Political Offense Exception in Extradition: A Proposed Judicial Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217 (1968); Pisapia, *Terrorismo: Delitto Politico O Delitto Commune?*, LAGGIUSTIZIA PENALE 1 (V-VI, Maggio 1975).

⁴⁰ Recall that war in defense against aggression or in opposition to foreign occupation is deemed justifiable, although the use of violence in such circumstances remains subject to express rules which exclude certain kinds of targets and means of violence. See generally A. RIFAAT, *INTERNATIONAL AGGRESSION* (1979). On international controls, see Bassiouni, *Methodological Options for International Legal Control of Terrorism*, 7 AKRON L.J. 388 (1974); Friedlander, *Sowing the Wind: Rebellion and Violence in Theory and Practice*, DEN. J. INT'L L. & POL. 89, 92 (1976). As to the laws of war, see 1 *INTERNATIONAL CRIMINAL LAW*, *supra* note 3, and note 44 *infra*. See also the Four Geneva Conventions of August 12, 1949, and the 1977 Additional Protocol thereto, particularly the enforcement provisions of Protocol I, Articles 73-79, commented upon in Bassiouni, *The Repression of Breaches of the Geneva Conventions Under the Draft Additional Protocol to the Geneva Conventions of August 12, 1949*, 8 RUT.-CAM. L.J. 185 (1976).

undergo before resorting to forms of terror-violence evidences that belief. Within this category of ideologically-motivated actors the process appears almost always the same:

1. heightened perception of oppressive conditions—whether real or imaginary;
2. recognition that such conditions are not the immutable order of things, but amenable to active reform;
3. that action designed to promote change is not forthcoming;
4. that one must at last resort to violence;
5. that such action need not be successful, but only contribute to setting in motion a series of events enlisting others and leading to change (a realization that dissemination of the cause is more important than success of the action);
6. that the individual's self-sacrifice outweighs the guilt borne by committing a violent act (thus violence without guilt);
7. that the cause transcends the need to rationalize the act of violence (the self-gratification merges with the higher purpose).

This transformation of consciousness is accompanied by two additional conditions:

8. the ethnocentricity of the values opposed to the desired change justifies the same arrogant ethnocentricity of values of the actor (thus polarization of values without a mechanism for reconciliation by virtue of evolutionary and participatory social change leads to violence);
9. the absence of resocialization of actors who do not conform to social norms stigmatizes them and prevents reintegration into society, which further radicalizes them and leads to increased violence.

Individuals motivated in the manner described are willing to take risks and bear personal sacrifice to a far greater extent than the more calculating common criminal motivated by personal gain. On the other hand, distinguishing between ideologically motivated actors and psychopathological individuals, who may manifest the same characteristics, is more difficult. This similarity may explain why frequently the media depict and the public perceives both actors as ruthless, brutal psychopaths.⁴¹

⁴¹ Surprisingly, however, societies and the organs of states, which are so prompt and peremptory in their denunciation of terrorism when committed by individuals against a constituted political order, react with less intensity when the political order engages in similar or more outrageous conduct against individuals. See note 3 *supra*. Certain social injustices have historically been corrected only through violence. Throughout the history of decolonization, violence has frequently triggered political change. In some cases, violence reached the proportions of limited war in order to achieve a political result. This was the case with Algeria and Vietnam. Finally, in part as a consequence of the first two phenomena, acts of terror-violence have shown a tendency to become self-legitimizing. Thus, anti-colonial violence was at its inception invariably condemned and repressed, but gained grudging recognition as its intensity increased, until finally erstwhile terrorists became acclaimed heroes, honored perhaps even by their former foes. Unfortunately, the lessons of the colonial period have not been lost on the leaders of contemporary urban guerrillas to whom the process is the same. They use the same strategies aimed at producing parallel results: the social, political, and

Individuals engaging in acts of terror-violence, however motivated, *a fortiori* commit common crimes subsumed in such categories as murder, assault, battery, kidnapping, robbery, theft, and extortion. Actions falling within these classes constitute crimes in violation of the criminal laws of every state in the world.⁴² Special national legislation therefore appears unnecessary unless research demonstrates compelling circumstances.⁴³ Similarly, special legislation proscribing terror-violence in the context of war, whether of an international or non-international character (a war of national liberation), is unnecessary because such acts are proscribed already by the law of armed conflict and international conventions.⁴⁴ It is difficult to explain why the world community continues to clamor for more international conventions on the subject of terrorism in time of peace when existing conventions cover piracy,⁴⁵ hijacking,⁴⁶ kidnapping of diplomats,⁴⁷ and civilian hostage-taking.⁴⁸ Although insufficiently recognized by the media, the most promising means of deterring terrorism is effective enforcement and implementation of these existing conventions and, particularly, greater cooperation between

economic transformation of the constituted public order. Their claims frequently linked, albeit remotely, to some valid grievance, they proceed by the paradox that they must destroy to build. Ironically, their goals are frequently met, for either reform or change occurs or repression takes hold and supports their indictments. It is not surprising that the saying of Mao Tse-Tung "Truth comes out of the barrel of a gun," has been so widely adopted by urban guerrillas. See M.C. BASSIOUNI, *supra* note 38; A. BURTON, *supra* note 19; S. SARKESIAN, *supra* note 19; P. WILKINSON, *supra* note 19.

⁴² This conclusion was reached after an examination of the laws of 53 countries relating to terrorism in connection with a study by the American Society of International Law. The outcome is published in LEGAL ASPECTS, *supra* note 1.

⁴³ For example, Congress might enact special legislation were it common for the media to detail the vulnerability of likely targets of terror-violence. Special legislation might also be appropriate if research showed that terrorist murders were more likely to incite additional violence than common criminal murders.

⁴⁴ The four Geneva Conventions of August 12, 1949, apply to both types of conflict and prohibit acts of terror-violence, as does the 1909 Hague Convention on the Customary Laws of Armed Conflicts. See *Terror Violence*, *supra* note 1, at 750 & n.17.

⁴⁵ The 1958 Geneva Conventions on the Law of the Sea, U.N. Doc. A/CONF. 13/L. 52-55 (1958).

⁴⁶ The 1963 Tokyo Convention, the 1970 Hague Convention, and the 1971 Montreal Convention. For discussion of them, see Evans, *Aircraft and Aviation Facilities*, in LEGAL ASPECTS, *supra* note 1, at 3; Evans & Lee, in INTERNATIONAL TERRORISM, *supra* note 5, at 219-84. See also 47 REVUE INTERNATIONALE DE DROIT PENAL (pts. 3-4) (1976).

⁴⁷ The 1972 O.A.S. Convention and 1974 U.N. Convention. For their discussion, see Murphy, *The Role of International Law in the Prevention of Terrorist Kidnapping of Diplomatic Personnel*, in INTERNATIONAL TERRORISM, *supra* note 5, at 285; Murphy, *Protected Persons and Diplomatic Facilities*, in LEGAL ASPECTS, *supra* note 1, at 277.

⁴⁸ Ad-Hoc Committee on the Drafting of An International Convention Against the Taking of Hostages, U.N. Doc. A/AC. 188/L.2, 188/L.3 (1977). The International Convention Against the Taking of Hostages was adopted 13 December 1979, U.N. GAOR (XXXIV), A/34/819.

states in the areas of extradition⁴⁹ and penal matters.⁵⁰

D. THE FUTURE OF NON-STATE-SPONSORED INDIVIDUALLY PERPETRATED TERROR-VIOLENCE

One commentator has argued that the existing balance of terror produced by nuclear weaponry has rendered conventional war, such as World War II, an unlikely occurrence.⁵¹ Changing world attitudes also offer the prospect of a reduction in the frequency and intensity of limited warfare. However, non-international violence is likely to increase in states in which the social, economic, and political structures do not permit the peaceful coexistence of disparate races, tribes, religions, or nationalities. This trend is evident in the conflicts in Cyprus, Lebanon, Ireland, and the Basque region of Spain. Likewise, non-international violence is likely to increase in fairly homogeneous societies in which certain social, economic, and political inequality is prevalent, and where the structures of the constituted order resist changes needed to satisfy internal dissent. Italy's extreme left and right, Germany's Baader-Meinhoff Group, and the Red Liberation Army, whose counterparts exist also in Japan, are products of these cultural tensions. Unwilling or unable to work within their respective systems to achieve peaceful evolutionary transformation, these groups resort to terror-violence.

Whether manifesting in a homogeneous or heterogeneous culture, non-international violence challenges the ability of democratic institutions to meet the legitimate demands of rising expectations. The ability of such institutions to permit, if not to foster, peaceful evolutionary change will determine whether terror-violence is perceived as a viable alternative. President Kennedy expressed this truth somewhat more succinctly: "Those who make peaceful evolution impossible, make violent revolution inevitable." A broad-based popular tolerance of terrorist-violence is indispensable to its survival. If political institutions provide for the needed change, then violence is avoidable.

The United States' experience with slavery provides an excellent example of the delicate balance between institutional sensitivity and violence. No greater injustice existed in American history than slavery and the sequel of racism. By the 1960s violence became the last resort for black Americans.⁵² However, led by a far-sighted judiciary⁵³ the sys-

⁴⁹ See generally M.C. BASSIOUNI, *supra* note 6; 39 REVUE INTERNATIONALE DE DROIT PENAL 375 (1968).

⁵⁰ See 2 INTERNATIONAL CRIMINAL LAW, *supra* note 3. See also 45 REVUE INTERNATIONALE DE DROIT PENAL 405 (1974).

⁵¹ See H. ARENDT, ON REVOLUTION (1965).

⁵² M.C. BASSIOUNI, *supra* note 38, at 25 *et seq.*

⁵³ *Id.*; Bassiouni, *Le Role du Juge aux Etats-Unis*, 46 REVUE INTERNATIONALE DE DROIT

tem responded positively, if inadequately, and thereby lessened the potential for racial violence. States in which social needs and values change without a corresponding response by the political system become fertile grounds for the seeds of terror-violence. Acts of terrorism in these states, whether national or international in their scope and effect, are likely to increase dramatically in the next decade. In that climate of social transformation, and occasional upheaval, both the mass media and law enforcement agencies will encounter their greatest challenges. These two institutions will be prone to conflict with one another, but their cooperation is essential to reducing the impact and spread of terror-violence.

The prospect that the comparatively limited yet increasing harm of terror-violence will replace conventional warfare in the 1980s in either of the two cultural contexts described above is to some extent consoling. Nevertheless, it is difficult to predict the extent of the damage this new form of urban violence may inflict.⁵⁴ It is probable that the incidence will increase, that new and more dramatic acts are likely to occur, and that these acts will cause great harm.

Never have contemporary democracies faced a greater and more enigmatic challenge than the increased violence, whether termed "terrorism" or "common criminality," which has become so characteristic of urban industrialized societies.⁵⁵ The reactions of organized societies are likely to incline toward excessively repressive measures. As the world community seeks to "thicken the veneer of civilization"⁵⁶ by promoting concern for human rights,⁵⁷ the opposing forces of violence and repression could endanger the few gains attained since the end of World War II. The vigilance of jurists as keepers of the law must therefore be increased. And along with the legal profession, those entrusted with the powerful tool of the mass media must bear a significant share of this

PENAL 37 (1976). To the extent that the potential for terror-violence has declined in the United States, the need for carefully drawn legislation confining media activity during ongoing terrorist incidents is heightened.

⁵⁴ Paust, *Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction*, 12 STAN. J. INT'L L. STUD. 79 (1977); Paust, *Private Measures of Sanction*, in LEGAL ASPECTS, *supra* note 1, at 575-612.

⁵⁵ Crime Prevention and Control Report of the Secretary-General on Crime Trends in the World, U.N. Doc. A/32/199 (1977).

⁵⁶ Bassiouni, *Human Rights Program: The Veneer of Civilization Thickens*, 21 DE PAUL L. REV. 271 (1971).

⁵⁷ See, e.g., P. GRAVEN, PROBLEMS DE PROTECTION INTERNATIONALE DES DROITS DE L'HOMME (vol. 1, 1969); P. GRAVEN, LE DIFFICILE PROGRES DU REGNE DE LA JUSTICE ET DE LA PAIX INTERNATIONALES PAR LE DROIT (vol. 2, 1970); D. PONCET, LA PROTECTION DE L'ACCUSE PAR LA CONVENTION EUROPEENNE DES DROITS DE L'HOMME (1977); A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE (1978); L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973); 21 DE PAUL L. REV. 271 (1971) (symposium issue on human rights).

social responsibility.⁵⁸ In societies which cherish freedom of the press, the media must not allow themselves to become an instrument of terror-violence. Conversely, in those societies that effectively control the press and engage in government sponsored terror-violence, the media must react boldly against it.⁵⁹ In considering the impact of mass dissemination, media managers must evaluate their decisions to publish or broadcast in light of these two imperatives. Their role and that of law enforcement, both in the public interest, can best be served by increased cooperation and understanding of their respective obligations and constraints.

II. PROBLEMS IN MEDIA COVERAGE OF NON-STATE-SPONSORED INCIDENTS OF TERROR-VIOLENCE

A. INTRODUCTION

The media are indispensable communications links of industrial society. They are as much a part of that society's needs as energy. From their economic and utilitarian function to their sociopolitical role, the media are indispensable social links of modern societies. With the constant developments in electronic technology, the speed and geographic scope of mass communications continues to increase.

