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

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

Michelle Ward Ghetti*

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“There is no need to cry in the wilderness when anyone so inclined can plead his case on national television.”¹

I. PREFACE

The following piece, written twenty-five years ago,² is remarkable for four reasons: (1) it illustrates that terrorism and/or publicity-seeking crime and the media coverage of it were concerns being discussed twenty-five years ago;³ (2) it is prophetic as to many issues;⁴ (3) there has been little development in the law in this area,⁵ despite an explosion of both broadcast technology/coverage⁶ and publicity-seeking crime⁷ since that time; and (4) there has been little to no coverage of it in legal journals.⁸

In the twenty-five years prior to the Article being written in 1982, approximately sixty incidents of non-state sponsored terrorism were documented within the United States or targeting United States citizens—more than there have been since 1982, although much of it was

1. Pohlmann & Foley, *Terrorism in the 70's: Media's Connection*, 61 NAT'L FORUM 33, 34 (1981).

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

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

4. See, e.g., the discussion of the expected impact of television news in the future *infra* notes 71-75.

5. See discussion *infra* at notes 31-39.

6. See discussion *infra* at notes 14-24.

7. See *Appendix B* and note 26, *infra*, for a list of terrorist crimes committed in the United States or against Americans since that time. Actually, terrorist crime in the United States has decreased since 1982, although international terrorism has increased.

8. See discussion *infra* at notes 39-40.

due to the racial unrest and antiwar sentiment in the United States at that time.⁹ By 1982, media coverage of such acts was being discussed within the media itself,¹⁰ in general publications,¹¹ and in higher education journals, both in the schools of journalism¹² and law.¹³

In 1982, the ability to cover publicity-seeking crime and broadcast it quickly and to large numbers of people was only in its infancy. Electronic news gathering (“ENG”)¹⁴ had only just begun¹⁵ Satellite broadcasting technology, enabling broadcasts from a distance, had only been developed in 1962,¹⁶ the United States had only placed its first true geostationary satellite

9. See Appendix A, *infra*.

10. The major forum for self-appraisal was a myriad of meetings of journalistic organizations and associations during 1977. For a discussion of these panels and meetings, see Herbert A. Terry, *Television and Terrorism: Professionalism Not Quite the Answer*, 53 IND. L.J. 745, 756-57 (1978). It is believed that the major impetus for the introspection was an incident in 1977 in Indianapolis, Indiana, wherein Tony Kiritis took a banker hostage for sixty-three hours, while making calls to a radio talk show host who broadcast everything he said on the air. He then stood outside with the hostage, a sawed-off shotgun wired to shoot him in the head, while making an emotional speech on live television.

11. See, e.g., *What's Right, Wrong with Television News*, U.S. NEWS & WORLD REPORT, Mar. 16, 1981 at 45 (Interview with Walter Cronkite) [hereinafter *Right, Wrong*].

12. See, e.g., Charles Fenyvesi, *Looking Into the Muzzle of Terrorists*, QUILL, Jul.-Aug. 1977, at 16 (stating that competitiveness within the industry had placed the lives of hostages in undue danger); Mark Monday, *What's Wrong With Our Aim*, QUILL, Jul.-Aug. 1977, at 19 (explaining journalists should be better trained to understand and cover terrorists); Halina Czerniejewski, *Guidelines for the Coverage of Terrorism*, QUILL, Jul.-Aug. 1977, at 21 (noting that formal guidelines and a more thoughtful study of the problem are needed).

13. For example, in 1978, again in response to the Kiritis hostage-taking situation, the Indiana School of Law published a symposium issue dedicated to the issue of media coverage of publicity-seeking crimes. See, e.g., Terry, *supra* note 10, at 756-57; Walter B. Jaehnig, *Journalists and Terrorism: Captives of the Libertarian Tradition*, 53 IND. L.J. 717, 720 (1978); Jordan J. Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives*, 53 IND. L.J. 621 (1978).

14. ENG is the use of electronic means for news coverage and transmission in place of using film as an intermediate step. Nielsen Media, Glossary of Media Terms—E Page, <http://www.nielsenmedia.com/glossary/terms/E/E.html> (last visited Apr. 16, 2008).

15. See Wysong Enterprises, Inc., Electronic News Gathering, http://www.wysongusa.com/electronic_news_gathering.html (last visited Apr. 16, 2008). ENG originally referred to the use of point-to-point terrestrial microwave signals to backhaul the remote signal to the studio. In modern news operations, however, it also includes satellite news gathering (SNG) and digital satellite news gathering (DSNG). ENG is almost always done using a specially modified truck or van. Terrestrial microwave vehicles can usually be identified by their masts which can be extended up to fifty feet (fifteen meters) in the air (to allow line-of-sight with the station's receiver antennas), while satellite trucks always use a larger dish that unfolds and points skywards toward one of the geostationary communications satellites.

16. Pacific Satellite, Satellite History, <http://www.pacificsatellite.com/project2.php> (last visited Apr. 16, 2008) (non-stationary satellite Telstar); Daniel L. Brenner et al., *History of Satellite Communications - The First Satellites*, 2 CABLE TV § 14:2 (2008).

in space in 1974¹⁷ and by 1979, the United States had only three geostationary satellites in space.¹⁸ Cable television was a recent invention with few people having access to it.¹⁹ Mobile phones had only just been introduced to journalism in the 1980s,²⁰ and did not contain texting or imaging capabilities as they do today. Digital cameras were not created until the late 1990s.²¹ The Internet was in its infancy,²² the IBM personal computer having only been created in 1981.²³ The first twenty-four hour

17. EDinformatics, Communications Satellite, http://www.edinformatics.com/inventionsinventors/communication_satellite.htm (last visited Apr. 16, 2008); Satellite Industry Association, Satellites History, <http://www.sia.org/history.html> (last visited Apr. 16, 2008) (referring to Weststar).

18. See David J. Whalen, *Communications Satellites: Making the Global Village Possible*, NASA History Division, <http://www.hq.nasa.gov/office/pao/History/satcomhistory.html> (last visited Apr. 16, 2008) (Satcom I was launched in 1975). Television began using satellites on March 1, 1978 when the Public Broadcasting Service (PBS) introduced Public Television Satellite Service. Broadcast networks adopted satellite communication as a distribution method from 1978 through 1984. Federal Communications Commission, History of Satellite TV, http://www.fcc.gov/cgb/kidszone/history_sat_tv.html (last visited Apr. 16, 2008).

19. In 1980, only fifteen million people had access to cable, and they were typically in rural communities receiving local broadcasts. See Cable NJ, <http://www.cablenj.org/AboutUs/CableHistory.asp> (demonstrating advancements in cable) (last visited Mar. 23, 2008). By 1989, fifty-nine million people had access. By 1995, there were 139 different cable channels available. *Id.* By the late 1980s, ninety-eight percent of all homes in the U.S. had at least one television set. See EDinformatics, http://edinformatics.com/inventions_inventors/television.htm (exploring the history of various media outlets) (last visited Mar. 23, 2008). Today, eighty-five percent of all U.S. households have cable, satellite or some other form of multi-channel reception. See Ted Hearn, *Analog Cutoff is Panned on Hill*, MULTICHANNEL NEWS, Sept. 30, 2002, <http://www.multichannel.com/article/CA246911.html>.

20. See Collette Snowden & Kerry Green, *Media Reporting, Mobility and Trauma*, 10 MEDIA/CULTURE 1, Mar. 2007, available at <http://journal.media-culture.org.au/0703/04-snowden-green.php>.

21. *Id.*

22. Internet Protocol ("IP") and Transmission Control Protocol ("TCP") were introduced in 1981 creating the TCP/IP protocol that much of the Internet uses today. Today, 1.173 billion people in the world use the Internet (approximately eighteen percent): approximately seventy percent of Americans, twelve percent of people in Asia, forty percent in Europe, and fifty-five percent in Australia. See Internet World Stats: World Internet Users, <http://www.internetworldstats.com/stats.htm> (last visited Mar. 23, 2008). Use of the Internet in the United States grew 225% between 2000 and 2007. More amazing is that use of the Internet increased 645% in Africa (3.6% use it), 495% in the Middle East (10.1% use it) and 509% in Latin America (19.8% use it). See Internet World Stats: Internet Usage Statistics for the Americas, <http://www.internetworldstats.com/stats2.htm> (last visited Mar. 23, 2008).

23. See IBM, IBM Personal Computer: Before the Beginning: Ancestors of the IBM Personal Computer, http://www-03.ibm.com/ibm/history/exhibits/pc/pc_1.html (last visited Apr. 16, 2008).

news channel, Cable News Network (“CNN”), was only launched in 1980.²⁴ Of course, today, all major media outlets have websites.

Since 1982, there have been at least 522 documented incidents of non-state sponsored terrorism throughout the world,²⁵ thirty-seven on American soil or targeting American citizens or assets.²⁶ Today, publicity-seeking criminals—such as Osama Bin Laden,²⁷ the Virginia Tech shooter, Seung-Hui Cho,²⁸ and Jack McClellan²⁹—unabashedly use the media to carry their message directly to the world.

Since 1982, the lower federal courts in the United States have dealt with the balance between media and the First Amendment in only limited ways. They have dealt with the reporter’s privilege and found it insufficient to block the government’s access to phone records relevant to funding of terrorism³⁰ or defendants’ access to videotaped interviews of terrorists,³¹ they have restricted media coverage of deportation proceedings where terrorism is involved,³² and they have found no right of the media to imbed a

24. See The History of Branding, History of CNN, <http://www.historyofbranding.com/cnn.html> (last visited Apr. 16, 2008). Today, there are five 24-hour news channels on cable in the United States: CNN, Headline News, Fox News Channel, MSNBC, and CNBC, as well as some regional channels. See Diane Ainsworth, *25 Hour News Through the Looking Glass*, BERKELEYAN, Jul. 12, 2000, <http://www.berkeley.edu/news/berkeleyan/2000/07/12/news.html>.

25. See Appendix B, *infra*.

26. Additionally, according to Mark Potok, Director of the Intelligence Project at the Southern Poverty Law Center, law enforcement officials have foiled sixty domestic terror plots since the Oklahoma City bombing and the number of hate groups has risen thirty-three percent since 2000 with 803 hate groups in existence in 2005. See Tim Talley, *Experts Fear Oklahoma City Bombing Lessons Forgotten*, SAN DIEGO UNION-TRIBUNE, Apr. 17, 2006.

27. See, e.g., *Bin Laden Video Finally Makes Militant Websites*, <http://www.usatoday.com/news/world/2007-09-08-bin-laden-videoN.htm?csp=34> (last visited Mar. 23, 2008) (regarding purposeful release of Bin Laden tape to news outlets before releasing it on the Internet).

28. See *What We Know*, <http://www.msnbc.msn.com/id/18185859/> (last visited Mar. 23, 2008) (detailing the package of correspondence express-mailed to NBC News during the two hours between the first and second shootings by Cho).

29. Jack McClellan is the self-admitted pedophile who ran a Web site with pictures of children and tips for other pedophiles. Fox News and others gave him an interview due to a Seattle newspaper report that Fox picked up on. See Katherine Noyes, *Judge Slaps Publicity-Seeking Pedophile With Restraining Order*, TECH NEWS WORLD, Aug. 6, 2007, <http://www.technewsworld.com/story/58695.html>.

30. See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

31. See *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

32. See *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002), *aff’d*, 303 F.3d 681 (6th Cir. 2002); *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

journalist with the troops.³³ They have also dealt with civil claims against media alleging that the media outlet aided and abetted crime³⁴ or negligently caused harm to another person.³⁵ The United States Supreme Court has remained silent. The more interesting legal developments have been in the international arena with the United Nations³⁶ and the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁷ passing resolutions that affect media coverage of terrorism and with three cases in international courts that affected media coverage of terrorism.³⁸

Very little has been published on media coverage of terrorism or publicity-seeking crime in the mainstream law journals or in books.³⁹ Most

33. *Flynt v. Rumsfeld*, 355 F.3d 697, 703 (D.C. Cir. 2004).

34. *See, e.g., Rice v. Paladin Enter.*, 128 F.3d 233 (4th Cir. 1997) (murder victim's family sued publisher of "hit man instruction manual" for aiding and abetting murder and won); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992) (\$4 million verdict to two brothers for murder of father).

35. *See, e.g., Clift v. Narragansett Television L.P.*, 688 A.2d 805 (R.I. 1996) (suicide victim's family sued television station for interview of family member during police standoff for allegedly negligently contributing to his suicide); *Risenhoover v. England*, 936 F. Supp. 392 (W.D. Tex. 1996) (families of ATF agents killed during the Branch Davidian/David Koresh search/arrest warrant execution allowed to sue newspaper and television stations which allegedly informed the Davidians pre-raid); *Hyde v. City of Columbia*, 637 S.W. 2d 251 (Mo. App. 1982); *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (denying negligence cause of action against newspaper for releasing name of rape victim legally obtained as violative of First Amendment).

36. *See G.A. Res. 51/210*, paras. I(3)(c), I(4), U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

37. *See Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 222, art. 10 on 7, available at <http://www.echr.coe.int/echr/> (click on 'Basic Texts,' then click on 'English') (last visited Apr. 16, 2008).

38. *See Jersild v. Denmark*, 298 Eur. Ct. H.R. 27, paras. 19-21, 25 (1994), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=jersild%20%7C%20v.%20%7C%20denmark&sessionId=6392234&skin=hudoc-en> (interviews of racist people broadcasted on Danish radio; broadcaster found guilty of aiding and abetting a hate crime; European Court of Human Rights found conviction to be a violation of Art. 10); *Arslan v. Turkey*, 13 Eur. Ct. H.R. 285-87, ¶30 (1999), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=852&sessionId=5836078&skin=hudoc-en&attachment=true> (author of book convicted of publishing separatist propaganda based on racial considerations; Court found punishment was disproportionate to aims pursued and not necessary in democratic society); *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment, paras. 8-10, 945 (Dec. 3, 2003) (radio station and newspaper owners convicted of intentionally aiding and abetting hate crimes through broadcasts/publications).

