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CAN I REALLY REPORT THAT?

The Decline of Contempt

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Abstract

This is an investigation into why the media are reporting more freely material that would have been considered un-reportable because of the laws of contempt two decades ago. It contains a description of five changes that may account for this. First, the courts are protecting fewer processes from media speech. Second, the threshold for determining what speech is considered to create a great enough risk to the court to merit restriction has been raised. Speech is nowadays less likely to be considered contemptuous. Third, the judges in the UK now place a higher value on the importance of the freedom of the press, higher even than that afforded to it by the European Court of Human Rights at Strasbourg. Fourth, the office of the Attorney General seems to chafe at the restrictions of contempt, given the current perception of a threat to national security. And complimentary to this, the Attorney General also seems to have been chilled by the series of rulings in the 1990s that created the more liberal climate for the media described above. Fifth, there has been a long-term move away from accusatorial judicial processes, particularly criminal trials, and the liberation of media speech is consistent with permitting a jury to hear more information, and trusting them to correctly weigh its relevance.

I conclude with an attempt to look forward. I question the legitimacy of a general restriction on the freedom of the press on the grounds that speech may undermine the authority of the court, and describe the danger posed by the rise of the internet to the doctrine of contempt. It risks becoming unenforceable.

*Thou shalt not go up and down as a tale-bearer among the people.
Leviticus 19.16*

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Can I really report that? The decline of contempt

Newspapers are very frightened of investigating the legal process because no one knows exactly what contempt of court is. It is therefore almost impossible, as has been outlined earlier, to know whether you are committing it in advance. The only rule of thumb is to do nothing that might be remotely interpreted as contempt. *David Leigh, journalist, 1980.*¹

We have moved into a situation where, in high-profile cases, there is saturated media coverage which is unduly speculative and which seriously impacts upon people the moment they are arrested. It raises two issues. First, it is detrimental where the person has only been arrested and not even charged - the media can, quite frankly, trash people's lives. Second, and more important, is whether such publicity, on such a scale, can really enable a fair trial to take place. *Mark Haslam, lawyer, 2007*²

Journalists have become friskier of late. They've reported things about court cases that in the past they would not have done. So much was clear from chat from journalists at my work, and it's something that lawyers and academics have also noticed³. I wondered why. I was particularly interested in the law of contempt. Had it changed, and if it had, how, and over what period? And what else, related to the law of contempt, could explain the press's current liberality? And what does the future hold?

I've found some potential answers, five to be exact. There may be others. First, the law has changed over the past quarter of a century. It has sought to protect fewer qualities and processes from the impact of journalism. And second, those qualities or processes it does choose to protect, it has protected to a lesser degree. This liberalisation must in part have caused the increased freedoms taken by the press that have been noticed.

The change has not been merely caused by the jurisprudence of the European Convention on Human Rights. The ECHR is now more stringent in a number of ways than the common law. The common law never, traditionally at least, considered freedom of the press to me much more than a residual right. But now it does, recognising that the media have a positive duty to report. And this is the third reason: it seems that the wig is increasingly recognising the value of the pen.

However, there's been no substantial change since about the year 2000, so any change in the practice of journalism since then has not been caused by changes in the law. In relation to cases involving allegations of threats to national security, such liberality is probably caused by a dissatisfaction felt by the Attorney General for the contempt

¹ *The Frontiers of Secrecy* (1980, Junction) 154

² (2007) LS Gaz, 15 Mar, 20

³ See, for example: *Pre trial publicity: Press and Prejudice*, Hanley, (2007) LS Gaz 15 Mar 20; *Whatever happened to respect?*, Raeburn N.L.J. 2007, 157, 110; *Treating contempt with contempt* Woffinden, *British Journalism Review* vol 18(2) June 2007; *Who still observes the law of contempt?* Smart, (2007) 171 JPN 76.

laws. That is the fourth reason. In relation to other cases, it may well simply be down to what has been described in the law of libel as “the chilling effect”, the fear of losing in court that restricts people’s actions, of the series of cases in the late 1990s that made it more difficult for the Attorney to prove that media speech was contemptuous.

What is the fifth reason? There has been in recent years a change in the extent to which the public are comfortable with the courts evaluating due process as more important than the pursuit of truth. This lack of comfort has been manifested in much legislation which has altered our courts, giving them elements of a more inquisitorial, truth-finding system. The classic example is the abolition of the rule against double jeopardy. Consonant with that view of the courts is the view that less material should be withheld from the fact-finding process. The lifting of restraints on the media from publishing matters that would previously be prohibited is in line with this trend. And that trend is the fifth reason.

What is the future for contempt? Such a question is difficult to answer. But given that the press and the courts are bound together in a tight embrace of legitimacy and authority, I argue that wide-ranging restrictions on press speech are wrong.

And in any event, change may be inevitable. The internet provides an enormous amount of information, information that can be discovered immediately and without difficulty. As such, it poses a challenge to the ability of the court to restrict the flow of information to those charged with deciding a case. Given problems of enforceability, the internet may sound the death knell for contempt, at least as it relates to the regulation of what the juries hear about a case.

1. What does the law seek to protect?

Over the years, the courts have considered rather different qualities and processes as being put at jeopardy by the media. A good place to show this is by looking at one of the cases that founded the jurisdiction in the first place. It’s a case from the early days of newspapers, shortly after they were invented, a case that was heard in 1742. The printer and publisher of a newspaper called the *St James’ Evening Post* had published an article attacking people who were pursuing an action in the Chancery court. The Lord Chancellor, Hardwicke, committed them to the Fleet Prison for contempt⁴. The Lord Chancellor explained the basis for his action:

⁴ This case also mentions the man who was probably the first journalist in this country to be committed for contempt of court. He deserves not to be forgotten by history. His name was Robert Raikes the elder, and he was a founding editor of the *Gloucester Journal*. In the 1730s or thereabouts, he published an article called *A hue and cry after a Commission of Charitable Uses*, for which he was committed. This wasn’t his first run-in with the authorities: it was his third. He was earlier imprisoned and then fined £40 by Parliament for publishing, on 12th March 1728, an unauthorised account of the state of the national debt, and then summoned again to Parliament for another contempt a year later. And in 1738 he was still challenging authority, writing a provocative editorial in support of the Melksham rioters. *Ibid, Dictionary of National Biography*, and *Robert Raikes the elder, and the Gloucester Journal, The Library, 3rd ser., 6 (1915), 1–24*

There are three different sorts of contempt. One kind of contempt is, scandalizing⁵ the court itself. There may be likewise a contempt of this court, in abusing parties who are concerned in causes here. There may be also a contempt of this court, in prejudicing mankind against persons before a cause is heard. There cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters⁶.

Lord Hardwicke was concerned about damage being done to the dignity of the court, and to the reputation of the parties to the trial. Despite the resounding phrase about the “streams of justice”, he wasn’t expressly concerned with the need to preserve the impartiality of the court, or even with the ability of the court to do its job. It’s perhaps not surprising that the Lord Chancellor didn’t specifically refer to these concerns, given that he alone was responsible for them, and undoubtedly he wouldn’t have considered himself at risk of being influenced by articles in the *Post*. The result would have been different, no doubt, had the responsibility not rested on the shoulders of a professional. They would have been different if part of the court’s responsibility was vested in someone less insulated from influence: a jury in a criminal trial, for example. And sure enough, criminal courts soon expressed concern about the risk of press influence on juries. In *R v Fisher* in 1811, the court considered the effect of newspaper reports on juries. The reports contained the prosecution’s evidence, which had been heard without challenge by the defence in a committal hearing. Newspapers had published it before the start of a trial. The court didn’t approve.

It is of infinite importance to us all, that whatever has a tendency to prevent a fair trial should be guarded against. Every one of us may be questioned in a Court of Law, and called upon to defend his life and his character. We would then wish to meet a jury of our countrymen with unbiased minds. But for this there can be no security, if such publications are permitted.⁷

So from the beginning of the court’s encounter with the media, there were differing things that it sought to protect: the dignity of the court, the reputations of the parties and the integrity of the process itself.

1.1 Cutting the cake

Trying to distinguish these, the justifications given by the courts for the restriction on media free speech is quite difficult. The ways that the media can, in theory, prejudice

⁵“ ... 3) To utter false or malicious reports of (a person's) conduct; to slander, to charge slanderously (with). Now somewhat rare. In early use also to insult, treat with contempt, [...] 4) trans. To bring shame or discredit upon; to disgrace.” OED.

⁶ *St James Evening Post (Roach v Garvan)* (1742) 2 Atkn 469, 26 ER 683

⁷ *R v Fisher* (1811) 170 ER 1253. See also Bayley J in relation to proceedings before a coroner: *R v Fleet* (1818) 106 ER 14 (1B&A 380) “Nothing can be more important to individuals than that their trials should take place without any prejudice in the minds of those who are ultimately to decide upon the facts in evidence..... A jury who are afterwards to sit upon the trial ought not to have ex parte accounts previously laid before them. They ought to decide solely upon the evidence which they hear on the trial. It is, therefore, highly criminal to publish, before such trial, an account of what has passed on the inquest before the coroner.”

justice are numerous, and some of them are probably impossible to anticipate in advance. However, the courts have described some, and so what I have sought to do is to classify these.

There are many ways of cutting the cake: you can look at who it is feared that the media influence will act on, or you can look at what the effect of the media influence is feared to be. I've chosen as my main framework to look at the effect. My starting point is the twofold distinction employed by Simon Brown LJ in *AG v Unger*. He pointed out that there are two mischiefs that the court seeks to avoid: the first consists of actions which risk affecting of the outcome of the trial. The second consists of everything else: the other ways that the media might pollute the streams of justice.⁸

1.2 Protecting the outcome of the trial

I'll look, to begin with, at Simon Brown LJ's first category, the outcome of the trial. There are a number of ways that the law says the media can affect this. The main one is to risk impairing the fact-finding ability of a court. This can occur in a number of ways, depending on who hears the speech by the media. It can be a lay fact-finder – a criminal jury, say, or a coroner's jury, or even a lay magistrate. It can be a professional fact-finder, anyone from the local District Judge up to a Lord of Appeal in Ordinary. And the operation of the speech can be on the conscious mind of the fact-finder, or it can be on the unconscious mind⁹.

It is the lay fact-finders that the courts are particularly at pains to protect. Professional fact-finders, it's considered, are much more robust and therefore much more difficult to influence¹⁰. This rather mirrors the approach of the early court, described above. Later, when I look at section 2(2) of the Contempt of Court Act 1981 (CCA 1981), I'll describe under what circumstances the law sees this risk of influence on the lay tribunal as most dangerous.

A further way that the outcome of a trial can be affected does not involve directly the fact-finder. The media can influence the witnesses or the parties to the case. Litigants – or defendants – can be pressurised into altering how they choose to litigate – or

⁸ Put the first way, the complaint is of possible prejudice to the outcome of proceedings; the second way alleges a more general prejudice to the course of justice in the proceedings. *AG v Unger* [1998] EMLR 280 QBD

⁹ “That passage, as is plain, does not rule out the possibility that, no matter how hard and how conscientiously a judge strives to exclude something from his mind, he may subconsciously be affected by it. No doubt much would depend on the nature and content of the publication and the circumstances in which it is made. Thus I would not go so far as to exclude absolutely the risk of influence on this score.” *Al Megrahi v Times* 2000, JC 22 Lord Justice Clerk. Also see *Abbot J R v Fleet* (1818) 106 ER 140 (1B&A 380). “Every person who has attended to the operations of his own mind must have observed how difficult it is to overcome preconceived prejudices and opinions, and that more especially in matters of sentiment or passion.”