Escalation in global terror-violence incidents since the 1960s corresponds to these innovations in technology enabling the media to disseminate information faster and to vastly augmented audiences. The relationship between terrorism and the media appears to be symbiotic: perpetrators of acts of terror-violence rely on the media to serve their terror-inspiring purposes and the media utilize such incidents as rewarding news items.⁶⁰ The problems addressed herein are necessarily more peculiar to the electronic than the print media. It is essential to recognize, however, that conclusive evidence of the terrorist-media relationship has not heretofore been presented.⁶¹

⁵⁸ Salomone, *Terrorism and the Mass-Media*, in INTERNATIONAL TERRORISM, *supra* note 5, at 43.

⁵⁹ Paust, *supra* note 37. See notes 60-123 & accompanying text *infra* for a discussion of the media as an instrument for terror-violence and the first amendment implications of regulation of the media during terrorist incidents.

⁶⁰ *Terror Violence*, *supra* note 1, at 760. Dr. Frederick Hacker, a California psychiatrist with experience as a terrorism negotiator, has remarked that: "If the mass media did not exist, terrorists would have to invent them. In turn, the mass media hanker after terroristic acts because they fit into their programming needs: namely, sudden acts of great excitement that are susceptible, presumably, of quick solution. So there's a mutual dependency." Hickey, *Terrorism and Television*, TV GUIDE, July 31, 1976. Walter Laquer has called the media the "terrorist's best friend." *Id.*

⁶¹ While it is difficult to design and perform research in this area, some studies suggest that media coverage exerts a positive influence on terrorist activity and others indicate that the effect is negative, i.e., that the media has a cathartic effect on the occurrence of subse-

Irrespective of whether the acts of terror-violence are committed by individuals against a state or are state-sponsored acts committed against individuals, terrorism seems invariably to involve the instrumentalization of the media. In that respect terrorism from "below" (non-state-sponsored) and terrorism from "above" (state-sponsored) share the same means and methods to disseminate or prevent the dissemination of their terror-inspiring message. As such it may be more advantageous at times for the purposes of terrorism from above to reduce media exposure of repressive violence. In the case of the serious state-sponsored violations of human rights, such as torture, arbitrary arrests, and detentions, the state may well use all of its powers to prevent the dissemination of such news. On the other hand, in acts such as the Iranian seizure of the United States Embassy in November, 1979, the perpetrators intend to focus maximum world attention on the underlying concerns which motivate the action.

The agents of individual acts of terror-violence will more often than not seek to propagandize their claims to achieve maximum publicity. Ideologically motivated terror-violence from below is the weapon of the weak.⁶² It is employed by those too few or too powerless to achieve their objectives through conventional sociopolitical processes. Media technology has made terror-violence an attractive mechanism for social or political transformation by providing a device by which individuals can appear powerful within a short period of time, with relatively little effort and in the context of an increasingly vulnerable society.⁶³

quent terrorist events. See, e.g., Berkowitz & McCauley, *The Contagion of Criminal Violence*, 34 SOCIOMETRY 238 (1971); Liebert & Schwarzgerg, *Effects of Mass Media*, 1977 ANN. REV. PSYCH. 141; Phillips, *Suicide, Motor Vehicle Fatalities, and the Mass Media: Evidence Toward a Theory of Suggestion*, 1979 AM. J. SOC. 1050.

⁶² B. CROZIER, A THEORY OF CONFLICT 129 (1974). See generally text accompanying notes 39-40 *supra*.

⁶³ Industrialization has provided such vulnerable and attractive targets as aircraft, electric power plants, nuclear reactors, dams, fuel storage facilities, telephone exchanges, while terrorists have obtained—through theft, purchase, and support from patron states—portable and sophisticated weapons of great destructive capability. See THE MEDIA AND TERRORISM, *supra* note 36, at 7. See also note 33 *supra*. The great modern threat is the theft or use of nuclear materials. See M. WILRICH & T. TAYLOR, NUCLEAR THEFT: RISKS AND SAFEGUARDS (1974).

The mass media include television, radio, newspapers, magazines, books, and films. For the purposes of this discussion, "media" refers primarily to the news organizations commonly associated with the first four media categories.

That the media have come to serve—willingly or unwillingly—the purposes of those who engage in terror-violence was expressed by the National Task Force on Disorders and Terrorism where it states:

Acts of terrorism have gained immediacy and diffusion through television, which conveys the terrorist message to millions worldwide. The modern terrorist has been quick to exploit this advantage; he has become a master of the medium in a way that shows government as a poor rival. Formerly, in countries where free speech and communication were jealously guarded rights, it would have been unthinkable for violent subver-

However balanced coverage is, problems of pervasive influence remain, which are of course compounded when the coverage is unbalanced. To some extent, the very function of the media in society condemn them to be the medium of the terrorist's message.⁶⁴ The mass media perform five basic functions:⁶⁵

1. *Informational*, by providing increasing numbers of people with a flow of news events;
2. *Judgmental*, by providing the public with standards of judgment for interpreting the information which is conveyed explicitly or implicitly by selection and treatment of subjects and material;
3. *Educational*, by transmitting the social and cultural heritage from one generation to the next, and by defining and clarifying social goals and social values;
4. *Interaccional*, by furnishing a basis from which both individual and collective judgments can be formed and ideas exchanged;
5. *Entertainment*, by providing amusement and relieving tension.

Although the literature has devoted increasing attention to the relationship between terror-violence and the media,⁶⁶ specific solutions to the problems it creates have thus far been limited. The remainder of this section seeks to contribute to understanding some of the problems presented by media coverage of terror-violence incidents. The next section will seek to develop some specific proposals to limit the effects of such problems in order to enhance the prevention and control of terror-violence within the framework of constitutional principles and the rule of law.

B. THE PUBLICITY OBJECTIVE OF TERROR-VIOLENCE

Implicit in the definition of terrorism is a psychological element.⁶⁷ Ideologically motivated terror-violence produces a psychological impact

sives to have seized control of the organs of mass communications. Today it is a commonplace consequence of terrorist action. In many ways, the modern terrorist is the very creation of the mass media. He has been magnified, enlarged beyond his own powers by others.

NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON DISORDERS AND TERRORISM 9 (1976) [hereinafter cited as DISORDERS AND TERRORISM].

⁶⁴ See, e.g., J. BELL, A TIME OF TERROR 110 (1978); DISORDERS AND TERRORISM, *supra* note 63, at 236-38, 366-69, 387-90, 401-04, 414; INSTITUTE FOR STUDY OF CONFLICT, TELEVISION AND CONFLICT (1978) [hereinafter cited as TELEVISION AND CONFLICT]; THE MEDIA AND TERRORISM, *supra* note 36; Alexander, *Terrorism, the Media and the Police*, 32 J. INT'L AFF. 101 (1978); Hickey, *supra* note 60; Hickey, *The Medium in the Middle*, TV GUIDE, August 7, 1976; MORE, June, 1977, at 12-21; Revzin, *A Reporter Looks at Media Role in Terror Threats*, Wall St. J., March 14, 1977, at 16; Seib, *The Hanafi Episode: A Media Event*, Washington Post, March 18, 1977, at A27; The National News Council, Paper on Terrorism (July, 1977) (unpublished). See also note 37 *supra*.

⁶⁵ *Terror Violence*, *supra* note 1, at 752.

⁶⁶ *Id.* at 758.

⁶⁷ See text accompanying notes 1-4 *supra*.

exceeding the actual harm caused. Sporadic acts of violence by themselves are of limited utility in producing terrorist objectives. The ideologically motivated terrorist seeks, therefore, to enhance the effect of these acts by publicizing them as widely as possible. The terrorist depends upon the mass media to disseminate the sociopolitical message and the terror-inspiring nature of the act performed. This terror-inspiring quality is not necessarily intrinsic to the act, but rather is derivative of its impact, which in turn is largely determined by the coverage it receives from the media.⁶⁸

The media thus play an important role in shaping the three stages of ideologically motivated terrorism:⁶⁹

1. the primary stage in which the tactical objective is an attack against a suitable target;
2. the intermediate stage in which the strategic objective is the dissemination by the media of the ideological claim or the terror-inspiring effect of the act;
3. the final stage in which the ultimate objective is the achievement of the desired power outcome.

The strategic objective of the terrorist influences his choice of tactical targets and means. Ideologically motivated perpetrators are likely to attack highly visible targets in a dramatic manner in order to attract media attention and thereby maximize the anticipated media-created impact of the event.⁷⁰ The media thus unwittingly further terrorist objectives by publicizing an event that has been staged by the perpetrator for the very reason of obtaining media coverage to produce a social impact which would not otherwise exist.

In addition to seeking maximum exposure, the media-conscious perpetrator attempts to manipulate the instruments of mass communication to publicize his ideology in a manner that conveys the desirability or inevitability of his ultimate objective. Through such manipulation the terrorist may seek, for example, to: (1) demonstrate the vulnerability and impotence of the government; (2) attract broader public sympathy by the choice of a carefully selected target that may be publicly rationalized; (3) cause a polarization and radicalization among the public; (4) goad the government into repressive action likely to discredit it; or (5) present the violent acts in a manner that makes them appear heroic.

In his *Minimanual of the Urban Guerrilla*, Carlos Marighella expounds the terrorist strategy of media manipulation:

The war of nerves or psychological war is an aggressive technique, based

⁶⁸ *Terror Violence*, *supra* note 1, at 759.

⁶⁹ *Id.* at 760.

⁷⁰ *Id.* at 757.

on the direct or indirect use of mass means of communication and news transmitted orally in order to demoralize the government. In psychological warfare, the government is always at a disadvantage since it imposes censorship on the mass media and winds up in a defensive position by not allowing anything against it to filter through. At this point it becomes desperate, is involved in greater contradictions and loss of prestige, and loses time and energy in an exhausting effort at control which is subject to being broken at any moment.⁷¹

It is apparent in this statement that the media are as much victims of the strategy of terror-violence as is society and its institutions. The Iranian seizure of the United States Embassy demonstrates strikingly how the media are manipulable for the strategic goal of the perpetrators.

C. THE "CINEMATOGENIC" LINK BETWEEN TERROR-VIOLENCE AND THE MASS MEDIA

One corollary of the proposed relationship between terrorism and the media is that state-sponsored as well as non-state-sponsored groups rely heavily on media-created stereotypes. So close is the interaction between the media and terror-violence that terrorist groups conform to certain media stereotypes in their internal organizational structure, chain of command, and even in the attitudes of their members. Likewise, the choice of targets and the time, manner, and place of action frequently correspond to media-created perceptions of what is expected in such spectacles. Those stereotypes, here termed the "cinematogenic" nature of contemporary terroristic behavior, afford support for the theory that a symbiotic relationship exists between the media and terrorism. Three consequences of the cinematogenic effect are critical in shaping terrorist events. First, the perpetrator's patterns of behavior seek to meet media expectations as portrayed in the context of either fact or fiction. Second, responding to stereotyped portrayals provides a framework facilitating communication between perpetrators and media personnel. Third, conformity to stereotype provides a sound basis for predictability of behavior and responses on the part of the perpetrators, the media, and the general public.

D. THE MEDIA-ENHANCED IMPACT OF TERROR-VIOLENCE

Democratic societies guaranteeing freedom of the press confront four problems associated with media coverage of terror-violence. First, coverage may encourage, by contagion, imitation, or otherwise, other individuals to engage in such conduct. Secondly, unbalanced media coverage enhances the climate of intimidation which the terrorist seeks to generate. Not only does this aid the perpetrator's objectives, but it

⁷¹ C. MARIGHELLA, *MINIMANUAL OF THE URBAN GUERRILLA* 103 (no date).

engenders pressures for counterproductive governmental repression and causes undesirable social consequences. Thirdly, media coverage may dull the sense of opprobrium of the general public. Finally, media reporting practices may endanger hostages' lives and interfere with effective law enforcement.⁷² These problems, treated in detail below, generally arise during contemporaneous, on-the-scene coverage of ongoing incidents.

The Contagion Hypothesis

The theory that media attention given terror-violence acts encourages further incidents has been labeled the contagion hypothesis.⁷³ Although this effect does not appear entirely susceptible to empirical verification,⁷⁴ at least with respect to ideologically motivated individuals, it is intuitively reasonable. For example, success may encourage a terrorist group to repeat attacks in order to maintain public attention. In addition, publicity generated by one terrorist group, such as that accorded the Italian Red Brigades by virtue of the Aldo Moro kidnapping, may cause increased or more daring action by other groups.⁷⁵

The contagion hypothesis may also apply to perpetrators motivated

⁷² From a different perspective, however, it should be noted that media coverage and media portrayal may serve as a safety valve in instances where media coverage is a way of securing the release of hostages as well as when media coverage co-opts the need for terror-violence by the dissemination of certain claims which would otherwise become exteriorized through violent action. See generally R. CRELINSTIN & D. SZABO, *HOSTAGE TAKING* (1979).

⁷³ See, e.g., DISORDERS AND TERRORISM, *supra* note 63, at 23-24, 237. "There is considerable evidence that contagion and imitation are significant factors in the incidence of terroristic activity. Often, after the use of novel and seemingly successful terroristic techniques has been widely publicized, they have been imitated and embellished by other terrorists. Much quasi-terroristic activity may be explained this way." *Id.* at 23. See also Hickey, *supra* note 64; text accompanying note 74 *infra*. In a report prepared for the U.S. State Department, the Rand Corporation stated: "It is hard not to conclude that terrorism judged on its own terms—as a way to get attention and arouse alarm—has been a success, and that highly visible success is likely to lead to further incidents of terrorism." Hickey, *supra* note 60.