39. *See, e.g., Daniel Joyce, The Judith Miller Case and the Relationship Between Reporter and Source: Competing Visions of the Media's Roll and Function*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555 (2007); Jane E. Kirtley, *Transparency and Accountability In A Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006); Todd M. Gardella, *Beyond Terrorism: The Potential Chilling Effect on the Internet of Broad Law Enforcement Legislation*, 80 St.

of what has been published has been on the Freedom of Information Act. Interestingly, like this initial piece, most of what has been published on the media's connection to terrorism is student-authored.⁴⁰

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

II. INTRODUCTION

“Terrorism” is a word which conjures up images of guerillas, foreign nationalists, and government overthrow. However, the term encompasses far more⁴¹ and for the purposes of this discussion includes all violence aimed at

JOHN'S L. REV. 655 (2006); *Recent Cases: International Law: Genocide: U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity – Prosecutor v. Nahimana, Barayagwiza and Ngeze*, 117 HARV. L. REV. 2769 (2004); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War On Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005); Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH 4 (2004); Carlos A. Kelly, *The Pen is Mightier Than the Sword or Why the Media Should Exercise Self-Restraint in Time of War*, 77 FLA. B.J. 22 (2003); Vivien Toomey Montz, *Recent Incitement Claims Against Publishers & Filmmakers: Restraints on First Amendment Rights or Proper Limits on Violent Speech?*, 1 VA. SPORTS & ENTER. L.J. 171 (2002); Sandra Davidson, *Blood Money: When Media Expose Others To Risk of Bodily Harm*, 19 HASTINGS COMM/ENT. L.J. 225 (1997). Examples of books would include: BRIGITTE L. NACOS, *MASS-MEDIATED TERRORISM: THE CENTRAL ROLE OF THE MEDIA IN TERRORISM & COUNTERTERRORISM* (2007); *TERRORISM, WAR, AND THE PRESS* (Nancy Palmer ed., 2003); BRIGITTE L. NACOS, *TERRORISM & THE MEDIA* (1994); Todd Fraley, *MEDIA TERRORISM & THEORY: A READER* (2006); WILLIAM A. HACHTEN & JAMES F. SCOTTON, *THE WORLD NEWS PRISM: GLOBAL MEDIA IN AN ERA OF TERRORISM* (2002); *FRAMING TERRORISM: THE NEWS MEDIA, THE GOVERNMENT, & THE PUBLIC* (Pippa Norris et al. eds., 2003).

40. See, e.g., Spencer W. Davis, Note, *Incitement to Terrorism in Media Coverage: Solutions to Al-Jazeera After the Rwandan Media Trial*, 38 GEO. WASH. INTL. L. REV. 749 (2006); Benjamin R. Davis, Comment, *Ending the Cyber Jihad: Combating Terrorist Exploitation of the Internet with the Rule of Law and Improved Tools for Cyber Governance*, 15 COMM.LAW CONSPICUOUS 119 (2006); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005); Elana J. Zeide, Note, *In Bed With the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309 (2005); Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005).

41. There is no generally accepted definition of terrorism. A common thread found in most definitions is the objective to receive the widest dissemination possible of the message, act, or identity of the perpetrators. See Research Study, *International and Transnational*

influencing the attitude and behavior of one or more target audiences, or, to coin a term, publicity-seeking crimes.⁴² In the past decade, the number of publicity-seeking crimes has escalated to a point where thousands of lives,⁴³ forty-two per cent of them American,⁴⁴ are taken each year and whole societies are held captive by one or more misguided individuals.

One of the problems of combating incidences of publicity-seeking crime is media involvement. Violence or threats of violence have long been deemed "newsworthy"⁴⁵ items by the media. Publicity-seeking criminals have recognized this fact and put it to full use. By attacking highly visible targets in a dramatic manner, publicity-seeking criminals guarantee themselves saturated news coverage. They make a shocking appeal to traditional news values by making full use of the news industry's attraction to the dramatic, conflict-laden, and potentially tragic event. The media thus

Terrorism: Diagnosis and Prognosis, 7-8 (CIA Apr. 1976) [hereinafter *Research Study*]; Dan van der Vat, *Terrorism and the Media*, INDEX ON CENSORSHIP, Apr. 1982, at 25; LEGAL & OTHER ASPECTS OF TERRORISM at 183 (E. Nobles Lowe et al. eds., 1979); M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES at xi (1975). However, some criminal acts which would be labeled terrorism by many do not seek publicity. For example, state-sponsored terrorism, i.e. genocide, hopes to gain no publicity. See M. Cherif Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals*, 72 J. CRIM. LAW & CRIMINOLOGY 1, 2, 7 (1981) [hereinafter Bassiouni, *Perspectives*]. See also, generally, Paust, *supra* note 13. Also, some criminal acts which seek publicity would not meet the criteria of some definitions of terrorism. Most definitions of terrorism require the objective of instilling fear in a targeted person or group of persons. Persons committing violent crimes just for self-glorification will not fit this element of many definitions.

42. A wide variety of crimes could be committed in seeking publicity but the most common are: kidnapping (with threat of bodily harm), barricading hostages, bombings (letter, incendiary, and explosive), hijacking, assassination and sniping. See NATIONAL FOREIGN ASSESSMENT CENTER, INTERNATIONAL TERRORISM IN 1978, at 4 (Fig. 5) (Mar. 1979) [hereinafter CIA REPORT].

43. In 1968-1971, deaths from terrorist activities averaged 60 per year and injuries averaged 200 per year. By 1978, death and injuries were up to 450 and 400 respectively. See *id.* at ii. By 1980, deaths were at 1,173. See *As Violence Spreads: Is U.S. Next?*, U.S. NEWS & WORLD REPORT at 32, 33 (Sept. 14, 1981) [hereinafter *Violence Spreads*].

44. The most active arenas for publicity-seeking crimes are North America, West Europe, Latin America, and the Middle East. Together they account for approximately 90% of all such activity. North America is the site of approximately 9.7% of the incidents while the U.S.S.R. and socialist Eastern Europe account for only 0.4% of terrorism. See CIA REPORT *supra* note 42, at 2, 7. Only 9.7% of the incidents take place in America—a fact which is explained by geographic inconvenience, bureaucratic obstacles, familiarity and attitude toward America. See *Violence Spreads*, *supra* note 43, at 33. Despite this statistic, Americans abroad are the most prominent targets of terrorism; 41.9% of the total casualties are American nationals. See CIA REPORT *supra* note 42, at 4 (Fig. 5).

45. Deciding just what "newsworthy material" is may be an unattainable goal. The line between news and entertainment is becoming thinner and thinner. See, e.g., discussion *infra* at notes 71-75.

further the criminals' objectives by publicizing an incident that was staged for the very purpose of obtaining media coverage. This has come to be called by many a "symbiotic relationship."⁴⁶

Critics both within⁴⁷ and outside⁴⁸ the news industry have begun to voice an awareness, if not a concern, for the ease with which such criminals obtain publicity on both a national and international platform. And yet, since 1977, when most of the self-appraisal and outside criticism dramatically increased,⁴⁹ no real changes have been made. Although a number of self-regulating guidelines have been promulgated by various broadcasting organizations,⁵⁰ it has been the general consensus that the First Amendment

46. See Bassiouni, *Perspectives*, *supra* note 42, at 14; Jaehnig, *supra* note 13, at 720.

47. See discussion *supra* at notes 10-12.

48. See, e.g., Fenyvesi, *supra* note 12, at 16 (explaining that competitiveness within the industry had placed the lives of hostages in undue danger); Monday, *supra* note 12, at 19 (journalists should be better trained to understand and cover terrorists); Czerniejewski, *supra* note 12, at 21 (arguing that formal guidelines and a more thoughtful study of the problem needed). The major forum for self appraisal, though, was the myriad of meetings of journalistic organizations and associations during 1977. For a discussion of these panels and meetings, see Terry, *supra* note 10, at 756-57.

49. 1977 saw a dramatic jump in the number of terrorist incidents, especially in America. However, the most likely cause for the critical attention given the problem that year was the manipulation of the media by theretofore unknown Anthony Kiritsis to gain live news coverage to express his personal grievances while holding a gun to the head of his hostage. See Terry, *supra* note 10, at 750-52; Jaehnig, *supra* note 13, at 717-18 for details of the event. Coincidentally, by 1977, seventy-five percent of commercial television broadcast stations had three new pieces of equipment, just invented in 1973, referred to as ENG equipment. They include: small, light video cameras (minicams), light, battery-powered video recorders, and the real technological breakthrough, a device called the time-base connector which converts the output of the lightweight video tape recorders into a picture with sufficient stability to be broadcast. These three pieces of equipment for the first time allowed instantaneous on-the-spot coverage of the news. See Terry, *supra* note 10, at 749.

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

An essential component of the story is the demands of the terrorist/kidnapper and we must report those demands. But we should avoid providing an excessive platform for the terrorist/kidnapper. Thus, unless such demands are succinctly stated and free of rhetoric and propaganda, it may be better to paraphrase the demands instead of presenting them directly through the voice or picture of the terrorist/kidnapper.

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

News personel [sic] should be mindful of the probable need by the authorities who are dealing with the terrorist for communication by telephone and hence should endeavor to ascertain, wherever feasible, whether our own use of such lines would

bars any government regulation in this area. It is the thesis of this Article that this may not be true in all cases. An analysis of the First Amendment as it applies to various forms of government regulation will follow the discussion of the problems created by publicity-seeking crimes and the media coverage thereof.

III. THE PROBLEM OF MEDIA COVERAGE OF PUBLICITY-SEEKING CRIMES

The objectives of terrorists, other than seeking publicity, are often coercion, extortion, disorientation and despair, provocation of unpopular countermeasures, and (with regard to the terrorists themselves) morale-building.⁵¹ M. Cherif Bassiouni, a leading scholar on international terrorism, has identified four types of publicity-seeking criminals based on their motivation: (1) the common criminal motivated by personal gain; (2) the person acting as a consequence of a psychopathic condition; (3) the person seeking to publicize a claim or redress an individual grievance; and (4) the ideologically motivated individual.⁵² This last category of individual is the one most frequently associated with the term "terrorism." It has been noted, however, at least in the area of assassination,⁵³ that the emphasis may

be likely to interfere with the authorities' communications.

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

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

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

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

Terry, *supra* note 10, at 776-77.

51. See *Research Study*, *supra* note 41, at 8. See also, Bassiouni, *Perspectives*, *supra* note 41, at 32, n.124 for a list of thirteen strategic objectives of terrorists that media coverage may help to fulfill.

52. See Bassiouni, *Perspectives*, *supra* 41, at 8.

53. See Richard Restak, *Assassin!*, 89 SCIENCE DIGEST 78, 82 (1981).

be shifting to individuals seeking self-definition⁵⁴ or self-assertion.⁵⁵ William R. Catton, professor of sociology at Washington University, observes that although

some of the groups so desperate for publicity want it as a presumed means of attaining political, economic, or nationalistic goals [(instrumentally - oriented terrorists)] ... [others] appear to crave publicity for its own sake [(expressly-oriented terrorists)] – i.e., as an antidote to the ignominy of seeming superfluous in a world too vast to have otherwise noticed their existence.⁵⁶

If nothing else, commentators seem to agree on one thing: to these people, more conventional means of communication seem to be unavailable or ineffective.⁵⁷

Scattered, isolated incidents of violence by themselves are of little use to publicity-seekers in producing their objectives of fear, coercion, and publication of a cause or self-identification. Terrorists rely on the psychological impact of acts rather than their immediate destructive consequences.⁵⁸ To achieve such impact, publicity-seeking criminals need to publicize their acts as widely as possible. Since the mass media have the ability to confer importance upon an individual or an event merely by presenting it,⁵⁹ they play a major role in the spreading and intensification of the desired psychological impact. With the advent of increasing numbers of technological communicative advances,⁶⁰ publicity-seeking criminals are able to command the immediate attention of millions, enabling these criminals to work their felonious will on whole nations rather than just the hostages in their presence.⁶¹

The media has been described as “a powerful force, sometimes more influential than government itself.”⁶² In fact, Iranian Acting Foreign Minister Abol Hassan Banisadr, during the taking of American hostages from the U.S. Embassy in Iran, exemplified this attitude when he said,

54. *Id.*

55. See William R. Catton, Jr., *Militants and the Media: Partners in Terrorism?*, 53 *IND. L.J.* 703, 707 (1978).

56. *Id.* at 710.

57. *Id.* at 705; Bassiouni, *Perspectives*, *supra* note 41, at 15; Restak, *supra* note 53, at 82-83.

58. See Bassiouni, *Perspectives*, *supra* note 41, at 8.

59. See Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 *VA. L. REV.* 1123, 1134 (1978).

60. See Terry, *supra* note 10, at 749; Bassiouni, *Perspectives*, *supra* note 41, at 14; *Research Study*, *supra* note 41, at 2, 19.

61. Catton, *supra* note 55, at 704.

62. See Legal & Other Aspects of Terrorism, *supra* note 41, at 183.

"Diplomats cannot solve this problem. We want to solve it through 'newspaper diplomacy.'"⁶³ This influence through the media could be a good thing if only the actions necessary to get this attention and consequential influence could fall short of violence.

Unfortunately, this has not been the case. William Raspberry, a columnist for the Washington Post, lamented on the use of violence as a means of gaining needed attention in the Watts Riots of 1965.⁶⁴ He pointed out that the attention received during the violent riots that summer brought home to the black people and other poor people that they could command the attention of the press. They realized that riots, threats of disorder, or demonstrations that had the prospect of getting out of hand always got the press out there. They found, for the first time, that this attention could lead to some positive gains for them and that was one of the reasons rioting flourished.⁶⁵

Why, then, must violence be resorted to in order to gain the "needed attention"? Is it just an example of the age-old maxim, "The wheel that squeaks the loudest is the one that gets the grease?"⁶⁶ Or, is there more to it?

American mass media—electronic (television and radio) and print (newspaper and magazine)—are commercial enterprises just as any other business. They exist and thrive by making profits. Profits are obtained from selling time or space to advertisers at rates determined by circulation or audience size.⁶⁷ The larger the audience, the more each medium prospers. The availability of attention-getting content serves the audience-attracting needs of the industry.⁶⁸ The dramatic, often emotional events staged by publicity-seeking criminals make news, sell newspapers, and draw millions to the television set. This adds handsomely to the profits of media owners, advertisers, shareholders, and employees (and no doubt to the job security of the journalists covering the event)⁶⁹ and contributes to the overall "success" news reporting has seen in recent years.⁷⁰

63. *Tehran's Reluctant Diplomats*, TIME, Dec. 3, 1979 at 64.

64. Raspberry also points out that when the riots began, reporters for the *L.A. Times* could not find a single clip on Watts in their newspaper's morgue and that big city newspapers everywhere suddenly became painfully aware that they knew nothing about their own ghettos. See Pohlmann & Foley, *supra* note 1, at 34.

65. *Id.*

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

67. Bassiouni, *Perspectives*, *supra* note 41, at 25.

68. Catton, *supra* note 55, at 713.

69. See van der Vat, *supra* note 41, at 25.

70. Catton, *supra* note 55, at 713.

The supposition that “news” is becoming a more popular form of television “entertainment” is illustrated by such articles as *The Coming Explosion in TV News*.⁷¹ Television tops all media in the number of people relying on it as their primary news source.⁷² Urban stations are doubling and tripling the time they devote to news and nonfiction features.⁷³ Cable networks have already created one 24-hour news channel and are working on two more.⁷⁴ In fact, a former news chief at CBS predicts that news will soon become the prime staple of the American viewing public.⁷⁵ As the line between “news” and “entertainment” grows less and less visible, and as the commercial objectives of news carriers become more and more evident, publicity-seeking criminals can be expected to continue, if not escalate, their efforts to feed on this audience-attracting need.