¹⁰ “The possibility that a professional judge will be influenced by anything he has read about the issues in a case which he has to try is very much more remote. He will not consciously allow himself to take account of anything other than the evidence and argument presented to him in court.” *Re Lonrho* [1990] 2 AC 154 Lord Bridge of Harwich, 209

defend – in a way that might have an effect on the outcome of a case¹¹. Witnesses can be pressurised or affected by court-related speech, resulting in their not taking part in a trial or other court process¹². Speech could therefore affect the outcome of the case, but not by acting on the fact-finders. And speech by the media can affect outcomes in other ways, for example by contaminating witnesses' evidence¹³.

To what extent do the courts currently seek to protect these from media speech? Quite actively. The reservation “quite” comes because it's a matter of degree. In general, the courts do protect these things, and consider the risk to the outcome of the trial as a significant one that ought to be protected, in general from speech by the media. The question of what sort of actions, in particular, put these at jeopardy are addressed by Section 2(2) CCA 1981.

Finally, the outcome of a trial or a procedure could be affected in a way not connected to its fact-finding function. For example media pressure could be brought to bear on a judge to impose a significantly higher sentence than he would have done otherwise. Or pressure could be brought to bear on a judicial figure to make any one of a number of judicial decisions that aren't dependant on a finding of fact – to grant, or not to grant bail, for example.

How tender is this area, and to what degree is it currently considered worthy of protection? Much less than the other areas described above. This is largely because such things are the responsibility of judges, and judges are considered to be insulated from the pressure of the press. On the question of whether they respond to media pressure on sentencing, some judges have left no room for doubt¹⁴.

We would like to stress that, whilst the press are the guardians of the public interest, to pursue a campaign of vilification of someone who has been before

¹¹ *The Sunday Times* attempted to exert pressure on Distillers conduct of the Thalidomide litigation, *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273. *Private Eye* attempted to exert pressure on the wife of the Yorkshire Ripper, Sonia Sutcliffe, in *AG v Hislop* [1991] 1QB 514

¹² “I accept that if there was any risk that the publications objected to could influence or affect the conduct of witnesses then that could impede the course of justice in respect of the trial and could prejudice the petitioners” *Al Megrahi v Times* 2000 JC 22 Lord Caplan. Other examples include the statutory guarantee of anonymity for those who have suffered from sexual offences. This reduces the risk of their not wanting to instigate and take part in court processes for fear of being named. Alleged blackmail victims are protected for a similar reason.

¹³ *AG v Express* [2005] EMLR 13. *The Daily Star*, ignoring police requests, published photos of an accused in a case where identification was in issue. This would have devalued any identification that the witness would have made. Also *Ex P HTV Cymru (Wales) Ltd* [2002] E.M.L.R. 11, when a television company wanted to interview prosecution witnesses after they'd given evidence. The court thought this might contaminate their evidence, which would be a problem should they be recalled.

¹⁴ Post *R v SoS ex p Venables* [1998] A.C. 407, Woolf MR, 455, the Home Secretary should not take account of media campaigns when exercising any judicial decision making about tariffs. It's not clear whether the same prohibition applies to judges, as a matter of law.

the court, in a way which causes hate mail to be sent, which causes his family to be under the need to move house, which causes his children to be shunned by other children in the neighbourhood, is doing no public service. Furthermore, if it is intended to bring pressure to bear on the courts, then it is wholly misguided.¹⁵

1.3 Protecting other things, part 1. The processes of justice

I'll now turn back to Simon Brown LJ's twofold distinction. First, outcome: he observed that the law seeks to protect the outcome of the trial from the influence of media speech. Second, non-outcome: there are those processes and qualities that the law also seeks to protect that don't have an effect on the outcome of the trial. I'll try to categorise what these are below. Before doing so, I should stress that these are considered desirable in themselves, as part of what "fair trial" means. As well as this value in themselves, influence on them might also, potentially, have an effect on the outcome of the trial. But it is the value they have in their own right that the court sometimes seeks to protect, irrespective of any effect they may have on the trial. It's the propriety and extent of these, non-outcome, values that I'm considering.

The question immediately arises as how to divide up this second category. A sensible division might be to look first at the process of justice, and the ways that the media can affect that, and then look at everything else.

There are at least two different ways in which the media can affect the process of justice, but, at the risk of labouring the point, not the outcome of the trial. First, it can get in the way of the processes themselves, or "impede" them, to use the term used in the law. And second, it can affect the public's confidence in the system in general.

Impeding justice

At first sight this seems clear enough – if the press gets in the way of the process of justice, ought this not to be something that the court is justified in limiting, irrespective of any effect on the trial? Such a view is enshrined in statute, as "impeding" is one of the two things that s2(2) CCA 1981 expressly states is worthy of court protection.¹⁶ It would be surprising if the court didn't consider the smooth, uninterrupted flow of justice as something that should remain undisturbed by the press.

A recent example of the court acting like this occurred after the trial of the Leeds United footballers accused of assaulting an Asian man. The jury had retired, after having been told on repeated occasions throughout the trial that there was no evidence that an alleged attack by the famous footballers had been racially motivated. That weekend the *Sunday Mirror* published an article. The article went completely against those instructions, and suggested that any attack had been racially motivated. The

¹⁵ *AG's Ref 34 of 1994* (1995) 16 Cr App R (S) 785

¹⁶ The other is prejudice. "The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced." s 2(2) CCA 1981. Prejudice and impeding are distinct, but they overlap. To impede is to retard, slow down, delay, hinder or obstruct. To prejudice something or someone is to say or do that which is detrimental or injurious to the interest of that thing or person. *AG v BBC* [1992] C.O.D. 264, DC"

publication caused the trial to be stopped with a jerk, the jury to be discharged. There had to be a re-trial¹⁷. The *Sunday Mirror* was found to be in contempt for this publication. The impediment of justice, of which delay was considered to be a significant part in this case¹⁸, caused by the paper was something that merited punishment. The protection of the smooth running of justice was something that justified restricting media free speech.

However, the respondents accepted liability. And this masks an interesting wrinkle, namely that the courts have been less clear about the extent to which the smooth flowing of justice is something that they consider worthy of protection simpliciter. If the impediment has an effect on the outcome of the trial – a prejudicial effect – that’s different. But regarding the smooth flow as a valuable thing in itself, the picture is a little unclear.

The first example of this lack of willingness to rely merely on impediment that I’ve found was a decision from 1998. In *AG v Birmingham Post*¹⁹, Simon Brown, in a very obiter passage, rejected “impeding” as something separate to prejudice, suggesting that prejudice was the significant thing that the courts were trying to prevent.

And there was a similar avoidance of “impeding” in the recent case of *Yousaf v Luton Crown Court*²⁰. This was a difficult case in which an anguished family of a murder victim printed a letter which seemed to ask people to protest outside court, and thereby potentially caused an impediment to the court. Such a protest would get in the way of the trial. The family members were brought before the trial judge. The judge considered whether there’d been a contempt. He founded his judgment on the impediment to justice caused by the family’s actions:

The question I have to consider is whether there is a substantial risk that by the creation of the document the course of justice would be seriously impeded. Substantial risk in this context means a real risk, as opposed to a remote possibility.

But on appeal, Hooper LJ said this was said to be the wrong test. Impediment was neither here nor there – the true test was prejudice:

The only relevant possible contempt in this case was, in our view, publishing matter calculated to prejudice the fairness of the trial over which Treacy J was presiding.

Does this case support the suggestion that the courts no longer wish to rely solely on a risk of impediment to the course of justice as a sufficient ground to restrict media speech? Such a view does seem strange, and perhaps the case is easily confinable to its facts. However, there’s some further support for this strange view.

¹⁷ *AG v MGN* [2002] EWHC 907

¹⁸ Though the article also caused a risk of prejudice by imputing a motive to the attack that had been withheld from the jury.

¹⁹ [1998] 4 All ER 49 at 53 and 59

²⁰ [2006] EWCA Crim 469

*AG v BBC*²¹ was a media appeal against an injunction granted to the Attorney General. The Attorney had been granted an injunction preventing the media from publishing material related to a police investigation. The investigation was into the allegations in 2007 that the Government received cash for honours. The injunction was being challenged on appeal. The judge at first instance based his judgment on the test of whether the publication of the information would risk impeding *or* prejudicing the police investigation. (En passant, this case illustrates that these rules are designed to protect not only the goings on in the courthouse, but also the investigations that lead to the courthouse.) However, in his judgment Sir Anthony Clarke, MR, didn't mention impediment as the test. The test, rather, was prejudice. A further example can be found in *AG v Guardian*²². Philip Havers QC, acting for the Attorney, didn't pursue the argument contained in his skeleton that contempt was founded on impediment to justice, but in the oral hearing relied merely on prejudice. The judge condoned this, and said: "impediment would result from prejudice."

Again, these cases are probably distinguishable. It would be a brave lawyer who advised his media client that it didn't matter if some publication delayed a trial, and that in publishing it they'd be safe from contempt²³. However, there does seem to be some judicial unease with founding cases on impediment alone. The authors of *Arlidge on Contempt* have noticed it. They point out that this could be because of the European Convention on Human Rights. Founding cases on impediment – in other words, restricting speech because it merely risks impeding justice on its own without prejudice to a trial – may not be, to quote one of the tests of the European Convention on Human Rights "necessary in a democratic society". It may therefore be an illegitimate restriction on free speech. It's an argument that doesn't convince the learned authors, but they do go on to point out that:

... the tendency of the most recent authorities has been to concentrate primarily on the statutory notion of "prejudice" in construing s 2(2) of the Act and to relegate that of "impeding" to a lesser importance. The two are not true alternatives, and there is room for confusion if the attempt is made to give equal weight to each. There is a danger also of finding contempt proved where there is truly no risk of prejudice, and thus setting the threshold lower than Parliament intended.²⁴

And indeed, if you look back at the recommendations of the Phillimore Committee, the committee that helped prompt the passing of the Contempt of Court Act 1981 ("CCA"), there's more support for this argument. Phillimore specifically wanted the "impeding" test in the CCA 1981 to "make it clear that the interference has to be undesirable. What the law is aiming at is prejudice and obstruction."²⁵ Merely getting in the way of justice, in the view of Phillimore, was not enough. Perhaps impeding,

²¹ [2007] EWCA Civ 280

²² [1999] All ER (D) 856

²³ Particularly in the light of cases that state that impediment is a legitimate reason to restrict media free speech: *AG v Times*, Oliver J, 21/1/1983 *The Times*, *AG v BBC* [1992] COD 264, *Ex P HTV Cymru (Wales) Ltd* [2002] EMLR 11

²⁴ *Arlidge, Eady & Smith on Contempt*, Sweet and Maxwell, 2005 (update 2007), 4-107

²⁵ *Phillimore Committee Cmnd 5794*, 1974, para 113.

without any risk of prejudice, is not enough either. Should putting a wheel-clamp on a detective's police car, thereby creating an impediment to an investigation and thereby the course of justice, but (assuming for the purposes of this example) no prejudice to it, be contempt? Similarly, should publishing an article that means counsel spend an extra day in legal submissions, but which causes no prejudice to the trial, be contempt?