⁷⁴ Nevertheless, commentators have repeatedly expressed concern over this effect. See Mendelsohn, *Socio-Psychological Perspectives on the Mass Media and Public Anxiety*, JOURNALISM Q., 1963, at 513. Individuals unable to redress a particular grievance, but otherwise normal, may also resort to terroristic means. After the Hanafi incident, Dr. Robert Jay Lifton, professor of psychiatry at Yale, remarked that when the press makes "the person of the terrorist something close to the total news of the week, the imagery of terrorism becomes much more active psychologically for the average person. Therefore it must contribute to stimulating similar acts among people who feel frustrated and for whom other avenues are closed." N.Y. Times, March 19, 1977, at 33, col. 2.

⁷⁵ For an enumeration of incidents, see R. LIEBERT, J. NEALE & E. DAVIDSON, *THE EARLY WINDOW* 1-3 (1973). See generally Hendrick, *When Television Is a School for Criminals*, TV GUIDE, Jan. 29, 1977, at 4. After interviewing inmates at a Michigan prison, Hendrick reports that 90% admitted that they had "learned new tricks and improved their criminal expertise by watching crime programs," while 40% said they had attempted the televised crimes they had viewed. *Id.* at 5. The 1978 *CIA Report* on terrorism predicts that "West German terrorists, having suffered reverses during the past year, are likely to feel greater pressure to

by non-ideological reasons. Since the mass media have the ability to "confer status upon an individual or an event merely by presenting them,"⁷⁶ the spotlight of media attention may be an irresistible lure to violence for certain psychopathic individuals. The common criminal, motivated by personal gain, may imitate successful techniques made known to him by media coverage of prior terrorist incidents.⁷⁷

Researchers continue to focus on the contagion hypothesis, but have not uncovered conclusive data. Common sense suggests a rule of imitation, implied in the theory of contagion, particularly when the imitation carries the promise of reward. Noteworthy also is the Sommer study, which indicates that 93% of the police chiefs surveyed "believed live television coverage of terrorist's acts encouraged terrorism."⁷⁸ No research presently corroborates that belief, but the question remains that if law enforcement officials harbor such a belief, perpetrators of violence may harbor it as well.

The counter-effect of contagion is deterrence produced by publicized failure of terrorist acts due to effective law enforcement. The me-

remind their domestic and international sympathizers that they remain revolutionary leaders by engaging in operations at home or overseas." CIA REPORT, *supra* note 8, at 5.

⁷⁶ Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1134 (1978).

⁷⁷ In 1971, D.B. Cooper skyjacked an airplane, collected a ransom, and successfully escaped by parachute. This technique was widely imitated. DISORDERS AND TERRORISM, *supra* note 63, at 23. Although many examples have been recorded of criminal education through media presentation of crime, one incident stands out:

Of Rod Serling's programs, "Doomsday Flight" probably is the most memorable. A caller hides an altitude bomb aboard an airliner and demands a ransom. If the company refuses to pay, he will not divulge the location of the bomb, and the plane will be destroyed as it descends for a landing. In the end, the pilot saves the plane by selecting an airport located at an elevation above the critical altitude. "Doomsday Flight" gained notoriety because of the immediate reaction it created. Before the hour-long program was over, one airline received an identical bomb threat; four similar threats came during the next twenty-four hours and another eight during the following week. Exported to other countries, the show made one Australian criminal \$500,000.00 richer thanks to Qantas Airlines' desire to protect 116 passengers en route to Hong Kong, while BOAC officials faced with a similar threat demonstrated familiarity with the script by arranging a landing at Denver instead of London.

Terror Violence, *supra* note 1, at 759-60.

Although *Doomsday Flight* was fictional, instruction in criminal techniques may also result from regular news reporting. For example, after media reporting of a skyjacking in which the perpetrator successfully escaped by parachute, subsequent skyjackers routinely included a parachute as an item in their demands. See generally T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970); W. RIVERS, T. PETERSON & J. JENSEN, *THE MASS MEDIA AND MODERN SOCIETY* 28-29 (2d ed. 1971); W. SCHRAMM, *MASS COMMUNICATIONS* (2d ed. 1960); Mendelsohn, *supra* note 74, at 511-12; Wright, *Functional Analysis and Mass Communications*, 24 PUB. OPINION Q. 605 (1960). The same contagion impact through education and emulation can also affect psychopathological individuals as Dr. David Hubbard reported in his well-known study. See D. HUBBARD, *supra* note 17.

⁷⁸ M. Sommer, *Project on Television Coverage of Terrorism*, reported in EDITOR AND PUBLISHER, Aug. 27, 1977, at 12.

dia also produce an effect known as the cathartic effect. That theory holds that media coverage of an event or social grievance can weaken the motivation of other individuals to engage in terror-violence in order to attract attention to the social problem at issue. However, as is the case with the contagion effect, research on the cathartic effect is inconclusive. The existence of the latter phenomenon does not necessarily imply the nonexistence of the contagion effect because of the widely different circumstances triggering these effects. For the purposes of the present analysis, it is presumed that media coverage has contagious consequences.

The Climate of Intimidation and the Psychologically Projected Prediction

Perhaps the most pervasive problem associated with media reporting of terror-violence is the climate of intimidation it engenders, a general fear of victimization that both despoils the quality of life and destabilizes social institutions. Although intimidation is usually a strategic objective of terror-violence, isolated incidents could not produce the ubiquitous psychological impact achieved through the repetitive dissemination of the terror-inspiring act.

In its social role, the media act in part as mediators between man and the environment. As society increases in complexity and events affecting individual welfare occur increasingly outside one's immediate experience, man's reliance on the mass media correspondingly increases as he attempts to construct for himself a trustworthy picture of his environment.⁷⁹ By providing information from the outside world, the media influence the way people view the world and, consequently, their behavior. The classic example of media influence on public emotions is the 1938 radio broadcast of H.G. Wells' *War of the Worlds*.⁸⁰ As Professor Harold Mendelsohn has written, "the mere fact that the so-called invasion was presented in the form of a radio broadcast gave it an authenticity *per se* which was sufficient for many listeners to accept uncritically and to base behavioral action upon."⁸¹ Similarly, a degree of public anxiety is a necessary by-product of media reporting of news events during times of stress.⁸² Such media-created anxiety, Mendelsohn continues, is "functional rather than dysfunctional" only when it prepares individuals to confront danger realistically:

It is where the mass media offer false standards of judgment by which readers, listeners and viewers may misinterpret the news that the dangers

⁷⁹ See W. LIPPMAN, *PUBLIC OPINION* (1922).

⁸⁰ For a study of the public reaction to the broadcast, see Cantril, *The Invasion from Mars*, in W. SCHRAMM, *THE PROCESSES AND EFFECTS OF MASS COMMUNICATION* 423 (1954).

⁸¹ Mendelsohn, *supra* note 74, at 513.

⁸² *Id.* at 513-14.

lie. Whether through ignorance, guile, vested interest or irresponsibility—where some sectors of the mass media create dysfunctional anxiety, we have a serious problem on our hands.⁸³

The potential outcome of this public anxiety is to enhance the perceived power of the terrorist in his own eyes, as well as in the eyes of his peer group and other groups and individuals. Such enhanced perceived power, combined with an awareness of socially vulnerable targets and ineffective law enforcement, produces public intimidation.

With recurrence of incidents producing a psychological projection prediction syndrome, the impact increases. This syndrome is a psychological reaction by which prior knowledge is recalled as a result of new information and then a projected prediction of harmful effect is made. The effect of psychological prediction seems to be a function of the frequency of reporting information on such incidents which makes the fact more readily available to human consciousness, irrespective of specifics such as actual harm. Thus repetition of a key word in the print or electronic media, after its repeated usage, may cause the public to make a prediction about the event it describes in a particular instance without regard to the actual facts of that case. This syndrome may enhance not only the climate of intimidation, but, indirectly, all violence.

The climate of intimidation may lead ultimately to either a level of tolerance (the immunization effect discussed below) or, conversely, the heightened resistance needed to combat terror-violence. The only caveat to the above conclusion is that it may cause counterproductive overreaction.

The Immunization Effect

The immunization effect is manifested in three ways. The first, an increased level of public tolerance of violence and terror-violence, derives from continuous media coverage of both. This tolerance magnifies when, in addition, such coverage is associated with certain “rewards” such as social prominence, sex appeal, financial success, or political importance. This increased acceptance of violence in turn increases its contagion effect. The second immunization effect derives from the portrayal of terrorists as crazies, or as individuals and organizations beyond the social means of control. In short, society explains away the phenomenon by considering it to be alien.

The third effect derives from the conceptualization of the act of terror-violence and its harmful effect. That effect is best describeable by reference to the Iranian hostage crisis of November, 1979. The media seldom referred to the hostages as individuals with names, families, and

⁸³ *Id.* at 514.

lives. The word "hostages" acquired the connotation of pawns on the chessboard of world politics. Thus, the public directed its outrage more at the political significance of the acts than its human dimensions.

The immunization effect, in any of its three modes, may increase violence for two reasons. First, the level of violence increases to overcome the dulled perceptions of the public in order to elicit the terror-inspiring effect desired. Second, more persons may resort to violence as a result of lessening social opprobrium. Public immunization and a concomitant increase in violence is not, however, a necessary consequence of media coverage of terror-violence. In fact, the opposite is likely where media portrayal increases public opposition and reaction to such behavior, and galvanizes social values. For example, the media might deemphasize terrorists and facilitate the public's ability to react to hostages as individuals by presenting the public with the hostages' backgrounds, interests, beliefs, and appearances. Thus terrorists must strike a careful balance between sufficient balanced media coverage to produce immunization, without inducing media outrage which could trigger opposing social reaction. In this respect the media and the public must clarify the values embodied in the media's function in society.

*The Combined Effect of Contagion, Intimidation, and Immunization
and Media Coverage Impact*

To the extent the media abuse—or allow the terrorist to abuse—their social mediating role, the media represent the terrorist's powers disproportionately to his actual capacity to harm. This abuse enhances the climate of intimidation while stimulating emulation through contagion. Although the media are becoming more accurate, responsible, and self-critical than in their often sensationalist past,⁸⁴ reporting abuses are still prevalent.

The portrayal of violence in literature and the mass media has been a cause for concern for over one hundred years.⁸⁵ The popularity and pervasiveness of television and the movie industry in shaping the attitudes of its audience has made that medium the subject of recent scrutiny by individuals, citizens groups,⁸⁶ and the Congress.⁸⁷ Some

⁸⁴ See Gruenwald, *The Press, the Courts and the Country*, TIME, July 16, 1979, at 74. For an account of press sensationalism, notably that of William Randolph Hearst and Joseph Pulitzer, see J. TEBBEL, *THE MEDIA IN AMERICA* 279-303 (1974).

⁸⁵ SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., *VIOLENCE ON TELEVISION 1* (Comm. Print 1977) [hereinafter cited as *VIOLENCE ON TELEVISION*].

⁸⁶ In addition to various church groups and the National Parent-Teachers Association, the American Medical Association adopted a resolution in 1976 that "TV violence is a risk factor threatening the health and welfare of young Americans, indeed our future society." AMA, *PROCEEDINGS OF THE HOUSE OF DELEGATES* 280 (June 1976) (Res. No. 38). The

researchers, notably Dr. George Gerbner, have concluded that heavy viewers of televised violence are far more likely to view the world with alienation, distrust, and fear.⁸⁸ Others, including the Surgeon General of the United States, have reported that viewing of televised violence by children encourages antisocial tendencies and aggressive behavior.⁸⁹ Although the causal connection between the level of violence on television and its psychological and behavioral impact upon viewers has not been satisfactorily established,⁹⁰ the Subcommittee on Interstate and Foreign Commerce nevertheless concluded that "an excessive amount of televised violence is a source of sufficient societal concern to warrant congressional attention and scrutiny."⁹¹ In a vigorous dissent, six members of the fifteen-member subcommittee went even farther, and concluded that the available evidence unmistakably established the adverse effects of viewing televised violence and that affirmative steps to reduce its presentation should be taken.⁹²

resolution encouraged all physicians to oppose TV programs containing violence as well as products and services sponsoring the programs. See *Sex and Violence on TV: Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 7 (1976) [hereinafter cited as *1976 House Hearings*].

⁸⁷ Prior to 1976, Senate investigations were conducted into the relationship between the media and the rising crime rate. See *Juvenile Delinquency (Effects on Young People of Violence and Crime Portrayed on Television): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (pt. 16) (1965); *Juvenile Delinquency (Television Programs): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess., 84th Cong., 1st Sess. (1954-55); *Violence on Television: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 2d Sess. (1974).

⁸⁸ See G. GERBNER, L. GROSS, M. ELEEY, M. JACKSON-BEECK, S. JEFFRIES-FOX & N. SIGNORIELLI, *Violence Profile No. 7: Trends in Network Television Drama and Viewer Conceptions of Social Reality 1967-75* 9 (1975). Dr. Gerbner has monitored television violence since 1968. See generally Gerbner & Gross, *Living with Television: The Violence Profile*, 26 J. COM. 172 (1976). For a critique of Gerbner's methodology and conclusions, see Krattenmaker & Powe, *supra* note 76, at 1157-70.

⁸⁹ See SURGEON GEN.'S SCIENTIFIC ADVISORY COMM. ON TELEVISION AND SOCIAL BEHAVIOR, *TELEVISION AND GROWING UP: THE IMPACT OF TELEVIEWED VIOLENCE* (1972). The Surgeon General subsequently testified that

broadcasters should be put on notice. The overwhelming consensus and unanimous . . . report indicates that televised violence, indeed, does have an adverse effect on certain members of our society. . . . [I]t is clear to me that the causal relationship between televised violence and anti-social behavior is sufficient to warrant appropriate and immediate remedial action. The data on social phenomena such as television and violence and/or aggressive behavior will never be clear enough for all social scientists. . . . But there comes a time when data are sufficient to justify action. That time has come.