In fact, according to a 1979 CIA report,⁷⁶ the nature and intensity of publicity-seeking crimes will fluctuate widely in the future.⁷⁷ The composition and character of such crimes will continue to change and increase in number although the regional patterns will stay the same.⁷⁸ According to the CIA, representatives of affluent countries, particularly government officials and business executives, will continue to be the primary targets for assassinations and kidnappings although the majority of incidents will continue to be bombings and incendiary attacks.⁷⁹ The CIA does voice a concern—as do others worried with nuclear development⁸⁰—that overcoming present tactical and technological limitations may permit

71. *The Coming Explosion in TV News*, U. S. NEWS & WORLD REPORT, Dec. 7, 1981 at 45.

72. *Id.*

73. *Id.*

74. *Id.* See also Right, Wrong, *supra* note 11, at 45.

75. See *The Coming Explosion in TV News*, *supra* note 71, at 45.

76. See CIA REPORT, *supra* note 42, at 1, 5.

77. *Id.*

78. *Id.*

79. *Id.*

80. See Catton, *supra* note 55, at 704. *But see, Violence Spreads*, *supra* note 43, at 34. Mr. Jenkins feels that because terrorists are not bent on killing large numbers of people, because they fear that resorting to nuclear terrorism might alienate constituents, because nuclear terrorism could provoke public revulsion and because terrorists fear an unprecedented governmental crackdown, any suggestion of mass killing would probably not succeed. *But see United States v. Progressive*, 467 F. Supp. 990 (E.D. Wis. 1979), where a lower federal court considered the potential for such nuclear destruction to outweigh any First Amendment rights. “A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.” *Id.* at 996.

use of more sophisticated devices such as heat-seeking missiles and the like.⁸¹

The trend, as shown by the previous incident and death statistics,⁸² is on a dramatic incline. Professor Catton believes that, in addition to feeling significance deprivation,⁸³ all people, especially Americans, are losing faith that any shortcomings of the present can be rectified in the future.⁸⁴ The combined effect of these feelings of insignificance, frustration with the system, and incompetence could lead to an increase in *American-based* expressly oriented acts. Brian Jenkins, director of the RAND Corporation program on political violence agrees.⁸⁵ He feels that although the American political system has an enormous co-optive capacity,⁸⁶ some "engines of terrorism"⁸⁷ that did not exist in America in the past could be emerging. He pointed to the peoples' perception of the economy and the development of single-issue politics as examples.⁸⁸ These changing societal factors combined with the high rate of relative success achieved⁸⁹ and the continued media saturation coverage⁹⁰ indicate little hope of de-escalation.

81. See CIA REPORT, *supra* note 42, at 1, 5.

82. See Violence Spreads, *supra* note 43.

83. See *supra* note 54-59.

84. See Catton, *supra* note 52, at 708.

85. See Violence Spreads, *supra* note 43.

86. By "co-optive," Mr. Jenkins means that the American political system can "incorporate an enormous diversity within its political system." See *id.* at 33.

87. *Id.*

88. *Id.* Mr. Jenkins contrasts "single-issue politics" against an overall anti-capitalist or nihilistic philosophy. He observed that we have already seen some willingness among single-issue movements to break the law but noted that it was not to the extent of doing serious violence to people or property. However, in November 1982, this point may have been reached when an anti-nuclear power advocate held the Washington Monument and its occupants hostage.

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

87% probability of actually seizing hostages

79% chance that all members of the terrorist team will escape punishment or death, whether or not they successfully seized hostages

40% chance that all or some demands will be met in operations where something more than just safe passage or exit permission was demanded.

29% chance of complete compliance with such demands

83% chance of success where safe passage or exit, for the terrorist themselves or for others, was the sole demand

67% chance that, if concessions to the principal demands were rejected, all or virtually all members of the terrorist team could still escape alive by going underground, accepting safe passage in lieu of original demands, or surrendering to

What if this situation continues to exist? What are the consequences?

Professor Bassouini has determined four main effects of media coverage of publicity-seeking crimes: intimidation, imitation, immunization, and imperilization. Media coverage of publicity-seeking crimes often (1) enhances the environment of fear and coercion the terrorists seek to generate (intimidation factor); (2) encourages other individuals to engage in such conduct (imitation factor); (3) dulls the sense of outrage and contempt in the general public (immunization factor); and (4) endangers hostages' lives and interferes with effective law enforcement (imperilization factor).⁹¹

A. Intimidation

Considered alone, each publicity-seeking act is not nearly as ominous as it appears to be. More than twice the number of people who have died in terrorist incidents between 1968 and 1975 have died from asthma in a single year in the U.S.; ten times as many have died from influenza.⁹² By focusing on terrorist events and giving them a disproportionate amount of news coverage, the media engenders the feeling in the viewing public that such events are more common and, therefore, more dangerous than they really are.⁹³ Media, particularly television, gives the effect of authenticity *per se*.⁹⁴ It gives the criminal the auspices of power in a short time, with little effort, on a wide scale. In some respects, the modern "terrorist" is "created" by the media: they magnify and enlarge him and his powers far beyond its true magnitude.⁹⁵ In effect, television puts everyone at the scene of the crime, helpless to do anything, engendering feelings of anxiety and fear—the terrorist's instruments of coercion. This public anxiety enhances the perceived power of the terrorist in his own eyes as well as the eyes of his peer group and others.⁹⁶ This enhanced power often leads to imitation⁹⁷ and the cycle repeats itself.

a sympathetic government, and
100% probability of gaining major publicity whenever that was one of the
terrorist's goals.

Research Study, *supra* note 39, at 22.

90. See *The Coming Explosion in TV News*, *supra* note 75, at 45.

91. See Bassiouni, *Perspectives*, *supra* note 41, at 18-19.

92. See Catton, *supra* note 55, at 712.

93. See Bassiouni, *Perspectives*, *supra* note 41, at 3.

94. *Id.* at 21.

95. See National Advisory Committee on Criminal Justice Standards & Goals, REPORT OF THE TASK FORCE ON DISORDERS & TERRORISM 366 (1976) [hereinafter TASK FORCE].

96. See Bassiouni, *Perspectives*, *supra* note 41, at 22.

97. See *id.* at 18-19.

B. Imitation

According to leading sociologists, "among all the different ways one might behave in given circumstances, any particular way is more likely to be repeated when the circumstances recur if the previous time it was done it was followed by some gratifying experience."⁹⁸ This is referred to as the "operant conditioning model."⁹⁹ This can also occur as a result of vicarious reinforcement through observational learning.¹⁰⁰ In other words,

If a person observes another individual, with whom he more or less identifies, and sees that in certain circumstances a certain action by that other individual tends to be followed by an experience that is rewarding to that other person, the probability that the observer would behave in those circumstances in about the way the observed person did is enhanced.¹⁰¹

Therefore, if a would-be terrorist sees someone else's terror-inspiring act succeeding (i.e., resulting in a gratifying experience) then the probability that the would-be terrorist will engage in similar acts is increased. If publicity is what these individuals seek, then receiving such publicity is gratifying and rewarding. By providing such a "reward" to publicity-seeking criminals, media is reinforcing and encouraging present and future terrorists.¹⁰² An excellent example of such a phenomenon took place during the Iran crisis.¹⁰³ Shortly after the incident began, United States' Embassies were attacked in Bangladesh, Libya, and Pakistan, basically following the steps of the successful Iranians.¹⁰⁴

Of course, the information on operant conditioning and vicarious reinforcement is theoretical and data on such social phenomenon will never be clear enough to convince *all* social scientists and *all* legal scholars. But, to quote former Surgeon General Jesse Steinfield, "There comes a time when

98. See Catton, *supra* note 55, at 713.

99. See Gerwitz, *Mechanism of Social Learning: Some Roles of Stimulation and Behavior in Early Human Development*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 57-212 (D. Goslin ed. 1969). See also Catton, *supra* note 55, at 713. Professor Bassiouni terms this phenomenon a "psychological projection prediction syndrome."

100. See Albert Bandura, *Social-Learning Theory of Identificatory Processes*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 213-62 (D. Goslin, ed. 1969). See also Catton, *supra* note 55, at 714.

101. Catton, *supra* note 55, at 714.

102. *Id.*

103. See Tehran's Reluctant Diplomats, *supra* note 65.

104. See Bassiouni, *Perspectives*, *supra* note 41, at 26.

data are sufficient to justify action."¹⁰⁵ There is a strong argument that the time is now. Ninety-three per cent of police chiefs surveyed in a recent study felt like live television coverage of terrorist acts encouraged terrorism.¹⁰⁶ Sixty-four percent of the general public surveyed in a 1977 Gallup poll believed detailed news coverage of terrorism encourages others to commit similar crimes.¹⁰⁷ It is also suggested that terrorist groups conform to certain media stereotypes in their internal organizational structure, chain of command, choice of targets, time, place, and manner of action, and even in the attitudes of their members.¹⁰⁸

Professor Catton warns, though, that the distinction must be made between "instrumentally-oriented terrorists" and "expressly-oriented terrorists."¹⁰⁹ For instrumentally-oriented terrorists, publicity about their goals would be reinforcing, but publicity about their actions and not their goals would not be reinforcing. For expressly-oriented terrorists, *any* publicity—even negative publicity—would be reinforcing. They seek publicity for its own sake, for self-identification. Any media attention provides relief from their "significance deprivation."¹¹⁰

C. Immunization

Constant and detailed coverage of publicity-seeking crimes has three less immediate and perhaps more subtle effects on society. First, it increases the level of public tolerance of such crimes and lessens the feeling of righteous indignation.¹¹¹ This, one might argue, is good because it thwarts the terrorist's goal of intimidation by removing the shock factor.¹¹² On the

105. Surgeon General's Report to the Scientific Advisory Committee on Television and Social Behavior: HEARINGS BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS OF THE SENATE COMMITTEE ON COMMERCE, 92d Cong., 2d Sess., 25-26 (1972).

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

107. Jaehnig, *supra* note 13, at 721. See also, Hendrick, *When Television is a School for Criminals*, TV GUIDE, Jan. 29, 1977, at 4. After interviewing inmates at a Michigan prison, Hendrick reported that ninety percent of the inmates admitted that had "learned new tricks and improved their criminal expertise by watching crime programs." Forty percent said they had attempted crimes they had viewed on television. *Id.* at 5.

108. See Bassiouni, *Perspectives, supra* note 41, at 18.

109. *Id.*

110. *Id.* at 714.

111. See Bassiouni, *Perspectives, supra* note 41, at 22.

112. See Martha Crenshaw, *The Causes of Terrorism*, 13 COMPARATIVE POLITICS 379, 386 (July 1981); Bassiouni, *Perspectives, supra* note 41, at 22.

other hand, more persons will feel less constricted by conscience as a result of the lessening social opprobrium.¹¹³

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

Third, repeated coverage of terrorist events tends to conceptualize the act.¹¹⁴ Instead of seeing an individual criminal, an individual victim, or an individual policeman, the public perceives roles—i.e., terrorists, hostages, law enforcement agencies—being played in a huge chess game. The individual act becomes an event and the human dimensions become lost.

D. Imperilization

Ongoing coverage of hostage-taking incidents is the hotbed of the media coverage controversy, and yet the problems seen there are probably the most susceptible to legal solution.¹¹⁵ There are two general areas of conflict: (1) media dissemination of information tactically useful to the publicity-seeking criminal and (2) media interference with an effective law enforcement response.¹¹⁶

1. Media dissemination of information

Media can serve as the "intelligence arm"¹¹⁷ of the criminal in many ways. Today, in most hostage situations, the criminal has a television or radio device within near proximity. By broadcasting police strategies,¹¹⁸ activities, plans, or the presence of hidden persons¹¹⁹ or escaping hostages, the media

113. See Bassiouni, *Perspectives*, *supra* note 41, at 22.

114. *Id.*

115. See discussion *infra* at notes 313-331 and 349-351.

116. See Bassiouni, *Perspectives*, *supra* note 41, at 28-30.

117. *Id.* at 28.

118. For a discussion of the strategic, hollow immunity offer made to Anthony Kirtsis and the planned refutation almost broadcast along with the potential ramifications of such broadcast, see Jaehnig, *supra* note 13, at 717, 719-20.

119. For example, in the 1977 Hanafi Muslim takeover of three buildings and 135 hostages in Washington, D.C., television cameras filmed a basket being lifted to the fifth floor where eleven people had evaded capture. Upon seeing this broadcast, the Hanafis tried to break the barricaded door to this room down. A tense nine-hour ordeal ensued but the police were finally able to free the people. See Bassiouni, *Perspectives*, *supra* note 41, at 29.

endangers the lives of the hostages,¹²⁰ law enforcement personnel, and innocent citizens.¹²¹ They also assist the criminals in determining escape routes and repelling police assaults.¹²²

2. Media interference with law enforcement

The physical presence of the media often interferes with the law enforcement agencies at the scene that are trained to effectively handle such situations. The somewhat obtrusive equipment interferes with their free movement and attracts crowds which compound the risk and increase the burden on the police. Questioning by a multitude of reporters can often distract key personnel at critical moments. Direct media contact with the criminal can tie up telephone access, incite the criminal by use of inflammatory questions or phrases,¹²³ goad the criminal into action to prove himself in the spotlight,¹²⁴ and can have the effect of isolating a trained professional negotiator from the mediating process by increasing the role of the untrained media person.¹²⁵ Police officials claim that the stampede of journalists to interview terrorists reinforces their sense of power and accomplishment.¹²⁶ Often, the mere presence of the media encourages terrorists to remain barricaded or to demand a press conference so as to increase coverage.¹²⁷

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

120. For example, during the 1977 hijacking of a Lufthansa jet, the media broadcasted that the pilot was passing intelligence information to the police. Upon hearing this on their radio, the terrorists promptly executed the pilot. See Bassiouni, *Perspectives*, *supra* note 41, at 29.

121. The 1977 Sommer survey showed that seventy-nine per cent of the police chiefs surveyed felt that live television coverage was a threat to hostages. See M. Sommer, *supra* note 106, at 12.

122. See Bassiouni, *Perspectives*, *supra* note 41, at 29.

123. Those who have had experience with terrorists have discovered that one particular word—a trigger word—can turn a seemingly normal man into an irrational and abnormal one in an instant. See INSTITUTE FOR STUDY OF CONFLICT, *TELEVISION AND CONFLICT* (1978) at 19-20. For example, during the Hanafi incident, a media contact identified the Hanafi Muslims with the Black Muslims. Khaalis, the leader of the sect, became enraged and threatened to execute one hostage in retaliation until the reporter, following police advice, apologized. See Fenyvesi, *supra* note 12, at 17.

124. See Bassiouni, *Perspectives*, *supra* note 41, at 29.

125. *Id.* at 29-30.