Attempting an answer draws one into the undergrowth of the reasons that exist for prohibiting the sort of speech that may constitute a contempt of court. If it is to ensure that the right answer to a question is given, or the right resolution to a dispute is arrived at, then mere impediment to justice ought not to be something that is legitimately restricted. Being irritated or annoyed by media conduct ought not to be sufficient. However, if one feels that the dignity of the court ought to be protected, or that public confidence in the court is something that is imperilled by this sort of action – and public confidence is something that the court needs at least in part to be legitimate – then this sort of conduct ought to be restricted²⁶. There is a third potential consequence too, to the accused. If one feels that this impediment, delay, will affect the accused, extending his anguish perhaps, then this may be a reason to restrict such media speech²⁷. But, whether it is or is not a justified reason in large part depends on the question of whether he is guilty or innocent.

So, on balance, there is some doubt. It's true that there are recent cases that establish that media speech that impedes justice is worthy of restriction, and therefore that the processes of justice are something that is worthy of protection. But it's not clear that the courts are comfortable relying on mere impediment, without it being associated with the tang of prejudice.

At this point it might be worth a short digression, an illustration of how different the position is in America. The difference arises from America's giving free speech a constitutional priority. Ian Cram²⁸ quotes this passage from the *The Reporter's Friend*, the American Bar Association's advice to journalists on the question of journalists impeding trials.

Q. Do reporters get in trouble if news stories cause the court to change the place of the trial or delay the trial because of adverse publicity?

A: No legal penalty or obligation may be imposed on reporters to avoid publicity about a case. No legal penalty may be imposed for even the most intense, exaggerated, biased or "hyped" coverage of any criminal case (except the remedies provided by successful libel suits).

This quote illustrates that a core interest to be protected here is that of the accused. But in the US, his protection is achieved through the law of defamation. I'll return, later, to the question of whether this is a preferable tool to use for this job.

²⁶ For a more thorough look at these questions, see section 6 below.

²⁷ For more discussion about the relationship between an accused and contempt of court, see section 1.4 below.

²⁸ Ian Cram *A virtue less cloistered*, Hart 2002, 63.

Confidence in justice

That was a description of the first impact that media free speech can have on the processes of justice. Another impact, not related to the outcome of a court case, looks outward, rather than inward. It relates to the effect media speech can have on other people's regard for the justice system.

Speech by the media can bring the court system into disrepute. And the reputation of the court has been something of which the courts have traditionally been jealous. (I ought to stress that I'm not dealing here with activity that can also have an effect on a party to litigation, and can therefore affect the outcome of the trial²⁹. I'm considering here acts which reduce public confidence in the court, irrespective of any consequences for a specific trial).

The court's reputation can be damaged in a number of different ways. The media can damage it merely by being rude about judges and the courts³⁰. The media can also damage it by prejudging cases and purporting to usurp the court's function as arbiter of disputes. And, as well as there being different ways of it happening, there are different people it can be done to. The reputation of the law in the eyes of the public can be affected. As can the court's reputation in the eyes of the parties.

I'll illustrate the fact that the court has considered the reputation of justice as being something for which it's worth restricting free speech, by looking at the question of media prejudgment and usurpation. Both of these have been considered undesirable because, amongst other things, of the risk to public confidence. I'll then show that there is some confusion in the UK about whether the preservation of public confidence remains something that the court seeks to protect by restraining media free speech.

Dealing first with prejudgment, the judicial urge to restrict prejudging by the media is old. However, it wasn't originally an urge that was based on a desire to protect public confidence. It was later that it became (in part) so based. I turn again to the 1742 case of the *St James Evening Post*. At the start of his judgment the Lord Chancellor, Lord Hardwicke, expounded the fundamental duty of the court. He returned to the theme towards the end.

²⁹“... articles of the nature published here, which plainly prejudice guilt, are capable of influencing an accused and thus constituting a contempt cannot be doubted. So much, indeed, is clear from the passage already cited from Lord Bridge's speech in *Re Lonrho*, although the reference there to influencing the conduct of a party by holding him up to public obloquy was essentially in the context of civil rather than criminal proceedings.” *AG v Unger* [1998] EMLR 280, 287

³⁰ Being rude to the court, without any consideration of the consequences for public confidence, is still something that is illegal. In England it's called “Scandalizing the Court”, and “Murmuring Judges” in Scotland. See *Arlidge*, *ibid*, 5-204. However, it's virtually obsolescent in the UK. In 1987, for example, the *Daily Mirror* published on its front page photos of the Law Lords. The photos were upside down, and were headlined “You Fools”. (It was in connection with the *Spycatcher* affair.) The *Mirror* wasn't punished. See further Robertson and Nichol, *Media Law*, Penguin 2002, 389.

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice in the minds of the public against persons concerned as parties in causes, before the cause is finally heard ... [towards the end of the judgment, Lord Hardwicke mentions the case of a Captain Perry, who printed his brief before a trial was heard]... the contempt of this court, was prejudicing the world with regard to the merits of the cause before it was heard.

The prejudice in the public's mind, the thing that the Lord Chancellor wished to avoid, would be caused by the press making judgments about the case before the court resolved it. And prejudgment continued to be a preoccupation of the Court. Two hundred years later, in 1974, Lord Reid said:

I think that anything in the nature of prejudgment of a case or of specific issues in it is objectionable, not only because of its possible effect on that particular case but also because of its side effects which may be far reaching. Responsible "mass media" will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly.³¹

The two judgments are similar. Both the eighteenth-century judge and the twentieth-century judge were concerned about the media coming to premature conclusions and telling the world about them before the courts have finished considering their case. Both are concerned about the media muddying the streams of justice. However, the eighteenth-century judge was concerned about the effect this would have on the reputation of the parties to the cause. The twentieth-century judge is also concerned about the reputation of the courts.

In the same case, Lord Diplock also looked to protect public confidence. It was something that he felt was jeopardised by the media usurping the court. (Both the references to "usurping" and "public confidence" are towards the end of the passage, but I'm quoting the passage in full because the rest is an eloquent and succinct account of the rationales behind the restriction of media free speech, and because the full passage is referred to by a case I discuss a little later.)

The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is

³¹ *AG v Times* [1974] AC 273

calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.³²

So the reputation of the court in the eyes of the public was seen to be a key concern. It was a legitimate reason to restrict media free speech. Do the courts still think it legitimate? The answer is slightly unclear, but is: “probably not”. However, in Europe, in the eyes of the European Court of Human Rights, the answer is undoubtedly: “yes”.

The “not” in the answer “probably not” derives from the heavy buffeting received by Lords Reid, Diplock and their colleagues in *AG v Times*. To start with, the European Court of Human Rights famously disapproved the case (albeit by a small majority)³³. And some years later, a differently constituted House of Lords doubted whether the rulings about prejudgment had survived the passing of the CCA 1981. In particular, they doubted the passage from Lord Reid’s speech that I quoted above³⁴. More recent cases have followed this doubt, if a doubt can be followed. One in particular described *AG v Times* as being, in general, a “forbidden direction”³⁵. That would suggest a settled conclusion, namely that the courts no longer see the protecting of their reputation as a legitimate reason for restricting media speech.

However, it’s not quite that simple. The disapproval of *AG v Times* described above relates specifically to the prejudgment test, in particular to the way it gave too broad an account of prejudgment. It does not relate to the question of whether protection of public confidence is a legitimate reason to restrict free speech. The means have been rejected, but the end has not. Or, at least, not conclusively. This was the view of the Court of Appeal in *AG v Channel 4*³⁶.

That case related to an attempt by Channel 4 to broadcast a TV reconstruction of the Birmingham 6’s appeal. The court said that Channel 4 could not broadcast the programme before the conclusion of the appeal. The reason was that, in part, it would potentially damage confidence in the court. (The confidence at risk was confidence held by two different sets of people. First, public confidence in the courts may suffer. Second, the parties’ confidence in the court, as they may think the media was influencing it, might suffer.)

The dictum of Lord Diplock in *AG v Times* [1974] 273 at 309 which sets out the requirements of due administration of justice – unhindered access of all citizens to the constitutionally established courts, arbitrament of a tribunal free from bias and acting only upon evidence adduced in accordance with the law

³² *AG v Times* [1974] AC 273 at 309

³³ *Sunday Times v UK* (1979) 2 EHHR 245

³⁴ “How far these passages from the speeches of their Lordships may still be relied upon as accurate expressions of the law is extremely doubtful, certainly in relation to the kind of contempt which is the subject matter of the strict liability rule under sections 1 and 2 of the Act of 1981” *Re Lonrho plc* [1990] 2 AC 154, 208

³⁵ *AG v Guardian* [1999] EMLR 904 at 918, referring to the subservience of free speech to fair trial in New Zealand, as referred to in *Gisborne Herald Co v Solicitor-General* [1995] 3 NZLR 563

³⁶ [1998] Crim LR 237

and no usurpation by any other person of the function of the court to decide according to the law a dispute submitted to it – is of general application. [... the television programme...] might affect the public's view of the judgment of the Court, and the appellants were entitled to be assured that so far as possible the Court had not been influenced by external matters.

AG v Channel 4 therefore provides the modifier “probably” in “probably not”. There is life in the old dog yet, to speak disrespectfully of *AG v Times*³⁷. Protection of the reputation of justice – not quite judicial PR but something close to it – is something that the courts seem to consider worthy of protection. And, therefore, it's something that the courts seem to consider a justified reason to restrict media free speech³⁸.

That said, this isn't an argument that convinces judges north of the border. In *Al Megrahi v Times*, the High Court of Justiciary was very disapproving of the reasoning of the Court of Appeal in *AG v Channel 4*. The Scottish judges said they didn't think that the statements relied on, in particular the passage from Lord Diplock's judgment I quoted above, were authoritative given the passing of the 1981 Act and the European Court of Human Rights ruling. Admittedly these opinions were once again on the question of prejudgment, not on the question of public confidence. But the court went on to say this about the question of restricting speech to protect confidence. (Again, it's worth quoting at length, as it makes the distinction between acts which merely protect the reputation of the court, and those that have wider potential effects, the former being a “non-outcome” and the latter an “outcome” effect.)

The administration of justice has to be robust enough to withstand criticism and misunderstanding. It would, of course, be an entirely different matter if the court were faced with conduct intended to impede or prejudice the administration of justice, either in the context of particular proceedings or more generally. The court would be well justified in making an order to prevent a deliberate affront to the administration of justice, for example, where a publication was regarded as impugning the integrity of the court or attacking its authority. I should add that on any view I do not consider that liability for contempt of court should depend on the viewpoint of the party to the proceedings, whether that is based on his actual attitude or upon some objective assessment of his position. It is one thing to say that it is good law that a party to proceedings should be able to rely on there being no usurpation by any other person of the function of the court to decide the case according to law. That is saying no more than that such a person has a right to complain about that as being contempt of court. It is quite another thing to say that what is contempt of court should be judged by reference to the perspective of that party.³⁹

³⁷ Channel 4 appealed to the ECHR, but were not successful. Decision of the Commission, 13 April 1989 Application No. 14132/88.