Surgeon General's Report to the Scientific Advisory Comm. on Television and Social Behavior: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, 92nd Cong., 2d Sess. 25, 26 (1972) (statement of Dr. Jesse Steinfield, Surgeon General). On the relationship between televised violence and aggression, see also A. BANDURA, *AGGRESSION* (1973).

⁹⁰ See, e.g., Krattenmaker & Powe, *supra* note 76, at 1134-70; *1976 House Hearings*, *supra* note 86, at 10-20. But see note 89 *supra*.

⁹¹ *Violence on Television*, *supra* note 85, at 7.

⁹² *Id.* at 17-19 (dissenting views of Reps. Waxman, Wirth, Mikulski, Markey & Gore). The minority stated that the FCC should initiate rulemaking proceedings on whether licen-

In addition to serving an important public function, the media also are private business enterprises in pursuit of a profit. Although bigness and the profit motive may have some positive effect on the quantity and quality of news reporting and media independence,⁹³ commercial factors also may lead to abuses. Since profits are obtained from selling time or space to advertisers at rates determined by circulation or audience size, the media in a sense are engaged in the business of selling attention. When news reporting becomes a commercial product whose relative media emphasis is determined by its potential for sensationalism, excessive coverage may afford violent events a disproportionate significance. The line between informing and entertaining in news reporting has always been indefinite, but the consequence of presenting acts of terror-violence as mass entertainment⁹⁴ is to augment dangerously the terrorist's audience.

The competitiveness of news organizations, their fear of being scooped by the opposition, and their quest for larger audiences and prestige encourages escalation in reporting techniques. Reporters do not simply report the news; they are often subjective participants—actors, scriptwriters, and idea men.⁹⁵ They seek to establish a personal reputation and to advance careers. Terrorists are aware of those desires and often seek to exploit them. While direct media contact and interviews with a terrorist make for a more exciting story, such reporting techniques may afford the perpetrator an unedited platform and excessive publicity. Hand-held microwave minicams enable terrorist incidents to be broadcast live into the viewer's home, where television's visual impact, immediacy, and realism may foster a climate of intimidation. In short, when commercial and competitive factors displace judgment in the coverage of terrorist incidents, the media may lose control over the situation, and itself become hostage to the terrorist.⁹⁶

sees should be required to "carry certain percentages of certain categories of programming." *Id.* at 24.

⁹³ See Grunwald, *supra* note 84, at 75.

⁹⁴ For the proposition that coverage of terrorist incidents have become a form of entertainment, see DISORDERS AND TERRORISM, *supra* note 63, at 8; Arlen, *Reflections on Terrorism and the Media*, MORE, June, 1977, at 12. A further problem may arise when spectacular and often tragic events are dramatized by the media for entertainment purposes, although it seems that the "networks have developed certain sensibilities and systems to counterbalance those inevitable competitive urges" and "are genuinely edgy about the risks of developing highly exploitable topics." Bedell, *Is TV Exploiting Tragedy?*, TV GUIDE, June 16, 1979, at 8.

⁹⁵ THE MEDIA AND TERRORISM, *supra* note 36, at 29 (remarks of Fenyvesi).

⁹⁶ Such an instance occurred in Indianapolis in February, 1977. Anthony Kiritsis kidnapped mortgage company executive Richard Hall and held him captive in an apartment believed booby-trapped with explosives. The 62-hour siege was covered by an army of national and regional reporters, and live television transmitters were ready for any break in the story. Trounstine, *We Interrupt This Program*, MORE, June, 1977, at 14. Kiritsis demanded live coverage of a statement to the press as a condition of his surrender. The media readily ac-

The experience with the Iranian crisis illustrates this phenomenon. The primary objective of the terrorists was to obtain media coverage.⁹⁷ The saturation coverage rewarded the perpetrators while at the same time triggering other violent reactions elsewhere. During that period of time United States embassies were attacked in Bangladesh, Libya, and Pakistan. The intimidation effect was also obvious as the United States feared to engage in action likely to affect the life and well-being of the hostages, a sign of the partial success of the action (and the apparent objective of the perpetrators) gained only through media coverage.

During this crisis the media faced anew the problem of how much to allow themselves to be instrumentalized in order to satisfy their institutional and competitive needs. In the interview with Marine Corporal William Gallegos, under a portrait of Khomeini, Gallegos spoke of the absence of ill treatment of the hostages. Alongside him was one of the perpetrators who delivered an unedited six-minute propaganda speech. The entire broadcast lasted thirty minutes, and was fully aired on prime time by NBC with excerpts on the evening news. NBC was strongly criticized by the media for relinquishing its responsibilities by permitting mass dissemination of the perpetrators' message of terror-violence.⁹⁸ Apparently exhibiting the contagion effect, the hostage-takers offered NBC another film on December 26, 1979, of clergymen visiting the hostages at Christmas, but NBC rejected it.⁹⁹ Potential terrorists, inspired by the impact of the Gallegos interview, are likely to seek direct and

ceded in order to save Hall's life and to better cover the dramatic incident. But instead of surrendering, Kiritsis emerged with a shotgun wired to his captive's neck and proceeded to deliver a diatribe riddled with obscenities. *Id.* at 15. One station interrupted the live coverage after about ten minutes, fearful that thousands of viewers might, at any moment, witness a live execution with color cameras at close range. *Id.* "We had a man here who was holding live television hostage as well as he was holding Mr. Hall hostage," an executive of the television station explained. "He was controlling us, manipulating us, and we didn't want to be a party to that. We elected to reassert control of the airwaves." *Id.* Two local stations, however, continued to broadcast the entire ordeal, with one news director later conceding, "We should have controlled it more than we did. The event controlled us." *Id.*

⁹⁷ *Tehran's Reluctant Diplomats*, TIME, Dec. 4, 1979, at 64. Speaking to some 200 journalists assembled by the Ministry of National Guidance, Iranian Acting Foreign Minister Abol Hasan Banisadr said, "Diplomats cannot solve this problem. We want to solve it through 'newspaper diplomacy.'" The contents of this article go on to describe what it refers to as "The most blatant use of television diplomacy" wherein its users were "playing the ratings game." The substance of the article indicates how much the Iranians "managed" the news and relied on the fact that the crisis, which they created, was exploiting the media for what was obviously a political goal. *Id.* Clearly the hostage-taking, at times described as a non-government-sponsored act, had a power-outcome goal which relied substantially on its media-created impact. See also Bassiouni, *Let the World Know How We Will React Next Time*, Chicago Sun-Times, Jan. 28, 1981, at 42, col. 1; *Sun-Times Editorial*, Chicago Sun-Times, Jan. 28, 1981, at 43, col. 1; TIME, Dec. 17, 1979, at 106.

⁹⁸ See Gruenwald, *supra* note 84, at 74-75; *Telling the News vs. Zapping the Cornea*, TIME, Oct. 1, 1979, at 83.

⁹⁹ See Int'l Herald Tribune, Dec. 27, 1979, at 2.

unedited access to the public via the electronic media.¹⁰⁰ Balanced coverage of trends in violence and law enforcement policies and capabilities is essential to adequately and accurately warn and inform the public of the danger posed by terrorism. Follow-up coverage of an incident is essential to aid public understanding, to combat irrational fears aroused by the event, and to prepare the public to react to future incidents.¹⁰¹ Coverage of the law enforcement and judicial responses also may help deter future perpetrators.¹⁰² Unfortunately, some media, particularly the electronic media, may be capable of carrying only the most current stories. As a result, presentation lacks proper balance.¹⁰³

Terrorists have a special affinity for gaining access to television, "for they appreciate its potency, its immediacy and its vast potential audience."¹⁰⁴ Operating clandestinely,¹⁰⁵ terrorist groups can determine when, and even to some degree how, the media cover them, and thus can manipulate the image transmitted. But, as has been observed, "[t]here is virtually no limitation upon the television reporting of abuses,

¹⁰⁰ One cannot help but conclude these observations without reference to the other significant incident of terror-violence which took place during that same period, namely the seizure of the Grand Mosque of Mecca along with hundreds of hostages held in it, in November, 1979. That incident was of much greater significance for the Islamic world than the seizure of the U.S. Embassy and 63 U.S. diplomats. The Saudi-Arabian government's first action was to seal off the area to the media. The result was limited coverage of the incident, with few specific details as it was unfolding. The perpetrators had no access to the media, which was therefore unable to disseminate their terror-inspiring message. The incident lasted over a week of prolonged and intense fighting. One-hundred-fifty-six persons were killed, and much damage was done to that holy shrine. With the reduction of contemporaneous coverage, however, there was no intimidation or contagion, and law enforcement agents controlled the crisis without further danger to society. One cannot help but speculate as to the outcome of the Iranian hostage-taking had the media given only limited factual coverage to the incident. [The summary of events above was drawn by the author from a number of news and information sources.—Ed.]

¹⁰¹ DISORDERS AND TERRORISM, *supra* note 63, at 402-03.

¹⁰² *Id.* at 368-69, 402-03.

¹⁰³ TELEVISION AND CONFLICT, *supra* note 64. The special relationship of television to terrorism was the subject of a recent British conference under the auspices of the Institute for the Study of Conflict. In its special report, the unique role of television was noted.

Television in the mass media form has acquired over the last 20 odd years an infinitely more powerful and penetrating means of communication than anything hitherto known to us. If a person reads a newspaper or a book, only the sense of sight is being employed and his reactions are entirely self-induced. Radio employs the sense of hearing and reactions to what is said are already to a very large extent affected by the manner of presentation. With television not only are the senses of sight and hearing fully occupied, but every emotion is closely caught and involved in what is happening on the live screen in the opposite corner of 15 million living rooms. This is a captive audience not necessarily in possession of the independent criteria by which to form judgments.

Id. at 14.

¹⁰⁴ *Id.* at 15 (quoting P. WILKINSON, TERRORISM AND THE LIBERAL STATE 169-70 (1979)).

¹⁰⁵ *Id.* at 26.

real or alleged, in pluralist and representative societies.”¹⁰⁶ Thus “television seems inevitably one-sided, and its bias inevitably on the side of the revolutionaries and against established authority.”¹⁰⁷ Some have suggested that in a state of undeclared war waged by terrorists against an open and democratic society, the powerful weapon of the media should be employed in defense of society and denied to the terrorist.¹⁰⁸ Because of television’s power and impact, because of the lack of choice afforded its viewers compared to that afforded recipients of the print media,¹⁰⁹ and because of its operation by government authority, television may have “a special duty to uphold, or at any rate not to undermine, constitutional authority and the forces of law and order.”¹¹⁰

E. PROBLEMS OF COVERING ONGOING ATTACKS AND RELATIONS
BETWEEN THE MEDIA AND LAW ENFORCEMENT

While the preceding sections dealt with certain general aspects of motivation and the impact of media coverage on both perpetrators and the public, this section focuses on the more specific problem of ongoing attacks. The reason for focusing on this area is that it has been perceived as susceptible to concrete solutions.

Extensive coverage of ongoing terrorist attacks provides the opportunity for terrorists to obtain publicity for their cause and rivet society’s attention to their exercise of power in open defiance of the government and law. Ongoing terrorist attacks are also the occasion of greatest conflict between the interests of law enforcement authorities and those of the media. The media perform several important functions, among which is controlling rumors by disseminating accurate information to the public of dangers present at the site. While the importance of the media in this capacity cannot be ignored, experience has shown that contemporaneous coverage of a terrorist attack consistently gives rise to three general areas of conflict between police and media.

The first area of conflict includes media dissemination of information tactically useful to the terrorist. For example, terrorists have equipped themselves with radio and television receivers which allow them to listen to news broadcasts when barricaded with hostages within a building. Thus the media may serve as the intelligence arm of the terrorist when it broadcasts the latest operational activities of the police, the presence of hidden persons who could become hostages, escaping hostages, the bargaining strategy of police negotiators, or any deceptions

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ *Id.* at 11-12, 21-22.

¹⁰⁹ *Id.* at 14.

¹¹⁰ *Id.*

planned by law enforcement officials.¹¹¹ Not only is the dissemination of such information critically helpful to the terrorist in determining possible escape routes or repelling impending police assaults, but it jeopardizes the lives of hostages, law enforcement personnel, and innocent citizens. During the October, 1977, hijacking of a Lufthansa jet, the media directly contributed to the death of a hostage when they broadcast that the pilot was passing intelligence information to the police through his normal radio transmissions. The terrorists had access to the radio news reports and executed the captain.¹¹²

In March, 1977, Hamaas Abdul Khaalis, a zealot bent upon avenging the murder of his children by Black Muslims, led the takeover of three Washington, D.C., buildings by the small Hanafi Muslim sect. A local television reporter outside the besieged B'nai B'rith building filmed a basket being lifted by rope to the fifth floor, where eleven people had evaded capture and had barricaded themselves in a room. Although apparently initially ignorant of their presence, fellow Hanafis monitoring the news reports outside probably informed the gunmen of the television reporter's scoop.¹¹³ Fortunately, the gunmen did not break through the door, and police later freed the potential hostages after a tense, nine-hour ordeal.¹¹⁴ Similar problems may arise in the context of newspaper reporting. Since some incidents may last for many hours, even days, newspaper accounts can also communicate tactical information to the perpetrators. The release of such information only endangers more lives and contributes little, if anything, to the public interest. It is not unreasonable, therefore, that in the absence of self-control, the media should be compelled to refrain from publishing information potentially helpful to the terrorists until the police are able to free the hostages from danger.