126. Jaehnig, *supra* note 13, at 723.

127. See Bassiouni, *Perspectives*, *supra* note 41, at 30.

IV. THE MEDIA'S REASONING

The media defends its coverage of publicity-seeking crimes as being part of its historical role in the makeup of American society. The freedoms of expression and of the press are usually justified in one or more ways.¹²⁸ First, they are an essential process for advancing knowledge and discovering truth. Someone seeking knowledge and truth needs to hear all sides of a question and to consider all alternatives.¹²⁹ Second, they are an essential element of self-governance. The governed must, in order to exercise their right to vote, be fully informed.¹³⁰ These first two factors are commonly encompassed in the concept of the public's "right to know." Finally, they operate as democracy's safety valve by substituting reason for force and providing a framework within which the conflict necessary to the progress of society can take place without destroying society.¹³¹

The media feel that in fulfilling the above objectives, it is their duty to play the role of the uninvolved observer,¹³² to merely report information. In fact, a widely-used reporting textbook advises the student of journalism that the *effect* of reporting the news is not the reporter's concern,¹³³ nor is preventing violence or determining the legitimacy of the grievance.¹³⁴ Walter Jaehnig, a professor of journalism himself, terms this role the "libertarian tradition."¹³⁵ Libertarianism lacks a moral code or philosophy and promotes moral neutrality.¹³⁶ When asked if a distinction shouldn't be made between terrorist acts and civil disobedience and the coverage keyed to such a distinction, an editor of a major metropolitan newspaper answered

128. See Thomas I. Emerson, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-8 (1970). There has been great debate over the years as to whether the addition of "and of the press" to the First Amendment's guarantee of freedom of speech holds any special significance. It is the general feeling today that the press clause does not signify any "special" privileges except in very rare instances. For a discussion of the press clause, see generally, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (Burger, J., concurring); Potter Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975); Melville B. Nimmer, *Introduction - Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L. J. 639 (1975); David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975).

129. See Emerson, *supra* note 128, at 6.

130. *Id.*

131. *Id.*

132. See Jaehnig, *supra* note 13, at 735.

133. Curtis D. MacDougall, *Interpretive Reporting* 11 (1977).

134. See Jaehnig, *supra* note 13, at 732.

135. *Id.* at 739.

136. *Id.*

that "...once we start making judgments of this sort ... I think the media is ... doing something far different from its basic role of simply informing."¹³⁷

This idea is simply not true. First, it assumes that such judgments are not already being made. Every day, editors and news producers decide what's "newsworthy" and what's not, how much coverage will be given, how it will be classified, how the headline will read, who will be interviewed, how many reporters and cameras should be sent, and so forth.¹³⁸ Second, with the instantaneous coverage permitted by the minicam, the individual decision of where one wants to go and what one wants to see has been taken away from the individual and put in the hands of the press. They have become the eyes and ears of the public—a conduit, a surrogate.¹³⁹ Like it or not, the media has the responsibility of deciding for the public what they want to experience in their lives.¹⁴⁰ The roles of the neutral, uninvolved observer and recorder of fact are antiquated ones if they even exist at all. Particularly in the area of coverage of publicity-seeking crimes, journalists today are often thrust into a life and death situation.¹⁴¹ Every reporter covering such an event must decide whether his actions are going to be governed by the interests of the hostages/victims, public authorities and the community at large, or the newsgathering and financial interests of his station or newspaper.¹⁴² Moral neutrality provides an insufficient basis for

137. *Id.* at 741.

138. As Professor Catton put it, "Why have we less 'right to be alerted' by the media to each million tons of potentially climate changing CO₂ added to the atmosphere, or each ton of radioactive waste added by the electric power industry...? When did the authors of the Bill of Rights decide it was violence committed by militants that we most needed to be informed about?" Catton, *supra* note 55, at 715. See also Bassiouni, *Perspectives*, *supra* note 41, at 2 n.7 where Professor Bassiouni notes the lack of coverage of state-sponsored terrorism, i.e., genocide in Cambodia/Vietnam, etc.

139. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1979). Instantaneous broadcasting largely eliminates the journalistic editing function. As Robert Faw, a CBS news reporter, once said, "[T]here's absolutely no journalism that takes place in a situation like that. The reporter becomes a game show host." Jaehnig, *supra* note 13, at 719 n.4.

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

141. A distinction has been made, also, in the coverage of publicity-seeking crimes because the reporter, through his use by the criminal, becomes a newsmaker rather than just a reporter of facts. See *LEGAL AND OTHER ASPECTS OF TERRORISM*, *supra* note 41, at 183.

142. See Jaehnig, *supra* note 13, at 724.

such decisions.¹⁴³ Since the 1940's, it has been argued that the media's freedom to report must be accompanied by the duty to report responsibly.¹⁴⁴ Surely, responsible judgments must be made that distinguish between the war of ideas that is fought within the legitimate boundaries of freedom of speech and the conflicts that resort to violence and intimidation rather than verbal expression and intellect.

An additional purpose or role of the free press, as perceived by Justice Stewart and others,¹⁴⁵ is to act as an additional check on the three official branches of government.¹⁴⁶ In fact, the press has come to be termed the "Fourth Estate."¹⁴⁷ This, arguably, is an important role the media does play. But the coverage of publicity-seeking crimes is not related to the functioning of any one of our three branches of government. Even if the criminal's purpose is to draw attention to what he considers a defect in our governmental system, he must be made to understand that there are many nonviolent ways for his protest to be heard within the legitimate parameters of free speech. He has no constitutional right to express himself in violent ways at the expense of innocent people,¹⁴⁸ yet the media nearly guarantee him just such a right. In addition, there are other ways for the media to provide him a forum for expression¹⁴⁹ and to inform the public about an individual's grievances with our government in ways that do not publicize these violent acts.¹⁵⁰

The media also express a concern over the possible loss of credibility in the eyes of the public if they withhold any information.¹⁵¹ They fear the public will question what other types of information might be withheld,

143. *Id.* at 739.

144. See COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947); FOUR THEORIES OF THE PRESS (Frederick Siebert, et al., eds. 1956); Clarence J. Mann, *Personnel and Property of Transnational Corporations*, LEGAL ASPECTS OF INT'L TERRORISM (ASIL 1978); Jaehnig, *supra* note 13, at 740, n.89.

145. Particularly the media themselves. See also, Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 591-92 (1979).

146. Stewart, *supra* note 128, at 634.

147. *Id.* See also, LEGAL AND OTHER ASPECTS OF TERRORISM, *supra* note 41, at 183.

148. See Bassiouni, *Perspectives*, *supra* note 41, at 36. For a discussion of the speech/action dichotomy, see also Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 601 (1978); United States v. O'Brien, 391 U.S. 367 (1968); United States v. Miller, 367 F.2d 72 (2d Cir. 1966).

149. See discussion *infra* at notes 341-346.

150. *Id.*

151. See 'Who's Who' Looks into the Ethical Questions of Covering Terrorist Acts, BROADCASTING, March 21, 1977 at 28 (statements of Walter Cronkite); Jaehnig, *supra* note 13, at 735.

suspect collusion with governmental agencies, and so forth. This again assumes that the public trusts that the media present all the facts in an unbiased way. In a recent national survey,¹⁵² Barbara Walters, Dan Rather, and Roger Mudd—all leading journalists—were the top three *least* trusted news personalities of the year.¹⁵³ Evidently, the public does not “trust” all journalists now. Even so, the credibility problem can be overcome in three ways. First, if the public is told the reasons and purposes behind the limited coverage—and legitimate reasons they are—they will understand (and probably agree with) the suppression of some news. Second, if the media is only responding to our working within legitimate laws regulating coverage,¹⁵⁴ they can hardly be held responsible for limited coverage and accused of collusion. Finally, a total blackout is unnecessary (if not illegal).¹⁵⁵ As argued later in this Article,¹⁵⁶ limited access and perhaps restraints on publicizing life-endangering information prior to the culmination of the event would still allow the public to stay informed and yet alleviate some of the problems related to media coverage of such crimes.

The media also argue that they serve worthwhile and necessary functions while covering publicity-seeking crimes in that they squelch rumors,¹⁵⁷ they can be an effective bargaining tool for the negotiator to use to obtain release of hostages,¹⁵⁸ and they can provide law enforcement agencies with otherwise unavailable tactical and intelligence information.¹⁵⁹ They also argue that lack of coverage will provoke these criminals to even more visible forms of violence which can't be ignored,¹⁶⁰ instill in the public a false sense of security,¹⁶¹ and fulfill the propaganda objective of terrorists by illustrating that democratic states are not really free.¹⁶²

These are legitimate observations. It must be remembered, however, that were the media not there to begin with, in all likelihood neither would be the terrorists; the immediacy of rumors usually only affect the immediate

152. Our Fifth Annual Poll: The Reader's Revenge, PEOPLE, Mar. 14, 1982, at 40.

153. *Id.* at 42.

154. See discussion *infra* at notes 249-253, 266-275, 281-287, 313-319.

155. See discussion *infra* at notes 240-280.

156. See discussion *infra* at notes 313-331.

157. See Jaehnig, *supra* note 13, at 735; LEGAL AND OTHER ASPECTS OF TERRORISM, *supra* note 41, at 187; van der Vat, *supra* note 41, at 26; Bassiouni, *Perspectives*, *supra* note 41, at 47.

158. See Bassiouni, *Perspectives*, *supra* note 41, at 31.

159. *Id.*

160. See van der Vat, *supra* note 41, at 26; Paust, *supra* note 13, at 671.

161. See van der Vat, *supra* note 41, at 26.

162. *Id.* See Jaehnig, *supra* note 13, at 24.

area and can be dissipated with minimal coverage. In a trade-off between giving tactical information to the terrorists which would endanger lives and getting tactical information from the terrorists, not many would choose the latter.¹⁶³ Also, as has been previously argued,¹⁶⁴ saturation coverage has the same effect on possible escalation in forms of violence as does lack of coverage and media-created anxiety is “functional rather than dysfunctional” only when it prepares individuals to confront danger realistically¹⁶⁵ which current coverage doesn’t do. And, again, a no-win situation is created by the terrorist: choose your propaganda—my grievances or your purported lack of freedom. Again, this propaganda objective is truly only fulfilled by a total blackout which is not suggested here. Other restraints, given legitimate and compelling purposes behind them, are justifiable.

V. SOLUTIONS

What, then, can be done? A number of suggestions have been made by both law enforcement officials, government¹⁶⁶ and the media.¹⁶⁷ However, very little else has been done. These suggestions can be divided into two basic groups: non-content-related and content-related.¹⁶⁸

A. *Non-content-related Suggestions*

The most often recommended and probably most feasible¹⁶⁹ suggestion is to limit the media’s access to the crime scene.¹⁷⁰ Possibilities include setting up a “broadcast area” near police lines for bulletins and interviews,¹⁷¹ setting up a “briefing area” for off-the-record information where no cameras or recording equipment would be allowed,¹⁷² establishing a police hotline

163. See, e.g., *supra* text accompanying notes 106, 121 (police survey where 65% of the police chiefs felt live coverage endangered hostages and 100% felt live coverage should be discontinued).

164. See CIA REPORT, *supra* note 42, at 1, 5.

165. See Mendelsohn, *Socio-Psychological Perspectives on the Mass Media and Public Anxiety*, JOURNALISM Q. 514 (1963).

166. See generally TASK FORCE, *supra* note 95 (The task force was composed mainly of police and governmental officials); *Police, Media, And Terrorism*, CHRISTIAN SCIENCE MONITOR, Dec. 5, 1977, at 46 (package of suggestions prepared by Maurice J. Cullinane, former Washington, D.C. police chief) [hereinafter Cullinane].

167. See, e.g., Terry, *supra* note 10.

168. See Cullinane, *supra* note 166 (This is an important distinction because under constitutional analysis, much stricter scrutiny is given to any content-based regulation).

169. See discussion *infra* at notes 313-331.

170. Bassiouni, *Perspectives*, *supra* note 41, at 33, 43 & 44; TASK FORCE, *supra* note 95, at 9; Cullinane, *supra* note 166, at 46; Mann, *supra* note 144; Paust, *supra* note 13, at 672.

171. Cullinane, *supra* note 166, at 46.

172. *Id.*

that would be updated continuously,¹⁷³ appointing an official police spokesperson to give periodic briefings,¹⁷⁴ and restricting direct contact with the criminal during an ongoing crime.¹⁷⁵ Another non-content related suggestion is to restrict the use of cameras and lighting or allow only lone camera shots.¹⁷⁶ Finally, some suggest limiting the number of reporters allowed on the scene by using pool reporters to cover activities on behalf of all news organizations and agencies.¹⁷⁷ One journalist, himself having been held hostage, proposed that a committee of editors in the city experiencing the incident be empowered to declare and enforce a "news emergency" under which certain rules of the profession be suspended and where protecting or, at least, not endangering the lives of hostages would be top priority. Anyone violating this rule would be subject to disciplinary action by his employer.¹⁷⁸ It has been suggested that instead of regulating the actual on-the-scene press activities, the law enforcement agencies could offer training to media representatives in handling hostage situations. It is felt that through this educational process the media would become more aware of the problems and be better able to understand the police requests made and consequently be more apt to follow them.¹⁷⁹

B. Content-related Suggestions

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

Limiting information: Suggestions to limit information include: Police tactical information which could prejudice the lives of hostages or potential victims¹⁸⁰ should not be released;¹⁸¹ any inflammatory or aggravating

173. *Id.*

174. *Id.* See also TASK FORCE, *supra* note 95, at 729.

175. Cullinane, *supra* note 166, at 46.

176. *Id.*

177. *Id.* See also *Saxbe v. Washington Post*, 417 U.S. 843, 874 at n.17 (1974) (Powell, J., dissenting) (the media argue that pools are time-consuming to establish, raise questions about which news organization should be permitted in the pool, and imply that news editors will be inclined to delegate responsibility for sensitive coverage to reporters whom they do not know); Jaehnig, *supra* note 13, at 733. However, as Justice Powell noted in *Saxbe*, pools are effectively used in other situations (trials, White House press coverage, etc.).

178. See CHARLES FENYVESI, *THE MEDIA & TERRORISM* 28, 30 (1977).

179. See Terry, *supra* note 10, at 775.

180. See Chris Elkins, *Caging the Beasts, Political Violence and the Role of the Media: Some Perspectives*, 1 POL. COMM. & PERSUASION 79, 98 (1980) (an example of endangering the life of a potential victim rather than a hostage is the news media broadcast that the armed vest worn by President Ford could only be pierced by a Springfield 303 rifle bullet).

information should be delayed until the incident is over;¹⁸² sensationalism should be avoided;¹⁸³ reports should be confined to police disseminated information only, at least until the incident is over;¹⁸⁴ "how to" information relating to terrorist tactics should be avoided;¹⁸⁵ and the name of any individual or group claiming responsibility for a bombing should be withheld.¹⁸⁶

Some suggest that because one of the underlying causes of publicity-seeking crimes is that more conventional means of communication seem unavailable,¹⁸⁷ the media should provide increased access to the conventional media to representatives of minority and non-establishment points of view.¹⁸⁸ One suggestion is to set aside one hour per week for presentation of messages by the public to be apportioned on a first-come-first-served basis and/or a representative spokesperson system.¹⁸⁹

C. *Providing Information*

Most authorities agree that at least the media should strive to give a balanced treatment of the phenomenon.¹⁹⁰ They should provide information from official sources in answer to the criminal's self-serving statements.¹⁹¹ They should give follow-up coverage of the incident; for example, they should cover the law enforcement and judicial responses to the criminal and his actions.¹⁹² Some feel that media has the responsibility to educate the public concerning the impropriety of taking innocent lives in order to publicize demands and grievances, the relative infrequency of such acts, the legitimate needs of law enforcement in a democratic society, and the

181. See TASK FORCE, *supra* note 95, at 729.

182. *Id.* See also Mann, *supra* note 144, at 672.