³⁸ This argument is given strength by the current rules which protect against the perception of bias. The test is now whether something would create a suspicion of bias in the mind of an average citizen: *R v Gough* [1993] A.C. 646. Given that this protects the reputation of the court, the justification for such protection being undertaken by the blunt tool of contempt recedes.

³⁹ 2000 JC 22 Lord Justice Clerk

Once again, the task for the lawyer advising a media client is probably not entirely a comfortable one. It would be reasonably safe to assume that a publication which merely undermines public confidence in the system is no longer a prohibited one, but not completely safe. Unless, that is, the lawyer and client were in Scotland, when they could hang their hat on it.

In Strasbourg, however, the hat would have to be hung somewhere else entirely. The principle there is very much alive. Maintaining the “authority and impartiality of the judiciary” is something that the European Convention on Human Rights explicitly states is a justification for the restriction of free speech⁴⁰. At first glance, that would seem to encompass the matter we’re dealing with: confidence in the system of justice. But perhaps there’s some doubt. After all, the phrase “authority and impartiality of the judiciary” doesn’t explicitly refer to public confidence. Perhaps that view is disputable. But any such dispute has long⁴¹ been settled in the case law of the European Court of Human Rights. In *Worm v Austria*⁴² for example, the court provided a gloss on the phrase, which puts beyond doubt that in the view of Strasbourg, it’s a legitimate aim to restrict free speech for the purposes of protection of public confidence⁴³. In the view of Strasbourg, Lord Diplock got it right⁴⁴.

The phrase "authority of the judiciary" includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function.⁴⁵

Which is the correct view? Ought the courts to be able to restrict free speech in order to protect public confidence in the system? Tempting though it is to embark on a full discussion of the question, I fear that I won’t have time or space to do it justice. But in passing, it’s worth making one point. The position of the Scottish judges is entirely consistent with the common law’s current⁴⁶ recognition of the value of media scrutiny

⁴⁰ Art 10 (2) ECHR

⁴¹ *Sunday Times v UK* (1979) EHRR 245 at 63: “Again it cannot be excluded that the public’s becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes”.

⁴² (1998) 25 EHRR 454

⁴³ Whether it is in practice acceptable to do so in specific cases depends on the rest of the Strasbourg process.

⁴⁴ Does that mean that the law of England has to change to come into line with European Human Rights law? Not necessarily: see section 3 below.

⁴⁵ Paragraph 40.

⁴⁶ It wasn’t always thus. “The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognised. Comments on government, on ministers and officers of state, on members of both Houses of Parliament, on Judges and other public functionaries are now made every day which half a century ago would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are the gainers by the change, and that, though injustice may be often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits

in general. For example, the law sees the criticism of the Executive as legitimate, obviously so, and of benefit to society.

In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.⁴⁷

It is inconsistent if the law considers that its own structures ought to be treated differently from those of the Executive, and ought to be immune from media scrutiny⁴⁸. The assertion that there is a societal benefit to such structures being subject to scrutiny is pretty robust⁴⁹. Building a fence around an institution is not always the best way of building confidence in it. Suspicion breeds on secrecy. As the American jurist, Brandeis J, pointed out, sunlight can be the best of disinfectants⁵⁰.

1.4 Protecting other things, part 2. The residual category

I started by first looking at the Court's desire to protect the outcome of its processes from media speech, and then put every other reason for restricting media free speech in a category called "other". This "other" I divided into two categories, "the process of justice" being the first, and "other" again being the second. It now falls to look at this "other, other", the residual category.

It would be foolish to assert that I could describe everything in this category. But perhaps, as I'm attempting to draw a sketch, not a map, I could be forgiven for not doing so. However, even in a sketch I need to point out the lay of the land. And the land is dominated by the Court's desire to protect people. Such desire turns on a concern for their privacy, and for their reputation⁵¹, and in some cases for their life⁵². And the concern can be directed at different sorts of people: witnesses, parties, officials (both lay and professional), or even, in the old cases, the public in general⁵³.

by public opinion being thus freely brought to bear on the discharge of public duties." *Watson v Walter* (1868) 38 LJR QB 34, sc Law Report 4 QB 73

⁴⁷ *Hector v AG of Antigua* [1990] 2 AC 312 at 318. See also "It is of the highest importance that a democratically elected government body should be open to uninhibited public criticism." *Derbyshire v Times* [1993] AC 534

⁴⁸ Where that scrutiny is not likely to affect a trial. Different considerations apply then: see the "outcome" section above.

⁴⁹ But not completely so. There is much discussion about the value of free speech, and in particular the efficiency and propriety of the "check value" of free speech implicitly asserted here, has spawned a literature in itself. See Eric Barendt's *Freedom of Speech*, OUP 2005, particularly chapter 1 "Why protect free speech?"

⁵⁰ For more discussion about press criticism of the courts, see section 6.

⁵¹ The two are related – the motive for protection of privacy can be to protect reputation, as in the case of a blackmail victim.

⁵² *Venables and Thompson v News Group* [2001] Fam 430

⁵³ "We are bound, for the purposes of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of morals and religion of the people. The first time I had occasion to consider the subject, was in the case of some

I'll look first at the protection of privacy. It's worth pointing out that I'm not attempting to deal with privacy law, namely the developing rights that people have to protect their privacy from media intrusion. That's a different field of law. Nor am I concerned with the quasi-paternal jurisdiction of the court to look after vulnerable people for whom it is responsible⁵⁴. I'm concentrating, rather, on the privacy-related part of the idea of "fair trial" that the courts have in the past relied on to justify the restriction of media free speech.

There are many sorts of people who are afforded such protection, the motive for which being a desire to keep the streams of justice pure. In relation to juries, those deliberations of the jury room relevant to the trial cannot be revealed⁵⁵. In relation to witnesses, section 11 of the CCA 1981 gives the court an express power to keep their identities, and other things, secret⁵⁶. And certain categories of people have the right to have their identities protected, or even a more complete restriction on what can be said about them. Victims of blackmail, for example, are generally anonymous as are complainants in sex crime cases⁵⁷, and children are protected by a fence of statutory regulations⁵⁸.

Much of this protection is motivated in an attempt to encourage vulnerable people to take part in trials. In other words, it's protection that is aimed at protecting the outcome of trials. However, my task in the "other, other" residual section is to find examples of the courts basing a restriction on media free speech on a desire to protect privacy that is related to "fair trial", but which isn't related to the outcome of a trial. (I apologise if this seems a convoluted approach.) The common examples are of privacy protection as either an end in itself, or as designed to secure the *outcome* of a fair trial. I have failed to find a non-outcome, but fair trial-related privacy justification⁵⁹ for the restriction of media free speech⁶⁰.

trials for adultery. It very often happens, that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But, though we are bound, in a court of justice, to hear it, other persons are not at liberty, afterwards, to circulate it, at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce." Bayley J in *R v Mary Carlile 1891* 106 ER 624, (3 B&A 167)

⁵⁴ The wardship jurisdiction of the Family Court for example.

⁵⁵ S8 CCA 1981

⁵⁶ And s11 CCA 1981 permits the court to prohibit publication of other names that crop up in trials of people that aren't witnesses. And a similar power exists to prevent mention of things other than names. Also, s4 CCA 1981 regulates postponement of fair and accurate reporting of trials.

⁵⁷ S1 Sexual Offences Amendment Act (SOAA) 1992.

⁵⁸ See *Arlidge* *ibid*, 7-83 (s11 CCA 1981) and Chapter 8.

⁵⁹ Just as privacy can be related to outcome, it can also be related to confidence in the judiciary. If the courts can't protect the privacy of witnesses, people may call into question their ability to come to the right conclusion.

⁶⁰ Perhaps the closest is *AG v BBC* [2001] EWHC Admin 1202. The BBC reported the identity of a victim of a sex crime, T, who was giving evidence against an accused. None of T's family knew his history. The BBC's report was in breach of s1 SOAA 1992, and a contempt of court under s1 CCA 1981. Was this a non-outcome case? No.

The reputation of the accused

On the other hand, it's much more easy to find examples of the courts seeking to protect people's reputations in the name of a fair trial. And it's even easier to find the courts being asked to do so by lawyers.

One of the earliest examples of the courts actually agreeing to do so was the case of the *St James' Evening Post*, cited twice already⁶¹. Lord Chancellor Hardwicke's motivation in restricting the press was expressly to keep the streams of justice pure. And the purpose of such cleanliness was to preserve the reputation of the parties. To pick out a couple of sentences from the sections quoted above which illustrate this: "there cannot be any thing of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters"; and: "There may be likewise a contempt of this court, in abusing parties who are concerned in causes here."⁶²

This concern for reputation has been consistently in lawyers' minds. It is doubtless a concern that is at the forefront of their clients' minds. From the earliest days that the media started to drink from the same streams as the law, legal representatives have complained about it, warning of the unfairness of the media's befouling of reputations. In 1824, for example, in the case of *Duncan v Thwaites*⁶³, Counsel Patteson said:

... if reports of this description are to be published, it will, under all circumstances, be at the expense of harassing the feelings of every person who is unfortunately taken up upon any charge. When once such a charge is published, it is extremely difficult to take off the effect of it by any counter statement, and it may possibly meet the eye of thousands who may never hear that the party accused was ultimately proved innocent or guilty. These inconveniences, therefore, infinitely outweigh any good that may arise from such publications."

After all, "a lie can be half-way around the world before truth has got its boots on", in the words of James Callaghan. In more recent times, Mark Haslam, a solicitor representing a client in relation to a series of murders of prostitutes in 2007⁶⁴, raised a similar concern in more modern language. I quoted Haslam at the top of this article, but it's probably worth repeating:

While the court obviously had enormous sympathy for T's privacy and the violation done to it, culpability of the BBC rested on the potential risk to the trial process caused by the broadcast, the result of which was that T didn't want to return to the witness box. (Para 16). The judgment was therefore based on the risk to the outcome of the trial.

⁶¹ See section 1.

⁶² *St James Evening Post (Roach v Garvan)* (1742) 2 Atkn 469, 26 ER 683

⁶³ *Duncan v Thwaites* (1824) 107 ER 846 (3 B&C 571)

⁶⁴ The media were pretty unrestrained in their reporting of this. It caused concern to the Attorney-General: *AG warns editors over murders*, Media Lawyer Newsletter, 2007, 67 39-41

We have moved into a situation where, in high-profile cases, there is saturated media coverage which is unduly speculative and which seriously impacts upon people the moment they are arrested. It raises two issues. First, it is detrimental where the person has only been arrested and not even charged - the media can, quite frankly, trash people's lives. Second, and more important, is whether such publicity, on such a scale, can really enable a fair trial to take place.⁶⁵

And there is good sense for such a concern. After all, the media's never been thorough in the way it arrives at its judgments on guilt or innocence. As Marjorie Jones puts it in her book *Justice and Journalism*, "the golden thread does not show up on the printed page"⁶⁶. Journalists do not often sit dispassionately and consider all the evidence before them, and weigh it before arriving at their conclusions. They are often motivated by other desires than the pursuit of justice. Journalism is, in the words of the 1947 Royal Commission on the Press, "a profession grafted on to a highly competitive industry", and even those that operate in good faith are attempting "to reconcile the claims of society and the claims of commerce"⁶⁷.