A second area of conflict is media interference with an effective law enforcement response. Direct media contact with a perpetrator while an attack is underway can interfere with law enforcement response in a number of ways:¹¹⁵ (1) tying up telephone lines; (2) goading the terrorist into action to prove himself under the spotlight of attention; (3) inciting the terrorist by the use of certain inflammatory questions or phrases;¹¹⁶ (4) isolating trained professional negotiators from the medi-

¹¹¹ *Terror Violence*, *supra* note 1, at 761.

¹¹² Alexander, *supra* note 64, at 107.

¹¹³ THE MEDIA AND TERRORISM, *supra* note 36, at 28-29.

¹¹⁴ *Id.*

¹¹⁵ *Terror Violence*, *supra* note 1, at n.31.

¹¹⁶ Many perpetrators may react violently to a particular question or term that does not comport with their ideological or psychological makeup:

Terrorists can behave like utterly normal men most of the time, perfectly balanced and intelligent, often with a far higher than average IQ. Yet in the commission of their

ating process by increasing the role of untrained media personnel;¹¹⁷ and (5) aggravating the often precarious psychological balance in which the terrorists operate by upsetting them, giving them the comfort of company, or interrupting the pattern of negotiations the police have attempted to establish.¹¹⁸

The Hanafi incident provides a powerful example of the adverse effects of direct communication by media personnel. Telephone calls by the media to the gunmen were so numerous that police negotiators had difficulty contacting the perpetrators. A local radio broadcaster asked Khaalis during a live telephone interview whether he had set a deadline, although the police and other experts had thought the absence of a deadline was encouraging.¹¹⁹ Another media contact enraged Khaalis by identifying his sect with the Black Muslims although in fact the Hanafis had broken off from the Muslims. Khaalis threatened to execute one hostage in retaliation for the reporter's remark and was mollified only after the newsman, following police advice, apologized for his unfortunate choice of words.¹²⁰

The third area of conflict arising between media and law enforcement interests involves crowd control. Reporters with obtrusive equipment may physically interfere with the free movement of law enforcement personnel and may attract crowds that compound the risks and burdens to the police. Questioning by a multitude of reporters may distract decisionmakers at a critical moment. Also, the obvious presence of many media representatives, especially those in television with lights and cameras, may encourage the terrorist either to remain barricaded to increase coverage, or to demand a press conference to gain direct personal or political publicity. The presence of the media thus may transform a news event into a spectacle attracting even greater numbers of

crimes they become completely abnormal. Those who have had experience of conversation with them can discover that one particular word, a trigger word, perhaps the name of a President or the object of the terrorists' hatred, can turn a seemingly normal man into an irrational and abnormal one in front of your eyes.

TELEVISION AND CONFLICT, *supra* note 64, at 19-20.

¹¹⁷ One media representative even advised gunmen not to give up their hostages so as to retain their bargaining position with the police. *Crisis Cop Raps Media*, MORE, June, 1977, at 19 (interview with Lt. Frank Bolz, head of N.Y.C.P.D.'s Hostage Negotiating Squad).

¹¹⁸ Additionally, not only does publicity hinder negotiation by subjecting the police to the additional pressure of public criticism, but the media indiscriminately publicize events even though publicity could itself serve as a valuable negotiating tool.

¹¹⁹ THE MEDIA AND TERRORISM, *supra* note 36, at 29 (remarks of Fenyvesi).

¹²⁰ *Id.* See also Fenyvesi, *Looking Into the Muzzle of Terrorists*, QUILL, July-Aug., 1977, at 17. For another account by a journalist held captive by the Hanafis critical of the media's interference with police management and hostage safety during the incident, see Siegel, *Looking at the Media from the Other End of the Gun*, in MEDIA AND TERRORISM: THE PSYCHOLOGICAL IMPACT 41 (1978) (seminar sponsored by Growth Associates).

people and thereby increasing the volatility of the situation.¹²¹ A possible solution to the problems presented by on-the-scene reporting is curtailment of coverage of terror-violence events. The risk to the public of such a solution is a weakening of its ability to monitor law enforcement conduct.¹²²

Contemporaneous media coverage provides, however, two specific and positive advantages to law enforcement agents. First, media coverage is frequently the most effective bargaining tool that a negotiator has in dealing with terrorists. Second, media coverage can provide law enforcement with otherwise unavailable tactical and intelligence information. In the Iranian hostage-taking, for example, the only source of information was media coverage.¹²³ Thus the problems created by media coverage can be offset by the directly related benefits it provides, in addition to other benefits to society which derive from the media's informational and watchdog roles.

F. CONCLUSION

The media's pervasive influence is well established. Their privileged role in society derives in large measure from fundamental democratic values which imply a high level of responsibility. Assuring responsibility in reporting in order to preserve these values is a task best administered by the media themselves.

The importance of law enforcement in preserving order and protecting citizens and property is similarly beyond dispute. Yet it is ill-equipped to deal with the improbable and unusual character of terrorism. Its legitimate apprehension of such incidents and the knowledge that the margin of flexibility for counteraction is limited make it intolerant of the media's purportedly disinterested appraisal and criticism. That feeling is heightened when the media's coverage tends to enhance terror-violence in any one of the effects discussed above. The result is increased animosity between media and law enforcement personnel which when exacerbated inures only to the benefit of terrorists. As the cycle of distrust and animosity between media and law enforcement personnel continues, the potential for cooperation between these institu-

¹²¹ According to the 1977 Sommer survey, 93% of the police chiefs responding believed live television coverage of terrorist acts encourages terrorism and 46% considered live television coverage to be "a great threat" to hostage safety, while 33% deemed it "a moderate threat." None believed that terrorist acts should be televised live. M. Sommer, *supra* note 78, at 12.

¹²² There are situations of on-the-scene coverage that do not involve law enforcement. For example, the media covering the Iranian hostage crisis did not have to deal with any law enforcement agents, only the perpetrators of the seizure and other sources of information. *See* notes 97-100 & accompanying text *supra*.

¹²³ This fact may partially explain the expulsion of United States news reporters in January, 1980.

tions decreases, and the extent of their respective public services is reduced to the detriment of society. It is essential, therefore, to improve understanding of the problems discussed herein for the purpose of achieving increased cooperation between these institutions.

III. PROPOSED SOLUTIONS IN LIGHT OF THE FIRST AMENDMENT

A. DEFINING THE ISSUES

Media-enhanced perception of danger to our system and to individual security may cause the community to overreact.¹²⁴ In traumatic times repressive governmental measures are not unusual. Such restrictive laws are likely also to apply to the press.¹²⁵ For example, the Federal Republic of Germany, a country that has recently been the scene of terror-violence activity, has recently enacted legislation attaching criminal sanctions to media glorification of terrorist violence.¹²⁶ Commentators in the United Kingdom have expressed the need for additional legislation making it "a criminal offense for broadcasting organisations to transmit material which encourages or is likely to encourage terrorism or violence for political ends."¹²⁷ In the United States, however, the question arises whether government, in response to public pressure,

¹²⁴ For an analysis of the pressures and influences to which the media are subject, *see* text accompanying notes 85-110 *supra*. Media coverage may help to fulfill the following strategic objectives of terrorists:

- 1) publicizing the claims of the perpetrators;
- 2) disseminating specific information about the perpetrators' ideology;
- 3) destroying or reducing confidence in the government or specific public authorities;
- 4) extracting certain specific concessions;
- 5) creating a general climate of public vulnerability;
- 6) stimulating a feeling of general apprehension coupled with the feeling of ineffective police protection;
- 7) projecting the perpetrators in a hero-like image;
- 8) projecting the government, public authorities or specific decision-makers in negative images;
- 9) conveying the general impression that the perpetrators or their followers can act at will;
- 10) providing a basis for the public's justification or rationalization of the act;
- 11) compelling the government or law enforcement authorities to engage in conduct or take measures which would be inimical to public sentiment;
- 12) placing the government or public authorities in dilemmas which highlight their weaknesses, indecision, or tendency to act contrary to the laws or public sentiment;
- 13) securing sympathy or new adherents to the movement, ideology in question or support for a specific claim.

Terror Violence, *supra* note 1, at 762.

After the Hanafi incident, Ronald Reagan called on broadcasting news directors to stop all live coverage of terrorist events and Andrew Young stated that "The First Amendment has got to be clarified by the Supreme Court in the light of the power of the mass media." *N.Y. Times*, March 19, 1977, at 33, col. 1. Former President Ford has called for an end to terrorism and attendant "lavish media attention." *N.Y. Times*, June 10, 1977, at 15, col. 6.

¹²⁵ *See* 29 U. MIAMI L. REV. 446, 451 (1975) (Media Law Conference).

¹²⁶ STGB § 131.

¹²⁷ TELEVISION AND CONFLICT, *supra* note 64, at 35. At the ISC Conference, upon submit-

could implement restrictions on the media consistent with the first amendment.¹²⁸ Restraint of media coverage of terror-violence incidents is currently foreseeable only in the context of reporting ongoing events. It will be further argued that restrictions on the media's ability to divulge information concerning strategic targets of high vulnerability are reasonable until such time as law enforcement officials are given notice and have an opportunity to remedy the problem. The inconclusiveness of research on the various psychological effects on the public of terror-violence at this point appears to preclude any state regulation of subsequent coverage. In this context, it will be suggested that media self-regulation in the form of general guidelines or licensing procedure is most appropriate.

Possible media regulatory schemes could take a variety of forms: (1) government-imposed prior restraints upon media reporting of terrorism, (2) content regulation in the form of criminal or civil sanctions attaching subsequent punishment to media dissemination of information having a harmful effect, (3) time, place, and manner regulations,¹²⁹ (4) access restrictions curtailing the media's access to ongoing terrorist attacks, and (5) self-restraint voluntarily adopted by the media. This last alternative would be more likely than the others to avoid constitutional objections and potentially restrictive first amendment "clarification,"¹³⁰ and would furnish a basis for cooperation instead of confrontation in media-law enforcement relations. In the final analysis, media self-regulation affords the best opportunity to successfully frustrate the publicity objective of terroristic crime¹³¹ while safeguarding the public function of the media.

Before commencing the present analysis, three initial observations regarding the first amendment should be made. First, despite the seemingly categorical command of the first amendment,¹³² a majority of the Supreme Court has never adhered to an absolutist approach in its interpretation.¹³³ The Court has deemed entire areas of expression outside

ting the question of whether new legislation was needed, 15 participants voted in favor and 15 against, with four abstentions. *Id.* at 38.

¹²⁸ The Hutchins Commission wrote in 1947 that "[t]he primary protector of freedom of expression is government, but any power capable of protecting freedom is also capable of endangering it." *Quoted with approval in* 29 U. MIAMI L. REV., *supra* note 125, at 451.

¹²⁹ See *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961).

¹³⁰ See note 124 *supra*.

¹³¹ DISORDERS AND TERRORISM, *supra* note 63, at 185-86.

¹³² "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend I. *Near v. Minnesota*, 238 U.S. 697 (1931), made the first amendment applicable to the states through the due process clause of the fourteenth amendment.

¹³³ See, e.g., *New York Times v. United States*, 403 U.S. 713, 761 (1971) (Blackmun, J.,

the scope of constitutional protection.¹³⁴ Even within the ambit of protected speech, the Court has recognized exceptions.¹³⁵ Secondly, the framers of the amendment could not foresee the rise of the electronic media¹³⁶ in this century to a position of dominance over the other media. Consequently, their intentions may no longer be as relevant. Finally, although the first amendment omits "any mention of the fact that the press was to be responsible as well as free,"¹³⁷ the concept of media responsibility continues to develop as the theoretical foundation of a free press shifts from the individual to society.¹³⁸ Today publishers and broadcasters speak less of their individual right to disseminate than of the "public's right to know."¹³⁹ Under the influence of the Commission on Freedom of the Press,¹⁴⁰ Professor Barron,¹⁴¹ the Federal Communications Commission,¹⁴² and others, a new theory linking freedom with responsibility for its exercise may be emerging. The Report of the Task Force on Disorders and Terrorism echoes this new standard:

A heavy and difficult responsibility rests with those who, in our society, enjoy freedom of expression, for by its incautious or unintelligent exercise they may well be contributing to its eventual demise at the hands of unprincipled extremists. The representatives of the media must make an urgent, searching reappraisal of their own values and responsibilities. Only by facing realistically the choices of potential harm, both to principles and

dissenting); *Konigsberg v. State Bar of California*, 366 U.S. 36; *Kovacs v. Cooper*, 336 U.S. 77 (1949) (Frankfurter, J., concurring) (construing development of the preferred position notion in prior caselaw).

¹³⁴ In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court established that certain areas of expression fall outside constitutional protection:

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 of "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72. Subsequently, the areas of unprotected expression have been further limited. *See, e.g.*, *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (limited protection afforded commercial speech); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (libel).

¹³⁵ *See, e.g.*, discussion of the clear and present danger doctrine in the text accompanying notes 152-63 *infra*.

¹³⁶ J. TEBBEL, *supra* note 84, at 74.

¹³⁷ *Id.*

¹³⁸ W. RIVERS, T. PETERSON & J. JENSEN, *supra* note 77, at 89.

¹³⁹ *Id.*

¹⁴⁰ *See generally* COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947); W. HOCKING, FREEDOM OF THE PRESS: A FRAMEWORK OF PRINCIPLE (1947).

¹⁴¹ Barron, *Access to the Press—A New First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969).