183. See TASK FORCE, *supra* note 95, at 729.

184. See Cullinane, *supra* note 166, at 46.

185. *Id.*

186. *Id.*

187. See van der Vat, *supra* note 41, at 27; Catton, *supra* note 55, at 705.

188. See Bassiouni, *Perspectives*, *supra* note 41, at 50; Pohlmann & Foley, *supra* note 1, at 35]; Terry, *supra* note 10, at 773-74.

189. Terry, *supra* note 10, at 773-74.

190. See TASK FORCE, *supra* note 95, at 367-68; Bassiouni, *Perspectives*, *supra* note 41, at 27; Jaehnig, *supra* note 13, at 740; Paust, *supra* note 13, at 672. Note that however balanced the coverage is, the pervasive influence remains. Any publicity—whether it put them in a good light or not—is gratifying to an expressly-oriented terrorist. See Catton, *supra* note 55, at 729.

191. See TASK FORCE, *supra* note 95, at 729.

192. Note, however, that the current statistics of success and failure would be a deterrent to future criminals. See note 86, *supra*.

non-romantic aspects of terrorism.¹⁹³ The media do indeed contribute to the problem of publicity-seeking crime. Is it not too much to hope that they would also contribute to its solution?

Perhaps it is too much to expect of the media. Since 1941, the media have been urged to police themselves.¹⁹⁴ And yet, it took a flurry of incidents in 1977¹⁹⁵ to even get some "guidelines" proposed and randomly adopted.¹⁹⁶ Western media officials are now aware of the dangers inherent in the coverage of publicity-seeking crimes but the competitive pressures are strong,¹⁹⁷ "professional judgment" may be unattainable,¹⁹⁸ and the industry is fragmented in nature and therefore hard to control from within.¹⁹⁹

The competitiveness of news organizations,²⁰⁰ their fear of being "scooped" by the opposition,²⁰¹ and their aforementioned quest for larger audiences and prestige²⁰² combine to encourage rather than discourage escalated reporting techniques and sensationalistic coverage. Many police officials, in fact, believe that it is the competition between newsmen, inspired by their respective news organizations, that lies at the root of the problem.²⁰³ An individual reporter who might refrain from covering a particular event for personal ethical reasons will more often succumb to the

193. See Mann, *supra* note 144, at 740.

194. See Terry, *supra* note 10, at 747; H.A.A. Cooper, *Terrorism and the Media*, 24 CHITTY'S LAW J. 226, 230 (Sept. 1976); Bassiouni, *Perspectives*, *supra* note 41, at 46; Pohlmann & Foley, *supra* note 1 at 35.

195. The first quarter of 1977 saw more than the usual number of publicity-seeking crimes: February 8 through February 10, Anthony Kiristsis held a mortgage company president hostage for sixty-three hours gaining a live news conference to state his views; February 14, Frederick Cowan held two captives in a New York factory then committed suicide; March 7 through March 9, Cory Moore took two captives and later received a telephone call from President Carter; March 9 through March 11, Hanafi Muslims took three Washington, D.C. buildings and 134 hostages. Terry, *supra* note 10, at 745.

196. *Id.* at 776.

197. See *Research Study*, *supra* 41, at 30. See also, text at notes 67-70, *supra*, and 200-206, *infra*.

198. See Terry, *supra* note 10, at 760. See also, text, *supra* at notes 207-214.

199. See, *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 550 (1976). See also, Jaehnig, *supra* note 13, at 727.

200. See *Research Study*, *supra* note 41, at 30; *Right, Wrong*, *supra* note 11, at 45; Jaehnig, *supra* note 13 at 726, 736; Bassiouni, *Perspectives*, *supra* note 41, at 25.

201. See Pohlmann & Foley, *supra* note 1, at 35; Terry, *supra* note 10, at 768; *Crisis Cop Raps Media: Hostage Squad's Frank Bolz Asks Press to Police Itself*, MORE, June 1977 at 19 [hereinafter *Crisis Cop*]; Bassiouni, *Perspectives*, *supra* note 41, at 25.

202. See Bassiouni, *Perspectives*, *supra* note 41, at 25.

203. See *Crisis Cop*, *supra* note 201, at 19; Jaehnig, *supra* note 13, at 726.

subtle persuasion of potential career enhancement.²⁰⁴ Network policies of recruitment and advancement assure that newsroom policies rather than philosophical principles succeed in network news.²⁰⁵ Newspaper staffers also conform to newsroom policies due to the somewhat more subtle factors of socialization within the job environment and esteem for superiors.²⁰⁶ Reporters are seeking to establish the reputation of being first with the news and first with the viewers. Neither factor is conducive to operating a self-regulated industry. Neither is either factor conducive to responsible reporting.

The media industry argues that they are a profession and that like any other recognized profession—e.g. doctors or lawyers—should be allowed to regulate themselves. However, journalists are not now and have never been truly considered “professionals.”²⁰⁷ They have no intense period of specialization; they, in fact, abhor responsibility for their judgments and actions;²⁰⁸ they tend to place greater emphasis on economic gain rather than personal service; they have no comprehensive self-governing organization; and they have no true Code of Ethics subject to clarification and interpretation by the courts.²⁰⁹ In truth, there is no reason to expect the industry to be “professional” enough to regulate itself.

Finally, self-regulation itself is an almost impossible task given the vast number of organizations nationwide with no central authority.²¹⁰ The National Association of Broadcasters (“NAB”), which most television stations belong to and which has been instrumental in regulating such areas as the family viewing hour,²¹¹ is the nearest thing in the industry to a central authority; however, membership is not mandatory.²¹² Even the United States Supreme Court has openly recognized the problems inherent in fragmented self-imposed restraints:²¹³ reporters from distant places are unlikely to be guided by their own standards and state courts have real

204. See Warren Breed, *Social Control in the News Room: A Functional Analysis*, 33 SOC. FORCES 326, 329-30 (1955); Jaehnig, *supra* note 13, at 742.

205. Jaehnig, *supra* note 13, at 742.

206. Breed, *supra* note 204, at 329-30.

207. See Terry, *supra* note 10, at 760-61.

208. See Jaehnig, *supra* note 13, at 732-39.

209. See Jack M. McLeod & Searle E. Hawley, Jr., *Professionalism Among Newsmen*, 41 JOUR. Q. 529, 530 (1964). Factors from a list of eight criteria relevant to deciding if an occupation is a profession are found in this publication.

210. See Jaehnig, *supra* note 13, at 727, 736; *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 550 (1976).

211. See Marc A. Franklin, *CASES AND MATERIALS ON MASS MEDIA LAW* (2d ed. 1982).

212. *Id.*

213. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 550 (1976).

practical difficulties in controlling newspapers or broadcasters outside of their jurisdiction.²¹⁴

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

VI. THE FIRST AMENDMENT

“Congress shall make no law . . . abridging freedom of speech or of the press”²¹⁵

The First Amendment has stood as a bar to government regulation of the media for 200 years. And yet, as Thomas Emerson has observed, “[t]he outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.”²¹⁶ Despite the apparent unequivocal command of the First Amendment, a majority of the Court has never supported the absolutist approach of interpretation.²¹⁷ Whole areas or forms of expression have been held outside the scope of constitutional protection.²¹⁸ Even with regard to protected speech, the Court frequently uses a balancing approach weighing the government concern involved in the regulatory scheme against the speaker’s, writer’s and/or society’s interest in the expression.²¹⁹ Within this balancing approach, the Court has on occasion found that certain categories of speech required a lower level of protection.²²⁰ Nonetheless, the First Amendment continues to

214. *Id.*

215. U.S. CONST. Amend. I.

216. See Emerson, *supra* note 128.

217. Only Justices Black and Douglas have subscribed to a literal interpretation of the First Amendment. See generally Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Countryman, *Justice Douglas and Freedom of Expression*, 1978 U. ILL. L.F. 301. See also *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black concurring); 385 U.S. at 401 (Douglas concurring); *Rosenblatt v. Baer*, 383 U.S. 75, 90 (1966) (Douglas dissenting), 383 U.S. at 95 (Black dissenting).

218. “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an 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.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

219. Franklin, *supra* note 211, at 34.

220. Obscenity is one example. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See generally Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist*

maintain a somewhat preferred position in constitutional analysis,²²¹ and when the press uses it as their shield or sword it could be a potent and valuable weapon.

There are two basic types of government interference with First Amendment freedoms: content-related and content-neutral.²²² Content-related regulation pertains to controlling *what* is said while content-neutral regulation applies to the *manner* in which it is said or, as applied to the press, the manner in which the information is received. The importance of the distinction is that normally the government bears a heavy burden in overcoming the presumption that content-based regulation is unconstitutional while the interests are more evenly balanced if a content-neutral regulation is at issue.²²³

A few words should be said at this point concerning the unique status of the electronic media (television and radio). The Supreme Court has been willing to recognize a limited distinction between printed and electronic media.²²⁴ Rationales for the different treatment of the broadcasting industry include: (1) airwaves are in the public domain and, as such, the grant of a license is a privilege, not a right;²²⁵ (2) due to a scarcity of airways, some regulation must occur so as to guarantee the public an uncluttered, comprehensible broadcast;²²⁶ (3) the unique power of the medium;²²⁷ and (4) the pervasive and intrusive nature of the medium.²²⁸ The Court has

View, 68 GEO. L. J. 727 (1980); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

221. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). *But see Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring).

222. See Tribe, *supra* note 148, at 580-81; Bassiouni, *Perspectives*, *supra* note 41, at 36.

223. See Bassiouni, *Perspectives*, *supra* note 41, at 36.

224. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 386, 388 (1969).

225. See Comment, *The First Amendment and Regulation of TV News*, 72 COLUMBIA L. REV. 746 (1972) [hereinafter *Regulation of TV News*]; Bassiouni, *Perspectives*, *supra* note 41, at 45. "A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *Columbia Broadcast Service v. FCC*, 453 U.S. 367, 395 (1981) (quoting *Office of Comm'n of the United Church of Christ v. FCC*, 359 F. 2d 994, 1003 (1966)).

226. See *Regulation of TV News*, *supra* note 225 at 766; Bassiouni, *Perspectives*, *supra* note 41, at 45.

227. See *Regulation of TV News*, *supra* note 225 at 765-66; H.R. REP. NO. 349, 92nd Cong., 1st Sess. 61-63 (1971); Bassiouni, *Perspectives*, *supra* note 41, at 45.

228. H.R. REP. NO. 349, 92nd Cong., 1st Sess., 61-63 (1971); Bassiouni, *Perspectives*, *supra* note 41, at 45; *Red Lion*, *supra* note 224, 395 U.S. at 387; *Pacifica*, *supra* note 224, 438 U.S. at 748. Other distinctions can be drawn between broadcasting, particularly television, and the print media: (1) the reader of a newspaper can at any time go directly to what interests

upheld regulation of the broadcasting medium by the FCC²²⁹ who has been empowered by the Communications Act of 1934 to grant renewable licenses on the basis of a "public interest, convenience, or necessity" standard.²³⁰ Although the FCC has no power of censorship nor power to interfere with the right of free speech,²³¹ the Commission is specifically directed to consider the demands of the public when promulgating rules and regulations²³² and prescribing restrictions and conditions²³³ upon obtaining a grant,²³⁴ renewal,²³⁵ or modification²³⁶ of a license. However, although there are numerous legal areas of content-regulation by the FCC and Congress,²³⁷ the Commission has never taken action against a license based

him and skim or ignore the rest; in broadcasting, the choice is made for the listener by the broadcaster: the speed, content and sequence are fixed; (2) the role of sound: written messages are not communicated unless they are read, and reading requires an affirmative act; an ordinary habitual television watcher could avoid messages only by the affirmative act of frequently leaving the room, changing the channel, or doing some other such affirmative act; (3) a person who knows he is appearing on television may alter his behavior because of it; and (4) television is not neutral; it represents a coherent world of images and messages serving its own institutional interest. See Franklin, *supra* note 211, at 716-17.

229. See, e.g., *Red Lion*, *supra* note 224, 395 U.S. at 387; *Pacifica*, *supra* note 224, 438 U.S. at 748; *FCC v. RCA Comm'n., Inc.*, 346 U.S. 86 (1953).

230. 47 U.S.C. §§ 303, 307, 309 (1970).

231. See *id.* at § 326.

232. See *id.* at § 303.

233. See *id.* at § 326.

234. See *id.* at §§ 307(a), 309(a).

235. See *id.* at § 307.

236. *Id.*

237. For example,

- 1) covert sponsorship of broadcast activities forbidden - 47 U.S.C. § 317(a)(1) (1970);
- 2) airing of rigged quiz shows forbidden - § 509(a);
- 3) obscenity - In re Application of WDKD for Renewal of License, 33 F.C.C. 250 (1962);
- 4) broadcasting obscene language - 18 U.S.C. §1464 (1970) (making obscenity, indecency or profane language a criminal act);
- 5) defamation - *Trinity Methodist Church, S. v. FRC*, 62 F.2d 850 (D.C. Cir. 1932) *cert. denied*, 288 U.S. 599 (1933) (denial of license renewal);
- 6) Fraud contests - In the Matter of KWK Radio, Inc., 34 FCC 1039 (1963) (license revocation);
- 7) Illegal lotteries - *WRBL Radio Station, Inc.*, 2 FCC 687 (1936); 18 U.S.C. § 1302 (1970);
- 8) Harmful medical advice - *KFKB Broadcasting Assn. v. FRC*, 47 F.2d 670 (D.C. Cir. 1931) (denial of license renewal).
- 9) Gambling information - *Community Broadcasting Service, Inc.*, 20 FCC 168 (1955) (denial of license renewal).
- 10) No mechanically reproduced production of news or other material "in which element of time is of special significance" made without announcement of such.

on improper news reporting,²³⁸ and the Supreme Court, when confronted with news-related issues, has failed to distinguish between the two mediums.²³⁹ It is only within the last ten to fifteen years that the broadcasting industry, particularly news reporting, has grown to have such a pervasive influence on our society. Our government, including the Supreme Court, has not assimilated this change into its constitutional analysis quite so quickly. However, the basis for a valid distinction regarding news reporting is there and should never be forgotten.

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

A. *Prior Restraint*

Considered the most pernicious form of regulation, prior restraints are extremely hard, if not impossible, for the government to justify. A prior restraint is considered, in many ways, to be more inhibiting than a subsequent punishment or an access restriction. As the United States Supreme Court has said,

It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; and the dynamics of the system drive toward excesses, as the history of all censorship shows.²⁴⁰

The true "muscle" in a system of prior restraints is the fact that once an injunction is issued, the party against whom it is issued must obey the injunction until it is stayed,²⁴¹ vacated, or reversed on appeal and should he be held in contempt, he is usually not permitted to assert the invalidity of the underlying order.²⁴² The Fifth Circuit has noted, however, that the media present special problems in contempt proceedings.²⁴³ It has recognized that

47 CFR 73.118, 73.288, 73.653 (1971).

238. See Regulation of TV News, *supra* note 225, at 748.

239. See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

240. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 589-90 (1976) (Brennan, J., concurring) (quoting Emerson, *supra* note 128 at 5-6).