And even those journalists who are not in commercial organisations are subject to the more fundamental structural balances that every journalist faces. There is a permanent struggle to optimally balance journalism that informs with journalism that entertains. Journalism that merely informs is deficient. At one extreme end of the scale, if journalists merely provide facts and present them in such a dull fashion that no one watches or reads them, they have created poor journalism. A central purpose of journalism is not only to discover or assess, but also to communicate. At the other end of the balance, journalism that merely entertains is more obviously deficient, as the prism of sensationalism bends the truth.

The law, the argument goes, is not subject to these strains. (It is, however, subject to its own limitations. For example, a criminal trial is not a process designed to seek the truth. And the need for finality in court processes can lead to injustices.⁶⁸) So the complaint of the accused, facing a media scrum outside their doorstep, and the well-funded echo of their lawyers to the same end, is understandable.

Given that this jurisdiction was first established in the eighteenth century, to what extent is it still alive? It exists, but is not commonly used. The only case I've found was in 1983. Oliver LJ said in his judgment, relating to the press coverage of Michael Fagan, the man who broke into Buckingham Palace:

Where a prosecution is pending, the publication, albeit made some time before the trial, of a report which expressly or impliedly states that an accused person has admitted the commission of the very offence with which he is charged

⁶⁵ (2007) LS Gaz, 15 Mar, 20

⁶⁶ Marjorie Jones, *Justice and Journalism*, Barry Rose 1974, 150

⁶⁷ Answer to Royal Commission on Press 1947, quoted in Marjorie Jones, *Justice and Journalism*, Barry Rose 1974, 100

⁶⁸ For more discussion, see section 6 and footnote 119.

inevitably carries a substantial risk that the mind of the ordinary reader will be prejudiced against the accused.⁶⁹

This damage to reputation, therefore, not related to the outcome of the trial but related to a fair trial, should be something that justifies the restriction of media freedom of speech. Later in the judgement Oliver LJ made the wider point about the interest of the court in things other than outcomes.

The course of justice is not just concerned with the outcome of proceedings. It is concerned with the whole process of the law⁷⁰.

The central idea seems to be that damage to a person's reputation is unfair before the court has established whether a charge against a person is correct. So the court, motivated by its desire to achieve fairness, restricts media free speech to protect people's reputations.

Given that this justification exists, but isn't commonly invoked, it's worth asking if it ought to exist at all? For one thing, it's at first sight inconsistent with another line of authority.

When thinking about whether the media ought to be able to report what's happening in a courtroom, as a general rule⁷¹, the principle of open justice applies: the courts see the potential damage to the reputation of an accused from this as a lesser evil than the restriction on free speech. (To be more exact, the judges have traditionally been less interested in the right to speak, and more interested in the right to hear, namely the benefit potentially achieved by the public hearing such speech.) The principle was established at the end of the eighteenth century:

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.⁷²

And there's much modern authority in support of it. For example, a recent Canadian criminal case endorsed the view⁷³:

⁶⁹ *AG v Times* 11/2/1983 unrep, LexisNexis, Oliver LJ. See also *Re Lonhro* [1990] 2 A.C. 154, Lord Bridge para 7.3

⁷⁰ *AG v Times* 11/2/1983 unrep, LexisNexis, Oliver LJ

⁷¹ There are numerous statutory exceptions under which parties to a court are permitted to stay out of the media's spotlight, most notably perhaps rape complainants and alleged victims of blackmail. For a more comprehensive list, see further *Arlidge, ibid*, Chapter 8.

⁷² *R. v. Wright* (1799), 8 T.R. 293 at p. 298

⁷³ The principle of open justice has also been challenged. See Jaconelli, *Open Justice*, OUP 2002.

...the public interest in this matter far outweighs the risk of possible embarrassment to the individuals in this case. While one may have great sympathy for anyone charged with criminal offences, particularly offences such as this, that sympathy must not be allowed to interfere with the duty of the court to act judicially.⁷⁴

But the courts appear to be speaking with two voices. On the one hand there is this rule, that free speech (and the public's right to hear) about trials is more important than the protection of an accused's reputation. On the other, there is the view mentioned earlier, that, based on a desire for fairness to flourish, and in particular on the principle of fairness that an accused ought not to be assumed to be guilty, media speech should be restricted. The rules are different, in that the former rule only applies for reporting during a trial, but the latter is not so restricted. But the inconsistency does appear to be there.

That was the first objection. And this inconsistency is bolstered by another observation, that we've crept here onto the turf of defamation. The business of defamation is the protection of reputations. So should not suing for libel be the recourse for an accused who has unjustly suffered the sharp end of the press's tongue? Against this can be set the observation that libel is a rich man's sport, and that this makes it deficient, and of little utility to many people. But surely that is an observation that recommends change to the laws of libel, rather than an argument for the enlargement of the law of contempt? Contempt, concerned as it is with the business of justice rather than fairness and unfairness in all its multitude of forms, is surely an ill-fitting tool for the job.

1.5 Conclusion: fewer things protected

I hope to have sketched out the main processes and qualities with which the law is concerned when it restricts media free speech in the name of preserving a fair trial. First and most significant is the protection of the outcome of the trial. Most important in this class is the protection of the lay fact-finders, the jury, who are considered to be most susceptible to influences from outside the court.

As to "non-outcome" considerations, the courts are less interested in protecting public confidence in the system of justice and also, it seems, impediments to justice simpliciter. However, in this view they seem to be out of step with the attitude of the European Court in Strasbourg. The ECHR still sees the preservation of public confidence in the justice system as something that justifies the restriction of media free speech.

The courts also seem to retain a power to restrict the media in order to preserve the reputations of people who come before them, and this is considered to be integral to the concept of maintaining a fair trial. However, this power is not often used, and there are doubts as to whether it should not rather be something for the law of defamation.

One thing that is clear from this survey, I hope, is that over the past quarter century, these processes and qualities that the law seeks to protect from media speech have

⁷⁴ *Re Regina v Several Unnamed persons* (1984) 4 DLR (4th) 310

reduced in number. The scope of the law of contempt of court has diminished. The courts are no longer as jealous as they once were about their domain.

2 What are the thresholds for protection?

So much for the general areas, those processes and qualities that the law is concerned with when it says “fair trial”, in reply to the media’s saying “free speech”. I’ll now turn to the question of thresholds. What sort of speech by the media is sufficient to trigger restrictions? The most important threshold test is section 2 (2) of the Contempt of Court Act 1981⁷⁵. And I’ll show how this threshold has been lowered over the past quarter century, lowered to the benefit of the media.

2.1 The evolving test of s2(2) CCA 1981

In 1981, Parliament passed the Contempt of Court Act to reform the rules that regulated media court-related speech. The act was prompted by a domestic review of the law⁷⁶, and also by a decision in the European Court of Human Rights⁷⁷ which found that the British rules of Contempt of Court were unduly restrictive of free speech.⁷⁸ The statute explicitly left in place the common law⁷⁹, but substantially altered the rules that restrict what can and can’t be said by the media about matters of which the courts are seized.

The key section for discerning what ought to be restricted is section 2.

The strict liability rule applies only to publication which creates a substantial risk that the courts of justice in the proceedings in question will be seriously impeded or prejudiced.

The key tests in the section are the related, but distinct, ones of “substantial risk” and “serious prejudice”. It’s to these tests that a court has to direct its mind when considering whether a piece of court-related media speech is contemptuous or not. What do they mean?

The first answer to this question was given in 1993 by Lord Diplock in the case of *R v English*⁸⁰. It still is, in theory, the most authoritative. The threshold was set at a low level, a level motivated, expressly, by a desire to restrict the excesses of the media and

⁷⁵ The common law still exists and operates, in essence, when there is an intentional to create a risk of prejudice. The threshold is slightly different, as is the period for which the processes of the court are protected. Most cases though are now brought under the CCA 1981, and hence this is the most significant test.

⁷⁶ The Phillimore Committee, Cmnd 5794, 1974

⁷⁷ *Sunday Times v UK* (1979) 2 EHHR 245

⁷⁸ It is pertinent to remember that s.2, indeed the 1981 Act as a whole, was made necessary by the decision of the European Court of Human Rights in the Sunday Times Thalidomide case that the decision of the House of Lords in *A.G. v Times Newspapers* [1974] A. C. 2 73 showed that the law of this country contravened the Convention. This was because the House of Lords decision gave too much weight to the protection of the administration of justice and too little to the protection of freedom of speech. *AG v Guardian* [1999] EMLR 904

⁷⁹ s 6 (c) CCA 1981

⁸⁰ [1983] 1 A.C. 116

protect the Law's turf. Much material was beyond the legitimate concern of the media.

The public policy that underlies the strict liability rule in contempt of court is deterrence. Trial by newspaper or, as it should be more compendiously expressed today, trial by the media, is not to be permitted in this country. [...] The true course of justice must not at any stage be put at risk. [...] Next for consideration is the concatenation in the subsection of the adjective "substantial" and the adverb "seriously," the former to describe the degree of risk, the latter to describe the degree of impediment or prejudice to the course of justice. "Substantial" is hardly the most apt word to apply to "risk" which is a noumenon⁸¹. In combination I take the two words to be intended to exclude a risk that is only remote.⁸²

"Serious risk", Lord Diplock went on to point out, was a word with an ordinary meaning, and he wasn't going to give it any further gloss. In terms of whether a report actually got in the way of the courts, Lord Diplock confirmed that it didn't matter. What was important was risk and potential prejudice. And the effect of this would have been to have marked out as off limits to the media a rather large area of material. Anything that could only remotely risk affecting the relevant parts of the courts' business is safe. However, anything that could be more likely than that to affect the Court was forbidden.

Despite this interpretation being subsequently criticised by judges as being too restrictive⁸³, it remains the foundation of any interpretation of section 2, and is referred to in modern cases. And while there may be criticism that it is too restrictive, it was a relaxation of the rules regulating media speech that existed before the 1981 Act⁸⁴.

Section 2 of the CCA has been interpreted by later cases in a way that relaxes things further. In 1990, In *Re Lonrho*⁸⁵ Lord Bridge said the key thing to think about was whether a "publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would otherwise have followed". He went on to stress that the process of court most at risk was the decision-making of the lay fact-finders, given that professional fact-finders were by their

⁸¹ This sentence needs a bit of explaining. A "noumenon" is a Kantian concept denoting something that is perceptible only to the mind, in contrast to a phenomenon. Therefore, the meaning of the word "substantial" which connotes physical existence (ie having form or substance) is a strange thing to modify a concept which is, by its nature, something that does not have physical existence. Lord Diplock, perhaps because of a desire to ensure the threshold remained high, did not think to use the other meaning of the words "substantial", namely "large". Had he done so, he could have avoided his epistemic quandary.