¹⁴² *See* text accompanying notes 198-203 *infra*.

to the community interest, can a proper balance be struck.¹⁴³

If terrorism in this country reaches epidemic proportions, certain adjustments in the social and legal systems may be inevitable. The Task Force concluded that "[c]oping with terrorism will invariably mean some inconvenience for the community, the curtailment of some freedoms, and modifications upon the exercise of others."¹⁴⁴ Thus the challenge posed by terrorism is to diminish this form of criminal activity by means that minimize the intrusion upon individual freedoms.¹⁴⁵ It is not here suggested that normal political and social evolution be discouraged, nor that the values implicit in free expression be lightly abrogated. But the first amendment does not exist in a vacuum; the right to security for both the individual and the collectivity is also of paramount importance. It would be anomalous if certain abuses were to undermine the very system of constitutional self-government that a free press was designed to guarantee. The solution lies to a large extent within the larger problem of accommodating, within more comprehensive constructs of freedom and welfare, individual rights and social responsibilities. A manufacturer, for example, is free to pursue profits subject to such limitations as refraining from polluting the environment, producing harmful products, or engaging in predatory tactics to curtail competition. But the question in all such cases is one of delicate balance and degree. The media enjoy extraordinary and valuable rights under the first amendment. They should take an active role in the difficult process of defining their correlative responsibilities. As Professor H. H. A. Cooper has written,

If the media indeed contributes to the terrorist problem, it is not too much to hope that it can also contribute to its solution. It cannot do so if its own attitude is that *the news is the news is the news*, nor can it do so if the attitude of those, in either the public or private sector, who become media managers, is one of hysterical distrust bordering on paranoia. The terrorist has simply seen the chink in modern society's armour and is seeking, not unnaturally to exploit that knowledge. . . . What the media needs is a sense of proportion, and this cannot be acquired by government fiat anymore than an individual can do so by such means. . . . Protection comes best through alertness against danger. If the media can truly see itself as a part of the problem it is well on the way to becoming an important part of the solution.¹⁴⁶

¹⁴³ DISORDERS AND TERRORISM, *supra* note 63, at 414.

¹⁴⁴ *Id.*

¹⁴⁵ See T. EMERSON, *supra* note 77, at 6-7.

¹⁴⁶ Cooper, *supra* note 37, at 232. For articles in which it is concluded that media restrictions during terroristic events are of doubtful constitutionality, see Jones & Miller, *The Media and Terrorist Activity: Resolving the First Amendment Issue*, 6 OHIO N.U.L. REV. 70 (1979); Gunnels & Maher, *Constitutional and Legal Issues Relating to News Media Coverage of Terrorism* (unpublished).

B. CONSTITUTIONAL CONSIDERATIONS

Despite their publicity objective, terroristic criminal acts, by themselves, clearly fall outside the sphere of constitutionally protected expression. Such acts are not properly "speech" at all, but rather "conduct" causing harm without time or opportunity for speech in response.¹⁴⁷ Acts of terror-violence thus may be proscribed subject only to minimal due process scrutiny. Media reporting of terrorist attacks, on the other hand, generally constitutes expression protected by the first amendment since such coverage aims at informing and provides a basis for public awareness and discussion of terrorism.

There are two basic types of governmental abridgment of speech and press freedoms. First, content-based abridgments occur when government regulation aims at the communicative impact of the message.¹⁴⁸ Such regulation is presumptively unconstitutional unless the government shows that the content of the message presents a clear and present danger, the message is necessary to further a compelling state interest, or otherwise falls within some narrow category of speech not accorded first amendment protection.¹⁴⁹ The second form of abridgment occurs when the regulation is directed not at the message conveyed, but rather at its noncommunicative impact or harmful effect.¹⁵⁰ This form of regulation, one commentator has observed, is constitutional "so long as it does not unduly constrict the flow of information and ideas."¹⁵¹ Although the first amendment does not provide an absolute bar against government restriction in either case, the significance of the distinction is that, while the government must bear the burden of justifying content-based regulation, a balancing of the competing interests involved ordinarily suffices for regulation that is content-neutral.

The Clear and Present Danger Doctrine

The formulation of first amendment jurisprudence by the United

¹⁴⁷ Though the speech/conduct distinction has become somewhat outmoded and is of little utility in constitutional analysis, its persistence has been attributed to the Supreme Court's reluctance to rule "that the first amendment has any relevance whatsoever to political assassinations, radical bank robberies, or other violent modes of expression." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 601 (1978). See *United States v. O'Brien*, 341 U.S. 367 (1968); *United States v. Miller*, 367 F.2d 72 (2d Cir. 1966).

¹⁴⁸ L. TRIBE, *supra* note 147, at 580. See, e.g., *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748; *Keyishian v. Board of Regents*, 385 U.S. 254 (1967); *Miller v. Alabama*, 384 U.S. 214 (1966); *New York Times v. Sullivan*, 376 U.S. 254; *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁴⁹ L. TRIBE, *supra* note 147, at 581-84, 586, 602.

¹⁵⁰ *Id.* at 580-81. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Brandenburg v. Hayes*, 408 U.S. 665 (1972); *Kovacs v. Cooper*, 336 U.S. 77.

¹⁵¹ L. TRIBE, *supra* note 147, at 582.

States Supreme Court began with a series of cases¹⁵² involving subversive advocacy during World War I. In *Schenck v. United States*,¹⁵³ Justice Holmes, writing for a unanimous Court, made it clear that the protection afforded speech is not absolute but "depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing panic."¹⁵⁴ He proceeded to enunciate the clear and present danger test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."¹⁵⁵

Subsequent cases infused the clear and present danger doctrine with the requirement of immediacy¹⁵⁶ between the pertinent speech and threatened harm. In *Brandenburg v. Ohio*,¹⁵⁷ the Court stated its most recent formulation of the test:

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁵⁸

The clear and present danger doctrine remains an essential element of first amendment jurisprudence, perhaps even forming, as has been suggested,¹⁵⁹ a framework for the Supreme Court's analysis of most expression attacked for its content.¹⁶⁰ Speech otherwise constitutionally

¹⁵² *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

¹⁵³ 249 U.S. 47.

¹⁵⁴ *Id.* at 52 (citations omitted).

¹⁵⁵ *Id.*

¹⁵⁶ *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹⁵⁷ 395 U.S. 444 (1969) (per curiam).

¹⁵⁸ *Id.* at 447.

¹⁵⁹ *Krattenmaker & Powe, supra* note 76, at 1183-93.

¹⁶⁰ The possibility of restraints on media coverage of terrorist events is likewise suggested by analysis of questions of reconciling the first amendment with other substantive interests at stake in (1) the civil law of libel, (2) the free press/fair trial issue, and (3) questions of national security.

Libel laws protect the individual's interest in his good name and reputation, an interest that the Court has described as "a basic concern." *Herbert v. Lando*, 441 U.S. 153, 169 (1979). Until *New York Times v. Sullivan*, 376 U.S. 254, the Court classified libel as wholly outside the sphere of protected speech. That case, however, established that libel "must be measured by standards that satisfy the First Amendment." *Id.* at 269. Accordingly, the Court has adopted a bifurcated analysis of such actions. Although private individuals may recover for negligently inflicted defamatory falsehoods, public officials and public figures may recover only upon showing that the defendant made the falsehood with "actual malice," i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 271-72. Thus, since the defendant's state of mind is crucial in any libel action, the constitutional interest in free and open discussion must be balanced with the plaintiff's need

protected may be suppressed under the doctrine if the following requirements are met: (1) the harm sought to be avoided is specific; (2) the expression sought to be suppressed is likely to cause that harm; and (3) the threatened harm is imminent. Although it has been persuasively

for discovery. In *Herbert v. Lando*, 441 U.S. 153, the Court rejected the claim that the first amendment precluded direct inquiry into the editorial process pertaining to an allegedly defamatory telecast. The court maintained that such a privilege would completely foreclose establishing liability in such circumstances, *id.* at 171, and that even “[i]f such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.” *Id.* at 172.

The fair trial/free press issue entails accommodating the first amendment rights of the press with the sixth amendment right of a criminal defendant to “a speedy and public trial, by an impartial jury.” U.S. CONST. amend. VI. The Court had recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial as far back as *Shepard v. Maxwell*, 384 U.S. 333 (1966), which established that the trial judge has the affirmative duty to minimize the effects of prejudicial pretrial publicity. *See also* *Estes v. Texas*, 381 U.S. 532 (1965). *Nebraska Press Ass’n v. Stewart*, 427 U.S. 539 (1976), was the first case in which the Court explicitly examined the conflict between first and sixth amendment interests. *Nebraska Press*, however, involved the appeal of a lower court order prohibiting the reporting of prejudicial news, a factual situation triggering the strong presumption against the constitutional validity of prior restraints. A unanimous Court held that the gag order violated the first amendment by preventing the press from publishing information already in its possession, although it refused to preclude the possibility that some threats to fair trial rights “would possess the requisite degree of certainty to justify restraints.” *Id.* at 569-70. Although it would seem that “once a public hearing is held, the press may report it with impunity,” *L. TRIBE, supra* note 147, at 628, there is no correlative right of media access to closed hearings. The Court recently held in *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), that the public generally, and the press in particular, have no constitutional right of access to pretrial hearings where the parties in the litigation agree to closure in order to assure the accused’s fair trial rights. Furthermore, the decision suggests that any denial of access that is temporary rather than absolute would have a lower burden of justification since the press retains the opportunity, though delayed, “to inform the public of the details of the pretrial hearing accurately and completely.” *Id.* at 393.

A recent federal district court decision, *United States v. The Progressive*, 467 F. Supp. 990 (E.D. Wis. 1979), suggests a new approach in accommodating the first amendment with national security interests. *The Progressive*, a magazine with a circulation of 40,000, intended to publish an article allegedly revealing “The H-Bomb Secret,” which it argued was obtained from sources in the public domain. The government contended that technical details and concepts contained in the article had never before been published in conjunction with one another and that their disclosure presented an “immediate, direct, and irreparable harm to the interests of the United States,” *id.* at 991, 993, for which § 2274 of the Atomic Energy Act of 1954 permits suppression. In granting a preliminary injunction prohibiting publication, the court noted that, although the article probably did not “provide a ‘do-it-yourself’ guide for the hydrogen bomb,” its publication could enable a “medium size nation to move faster in developing a hydrogen weapon.” *Id.* at 993. The court noted the “disparity of risk” between a mistaken ruling that would “seriously infringe cherished First Amendment rights” and a mistaken ruling that “could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.” *Id.* at 995-96. If the government had not decided to drop its opposition to publication, affirmance on appeal might have indicated that when the harm threatened is serious enough, although speculative, the causal relationship ordinarily required between publication and the harm in order to justify a prior restraint may be somewhat less proximate.

argued that the clear and present danger doctrine would not permit regulation of violence televised for entertainment purposes,¹⁶¹ the doctrine would appear to provide a basis for regulating media reporting of terrorist incidents in at least three instances: first, where the terrorist attacks are perceived as a "demonstrated risk of specific threats to the social order"¹⁶² and no opportunity or time exists to respond to the information disseminated; second, in those rare circumstances where a media representative's remarks could be construed, in the context in which they are uttered, as an incitement to lawless action; and third, where media dissemination of specific information immediately jeopardized the lives of hostages. In each of these circumstances, a compelling state interest must outweigh countervailing first amendment values.¹⁶³

Prior Restraints

*Near v. Minnesota*¹⁶⁴ was the first case involving press censorship to come before the Supreme Court. Chief Justice Hughes wrote for the majority that since "the chief purpose of the first amendment's guarantee is to prevent previous restraints upon publication,"¹⁶⁵ a statute providing for the enjoinder of "malicious, scandalous and defamatory"¹⁶⁶ newspapers and periodicals was an unconstitutional infringement of press freedom. But the Chief Justice suggested that the prohibition against prior restraint is not absolute:

[T]he protection even as to previous restraints is not absolutely unlimited. But the limitation has been recognized only in exceptional cases No one would question but that government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force."¹⁶⁷

¹⁶¹ Krattenmaker & Powe, *supra* note 76, at 1193-96. In view of the inconclusive research findings concerning the relationship between terrorist events and media coverage thereof, that argument remains sound.

¹⁶² *Id.* at 1196.

¹⁶³ *See, e.g.*, *Landmark Communications v. Virginia*, 435 U.S. 829, 843 (1978); *First Nat'l Bank of Boston v. Belotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1.

¹⁶⁴ 283 U.S. 697. On prior restraints in general, *see Nebraska Press Ass'n v. Stewart*, 427 U.S. 539.

¹⁶⁵ 283 U.S. at 713.

¹⁶⁶ 1925 Minn. Laws ch. 285, §§ 1-2.

¹⁶⁷ 283 U.S. at 716. The difficulty imposed on the state in showing the constitutional validity of a prior restraint suggests why the United States has not ratified the Genocide Convention which in article III(c) prohibits "direct and public incitement to commit genocide." Convention on the Prevention and Punishment of the Crime of Genocide, U.N.

Forty years later in the Pentagon Papers Case,¹⁶⁸ the Supreme Court rejected by six to three the government's effort to restrain the publication of classified materials on the Vietnam War. The Court held that the government had failed to meet its "heavy burden of showing justification," since "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."¹⁶⁹

Thus, despite the strong presumption of unconstitutionality, prior restraints may be constitutionally permissible where specific harm of a grave nature would surely result from media dissemination of certain information. Although general reporting of terrorism would lack the contextual immediacy required to justify suppression, the same may not be true during contemporaneous coverage of ongoing incidents, particularly in hostage situations. Numerous scenarios are imaginable in which prior restraints may be justified to save lives, as for example where the perpetrators condition the lives of the hostages upon the media's dissemination of, or restraint in disseminating, a particular statement or viewpoint. Even though such demands could be tantamount to editorial control, if the media refused, citing their first amendment freedoms, an injunction compelling compliance may nevertheless issue.¹⁷⁰

GAOR, Res. 96(1), 78 U.N.T.S. 278 (Dec. 11, 1946). See Bassiouni, *Genocide and Racial Discrimination*, in INTERNATIONAL CRIMINAL LAW, *supra* note 3, at 522.