241. State and federal courts commonly provide that a single appellate judge may stay the order of a lower court. See Franklin, *supra* note 211 at 62.

242. See *id.* at 60.

243. See *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972).

timeliness of the publication of news is sometimes all-important.²⁴⁴ Thus, “where the publication of news is sought to be restrained, the incontestable inviolability of the order may depend on the immediate accessibility of orderly review.”²⁴⁵ “[N]ewsmen are citizens, too. They too may sometimes have to wait. They are not yet wrapped in any immunity or given the absolute right to decide with impunity whether a judge’s order is to be obeyed or whether an appellate court is acting promptly enough.”²⁴⁶

*Near v. Minnesota*²⁴⁷ was the first case involving press censorship and prior restraint to come before the Supreme Court. Chief Justice Hughes, writing for the majority, noted, “The main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments.”²⁴⁸ However, he also suggested that the prohibition against prior restraints is not absolute,²⁴⁹ noting that limitations on First Amendment protection might be recognized in the following situations: (1) to “prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops” (troopship exception);²⁵⁰ (2) to enforce the “primary requirements of decency” against obscene publications;²⁵¹ (3) to protect the community “against incitements to acts of violence and the overthrow by force of orderly government;”²⁵² and (4) to enjoin “against uttering words that may have all the effect of force.”²⁵³

Forty years later, in the “Pentagon Papers” case,²⁵⁴ the Supreme Court was still unwilling to declare an absolute ban against prior restraints.²⁵⁵ Although rejecting by six to three the government’s effort to restrain the publication of classified materials on the Vietnam War, the Justices, in their concurrences and dissents, discussed the times when prior restraint might be permitted. Justice Brennan would have upheld the troop/ship exception as the only exception.²⁵⁶ Justices Stewart and White would have upheld a

244. *Id.* at 512.

245. *Id.*

246. *Id.* (internal citation omitted).

247. *Near v. Minnesota*, 283 U.S. 697 (1931).

248. *Id.* at 714.

249. *Id.* at 716.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *N.Y. Times Co. v. U.S.*, 403 U.S. 713 (1971).

255. *See id.* at 714.

256. *See id.* at 726-27.

prior restraint where disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people."²⁵⁷ Justices Marshall, White, Stewart and Burger felt that a prior restraint might be okay had Congress legislated it but that it was "inconsistent with the concept of separation of powers for th[at] Court to use its power of contempt to prevent [certain] behavior."²⁵⁸ Justice Blackmun subscribed to a system of balancing.²⁵⁹

Near concerned a *total* restraint on a future publication by a newspaper while the Pentagon Papers case involved publishing material about an event that was history. *Nebraska Press Association v. Stewart*²⁶⁰ provides a case more directly analogous to a terrorist situation in that it involved only a temporary restraint on publication²⁶¹ and an urgent ongoing situation in the context of pretrial publicity.²⁶² Even so, the Court decided that other alternatives were available and therefore a resort to prior restraints was unconstitutional.²⁶³ It should be noted, however, that the Court went through a detailed analysis of the record considering the nature and extent of the pretrial news coverage, alternative measures, how effective a restraining order would be, and the precise terms of such an order.²⁶⁴ A four-prong-test can be deduced from the Court's analysis and was enunciated by Justice Powell in his concurrence.²⁶⁵ A prior restraint may issue only when there is a showing that (1) there is a clear threat to the governmental interest, (2) "such a threat is posed by the actual publicity to be restrained," (3) "no less restrictive alternatives are available" and (4) "previous publicity or publicity from unrestrained sources will not render the restraint inefficacious."²⁶⁶

257. *Id.* at 729.

258. *Id.* at 741.

259. *See id.* at 761.

260. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

261. The temporary nature of the order did not persuade the Court. In fact, it noted that in *New York Times Co.* the burden on the Government was not reduced by the temporary nature of a restraint. *Id.* at 559. The Court also discussed the nature of delay in the news industry concluding that the element of time is important if the press is to "fulfill its traditional function of bringing news to the public promptly." *Id.* at 560-561. The Court also expressed a skepticism about any measure which "would allow government to insinuate itself into the editorial rooms of this Nation's press." *Id.* (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring)).

262. *See id.* at 542.

263. *See id.* at 570.

264. *Id.* at 562-70.

265. *Id.* at 571 (Powell, J. concurring).

266. *Id.*

Closely related to prior restraints are the “clear and present danger”²⁶⁷ and “national/state security”²⁶⁸ cases. The “clear and present danger” doctrine originated during the World-War-I-era in *Schenk v. United States*²⁶⁹ and concerned subversive advocacy. The original test was “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.”²⁷⁰ Subsequent cases have added a requirement of immediacy.²⁷¹ As stated in *Landmark Communications v. Virginia*,²⁷²

the [clear and present danger] test requires a court to make its own inquiry into the imminence and magnitude of danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State’s interests should also be weighed.²⁷³

As one can see it is hard to distinguish between the requirements necessary to overcome a prior restraint and the requirements of the clear and present danger test. Appropriately, it has been suggested that the clear and present danger test (i.e. suppression is all right if the harm sought to be avoided is specific, the suppression sought to be suppressed is likely to cause that harm, and the threatened harm is imminent)²⁷⁴ is the framework for the Supreme Court’s analysis of most content-related speech.²⁷⁵

Although the Supreme Court has long realized that the “State has [a] necessary interest in . . . preventing the community from being disrupted by violent disorders endangering both persons and property,”²⁷⁶ it is unlikely that prior restraints or regulations relating to the intimidation,²⁷⁷ imitation,²⁷⁸ and immunization²⁷⁹ factors will be allowed. They lack immediacy of

267. *Schenk v. U.S.*, 249 U.S. 47, 52 (1919); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

268. Franklin, *supra* note 211, at 260; *U.S. v. Progressive, Inc.*, 467 F. Supp. 990 (E.D. Wis. 1979); *N.Y. Times v. U.S.*, 403 U.S. 713 (1971).

269. *Schenk v. U.S.*, 249 U.S. 47 (1919).

270. *Id.* at 52.

271. The publication must “surely result in direct, immediate, and irreparable damage to our Nation or its people.” *N.Y. Times*, 403 U. S. at 730 (Stewart, J., concurring). *See also, Brandenburg, supra* note 267, 395 U.S. at 447-48.

272. *Landmark Comm’ns v. Virginia*, 435 U.S. 829 (1978).

273. *Id.* at 843.

274. *See Bassiouni, Perspectives, supra* note 41, at 38.

275. KRATTENMAKER & POWE, *supra* note 61, at 1183-93.

276. *Brandenburg v. Hayes*, 408 U.S. 665, 701 (1972).

277. *See text at note 89-94, supra.*

278. *See text at note 95-107, supra.*

279. *See text at note 108-111, supra.*

danger and sufficient empirical data to link the broadcast to the harm.²⁸⁰ However, dissemination of information highly likely to jeopardize the lives of hostages or victims is a specific harm of a very grave nature which is sure to result if the publication of the information is not suppressed. It is highly likely that a narrowly drawn regulation affecting such dissemination would be constitutionally permissible.

B. *Subsequent Punishment*

Although the Court seems adamant about its refusal to authorize prior restraints except under the most compelling situations, it seems to have no difficulty with the concept of criminal or civil sanctions.²⁸¹ In the Pentagon Papers case,²⁸² Justices Stewart,²⁸³ White,²⁸⁴ Marshall,²⁸⁵ and Burger²⁸⁶ expressed the idea that Congress had the power to enact specific and appropriate laws and that they would have no difficulty sustaining convictions under such laws. However, the precedents dealing with content regulation by criminal or civil sanction are few and distinguishable.²⁸⁷

Most recently, in *Smith v. Daily Mail Publishing Co.*,²⁸⁸ the Court held that a state interest of the highest order was necessary to punish publication of truthful information lawfully obtained.²⁸⁹ The statute in that case, punishing dissemination of the name of juvenile offenders, was held

280. See Krattenmaker & Powe, *supra* note 59, at 1193-96; Bassiouni, *Perspectives, supra* note 41.

281. See, e.g. *N.Y. Times v. U.S.*, 403 U.S. 713, 730-33; *Near v. Minnesota*, 283 U.S. 697, 720 (1931); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 588 n.15 (1976) (Brennan, J., concurring).

282. *N.Y. Times*, *supra* note 254, 403 U.S. at 713.

283. *Id.* at 730 (Stewart, J., concurring).

284. *Id.* at 734-39 (White, J., concurring) ("However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed...I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.").

285. *Id.* at 743 (Marshall, J., concurring).

286. *Id.* at 752 (Burger, C.J., dissenting) ("I should add that I am in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.").

287. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (concerning publication of a juvenile offender's identity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (dealing with a group libel law); *Winters v. New York*, 333 U.S. 507 (1948) (dealing with an unconstitutionally vague statute); *Landmark Commissioners v. Virginia*, 435 U.S. 829 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

288. *Daily Mail, supra* note 287, 443 U.S. at 97.

289. *Id.* at 103.

unconstitutional. Although finding the state interest of protecting the reputation of juveniles not compelling enough, the Court makes strong mention of the fact that the statute did not truly serve that state interest because by punishing newspapers only, it allowed dissemination by other sources.²⁹⁰ It noted, too, that although other states had the same interest, they had found an alternative way of accomplishing their objective.²⁹¹ Very possibly, had the statute included all media in its prohibition and had the Court found no alternative means, the statute would have passed constitutional muster.

Civil action against the media is, again, a fairly undeveloped area, and usually deals with the electronic media. The cases tend to fall into two main categories: (1) where the content of the broadcast has an immediate impact on the viewer (direct harm), and (2) where the viewer of the broadcast engages in conduct that harms a third party (indirect harm).²⁹² The direct harm cases entail a factual situation where the viewer tries something he has seen done on television, has heard on the radio, or read in a book and consequently harms himself. The clear and present danger doctrine has been the analytical framework used by the court in these few cases,²⁹³ although the test seems to turn on a reasonable man/likelihood of harm analysis.²⁹⁴

The indirect harm cases encompass the controversial "influence of television violence"²⁹⁵ and imitative crime²⁹⁶ cases. Incitement to

290. *Id.* at 104-05.

291. *Id.* at 105.

292. Franklin, *supra* note 211, at 221.

293. *See* Walt Disney Productions, Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981). *See also* DeFilippo v. Nat'l Broadcasting Co., No. 79-3678 (R.I. Sup. Ct. June 8, 1980) (unpublished opinion). It is generally held, often as a result of "Printer's Ink Statutes," that publishers are not liable for harm caused to readers by advertisements unless the editor knew of the danger created by the advertised product. Franklin, *supra* note 211, at 225. Perhaps the same standard should be used with news reporting. Publishers will not be liable for harm caused by publication of a terrorist event (remember terrorists are using the media for publicity just as any vendor is) unless the editing reporter knew such publication was dangerous—either to the public at large (such "knowledge" at this date would be hard to prove) or to specific individuals (hostages or potential victims).

294. *See* Walt Disney, *id.*, 276 S.E.2d at 583 ("Pied Piper" discussion).

295. *See, e.g.*, Zamora v. Columbia Brdcst. Sys., 480 F. Supp. 199 (S.D. Fla. 1979) where a fifteen-year-old convicted of killing his eighty-three-year-old neighbor claimed that while he was between the ages of five and fifteen he had become desensitized to and intoxicated by violence because of extensive viewing of televised violence and that the network had incited him to duplicate the acts he saw on television. The trial judge dismissed the complaint. *See also* Franklin, *supra* note 211, at 232.

296. *See, e.g.*, Olivia N. v. Nat'l Broadcasting Co., 126 Cal App. 3d 488 (1981); Niemi v. Nat'l Broadcasting Co. Inc., 458 U.S. 1108 (1982) (involving the artificial rape of a 9 year old girl allegedly connected to the viewing of the show "Born Innocent"); Weirum v. RKO

violence²⁹⁷ is the test being used and, so far, empirical data proving the causal link seems to be the missing factor in holding a station liable.²⁹⁸ However, in a recent California Supreme Court case,²⁹⁹ a radio station was held liable for a death caused by a teenage driver who was speeding to find a moving radio van whose driver was offering prizes to the first to find them. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner.³⁰⁰

Particularly in ongoing situations involving hostages or potential victims, media reporters should be able to predict with a reasonable degree of certainty that a harmful act is likely to result from certain broadcasts.³⁰¹ That the act is physically perpetrated by a third party should make the media no less culpable.³⁰² Media corporations should be held financially responsible for harm caused to innocent victims through the fault of the media's employees. They profit from the broadcast of the incident and in a just and fair system, that profit should be made available to compensate the victim of the activity.³⁰³ However, either a new judicially created tort theory of recovery or an adoption of a statute may be needed.³⁰⁴ At least one commentator has suggested such a statute.³⁰⁵

General, Inc., 539 P.2d 36 (Cal. 1975) (involving a traffic fatality allegedly caused by the enticement of a radio station promotion reward program).

297. See *Olivia N.*, *id.*, 126 Cal. App. 3d at 495. See also *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Appellant's counsel in *Olivia N.* defined incitement as "telling someone to go out, encouraging them, directing them, advising them." 126 Cal. App. 3d at 491 n.1. See also Franklin, *supra* note 211, at 227, n.1.

298. See Michael I. Spak, *Predictable Harm: Should the Media Be Liable?*, 42 OHIO ST. LAW J. 671, 680 (1981).

299. *Weirum*, *supra* note 296, 539 P.2d 36.

300. In *Weirum*, the court emphasized that the youthful contestant's reckless behavior was "stimulated" by the radio station's broadcast, and that the broadcast repeatedly and actively encouraged listeners to speed to announced locations. *Id.*, 539 P.2d at 40.

301. See Spak, *supra* note 298, at 671.

302. See *Wierum*, *supra* note 296, 539 P.2d at 40.

303. See Spak, *supra* note 298 at 680-81.

304. See *id.* at 671.

305. "Any person, partnership, joint venture, or corporation that produces any work designed to be shown to the public will be liable for the physical harm caused to a member of the public as a result of the showing of that work if: (a) it is shown by clear and convincing evidence that the proximate cause of plaintiff's injuries was a reaction by some member of the public to viewing the work; (b) it is shown by clear and convincing evidence that the act that was reproduced was excessively violent in fact; and (c) the producers knew or should have known that the depiction of this violent act created a probability of its being reproduced in society." *Id.* at 679-80.