⁸² [1983] 1 A.C. 116 Page 142

⁸³ The novelty of the test laid down in the 1981 Act was not, perhaps, fully recognised in *AG v English* [1982] C.A.R. 302 but it was recognised in *In re Lonrho plc* [1990] 2 A.C. 154. *Al Megrahi v Times* 2000 JC 22 *Lord Coulsfield*.

⁸⁴ Contained in *AG v Times* [1974] A. C. 2 73 and referred to above.

⁸⁵ [1990] 2 A.C. 154.

training insulated from media pressure and it would be very difficult to commit contempt against them. In saying so, he ceded more ground to the media.

Then, in the late 1990s, a trio of cases further liberalised the law. The first, heard in 1997, was *AG v MGN*⁸⁶. Whilst purporting to follow Lord Diplock in *English*, Schiemann LJ reduced further the area that the law protects. He did this by further concentrating on lay fact-finders, and considering what activity by the media could reasonably be feared to influence them.

In making an assessment of whether the publication does create this substantial risk of that serious effect on the course of justice the following amongst other matters arise for consideration: (a) the likelihood of the publication coming to the attention of a potential juror; (b) the likely impact of the publication on an ordinary reader at the time of publication; and (c) the residual impact of the publication on a notional juror at the time of trial. It is this last matter which is crucial.

In *R v Unger*, Simon Brown LJ raised the threshold further. Speech became less likely to be considered contemptuous. He introduced the idea of the “fade factor”, the idea that with the lapse of time, the impact of any media comment or statement would be likely to fade from the minds of a jury:

When, however, one comes to (c), the “crucial” matter of the residual impact of the publication on a notional juror at the time of trial, the respondents’ arguments are at their strongest. Prominent amongst them is the importance in these cases of the “fade” factor, the effect of the lapse of time, between publication and trial probably here of the order of nine months, upon the recollections of the article by any juror who had chanced to read it.⁸⁷

And then in *AG v Guardian*⁸⁸, Sedley J took account of the importance of neutralising directions on reasonably robust juries. He said that for there to be a contempt, he would have to be sure:

that the risk created by the publication was a substantial risk that a jury, properly directed to disregard its own sentiments and any media comment, would nevertheless have its own thoughts or value judgments reinforced by the article to a point where they influenced the verdict.

The effect of these 1990s cases was to re-draw the threshold. At the turn of the millennium, contempt was no longer merely the creation of a more than remote risk, envisaged by Lord Diplock in *R v English*. It was now something that was much harder to commit. Consequently, the media were now entitled to publish much more than they had been.

⁸⁶ The Ronnie Knight and Gillian Taylforth case. [1997] 1 All ER 456

⁸⁷ *AG v Unger* [1998] EMLR 280, 291

⁸⁸ [1999] EMLR 904

2.2 Conclusion: more speech permitted

So what now is the current state of the law? It hasn't changed substantially since the end of the 1990s. The biggest impediment to media free speech is caused by the risk of such speech affecting the outcome of a trial, and in particular a criminal trial. The most vulnerable part of the Court's machinery is considered to be the jury.

What can be published without it causing an undue risk is much larger than it has been before. This is because judges have said that juries are not as susceptible to the influence of the media as much as had previously been thought. They can be relied on to forget what the media said. If they do remember, often they can be relied on to ignore it, particularly when told to do so by a judge.

Whether that invulnerability to influence can be expected of the jury, though, depends on a number of factors. Perhaps most importantly is the fade factor. The evaluation of whether such a risk is created is to be assessed at the time of the publication. The further away from a trial that a story is reported, the less likely a jury is to remember it and even if they do, the less likely they are to give it more weight than the evidence they hear in court. Other things are also important. The court also in general has regard to whether there are any significant other features that are likely to make the jury pay regard to any reporting, or make it stick in their minds. Reporting which is particularly memorable is more likely to be contemptuous, because it's more likely to stick in the minds of the jury. Comments by celebrities might make reporting memorable. Other factors include whether a jury's even likely to hear the reporting. The vagaries of newspaper distribution and television and radio broadcasting may mean that such reporting is confined to an area a long way from the place from which a jury will be drawn. Consequently if a jury are unlikely to hear reporting, it's unlikely to be a contempt. Each publication needs to be taken on its own, so the general climate of reporting won't make a particular bit of reporting in itself more or less likely to be contempt.

As a sort of summary, looking at the question from the other way round, the sort of thing that would amount to contempt is similar to the sort of thing that could found a successful appeal⁸⁹.

And the standard of proof is high, the criminal standard. A tribunal has to be convinced that the threshold of section 2 is met beyond reasonable doubt.

3 The European Court of Human Rights and the new duty of the press

There is an irony though. The evolution and liberalisation of the position in the UK was largely prompted by the decision of the European Court of Human Rights in *Sunday Times v UK*⁹⁰. However, during the same period as the British courts have lowered the threshold to the media, the European Court has raised it. The current test in Strasbourg is rather similar to Lord Diplock's in *R v English*, that of mere

⁸⁹ This was set out in *AG v Guardian* [1999] EMLR 904 DC, by Sedley LJ. However, whilst the two – appeals, and contempt – are linked, he recognised that they aren't exactly the same. And a distinct but related test is that a judge applies when considering whether a prosecution should be stayed for abuse of process due to unfair publicity. See, for a further discussion of this, see section 5.

⁹⁰ (1979) 2 EHHR 245

“likelihood”. Activity is banned that is merely likely to prejudice a fair trial, or even undermine public confidence in justice. (Once more, the European Court is on the side of Lord Diplock.)

the limits of permissible comment on pending criminal proceedings may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of justice.⁹¹

Does that mean that British law ought to be changed to come into line with Strasbourg? Not necessarily. The argument that it shouldn't is based on Section 11 of the Human Rights Act (HRA). This section provides that the Convention can't be used to restrict rights that existed before its coming into force. The HRA was the Act that incorporated the Convention into the law of the UK. And section 11 gives force to the declaration in the White Paper, which presaged the act, that the Act wouldn't be used to water down rights, only enhance them. On the other hand, there is an argument that it should. Partly because it is not clear that section 11 applies, as here we have a conflict of rights rather than merely an attempt to extinguish a right. And also there is an argument based on section 2 of the HRA. This section says that courts ought to take into account Strasbourg jurisprudence when coming to their decisions. Therefore they ought to take this ruling into account. And there's another provision which suggests that the courts, as public bodies, need to give force to Convention rights, so perhaps ought to give force to this right.

The point is as yet untested, but any resolution of it is will be a little complicated. As well as the construction and interpretation of the Human Rights Act, it's based on the priority of the rights being employed. At first sight, Article 6, the right to a fair trial, has priority over Article 10 in the Convention. However, whether the balance between the two is appropriately struck by a domestic court may be a matter within the competence of the domestic court, and so may be considered to be within the “margin of appreciation” by the European Court of Human Rights. Whether it ought to be so depends on whether the Convention ought to be seen as providing merely a safety net of rights, or whether it ought to provide an aspiration, mandating a suite of rights that States ought to grant to their citizens: the question, in other words, of whether the Convention is a floor, or whether it's a ceiling.

But turning back to contempt. This irony is also interesting for another reason. It tends to suggest that the common law has had a fundamental change of attitude in its views of the importance of a free press. By fundamental, I mean at a deep conceptual level, not merely explained by the implementation of Strasbourg's law.

The argument goes like this. The current liberality of the law of contempt that I've described in this article cannot fully be explained by the bringing into force of the Convention. This is because the law of the Convention is now stricter on the media than domestic law. Therefore something else must explain the liberality of domestic law. And that “something else” is in part the judiciary's attitude to the value of a free press: the British courts think it's more important than Strasbourg does.

⁹¹ *News Verlags GmbH v Austria* (2001) 31 EHRR 8

There's no doubt there has been a fundamental shift in the attitude of the courts to freedom of the press. In older days, the freedom of the press was a residual right.

“Free” in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech: it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law.⁹²

However, modern judges consider it to be an active one, to the extent of using the language of duty:

As is now fully acknowledged in the jurisprudence of the European Court of Human Rights, the media have a positive duty to act as a “ watchdog”, or as the “eyes and ears” of the general public, and thus to inform their readers and viewers about issues of public interest including the administration of justice: [...] All judges nowadays are very conscious of the importance of freedom of communication and of the right (and indeed duty) of the media to report court proceedings.⁹³

While the concept of press freedom as a positive duty may be borrowed from Europe, the British judges are permitting more of it than the Strasbourg ones. British judges are not only citing Strasbourg jurisprudence, but they are going beyond it. It weighs more in their balance than it does in the scales in Europe.

An example of this can be found in the Scottish case of *Al Megrahi v Times*⁹⁴. I discussed this case above, when dealing with the question of whether the press should be prevented from prejudging cases. In this case, the Scottish court explicitly took a different view to the authorities in Strasbourg – in the case the Commission – on the balance between press free speech and the need to protect the authority of the Court. The Scottish judges refused to follow the Commission on the point of principle, and allowed the press more freedom than that apportioned to it by Strasbourg.⁹⁵

⁹² *James v Commonwealth of Australia* [1936] AC 578, 627)

⁹³ Eady, J para 17 *Ex P Telegraph* [2001] 1 W.L.R. 1983

⁹⁴ 2000 JC 22

⁹⁵ “The Commission was satisfied that the injunction constituted an interference with the television company's freedom of expression within the meaning of Article 10(1) of the European Convention on Human Rights. However, it held that, for the purposes of Article 10(2), the restriction was “prescribed by law”, pursued the legitimate aims of protecting the rights of others and of maintaining the authority and impartiality of the judiciary, and was justified by a “pressing social need”. Accordingly the Commission found that the case failed to disclose an arguable claim of a violation of Article 10. It was not, of course, for the Commission to determine whether the Court of Appeal had correctly interpreted or applied the law of contempt. It was concerned with whether the decision of the Court of Appeal was or was not compatible with Article 10. Accordingly I propose to concentrate on the basis of that decision.” Lord Justice Clerk

If this is true, and British judges now conceive of the press as providing something of greater value than traditionally afforded it, this may – in addition to the incorporation of the European Convention on Human Rights – explain why the courts have allowed the media to speak more freely.

4. The Attorney General

It would be timely to raise a signpost, and remind myself of the question with which I started: why have journalists become more frisky of late? Given that there has been no substantial change in the law since the end of the 1990s, what else could account for any increase in liberality by the press since then?⁹⁶

Part of the answer is the current perceived threat to national security. Such threats traditionally dampened the attraction of the authorities to the rules of contempt of court. The attraction is dampened largely because these rules prevent the authorities from explaining to the public the threat they perceive that exists, and which explains their actions. So, for example, early in 2007, for example the senior policeman responsible for anti-terrorism, Deputy Assistant Commissioner Peter Clarke, made a speech challenging the existence of the rules:

I understand why we need to protect juries from prejudicial material, but I wonder, in the era of global communications, whether it is sensible for us to pretend that potential jurors will not have access to the internet⁹⁷. [...] I understand the difficulties in all this, but I just wonder if we could be bolder and, dare I say it, trust juries to distinguish the prejudicial from the probative.⁹⁸

And a couple of months later, the then Attorney General, Lord Goldsmith, endorsed, in part, this call:

I believe that we should look at providing more, but controlled, information to the public in other cases where there is a strong public interest. A consistent concern expressed to me is that the absence of information on cases pending, especially after high profile arrests, can be very damaging. Radio silence can give the impression that there was in fact no good case and so it damages public safety as it seems to support a view that the State has been trumping up charges.⁹⁹

And other administrations, in other times where there's been a perceived threat to national security, have had a similar distaste for the rules of contempt of court. In the days of active Irish republican terrorism, the Conservative Attorney General, and indeed the then Master of the Rolls, similarly chafed at the jurisdiction¹⁰⁰.