¹⁶⁸ *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). See also *United States v. The Progressive*, 467 F. Supp. 990, and note 160 *supra*.

¹⁶⁹ 403 U.S. at 713. Although the decision was initially evaluated as a decisive victory for the press, subsequent analysis of the nine separate opinions indicates a contrary conclusion. Of the six Justices who formed the majority, only Justices Black and Douglas urged that the first amendment constitutes an absolute bar against prior restraint. Although espousing a similar position, Justice Brennan refused to dismiss the possibility of an appropriate prior restraint where there is "allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." *Id.* at 726-27. It should be noted that the troopship exception, strictly construed, does not require that the threatened harm be *certain* to follow from the publication; what need be certain is merely an enhanced danger that the harm will occur. Disclosure of the sailing date of a troopship, for example, does not guarantee that the ship will be sunk by enemy action, but significantly increases the risk, always present, of its being sunk. For Justice Stewart prior restraint could be constitutionally permissible where disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people." *Id.* at 730. Likewise, Justice White, in concurrence, and Chief Justice Burger, Justice Harlan, and Justice Blackmun, in dissent, could not subscribe to a doctrine of first amendment absolutism. Perhaps Justice Blackmun captured the issue when he wrote: "[t]he First Amendment, after all, is only one part of an entire Constitution What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent." *Id.* at 745.

¹⁷⁰ The Hanafis, for example, demanded that the movie *Mohammad, Messenger of God*, cease being shown and United Artists complied. For an interesting elaboration of the scenario had the studio refused, see Bellows, *Hijacking the 1st Amendment*, MORE, June, 1977, at 16.

Criminal and Civil Sanctions

In the Pentagon Papers Case, several Justices indicated that the inappropriateness of prior restraint in that case would not immunize the press from subsequent criminal prosecution.¹⁷¹ Since criminal sanctions prompt self-censorship by exposing the media to possible subsequent punishment, and the defense of first amendment protection remains available during the trial,¹⁷² the content regulation involved in criminal sanctions would not appear to bear as heavy a presumption of unconstitutionality as prior restraints. Nonetheless, it has been established that "First Amendment protection reaches beyond prior restraints."¹⁷³ To sustain a constitutional attack, a criminal sanction punishing publication of "lawfully obtained, truthful information" after the event requires (1) "the highest form of state interest," and (2) demonstration "that its punitive action was necessary to further the state interests asserted."¹⁷⁴

It seems possible that a narrowly drawn criminal statute punishing media dissemination of information unnecessarily assisting the perpetrators or jeopardizing the lives of hostages may withstand constitutional scrutiny. The state interest in public safety during terrorist attacks is compelling, and showing the required close nexus between the regulatory means chosen and the interest asserted does not appear insurmountable in the context of ongoing incidents. Since the precedents¹⁷⁵ dealing with content regulation by criminal sanction are few and distinguishable from the circumstances under discussion here, the constitutional validity of such a criminal statute would largely depend upon the factual context in which it is challenged and upon the precision with which it is written, so as to withstand overbreadth, vagueness, and possibly equal protection analysis.

Civil actions against the media by the victims of terrorist incidents are a likely future development under the theory that media coverage contributed to the harm they sustained. Three cases to date indicate this new direction although in only one has a final decision been ren-

¹⁷¹ *New York Times Co. v. United States*, 403 U.S. at 733 (White, J., concurring); *id.* at 730 (Stewart, J., concurring). *See also* *Near v. Minnesota*, 283 U.S. at 720 ("Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.")

¹⁷² *See* L. TRIBE, *supra* note 147, at 727.

¹⁷³ *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

¹⁷⁴ *Id.*

¹⁷⁵ *See, e.g., id.* (holding that state interest insufficient to justify statute punishing publication of juvenile offender's identity, particularly where no provision for punishment for disclosure by the electronic media); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding criminal group libel law); *Winters v. New York*, 333 U.S. 507 (1948) (holding criminal statute punishing publications devoted to accounts of criminal deeds unconstitutionally vague, refusing to decide the substantive first amendment issue).

dered. In *Weirum v. RKO General, Inc.*,¹⁷⁶ the Court found a radio station liable for the wrongful death of an individual killed when his car was forced off the road by two teenagers pursuing a traveling disc-jockey who had been giving away money pursuant to a contest in which the station gave hints over the air as to his location. In *Niemi v. National Broadcasting Corporation*,¹⁷⁷ the complaint alleged that the prime time telecast of "Born Innocent," a program depicting the rape of a young girl, proximately caused a similar sexual assault four days later on the nine-year-old plaintiff. A California appellate court reversed and remanded the case following the trial court's dismissal for lack of deliberate incitement of the attack. The third case, *Kane v. National Broadcasting Corporation*,¹⁷⁸ has yet to be heard, but evidently the plaintiff brought the action under the same theory as *Niemi*.

It remains questionable whether negligence actions based on the media's alleged irresponsibility and recklessness will be deemed violative of the media's first amendment rights. It is conceivable that in appropriate circumstances involving coverage of ongoing incidents, courts may hold a medium liable for incitement to violence or even for intentional infliction of harm under the legal principle that an individual intends the reasonably foreseeable consequences of his actions.

Regulation Independent of Content

Restrictions as to time, place, and manner are general regulatory statutes which further valid governmental interests wholly unrelated to the content of the expression regulated.¹⁷⁹ Regulation of the time, place, and manner of protected expression is subject to a weighing of the respective interests involved and is constitutionally permissible, even though the indirect result is to constrict the flow of information or ideas,¹⁸⁰ provided that the governmental purpose is not attainable by less restrictive alternatives.¹⁸¹ On this basis, government may seek to impose limitations on the use of live coverage during ongoing terrorist incidents, on the use of certain obtrusive lighting and equipment, or perhaps even on the contemporaneous reporting of certain details presenting a clear and present danger to life and effective law enforcement management. Limiting in these ways the mode of presentation of

¹⁷⁶ 15 Cal. 3d 40, 539 P.2d 36, 123 Cal. Rptr. 109 (1976).

¹⁷⁷ 74 Cal. App. 3d 383, 141 Cal. Rptr. 511 (1977), *cert. denied*, 435 U.S. 1000 (1978).

¹⁷⁸ No. 77 Civ. Ct. 1193 (S.D.N.Y.).

¹⁷⁹ See note 129 *supra*. Usually cited in support of non-content regulation of speech is *United States v. O'Brien*, 391 U.S. 367. See also Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Stone, *Restrictions of Speech Because of Its Content*, 46 U. CHI. L. REV. 81 (1978).

¹⁸⁰ L. TRIBE, *supra* note 147, at 682.

¹⁸¹ See, e.g., *Schneider v. State*, 308 U.S. 147 (1939).

terrorist incidents arguably would not prohibit media dissemination of the information in alternate forms.

Access restrictions to the scene of ongoing terrorist attacks would raise the issue of the media's news gathering rights under the first amendment. In *Branzburg v. Hayes*,¹⁸² the Court held that newsmen summoned before grand juries conducting good faith criminal investigations cannot claim even a qualified testimonial privilege, even though the identity of confidential sources would be revealed by compelling their testimony. Although recognizing that "without some protection for seeking out the news, freedom of press could be eviscerated,"¹⁸³ the Court rejected the claim that the burden on news gathering outweighed the public interest in obtaining the information and noted that the Constitution does not guarantee the press special access to information not available to the public generally:

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.¹⁸⁴

Subsequent to *Branzburg*, the press presented new demands for affirmative rights of access to, *inter alia*, government reports, congressional galleries, and official press conferences.¹⁸⁵ In *Pell v. Procunier*¹⁸⁶ and *Saxbe v. Washington Post Co.*,¹⁸⁷ the Court rejected challenges to prohibitions of

¹⁸² 408 U.S. 665 (1972). See also *Houchins v. KQED*, 438 U.S. 1 (1978) (denying media access to prisons). Cf. *Richmond Newspapers, Inc., v. Virginia*, 100 S. Ct. 2814 (1980) (right of access to criminal trials).

¹⁸³ 408 U.S. at 681.

¹⁸⁴ *Id.* at 684-85. See also *Zemel v. Rusk*, 381 U.S. 1 (1965), in which the Supreme Court rejected appellant's argument that the denial by the Secretary of State of his application for a travel permit to Cuba violated, among other rights, his first amendment right to the free exchange of ideas and information. Justice Warren, writing for the majority, noted that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 17. A California court has stated:

Restrictions on the right of access to particular places at particular times are consistent with other reasonable restrictions on liberty based upon the police power, and these restrictions remain valid even though the ability of the press to gather news and express views on a particular subject may be incidentally hampered.

Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal. App. 3d 448, 455, 88 Cal. Rptr. 605, 610 (1970).

¹⁸⁵ See, e.g., *Seattle-Tacoma Newspaper Guild, Local 82 v. Parker*, 480 F.2d 1062 (9th Cir. 1973); *Borra v. Fasi*, 369 F. Supp. 906 (D. Hawaii 1974); *Lewis v. Baxley*, 368 F. Supp. 768 (M.D. Ala. 1973); *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n*, 365 F. Supp. 18 (D.D.C. 1973); *Washington Post v. Kleindienst*, 357 F. Supp. 770 (D.D.C. 1972); *McMullen v. Wohlgenuth*, 453 Pa. 147, 308 A.2d 888 (1973), *appeal dismissed for want of substantial federal question*, 415 U.S. 970 (1974).

¹⁸⁶ 417 U.S. 817 (1974).

¹⁸⁷ 417 U.S. 843 (1974).

personal interviews between newsmen and inmates of state and federal prisons. The Court held that since the restrictions did not "deny the press access to sources of information available to members of the general public,"¹⁸⁸ no violations of the media's first amendment rights were involved. Following the direction of *Branzburg*, the Court concluded that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public,"¹⁸⁹ and that the first amendment guarantee of press freedom does not "require the government to accord the press special access to information not shared by members of the public generally."¹⁹⁰ Consistent with these developments, therefore, the courts could deny the media access to scenes of terrorist events, since the public typically is banned from those sites.

The Special Status of Broadcasting

The broadcasting industry is regulated by the Communications Act of 1934,¹⁹¹ which empowers the Federal Communications Commission to grant renewable three-year broadcasting licenses on the basis of a "public interest, convenience, or necessity"¹⁹² standard. Section 3(h) provides that licensees "shall not . . . be deemed a common carrier,"¹⁹³ while section 326 declares that the FCC has no "power of censorship, nor power to interfere with the right of free speech."¹⁹⁴

Although broadcasters have strenuously argued that the first amendment has equal applicability to their medium under section 326, the Supreme Court has declined to recognize any "unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."¹⁹⁵ Judicial precedent¹⁹⁶ lends support to government regulation of broadcasting in three ways. First, FCC licensing procedures permit consideration of past and prospective programming in determining whether the renewal or grant of a license is consistent with the public interest, convenience, or necessity.¹⁹⁷ Second, statutory prohibitions and FCC rules include (1) a ban on obscenity and

¹⁸⁸ 417 U.S. at 835.

¹⁸⁹ *Id.* at 834.

¹⁹⁰ *Id.*

¹⁹¹ 47 U.S.C. §§ 151-609 (1970). For a discussion of the special status of the broadcast media, see generally L. TRIBE, *supra* note 147, at 696-700.

¹⁹² See 47 U.S.C. §§ 303, 307, 309 (1970).

¹⁹³ *Id.* § 153(h).

¹⁹⁴ *Id.* § 326.

¹⁹⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). See also *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) ("Of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

¹⁹⁶ See Albert, *Constitutional Regulation of Televised Violence*, 64 VA. L. REV. 1299, 1318-19 & n.107 (1978).

¹⁹⁷ See *id.* at 1319-27.

profanity,¹⁹⁸ (2) the equal time provision which requires that, when one candidate for public office is permitted to use broadcast time, all candidates for that office must be offered equal opportunities,¹⁹⁹ (3) the fairness doctrine which requires licensees "to afford reasonable opportunity for the discussion of conflicting views of issues of public importance,"²⁰⁰ and (4) standards against deliberate distortion or bias in news programming and documentaries.²⁰¹ Finally, the FCC encourages industry self-regulation by issuing policy statements, letters of advice, and reprimands.

Various rationales exist for the differential first amendment treatment afforded broadcasting: public ownership of the airwaves, the unique power of the medium, spectrum scarcity, and the medium's pervasiveness and intrusiveness.²⁰² In *Red Lion Broadcasting Co. v. FCC*,²⁰³ Justice White, writing for a unanimous Supreme Court, observed that, while broadcasting is "affected by a First Amendment interest,"²⁰⁴ the relative scarcity of frequencies in comparison to the demand for them permits the government²⁰⁵ "to put restraints on licensees in favor of others whose views should be expressed on this unique medium It is the right of viewers and listeners, not the right of the broadcasters, which is paramount."²⁰⁶ In *FCC v. Pacifica Foundation*,²⁰⁷ upholding the FCC's authority to proscribe the broadcast of an indecent monologue, the Court employed a new rationale based on two characteristics of broadcasting: Its "uniquely pervasive presence"²⁰⁸ and the presence of unsupervised children in the audience.²⁰⁹ Although the holding in *Pacifica* was a narrow one and has met with criticism,²¹⁰ it nevertheless provides a new justification for affording broadcasting limited first amendment protection particularly when new technologies may soon obviate the scarcity rationale.²¹¹

¹⁹⁸ 18 U.S.C. § 1464 (1976).