Any statute, criminal or civil,³⁰⁶ must be narrowly and precisely drawn. It must show a compelling necessity for regulation³⁰⁷ and that the government's objective cannot be achieved through any alternative means.³⁰⁸ The regulation must be specific enough to withstand overbreadth, vagueness, and possible equal protection analysis,³⁰⁹ and to put the affected actors on fair and sufficient notice that their conduct is illegal.³¹⁰ It should allow only limited official discretion.³¹¹ A statute too vague or indefinite, in form or as interpreted, will be considered void on its face.³¹²

C. Access Restrictions

It has been repeatedly held that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."³¹³ However, in recent cases, the inquiry has begun to turn on what information the public *should* have access to. Furthermore, the role of the press seems to be evolving into that of a surrogate for the public.³¹⁴ The most recent cases have involved access to prisons³¹⁵ and access to court proceedings.³¹⁶ Both areas deal with public institutions; however, the Supreme Court has upheld regulations related to media access to prisons³¹⁷ while holding unconstitutional restraints on trial coverage.³¹⁸ Distinctions and similarities can be drawn between the two and history seems to be the biggest factor.

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

307. See Juanita Jones & Abraham Miller, *The Media and Terrorist Activity: Resolving the First Amendment Dilemma*, 6 OHIO N. U. L. REV. 70, 79-81 (1979).

308. *Id.* at 79, 81.

309. See Bassiouni, *Perspectives*, *supra* note 41, at 41.

310. *Winters*, *supra* note 306, 333 U.S. at 509-10.

311. See Jones & Miller, *supra* note 307, at 79, 81.

312. *Winters*, *supra* note 306, 333 U.S. at 509.

313. *Branzburg*, *supra* note 276, 408 U.S. at 684. See also *Richmond Newspapers*, 448 U.S. 555; *Houchins*, *supra* note 239, 438 U.S. 1; *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Saxbe*, 417 U.S. 843.

314. See *Richmond Newspapers*, 448 U.S. at 573; *Houchins*, 438 U.S. at 39; *Pell*, 417 U.S. at 839-40, (Douglas, J., dissenting); *Saxbe*, *supra* note 177, 417 U.S. at 861-64 (Powell, J., dissenting).

315. See *Houchins*, *supra* note 239, 438 U.S. 1; *Saxbe*, *supra* note 177, 417 U.S. 843; *Pell*, *supra* note 313, 417 U.S. 817.

316. *Richmond Newspapers*, *supra* note 313, 448 U.S. at 555; *Gannet Co. v. DePasquale*, 443 U.S. 368 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

317. See cases cited *supra* note 316.

318. See cases cited *supra* note 317. Note, however, that no case in either of these areas has drawn a majority: *Richmond Newspapers* had six concurrences, one dissent and one

Historically, trials have been public. The Supreme Court has found that public trials are necessary to a proper functioning of our political system.³¹⁹ Where the public goes, so goes the press. Historically, the public has not had access to prisons; therefore, regulating media access would not be discriminatory against the press, but would merely eliminate a special privilege the press has vis-à-vis the public.³²⁰ Similarly, restricting media access to the scene of a publicity-seeking crime would surely be within constitutional bounds. The Supreme Court has specifically said, "Newsmen have no constitutional right of access to scenes of crime or disaster when the general public is excluded."³²¹ Except to know whether they are in immediate danger, the public has no real interest in the details of a crime—other than morbid interest in the tragedy of others on which our society seems to thrive. Therefore, the press, having no greater access rights than the general public, could constitutionally be restricted in their access to publicity-seeking crimes and criminals.

In considering alternative measures available in the trial case, the Court found that the State rather than the media had viable alternatives to choose from for fulfilling its goal and that those alternatives were less restrictive than refusing access to the media.³²² In the prison cases, however, the Court noted that the media, rather than the government, had alternative means to fulfill its goals of getting information about prison conditions such as interviewing recently released prisoners, legal advisors, doctors, and others who were in and out of the prisons.³²³ In much the same way, and for many of the same reasons, it is the press rather than the government who has alternative means to achieve its goals in a publicity-seeking crime situation. Information can be obtained from police officials during the incident and from released victims, hostages, and the criminals themselves after the incident.

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

Justice took no part in the decision; *Nebraska Press* had six concurrences; *Gannett* had three concurrences, four concurrences in part and dissent in part; *Pell* had three dissents and one concurrence and dissent; *Saxbe* had four dissents; *Houchins* had one concurrence, two Justices took no part and three dissents.

319. See *Richmond Newspapers*, *supra* note 313, 448 U.S. at 573.

320. See *Pell*, *supra* note 312, 417 U.S. at 831.

321. *Branzburg*, *supra* note 276, 408 U.S. at 684-85. See also *Pell*, *supra* note 312, 417 U.S. at 834; *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980).

322. *Richmond Newspapers*, *supra* note 313, 448 U.S. at 580-581.

323. *Saxbe*, *supra* note 177, 417 U.S. at 848.

also has noted that pretrial publicity did not always result in an unfair trial.³²⁴ In addition, the result of an unfair trial could be cured through a reversal, although the Court noted that this was not the best remedy.³²⁵ The harm threatened in the prison cases, however, was personal physical violence and once perpetrated could never be undone.³²⁶ The Court was concerned with the fact that press attention made certain inmates virtually public figures within the prison society, gaining them a disproportionate degree of notoriety and influence among their fellow inmates. These inmates tended to become a source of substantial disciplinary problems. This fact, combined with the substantial security needs in an environment with such a large capacity for violence was considered a compelling state interest by the Court.³²⁷ This is a strong point in favor of the constitutionality of restricted media access during publicity-seeking crimes.

The Court has never ruled directly on the problems with obtrusive equipment and the sheer numbers of reporters³²⁸ although restrictions on numbers have been allowed if a reasonable basis for selective classification is given.³²⁹ It seems, however, that in a case where such equipment and a crowd of reporters could directly jeopardize lives in an on-going situation,³³⁰ restrictions on the use of cameras, the number of reporters,³³¹ the type of

324. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). See also *Richmond Newspapers*, *supra* note 313, 448 U.S. at 564.

325. *Richmond Newspapers*, *supra* note 313, 448 U.S. at 555.

326. See *Pell*, *supra* note 312, 417 U.S. at 822-23, 826-27, 848-49.

327. *Id.*

328. Note, however, that at least one Justice has expressed an opinion on restrictions of media equipment. Justice Stewart, concurring in *Houchins v. KQED*, refers to "effective" access:

A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Houchins, *supra* note 239, 438 U.S. at 17. The plurality opinion, however, upheld the restriction against the use of cameras and tape recorders on the monthly tours. *Id.* at 5, 16. See also *Sigma Delta Chi v. Speaker*, Maryland House of Delegates, 310 A.2d 156 (1973); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977).

329. *Los Angeles Free Press, Inc. v. Los Angeles*, 9 Cal App.3d 448 (1970); *Cable News Network, Inc. v. American Broadcasting Co.*, 518 F. Supp. 1238 (N.D. Ga. 1981).

330. See *supra* text accompanying notes 122-127.

331. One suggestion might be to limit the number of reporters to only those trained in terrorist events.

cameras, telephone access, helicopter coverage, etc., would be constitutionally permissible.

D. FCC Regulation

As has been detailed previously,³³² the Supreme Court, at least in areas other than news coverage, has been willing to make a distinction between the printed and electronic media.³³³ It is time for that distinction to flow over into the area of news broadcasting. News broadcasting poses unique problems not present in the traditional free speech case³³⁴ and certainly inconceivable to the framers of the Constitution.³³⁵ It is pervasive,³³⁶ becoming less and less edited,³³⁷ and gives the impression of "authenticity per se."³³⁸

In addition to the above, the media wields unprecedented power.³³⁹ And yet, access by the average citizen is extremely limited. As John F. Kennedy once said, "Those who make peaceful evolution impossible, make violent revolution inevitable."³⁴⁰ In other words, those who make peaceful evolution possible, make violent revolution unnecessary. If publicity is what these criminals so desperately desire, why should the media be allowed to force them to violence to attain such publicity? Shouldn't those with full control of all the resources be made to share those resources, which are supposedly part of the public domain, to a small extent with the public?

Although the Court has never recognized a general right of public access to the airwaves,³⁴¹ it has recognized a limited right to reasonable

332. See *supra* text accompanying notes 224-230.

333. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

334. *Buckley v. Valeo*, 424 U.S. 1, 50, n.55 (1976) (citing *Red Lion*); *Columbia Broadcasting v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973). Television and radio have a greater impact than any other media. The public places heavy reliance on television as its primary source of information concerning public events. The psychological impact of television news is said to be far different from that of the printed press. Whereas a newspaper account provides a narration of an event, television news frequently purports to present the event as it actually occurred, with the impression conveyed to the viewer that he himself is perceiving the event. H.R. REP. NO. 349, 92nd Cong., 1st Sess. 61-63 (1971); *Regulation of TV News*, *supra* note 225; *The Coming Explosion in TV News*, *supra* note 75, at 46.

335. See Catton, *supra* note 55 at 704.

336. *Pacifica*, *supra* note 140, 438 U.S. at 726.

337. See Jaehnig, *supra* note 13, at 719.

338. See Bassiouni, *Perspectives*, *supra* note 41, at 21.

339. See note 59, *supra*.

340. See Bassiouni, *Perspectives*, *supra* note 41, at 12.

341. See *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981).

access under the Fairness Doctrine.³⁴² The Fairness Doctrine is a requirement placed on radio and television broadcasters that adequate coverage be given to public issues and that such coverage must be fair in that it accurately reflect the opposing views. This must be done at the broadcaster's own expense and initiative if sponsorship and suggestions are available from no other source.³⁴³ A number of years ago a proposal was made by the FCC³⁴⁴ that would have allowed broadcasters to opt for public access to the airwaves system in lieu of complying with the commission's traditional standard for the Fairness Doctrine. Under the proposal, a broadcaster would presumptively be in compliance if four conditions were met: (1) one hour per week should be set aside for spot announcements and lengthier programming which would be available for the presentation of messages by members of the general public; (2) half of this time should be allotted on a first-come-first served basis on any topic whatsoever; (3) both parts of the allocation scheme should be "nondiscriminatory as to content with the licensee"; and (4) the broadcaster would still be required to ensure that spot messages or other forms of response to "editorial advertisements" are broadcast.³⁴⁵ This proposal should be reappraised by the FCC and considered as a mandatory access rather than an option to the broadcasters in hopes that given a less violent opportunity at mass communication, many publicity-seeking criminals could be placated.³⁴⁶

The FCC is empowered to prescribe restrictions and conditions on obtaining a license based on a public interest, convenience, or necessity standard.³⁴⁷ It is also possible, but not very likely, that television and radio licensees could be restricted in their coverage of publicity-seeking crime that relates to sensationalism, publication of "how to" information, and publication of the names of groups or individuals claiming responsibility for various crimes based on a public interest justification. However, it must be remembered that the FCC has no power of censorship nor any power to interfere with the right of free speech,³⁴⁸ so just how far the regulations can go is probably limited by the same standards mentioned in the prior restraint, subsequent punishment, and access restrictions areas.

342. *Id.* at 400.

343. *See Red Lion, supra* note 333, 395 U.S. 367, 377.

344. 41 RAD. REG. 22d 1311 (P & F 1977).. *See also*, Terry, *supra* note 10, at 773-74.

345. 41 RAD. REG. 22d at 1335 (P & F 1977). *See also*, Terry, *supra* note 10, at 773-74.

346. *See Bassiouni, Perspectives, supra* note 41, at 30; Pohlmann & Foley, *supra* note 1, at 35; van der Vat, *supra* note 41, at 27.

347. 47 U.S.C. §§ 303, 307, 309 (1970).

348. *Id.* at § 326.

VII. CONCLUSION

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

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

By limiting media access to the scenes of on-going crimes, all three concerns could be lessened in their impact. By not showing the actual crime being perpetrated on the screens of viewers' living room television sets, feelings of anxiety and fear could be lessened. By not showing the criminals in the act of committing the crime, much of the gratification is removed from the act for the criminal and for those who might imitate him. Again, by not continually showing the gory details as they happen, the viewing public becomes less immunized against the atrocities of crime. The reasons for limiting access are not related to the intimidation, imitation, or immunization factors but are based on the safety of potential victims. However, as long as

the regulation is justified by a sufficient state interest, any overflow benefits are a windfall.

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

First and foremost, the Government should require that on-the-scene coverage should be limited to only those reporters who have had training in terrorist situations. Such selective access could be supported as long as it furthers a compelling governmental interest identified by narrowly drawn standards.³⁴⁹ Secondly, all suggestions made regarding broadcast areas, briefing areas, police hotlines, police spokespersons, direct contact with criminals during ongoing situations, and so forth³⁵⁰ could be justified based on the fact that the public has no need or right to be at the scene and the press has no more rights than the public, the lack of governmental alternatives in dealing with the problem, and the gravity of the harm.³⁵¹

It is quite possible that prior restraints could operate to restrain a newsman from publishing information such as police strategies, activities, or plans or the presence of hidden persons or escaping hostages. Such publication would "surely result in direct, immediate, and irreparable damage to [our Nation's]... people."³⁵²

However, it is more likely that subsequent punishment would be met with less resistance. The state interest in saving lives is of compelling importance, there are no less restrictive alternatives (as long as access is also being limited), and it would apply to all media. It is very likely that civil sanctions would be allowed in these situations. Media reporters, especially those trained in terrorist tactics, should know what information, if released, would endanger lives. Such knowledge should make them and their respective employers liable for any harm caused because of their actions.³⁵³

Three of the purposes for constitutionally guaranteeing freedoms of expression and of the press were 1) the advancement of knowledge and discovery of truth, as an essential element of self-governance, 2) the provision of a safety valve by substituting reason for force, and 3) the

349. See *Sherril v. Knight*, 569 F.2d 124, 126 (D.C. CA 1977); *Watson v. Cronin*, 384 F. Supp. 652, 660 (D. Colo. 1974).

350. See discussion in text and notes 169-179, *supra*.

351. See discussion in text and notes 321, 267-275, *supra*.

352. *N.Y. Times v. U.S.*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring with whom White, J. joins).

353. See discussion in text at notes 301-305, *supra*.

providing of a framework within which the conflict necessary to the progress of society could take place without destroying society.³⁵⁴ Media coverage of publicity-seeking crimes *thwarts* all three objectives.

As to the purpose of advancement of knowledge, in the technological world of today, the majority of the public is informed through television news.³⁵⁵ Should a person decide that he or she does not want his or her children to watch a publicity-seeking crime as it takes place — a decision which, given the chance, most persons would probably make — he must completely give up his constitutionally guaranteed source of information (since he has no control over the sequence of the news). Secondly, by giving publicity and gratification to these criminals, newsmen are encouraging substitution of force for reason — which is a complete contradiction to the very purpose they serve. And, finally, instead of providing a framework within which conflict can take place without destroying society, they provide a framework within which to destroy society. Justice Frankfurter summarized this idea in *Beauharnais*:

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

Every power may be abused, but the possibility of abuse is a poor reason for denying [a state] the power to adopt [appropriate] measures....³⁵⁶

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

354. See discussion in text at notes 128-131, *supra*.

355. See note 69, *supra*.

356. *Beauharnais v. Illinois*, 343 U.S. 250, 261-63 (1952).