The cause of the chafing against the rules of contempt seems to be (at least) twofold. First is the inability to tell the public what the perceived risks are. The risks to the

⁹⁶ See above, footnote 3.

⁹⁷ See below for a discussion of the effects of the internet

⁹⁸ For trusting the jury, see section 5. For the effect of the internet, see section 6.

⁹⁹ Speech to the Reform Club, 2007

¹⁰⁰ (1990) 92 Cr App R 239, and for Lord Denning's account see [1990] Crim LR 535.

public come from people doing things like letting off bombs. If the people associated with the bombs have been arrested and are going through the court process, it becomes impossible to tell the public what the risks are perceived to be, because in doing so the authorities will fall foul of the rules of contempt. That is frustrating to the authorities, and potentially damaging to public trust and confidence in the authorities, because the public are not being told the authorities' side of the story. That has to wait until a trial, which can be years away from an arrest. And misinformation breeds in darkness. Second, perhaps, the chafing comes from a belief that the protection afforded by contempt is unnecessary, given the heinous crimes with which the accused are facing. And, perhaps in the eyes of the police, who are marshals of the evidence against them, unjustified. This may be based on the view, propounded by some commentators after 9/11, that the provisions of such rights as those of fair trial that lie behind the contempt jurisdiction are not appropriate to people accused of certain crimes: that by their conduct, "terrorists" forfeit their rights¹⁰¹.

Whatever the reason for the distaste, it does seem to exist. Given that the Attorney General is the most significant authority, in England at least, responsible for prosecutions for contempt of court, the attitude of her office will have an affect on how many cases against the media are pursued¹⁰². However, it only goes some way to explain the increase in press reporting since the turn of the millennium, when the law settled on its current assessment of what it protects, and what the thresholds are for protection¹⁰³. It would explain why the Attorney General doesn't enforce the law of contempt against cases involving national security. However, it wouldn't explain any increased liberality in relation to cases that don't involve national security.

An explanation for that may come from a more general chilling effect that the law has had on the attitude of the Attorney General. The legal decisions of *MGN*, *Unger* and other similar cases seem to have dissuaded her office from risking prosecutions. Arlidge distinguishes three principles (one discussed in detail above, one below) which have contributed to this chilling:

There can be little doubt that the prominence given, especially in *AG v MGN* and *AG v Unger* to (1) the "fade factor", (2) the "presumption central to the whole criminal process" that jurors will decide cases solely on the evidence before them and (3) the need to prove a causal link between the individual article(s) and the risk of prejudice (as opposed to relying upon a general climate of prejudice) have contributed significantly to the reluctance of the Law Officers in the intervening years to institute proceedings for strict liability contempt.¹⁰⁴

¹⁰¹ The American lawyer Alan Dershowitz has held that torture can be legitimate when, for example, a terrorist has information about the location of a ticking bomb.

¹⁰² For a discussion of the appropriateness of the Attorney General being a politician, and therefore subject to political pressure on her judicial decision making, see *Fenwick and Phillipson, Media Freedom under the Human Rights Act, OUP 2006*, 252 – 257.

¹⁰³ See sections 1 and 2, above

¹⁰⁴ *Arlidge*, *ibid*, 4-173

I suggested earlier that underlying this judicial position may well be a change in principle as well as a change in practice, namely an increase in the value placed by the judges on the importance of a free press.

The law may have chilled the office of the Attorney General into prosecuting fewer cases of contempt, but it still exerts a regulating force. It does this by issuing guidelines to the press. These aren't legal rulings, but, rather like the Codes under PACE, breach of the guidelines, while not an offence in itself, can be a strong indication that press speech is contemptuous¹⁰⁵. It might even create an evidential presumption of contempt.

5. Truth and due process

Underpinning many of the changes in the law from 1980 to 2000 was an attempt to reconcile three different approaches to the question of under what circumstances media speech ought to be regulated. First, judges were concerned with the question of what media speech could make a trial unfair, and therefore merit a trial's being stopped for abuse of process due to unfair publicity. Second, they were concerned with when an appeal against conviction could be allowed due to unfair publicity. And third, they were concerned with when media speech ought to be punished (or prevented by prior restraint) as a contempt of court.

In the 1980s and the early part of the 1990s, the tests for each of these were slightly different. The jury was considered to be more susceptible to media speech in a prosecution for contempt than it was when considering an appeal, or an application for an abuse of process stay. Convictions for contempt were more readily obtainable on the grounds that the jury might be swayed than appeals (and stays) were obtainable on the same grounds. In actions for contempt, juries were often considered vulnerable to the press. Hence media speech was stopped or punished. In appeals (and applications for stays), by contrast, juries were often considered to be robustly able to ignore the press. Appeals (and stays) were seldom granted¹⁰⁶.

Nowadays, the tests have been aligned¹⁰⁷. The alignment has been to the benefit of the media. Judges in appeals and applications for stays have for many years recognised the value of "neutralising" directions, directions by the judge to ignore media prattle, and now this view of the psychology of the jury applies to contempt too. The law now in a more thorough-going way says that judges ought to consider

¹⁰⁵ See, for example, *AG v Express* [2005] EMLR 13

¹⁰⁶ Scotland in the 1990s was a fascinating case in point. During that period, it has been said that there was never a case of a successful appeal on the basis of unfair publicity, yet at the same time newspapers were "virtually guaranteed to be found contempt for anything which is in the least prejudicial." *Cross borders: cross purposes*: (1996) 146 NLJ 1312, and in general Chapter 3 *A virtue less cloistered*, Ian Cram, Hart, 2002, 80ff.

¹⁰⁷ They remain conceptually different, though. Section 2 looks at risks of prejudice, considered before an event – the trial. The threshold for appealing is whether the conviction is safe, and is also considered after an event – the verdict. The test for whether a stay should be granted is between the two.

juries as robust. A recent Scottish judge said juries do not need a “germ-free atmosphere”¹⁰⁸

And indeed, a belief in the ability of juries to discern relevance and irrelevance and evaluate information is absolutely essential to our system. If one does not retain a belief in the ability of the juries to come to a true verdict according to the evidence they hear in court – and that includes the ability to ignore what the press says outside court – and to follow the directions of the judge, it’s not clear what the purpose of having a jury is.

There is a feature of our trial system which is sometimes overlooked or taken for granted. The collective experience of this constitution as well as the previous constitution of the court, both when we were in practice at the Bar and judicially, has demonstrated to us time and time again, that juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court.¹⁰⁹

After all, the law often expects a jury to be able to perform more difficult mental gymnastics than that of ignoring the press:

“Juries are capable of disregarding that which is not properly before them. They are expected to disregard what one accused says about another in his absence. If they can do that, which is far from easy, they can disregard what has been said in a newspaper.”¹¹⁰

This does, though, create a problem. If the judges now trust juries to be able to filter out media noise, and ignore irrelevant material, the question has to be asked whether juries need protection from the media at all? If ignoring the press is a lesser task than some that juries are asked to perform, is there any need for the contempt law? The point has not escaped judicial notice.

I should say a word about neutralising directions. Not unnaturally, in all contempt cases such as this counsel for the alleged contemnor relies on a number of judicial observations about the ability of jurors to comply with their oaths and to decide cases solely according to the evidence. Mr Nicol is no exception. It is clearly right that this should be borne in mind but, as has been

¹⁰⁸ *Cox Petitioner*, (1998) SLT 1172, 1178 Lord Prosser

¹⁰⁹ *R v B* [2006] EWCA 2692, [2007] EMLR 5. See, also, amongst many others: “I have enough confidence in my fellow-countrymen to think that they have got newspapers sized up just as they are capable in normal circumstances of looking at a matter fairly and without prejudice even though they have to disregard what they may have read in a newspaper.” *R v Kray*, (1969) 53 Cr App R 412, 414, Lawton J

¹¹⁰ *R. v. Coughlan* (1976) 63 Cr. App. R. 33, 37.

said, it cannot be taken too far because, if it is, there would be no need for any law of contempt.¹¹¹

There is, to some extent, an empirical answer. And it's based on the fact/opinion distinction. Speech by the media can consist of statements of opinion, or it can consist of statements of fact. A statement of opinion would be a headline of the type "Got the Bastards", *The Sun's* headline at the arrest of the (now convicted) 21/7 bombers of London. The opinion inherent in this headline is that the bombers are guilty. Distinct from this are statements of fact. An example of this might have been the revelation by the press before the trial of the previous convictions of the 21/7 bombers. Empirical studies¹¹² in foreign jurisdictions (such studies are notoriously difficult to carry out in the UK because of the statutory secrecy of the jury room¹¹³) have suggested that lay fact-finders tend to be more able to ignore opinion court-related speech than fact¹¹⁴.

So one sort of media speech – statements of opinion – are less likely to influence fact-finders than the other sort – statements of fact. Given that juries are more able to ignore statements of opinion than statements of fact, shouldn't the law concentrate on restricting media statements of fact? To some extent the law has already headed in this direction, concentrating as it does on restricting the media's revelation of some detail which damages a case, and not being particularly bothered anymore about the media prejudging a case. Such a distinction is implicitly based on the difference between a statement of fact and a statement of opinion.

There are wrinkles here, though. The distinction between fact and opinion as a cause of action can be blurred. The media can portray an opinion as a fact in a way that can mislead the jury. It can be difficult to legislate to prevent this greying of the line. And anyway, empirical answers have their limitations. There are often doubts about the robustness of psychological testing, and there may be tests that are more equivocal. Even if the testing is robust, there may be doubts as to the extent to which results from one jurisdiction can be used to set rules in a different one. Susceptibility and robustness are, at least in part, likely to be culturally dependent. The experience in New Zealand or Australia is not necessarily evidence on which to make decisions in the UK.

Nevertheless, there also appears to be a more fundamental trend behind this increased trust in the jury. It is associated with a wider trend over the past decade or so, marked by dissatisfaction with the accusatorial system of justice. This is founded in dissatisfaction with the idea of the courts as a place where due process is done, and in an attraction to the idea that the courts ought to be a place where the truth is

¹¹¹ *AG v Guardian* [1997] EMLR 904 Collins J

¹¹² For a summary of recent studies, see *Alridge* 2-44, and in more detail *Fenwick and Phillipson, Media Freedom under the Human Rights Act*, OUP 2006, p 272 – 275. For a more complete list up to 2001, see Appendix V to *Auld's Review of the Criminal Courts of England and Wales, HMSO (2001)*

¹¹³ Section 8 Contempt of Court Act 1981

¹¹⁴ Australian Law Reform Commission, *Contempt*, Report 35 (1987) para 287. Full report available on line:

http://www.austlii.edu.au/au/other/alrc/publications/reports/35/Report_35.txt

discerned¹¹⁵. The criminal courts, in particular, have never been primarily a truth-finding endeavour. The purpose of the jury is not primarily to discern the truth.