¹⁹⁹ 47 U.S.C. § 315(a) (1970).

²⁰⁰ *Id.*

²⁰¹ See Albert, *supra* note 196, at 1335-37.

²⁰² See Krattenmaker & Powe, *supra* note 76, at 1221-35.

²⁰³ 395 U.S. 367 (1969) (upholding constitutionality of the fairness doctrine).

²⁰⁴ *Id.* at 386.

²⁰⁵ *Id.* at 388.

²⁰⁶ *Id.* at 390.

²⁰⁷ 438 U.S. 726 (1978).

²⁰⁸ *Id.* at 748.

²⁰⁹ *Id.* at 749.

²¹⁰ See Krattenmaker & Powe, *supra* note 76, at 1280-88. See also Note, *First Amendment—Obscenity and Indecency*, 69 J. CRIM. L. & C. 474 (1978); Note, *Keeping the Airwaves Safe for Indecency—Pacifica Foundation v. Federal Communications Commission*, 27 DE PAUL L. REV. 155 (1977).

²¹¹ See generally Brown, *Television v. Progress*, SATURDAY REV., Sept. 16, 1978, at 24.

C. PROPOSED SOLUTIONS

While intended as an agenda for discussion and not as a blueprint for government action, the foregoing analysis indicates that potential government regulators would not lack a constitutional basis for imposing at least some restrictions on media reporting of terrorist incidents, particularly in hostage-taking situations. Court orders restraining media personnel may be obtainable where, presenting a clear and present danger to the lives of hostages and law enforcement personnel, media coverage would disseminate such information as (1) possible escape routes for hostages, (2) the location of potential hostages whose whereabouts appear unknown to the terrorists, (3) the deployment and tactics of law enforcement personnel to capture the terrorists and free the hostages, and (4) the strategies of police negotiators. Although the constitutional validity of specific proposals for direct media regulation would depend on whether the circumstances are sufficiently extraordinary and the state interest sufficiently compelling, indirect regulation—such as access restrictions or FCC action—would probably face lesser constitutional objections. In light of the foregoing constitutional analysis, however, it is preferable that the media either adopt their own guidelines to regulate the conduct of their members or, in the alternative, adopt a licensing procedure which entails such graduated sanctions as reprimands, suspension, and revocation depending upon the gravity of the violation as measured by the harm to hostages and the causal connection between such harm and media reporting. The failure of the media to regulate themselves in the context of terror-violence could result in greater governmental regulation and harsher sanctions.²¹²

The constitutional issues presented by media reporting during terrorist incidents remain untested in the courts. Since a vigorous and independent press is essential to the functioning of democratic government, the media should arguably play an adversarial role with respect to civil authority. Democratic institutions work best, however, when there is provision for flexibility and forbearance on each side. Any direct collision over first amendment freedoms would merely shift the problem to a higher conflict of values²¹³ and postpone steps toward the prevention and control of terror-violence. Consequently, the public interest can only suffer, and the terrorist's objective be aided, should active enmity characterize media-government relations.

Any comprehensive solution to the problems presented by the me-

²¹² Again, it is emphasized that no proposal is advanced here concerning media coverage of general incidents of violence. Suggested guidelines are limited to coverage of ongoing terroristic incidents posing grave danger of harm to hostages.

²¹³ *Terror Violence*, *supra* note 1, at 764.

dia's vulnerability to terrorist manipulation must take into consideration at least five competing interests: (1) the public's basic right to be informed through a free press; (2) the safety and well-being of hostages; (3) the public's need for effective law enforcement response; (4) the deterrence and prevention of future terroristic crime; and (5) the need to respect the privacy of victims.²¹⁴ Although the complexity of terror-violence factual settings frequently precludes absolute priorities among these interests, the parameters of a solution are clear. An absolute ban on media coverage of ongoing incidents is clearly unacceptable despite the fact that any coverage represents a concession to the publicity objective of the terrorist;²¹⁵ such a ban could promote exaggerated word-of-mouth rumors, impair the public credibility of both the media and civil authority, and may encourage potential terrorists to devise even more spectacular attacks that cannot be ignored. On the other hand, concern for human life should outweigh competitive urge. Although the public must be informed about occurrences of terrorist attacks, the public's right to know may be satisfied in certain instances by less than full disclosure of all particulars concerning those incidents. Only cooperation and understanding between the media and the police can frustrate the publicity objective of terroristic crime.²¹⁶

Since the media and law enforcement both act in the public interest, voluntary cooperation, based on affirmative duties, should be possible. Both media managers and law enforcement officials, however, must exercise judgment, restraint, and sensitivity with respect to the obligations and difficulties of the other, in addition to their own. As the Task Force on Disorders and Terrorism recommends, law enforcement officials should endeavor to maximize the media's access to reliable, accurate information, since generally "it is more—and more balanced coverage—rather than less coverage that will best promote both crime prevention and public confidence in law enforcement."²¹⁷ Thus police should establish a media information center as near to the site of an ongoing incident as practicable. Such a center would facilitate the release of official information and provide a centralized location where media personnel can verify information as well as be apprised of the detrimental potential of specific reportage. The media, on the other hand, must recognize that "in a relatively small number of situations involving extraordinary violence, where emergency conditions exist or where a criminal objective would be furthered by press coverage, argu-

²¹⁴ See Mann, *Personnel and Property of Transnational Corporations*, in LEGAL ASPECTS, *supra* note 1.

²¹⁵ DISORDERS AND TERRORISM, *supra* note 63, at 238.

²¹⁶ *Id.* at 185.

²¹⁷ *Id.* at 237.

ments in favor of temporary, limited, but effective regulation of the media should be given weight."²¹⁸ It is generally recognized, however, that necessary or appropriate restraints in the timing, content, or techniques of coverage are best left to the determination of those who make news decisions.²¹⁹

The media have demonstrated increasing awareness that during terrorist incidents they must balance their responsibility to provide full and fair coverage with their responsibility not to increase the threat to life and impede effective law enforcement. After the Hanafi Muslim incident, for example, The National News Council offered to become a clearinghouse for internal guidelines prepared by news organizations.²²⁰ Among the first to formulate written guidelines for coverage of terrorist/hostage situations were four major news organizations—CBS News, the Louisville *Courier-Journal and Times*, the Chicago *Sun-Times* and *Daily News*, and United Press International. Other organizations subsequently followed, some no doubt prompted by a solicitation of media views in October, 1978, by Representative Don Edwards, Chairman of The Subcommittee on Civil and Constitutional Rights. Most guidelines share a number of characteristics. First, they adopt a flexible approach emphasizing case-by-case determination of the newsworthiness of the event, the use of balance and restraint, and the avoidance of sensationalism. Most attempt to avoid affording the terrorist an unedited platform, often suggesting that the demands be paraphrased. The guidelines suggest that media personnel avoid becoming participants or intermediaries in terrorist situations. Most provide for greater control over coverage by senior news executives, particularly with regard to the use of live broadcasts. None of the guidelines, however, prohibit media personnel from directly contacting the terrorists for interviews or by telephone. Curiously, most of the guidelines reiterate the basic principles of professional journalism—accuracy, balance, common sense—and thereby suggest, as one commentator has remarked, “an embarrassing question: Shouldn’t

²¹⁸ *Id.*

²¹⁹ The role of the news media in terrorist incidents has come to the attention of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. In its Staff Report on *Federal Capabilities in Crisis Management and Terrorism*, the need for voluntary self-restraint on the part of the media was recognized:

Government officials, law enforcement officers and media representatives generally understand the need to develop voluntary flexible guidelines for news coverage of a terrorist incident. The development of voluntary guidelines would foster a mutual understanding between the media and law enforcement, thereby serving both the media’s pursuit of the news and law enforcement’s duty to maintain order and preserve human life and property.

STAFF REPORT OF THE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., *FEDERAL CAPABILITIES IN CRISIS MANAGEMENT AND TERRORISM* 15-16 (Comm. Print 1979).

²²⁰ N.Y. Times, March 23, 1977, § 2, at 4, col. 2.

journalists ask themselves how these basics sometimes get shoved aside, ignored or forgotten when they're most necessary?"²²¹ Furthermore, the guidelines adopted so far do not attempt to resolve the essential problem posed by media coverage: how to avoid the media becoming the inducement for or instrument of terroristic crime.

A comprehensive solution might involve the following recommendations:

1. *Timing*: The media should delay reporting details that could inflame or aggravate an incident, particularly information that could provide terrorists with valuable intelligence. Such information need not be permanently suppressed, merely delayed until after the danger has passed.²²²
2. *Balance*: The amount of coverage afforded an incident should be in proportion to its objective news values. In covering a specific incident, the media should provide factual background reports of terrorism generally and appropriate follow-up coverage of the consequences to the victims and perpetrators. The media should balance dissemination of information about the perpetrators with information about the official response to them. Sensationalism and excessive publicity should be avoided, particularly with respect to propaganda demands and live interviews. The media should avoid speculative reporting and unverified casualty figures and rumors. Disclosure of "how-to" aspects and specific law enforcement strategies and tactical capabilities should be minimized to prevent aiding terrorists in planning future attacks.
3. *Cooperation*: Media personnel should attempt to cooperate with police and other news organizations in order to minimize abuses arising from unrestrained competition. Reporters and equipment should be pooled when practicable to minimize obtrusiveness and burdens on law enforcement personnel. In cases of extraordinary violence, a metropolitan committee of editors and news directors should be constituted with authority to promulgate additional restraints as may be required. To facilitate dissemination of accurate information, media supervisory personnel should make themselves available to law enforcement officials, and enforcement agencies should train some officers to deal specifically with the problem of public information.
4. *Non-intervention*: Media personnel should avoid becoming a party to the negotiation process and should curtail direct contact with perpetrators during ongoing incidents. Qualified news personnel may undertake direct contact with the perpetrators after resolution of the incident only upon the express authorization of senior news executives and after consultation with appropriate authorities so as not to interfere with police communications, incite the perpetrator by particular

²²¹ Czerniejewski, *Guidelines for the Coverage of Terrorism*, QUILL, July-Aug., 1977, at 23.

²²² This recommendation would have particular value in protecting targets highly vulnerable to extensive public injury if successfully attacked. The most obvious example is, of course, nuclear power plants. In that context, the media should at least refrain from divulging information until law enforcement officials receive notice of the danger and have reasonable opportunity to rectify the problem.

questions or phrasing, or vitiate police efforts to minimize harm to persons or property.

5. *Education*: Media coverage should emphasize the following: (a) resort to terroristic violence is contrary to social values and has a low probability of success; (b) police must operate under the drastic practical handicap of minimizing harm to persons and property in relation to terror-violence; (c) police personnel take the same risks as those taken by terrorists; and (d) society is not helpless with respect to terror-violence, but rather acts within a certain legal framework. The media should provide access for the voices of reason among dissident groups in order to minimize the need to resort to violence. Various tertiary institutions should promote responsible media coverage through continuing professional education of media personnel, professional codes and associations, and periodic conferences between law enforcement officials and media policymakers to facilitate the frank exchange of views and concerns.

With respect to the electronic media, another area for self-regulation is that of media control over the content of broadcasts and the realization of the terrorists' objective of dissemination. That problem was evident in the Gallegos interview discussed above. Both ABC and CBS satisfactorily regulated their own conduct while NBC abdicated its responsibility by permitting the Iranians to control the media with little discernable benefit to the public.²²³

Some of these proposals are not alien to the traditional exercise of self-restraint now practiced by the United States media. Cooperation between the media and civil authority is not without precedent, as evidenced by kidnapping cases since the 1931 Lindbergh case and by events during World War II. Other proposals may require adjustment in the traditional role of journalism as an objective reporter of events. Such claims to impartiality, however, do not insulate the media from becoming the instrument of terroristic crime. As Professor Jaehnig explains:

The problem lies in journalism's moral neutrality posture, which prohibits the development of an ethic oriented toward the maintenance of the community, its standards, values and culture. Traditions that prescribe an inflexible "watchdog" role for the press, or emphasize the publication of terrorist rhetoric when the community itself feels intimidated, appear self-defeating. Clearly judgments must be made by journalists that differentiate between wars of ideas fought within legitimated institutions of the community, and struggles fought outside these institutions and which rely upon violence rather than verbiage, intimidation instead of intellect. As one journalist argues: "When hate propagandists and apostles of violence attack the democratic body politic, the journalist must be more than a passive channel of communication. He has got to be a crusader for a cli-

²²³ See notes 97-103 & accompanying text *supra*.

mate of reason in which ordered liberty and due process can work."²²⁴

Thus the time is ripe to discuss a more active role for the media in handling terror-violence coverage. The media's failure to take the initiative would only exacerbate existing conflicts and invite the search for more restrictive alternatives. It bears repeating, however, that in societies where freedom of the press is nonexistent or strictly controlled, the problems discussed herein do not occur. In those societies it is usually the state that engages in or sponsors terror-violence. A free and responsible media is an indispensable element of democracy. And without democracy no society can be free and no individual can be assured the essential guarantees of human justice.

²²⁴ Jaehnig, *Journalists and Terrorism: Captives of the Libertarian Tradition*, 53 IND. L.J. 717, 743 (1978).