VIII. APPENDIX A: NON-STATE SPONSORED TERRORIST CRIMES
AFFECTING THE UNITED STATES AND/OR ITS CITIZENS
COMMITTED FROM 1958 TO 1982.³⁵⁷

1958: June 27: Thirty U.S. Marines kidnapped by Communist guerillas on Cuba, near the U.S. naval base at Guantanamo Bay. All are eventually released unharmed; October 12: Bombing of the Hebrew Benevolent Congregation Temple in Atlanta.

1961: May 1: First ever U.S. aircraft hijacked and forced to fly to Communist Cuba by Puerto Rican born Abntulio Ramirez Ortiz.

1963: 16th Street Baptist Church bombing by a member of the Ku Klux Klan (“KKK”) killing four girls aged eleven to fourteen; November 22: President John F. Kennedy is assassinated.

1965: February 21: Black power leader Malcolm X shot dead during a public meeting in New York City; The KKK murdered Viola Liuzzo, while transporting civil rights marchers; New York police thwart an attempt to dynamite the Statue of Liberty, Liberty Bell, and the Washington Monument by three members of the pro-Castro Black Liberation Front (“BLF”).

1966: NAACP leader Vernon Dahme assassinated by the KKK.

1968: February 21: Delta Airlines DC8 hijacked to fly to Havana, Cuba for political asylum; April 4: Black civil rights activist Rev. Martin Luther King, Jr. shot dead in a hotel in Memphis by James Earl Ray; April 23: Students for a Democratic Society and Student Afro-American Society held a dean hostage at Columbia University; June 6: Senator Robert F. Kennedy assassinated by Jordanian terrorist, Sirhan Sirhan, in Los Angeles; Further terrorist threats were received from Arab groups attempting to obtain Sirhan’s release; August: Abbie Hoffman threatened to spike the water of Chicago with LSD prior to Democratic Convention; August 28: John Gordon Meir, U.S. ambassador to Guatemala is murdered by a rebel faction, becoming the first ever American ambassador to be assassinated by terrorists; October 12: A U.S. Army officer serving as an advisor to the Brazilian army is gunned down in his home in Sao Paulo, Brazil by left-wing guerillas, who falsely claim he is a Vietnam “war criminal.”

357. List of Alleged Terrorist Acts 1945-2000, <http://www.southernct.edu/~seymour/cases/terror/terlst.htm> (last visited Mar. 23, 2008); List of Terrorist Incidents, http://www.reference.com/browse/wiki/List_of_terrorist_incidents (last visited Mar. 23, 2008).

1969: September 4: American Ambassador Charles Elbrick kidnapped in Brazil by left-wing terrorists and freed after fifteen terrorists were released from jail; October: Members of the Weathermen, including Prof. Bill Ayers, staged riots over a four day period in Chicago resulting in one death and massive amounts of property damage.³⁵⁸

1970: March 6: The Greenwich Village Townhouse explosion was the premature detonation, by members of The Weathermen, of a bomb intended for an officers' dance at Fort Dix in New Jersey and for Butler Library at Columbia University; August 24: The Army Mathematics Research Center on the University of Wisconsin-Madison campus was blown up resulting in one death; October 22: An anti-personnel time bomb explodes outside a San Francisco church, the Black Liberation Army ("BLA") is suspected.

1970-1972: The Jewish Defense League ("JDL") was linked with a bomb explosion outside of Aeroflot's New York City office, and a detonation outside of Soviet cultural offices in Washington, D.C.; A JDL member allegedly fired a rifle into the Soviet Union's mission office at the United Nations ("U.N."); Conspiracy to blow up the Long Island residence of the Soviet Mission to the U.N. by JDL.

1971: The BLA is suspected (and in 2007 convicted) of shooting and/or bombing numerous police officers and/or cars and/or offices in various cities around the country and running a guerrilla warfare school in Georgia.

1972: January 27: Two policemen suspected to have been murdered by members of the BLA; May 11: U.S. Army headquarters in Frankfurt, Germany, attacked by Red Army Faction car bomb killing one American officer and injuring thirteen people; Three more U.S. servicemen injured in another Red Army Faction car bomb attack on the U.S. Army headquarters at Heidelberg, Germany, later that month; October 27: Police car bombing in Los Angeles claimed by Afro-American Liberation Army ("AALA"); December: A travel agency in Queens, New York is bombed by FIN, a Cuban exile group opposed to the government of Fidel Castro; December 11: The VA-Cuba Forwarding Company is bombed in New York City, FIN suspected; December 28: A Brooklyn, New York bartender is held for ransom by the BLA.

1973: January 7: Mark Essex, a former Black Panther, shot nineteen people at a Howard Johnson hotel in New Orleans and sets fire to the hotel; A New York City transit detective is killed and ten law enforcement personnel are

358. WILLIAM AYERS, *FUGITIVE DAYS: A MEMOIR* (BEACON PRESS 2001).

shot (four by machine gun) in and around New York City by the BLA; Two members of BLA were arrested with a car full of explosives.

1974: February 4: American heiress Patricia Hearst kidnapped by Symbionese Liberation Army terrorists and participated in a raid on the Hibernia Bank in San Francisco; March 1: Saudi Arabian embassy in Khartoum, Sudan, seized by Black September terrorists who murdered two American diplomats; September 8: Bomb killed eighty-eight people on TWA Flight 841, attributed to Abu Nidal and his terror organization; December 11: Bomb set off by the Puerto Rican nationalist group FALN in East Harlem.

1975: January 24: FALN bomb the Fraunces Tavern in New York City, killing four and injuring more than fifty; April 19: FALN set off four bombs within a forty-minute period in Manhattan, New York injuring at least five people; December 29: Bomb explodes at New York's LaGuardia Airport, killing eleven and injuring seventy-five, no arrests made and the reason for this attack remains unknown.

1976: September 10-11: Croatian Freedom Fighters hijacked a TWA airliner from New York to Paris, a police officer was killed and three injured by a bomb that contained their communiqués in a New York City train station locker; September 21: Chilean exile Orlando Letelier was assassinated in Washington, D.C. by the Chilean government.

1977: March 9: Three buildings in Washington, D.C., including city hall, were seized by members of the militant African-American Muslim Hanafi sect and over 100 hostages were taken, one bystander was killed, civil rights activist Marion Barry was shot in the chest; August 3: FALN bombed the offices of Mobil and a Department of Defense building and warned that bombs were located in thirteen other buildings, including the Empire State Building and the World Trade Center. A bomb was later found in the AMEX building.

1978-1995: The Unabomber kills three and injures twenty-nine in a string of anti-technology bombings.

1979: June 9: FALN exploded a bomb outside of the Shubert Theatre in Chicago, injuring five people; June 18: NATO's Supreme Allied Commander Europe General Alexander Haig (an American) escaped death after a German Red Army Faction bomb exploded under a bridge just after his motorcade had passed over it; November 4: Iran hostage crisis, a 444-day standoff during which student proxies of the new Iranian regime held sixty-six diplomats and U.S. citizens hostage inside the U.S. embassy in

Tehran; November 15: Unabomber puts bomb on American Airlines Flight 444 which fails to detonate.

1980: March 15: Armed members of FALN raided the campaign headquarters of President Jimmy Carter in Chicago and the campaign headquarters of George H. W. Bush in New York City, tying up hostages and vandalizing the offices and later sent threatening letters to delegates; June 3: A bomb destroyed most of the exhibits in the Statue of Liberty Story Room, Croatian separatists were suspected; August 13: Air Florida flight from Key West to Miami hijacked by seven Cubans and flown to Cuba, six further U.S. airliners were hijacked to Cuba over the next month.

1981: May 16: Puerto Rican Resistance Army placed a bomb in the toilets at the Pan Am terminal of the John F. Kennedy Airport in New York; August 31: A large bomb exploded in the car park of the USAF base at Ramstein, Germany, injuring twenty people, the Red Army Faction claimed responsibility; September 15: Red Army Faction terrorists made an unsuccessful rocket attack on the car of a U.S. Army commander in West Germany.

1982: August 11: A bomb exploded on Pan Am Flight 830, en route from Tokyo to Honolulu, killing one teenager and injuring fifteen passengers; December 12: An anti-nuclear protestor held eight tourists hostage in the Washington Monument, in Washington, D.C. before he was shot dead by a police sniper.

IX. APPENDIX B: NON-STATE SPONSORED TERRORIST CRIMES AFFECTING THE UNITED STATES AND/OR ITS CITIZENS COMMITTED FROM 1982 TO PRESENT.³⁵⁹

1983: April 18: Sixty-three people, including the CIA's Middle East Director, were killed and 120 injured in a 400-pound suicide truck bomb attack on the U.S. Embassy in Beirut, Lebanon, responsibility was claimed by Islamic Jihad; October 23: A suicide truck bomb in Beirut, Lebanon destroyed a U.S. Marine Corps base killing 241 Americans, Islamic Jihad claimed responsibility; November 9: A time bomb consisting of several sticks of dynamite exploded at the U.S. Senate in response to the U.S. invasion of Grenada, a group known as the Armed Resistance Unit claimed responsibility; November 15: U.S. Naval officer was shot by terrorist group

359. See List of Various Alleged Terrorist Acts 1945-2000, <http://www.southernct.edu/~seymour/cases/terror/terlst.htm> (last visited Mar. 23, 2008); http://www.reference.com/browse/wiki/List_of_terrorist_incidents (last visited Mar. 23, 2008).

in Athens, Greece, when his car stopped at a traffic light; December 12: The U.S. Embassy in Kuwait was targeted by Iranian-backed Iraqi Shia terrorist who attempted to destroy the building with a truck bomb, the attack was foiled by guards and the device exploded in the Embassy forecourt killing five people; December 17: U.S. Army Brigadier General James Dozier was kidnapped from his home in Verona, Italy by Italian Red Brigades terrorists, he was held for forty-five days until Italian Special Forces rescued him.

1984: August: The Rajneeshee cult spreads salmonella in salad bars at ten restaurants in Oregon to influence a local election, 751 people were sickened and more than 40 were hospitalized.

1985: October 11: Arab anti-discrimination group leader Alex Odeh was killed when a bomb exploded in his California office.

1988: April 12: Japanese Red Army terrorist Yu Kikumura was arrested at a rest stop on the New Jersey turnpike in possession of pipe bombs on his way to New York.

1990: November 5: Meir Kahane, head of Israel's Koch party and founder of the American vigilante group, the Jewish Defense League, was assassinated in a New York hotel lobby by early elements of Al Qaeda.

1993: January 25: Mir Aimal Kansi, a Pakistani, fired an AK-47 assault rifle into cars waiting at a stoplight in front of the CIA headquarters, killing two and injuring three others; February 26: A coalition of five groups (Jamaat Al-Fuqra', Gamaat Islamiya, Hamas, Islamic Jihad, National Islamic Front), including Ramzi Yousef and financed by Khaled Shaikh Mohammed, killed six and injured over 1,000 people in a World Trade Center bombing; June: A New York City landmark bomb plot failed.

1994: March 1: Rashid Baz kills a Hasidic seminary student and wounds four on the Brooklyn Bridge in New York City in response to the Cave of the Patriarchs Massacre in Palestine.

1995: March 8: Terrorists in Karachi, Pakistan, armed with automatic rifles, murdered two American consulate employees and wounded a third as they traveled in the consulate shuttle bus; April 19: the Oklahoma City bombing kills 168 people, nineteen of them were children; October 9: An Amtrak Sunset Limited train is derailed by antigovernment saboteurs near Palo Verde, Arizona, one person is killed and seventy-eight are injured.

1996: July 27: Centennial Olympic Park was bombed, killing one and wounding 111.

1997: February 24: Ali Abu Kamal opens fire on tourists at an observation deck atop the Empire State Building in New York City, killing a Danish national and wounding visitors from the U.S., Argentina, Switzerland, and

France before turning the gun on himself; a handwritten note carried by the gunman claimed that this was a punishment attack against the “enemies of Palestine.”

1998: August 7: Al-Qaeda bombed U.S. Embassies in Tanzania and Kenya, killing 225 people and injuring more than 4,000.

1999: April 20: Eric Harris and Dylan Klebold killed thirteen students and a teacher and wounded twenty-four others in the Columbine High School massacre; December 14: Ahmed Ressam is arrested on the U.S.-Canada border in Port Angeles, Washington, where he confessed to planning to bomb the Los Angeles International Airport as part of the 2000 millennium attack plots.

2000: The last of the 2000 millennium attack plots failed, as a boat meant to bomb U.S.S. *The Sullivans* sank; October 12: U.S.S. *Cole* is bombed, killing seventeen U.S. sailors and wounding forty off the port coast of Aden, Yemen, by Al-Qaeda.

2001: September 11: Attacks by Al-Qaeda kill 2,997 in a series of hijacked airliner crashed into the World Trade Center in New York City and the Pentagon in Virginia, a third plane crashed in Pennsylvania after an apparent revolt against the hijackers by the plane’s passengers; October: Anthrax attacks on U.S. Congress and New York government offices and on employees of television networks and tabloids occurred; December 12: JDL plot by Chairman Irv Rubin and follower Earl Krugel to blow up the King Fahd Mosque in California and office of Lebanese-American Rep. Darrell Issa is foiled; December 22: Richard Reid, attempting to destroy American Airlines Flight 63, was subdued by passengers and flight attendants before he could detonate his shoe bomb.

2002: May: Luke Helder injures six people by placing pipe bombs in mailboxes in the Midwest; July 4: An Egyptian gunman opened fire at an El Al ticket counter in Los Angeles International Airport, killing two Israelis before being killed himself; October: John Allen Muhammad and Lee Boyd Malvo conducted the Beltway Sniper Attacks, killing ten people in various locations throughout the Washington, D.C. metropolitan area.

2004: August 28: Shahawar Matin Siraj and James Elshafay were arrested for planning to bomb the 34th Street–Herald Square subway station in New York City during the 2004 Republican National Convention.

2006: March 3: Mohammed Reza Taheri-azar, an Iranian-born graduate of the University of North Carolina, drove an SUV onto a crowded part of campus, injuring nine; August 10: A major antiterrorist operation disrupted an alleged bomb plot targeting multiple airplanes bound for the U.S. flying

through Heathrow Airport; August 30: An Afghani-Muslim hit nineteen pedestrians, killing one, with his SUV in the San Francisco Bay area.

2007: March 5: A Rikers Island inmate offered to pay an undercover police officer posing as a hit man to behead New York City Police Commissioner Raymond Kelly and bomb police headquarters in retaliation for the controversial police shooting of Sean Bell; Seung-Hui Cho killed thirty-three people including himself in the Virginia Tech Massacre; May 7: Six men inspired by jihadist videos were arrested in the U.S., in a failed homegrown terrorism plot to kill U.S. soldiers; June 3: A homegrown Islamist terrorism plot—intended to destroy the fuel supply system for John F. Kennedy Airport in New York City and cause a large amount of casualties by blowing up the connecting pipeline system that runs through densely populated neighborhoods—was thwarted.