Criminal courts are places, rather, where the State's power to punish an accused is fettered. Using only fair evidence, the State has to be able to convince a random selection of the public to a high degree, that an accused is guilty of specific, exactly delimited conduct. Truth may be discerned, but it isn't the prime purpose. The limitation of evidence to that which is *fair* rather than the admissibility of all evidence that is *potentially relevant* is a crucial indication of this. Take the example of evidence acquired by torture or trickery. If the discovery of truth were all that's at stake, there'd be no question but that evidence derived from torture and trickery would be acceptable as worthy of being weighed in pursuit of the truth. If evidence acquired by such means helped to uncover the truth, and truth is all that we're trying to uncover, where is the argument against it? But there is an argument against it, and (leaving aside the argument that evidence derived from torture may not be true) it's founded on such activity being unfair and activity that ought not to be encouraged. Such evidence ought not even to be weighed in our system¹¹⁶. Hence a criminal trial is not primarily a truth-seeking endeavour. It is more fundamentally concerned with due process.

However, the balance between the pursuit of fairness and the pursuit of truth seems to have shifted in recent times in the public's eyes, reflected in the legislative agenda of Parliament. What are the examples of this? The abandonment of the rule against double jeopardy, for example. The restrictions placed on the right to silence. The abolition of the rule of *doli incapax*. The ability of the Attorney General to appeal sentences. The creation of the CCRC, the increased use of hearsay in family cases, and the reduction in the stringency of the hearsay rules in criminal cases: previous convictions are now considered in more circumstances than in the past to be matters of which that the jury can properly take note. All these, and more, seem motivated by a desire for the court system to re-weight the balance away from due process, and more towards the discernment of truth.

How does the increased trust in the jury I described above fit in with this trend? Partly it's a dissatisfaction with those due process rules that absolutely bar the jury from hearing evidence that may be probative, even though it's prejudicial. If we're increasingly trying to discern truth, the jury should be able to hear more. We ought

¹¹⁵ See, for example, Austin Mitchell MP's letter in *The Guardian*, 9/10/07. He says that the adversarial process is an "expensive and futile game". He goes on to say: "The CJA 2003 and the new procedural rules are the beginning of a move back to a system that is interested in the truth. Adversarialism gets in the way of everything, including the truth."

¹¹⁶ See, for example, the exclusionary rules under s78 Police and Criminal Evidence Act, which describe fairness explicitly as something that the court has to consider when evaluating whether to exclude evidence. See also Lord Donaldson, quoting Professor Michael Zander, when he was a member of the Royal Commission on Criminal Justice: "The question of whether someone is innocent or not is not one that is addressed in a criminal trial in our legal system." Quoted on p 168 in *Understanding Miscarriages of Justice*, Nobles and Schiff, OUP, 2000. See also a comparison of similar rules in the USA, Canada and the UK: *Why suppress the truth?*, Res Publica Vol 2, no 1, March 1996

not to restrict the flow of information for due process reasons. If it can help with the truth, the jury ought to hear it. That information may possibly include information that the press was previously forbidden from reporting. So the liberalisation of the laws of contempt of court are very much in line with the liberalisation in general of what can be heard in criminal courts, prompted by a desire for them to search more after truth. They are about allowing the jury to hear more.

However, it's almost so obvious that it doesn't need to be said, that media speech may not be material which helps discern the truth. It may be material that is pure prejudice, or venom, or even just unconsciously prejudicial. Ought not this still to be regulated, even if we are entering a climate where there is more of a desire for the courts to be more truth-focussed?

Not necessarily. In a criminal trial, it is traditionally the job of the judge to discern what the jury should hear. That decision is made by weighing up, amongst other things, the probative force against the prejudicial force of statements. But if one trusts the jury more, then they should be able to make more of those decisions for themselves. Therefore the press ought to be able to report more than they traditionally were able to.

This isn't an argument for a press free-for-all. But it is to point out that the recent trend of permitting the media more leeway about what they can report is consistent with the trend of trusting the jury to discern the relevance of matters that would have in previous years been considered inadmissible hearsay. And this trend is consistent with wider dissatisfaction with the balance that the courts, particularly the criminal courts, have struck between the pursuit of truth and the protection of fairness.

6. What is the future for contempt?

I would not think it desirable to extend the doctrine (of contempt) which is unknown, and not apparently needed, in most civilized legal systems, beyond its historical scope, namely the proceedings of courts of judicature.¹¹⁷

Contempt of court is undoubtedly one of the great contributions the common law has made to the civilised behaviour of a large part of the world beyond the continent of Europe where the institution is unknown¹¹⁸

It's clear that contempt is not necessary in the logical sense of the word. Similar judicial systems to ours – common law based, with jury fact-finders – exist without it. Famously, or notoriously depending on one's view, the jurisdiction does not exist in the USA. And their system is not obviously deficient because of the absence of contempt. So if contempt is under threat and may ultimately pass away, this would not of itself be a terminal blow to our system.

What is the future for contempt? So far I've addressed the easier question in this article of what has been the recent past: in suggesting why journalists are reporting more court-related material than they used to, I have described the change in the law and made some observations about the office of the Attorney General and the attitude

¹¹⁷ Lord Scarman *AG v BBC* [1980] 3AER 161

¹¹⁸ F A Mann, (1979) 95 LQR 348-9 (note)

of the judges to the idea of freedom of the press. The more difficult question remains of what the future holds. I feel that the existence of the jurisdiction is under threat because of the influence of the internet.

But before I set out that argument, it's worth a short digression to look at an aspect of the key question of why it is necessary to protect the process of justice at all. It has often been argued that protection is necessary because the media gets in the way of the court process's search for accuracy¹¹⁹ or its ability to discern the truth. I've described above that the criminal courts in particular, and traditionally many of our courts more generally are not primarily designed to seek the truth¹²⁰. Leaving aside the current trend to make them so, what other reasons are there to protect the processes of the courts? An answer lies in an examination of the function of the courts in our society.

Once again, there are many ways to slice this cake. But one of the fundamental points of courts is that they are the *acceptable* means of resolving disputes and meeting out punishment. It is most fundamental that society accepts their authority.

Lord Morris in *AG v Times* described why the authority of the Court is advantageous, and why a challenge to its authority is to the detriment of most people:

In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if

¹¹⁹ "It was easy to see the point of these restrictions on freedom of expression: the established authoritative process for deciding whether certain information is accurate, so that its dissemination is strongly protected by the right to freedom of expression, should not have its conclusions corrupted by premature exercises of that right." John Garnder in Chris McCrudden, *Individual Rights and the Law in Britain*, McCrudden and Chambers, 1995, 227

¹²⁰ This in itself provides an argument for media speech. If the criminal courts sometimes let truth fall from their fingers because they are juggling with due process, there is a void, an absence of a structure in society to perform the task of searching after the truth. This void is often filled, or is attempted to be filled, by the media. An example is in the field of miscarriages of justice. The pursuit of due process and finality by the criminal courts risks creating the injustice of people being in prison for things they didn't do – for example, the possibility of appeal is often severely restricted. (It also, more commonly, creates the injustice of people not being punished for thing they did do.) In the past, the courts were content with this situation. But the media was often not, and was prompted to investigate matters for itself, dissatisfied with the courts' pursuit of (at times) due process at the expense of truth. The legitimacy of this activity was recognised by the court in *Ex p Simms* [2000] 2 A.C. 115. The particular structural problem was recognised by the legislature in the creation of the Criminal Cases review commission.

the recognised courts of the land are so flouted that their authority wanes and is supplanted.¹²¹

But why should society accept the authority of the courts? If one starts from the position that individuals or groups of people are autonomous¹²², and derogation from that has to be justified, what is the justification for autonomous units permitting their autonomy to be breached by the actions of the courts?

Joseph Raz's account is based on the idea of efficiency. If an arrangement is more likely to bring about a desired state of affairs, then it is an appropriate arrangement. If someone does something better than you, it makes sense to allow them to do it. A parent is more likely to find the right outcome than a child, hence the child's autonomy is appropriately compromised by the parent. If a court process is more likely to bring about an acceptable resolution of disputes, or an acceptable infliction of punishment than other processes, it is appropriate. It is justified, therefore, that courts wield authority over people's autonomy, given that the court process is more likely to achieve what people in general want.

Part of the work in the paragraph above is done by the word "acceptable", as in "acceptable resolution of disputes" and "acceptable infliction of punishment". On one account of Raz, the test is that of rightness. On this account, authority is justified because it brings about the right result. So in this case, courts are justified in wielding authority because they bring about the right result: the correct resolution of a factual dispute which accords with what happened, or a legitimate imposition of punishment. However, this account does beg some questions about truth and legitimacy. These can be avoided by couching the test as acceptability, the desired state of affairs which the Court brings about.

There is a deeper question, then. The courts are legitimate if they come to acceptable conclusions. But what determines whether these conclusions are acceptable? A short answer is that the acceptability of the conclusions is founded in the fact that the conclusions are based on the law, and that the law is determined by Parliament, and in our system, Parliament reflects the views of the people because they have a say in its constitution. However, that answer is a bit unsatisfactory, not least because more work needs to be done to explain why the laws passed by Parliament are always legitimate. Work also needs to be done to explain the legitimacy of judge-made law. A more complicated answer is that acceptability is dynamic, changing over time. And it also is different when considered at different scales: the courts can be more or less acceptable in specific cases, and more or less acceptable in general as a process. It is gauged ultimately by the actions of the people, and their reactions to the Court. This is a pragmatic account of the legitimacy of the Court. Legitimacy springs from acceptability, as does the recognition of legitimacy, which is authority.

¹²¹ Lord Morris in *AG v Times* [1974] AC 273

¹²² Autonomy doesn't need, for Raz's purposes, to vest in individuals. That makes the theory attractive, as individual autonomy as the fundamental principle of societies is contestable. Collectivist approaches doubt the validity of asserting that individuals are the fundamental unit that falls to be considered. A union, a regiment, and some families, for example, would consider the autonomy to reside in a greater collection of people than individuals.

Part of the process by which the actions of the people are expressed, and thereby the acceptability and therefore legitimacy of the Court is established, and indeed part of the way that it is communicated, is in our society the operation of the media. Trends of media reporting and comment reflect, as well as influence, groundswells in society. And it is in these groundswells, profound tides of public opinion, which are sometimes reflected in the media, that the acceptability, and therefore legitimacy, of the Court are in part established.

There is a complicated relationship between media opinion and public opinion, each in part led and each in part dictating the other. Given that, there is by extension a complicated relationship between the legitimacy of the Court and media opinion and speech. And, in part, it is media speech that confers upon the Court its legitimacy.

That's not to say that if the *Daily Mirror* prints pictures of the Law Lords upside down with the caption "You Fools"¹²³ it means that there is no longer any acceptability, and therefore legitimate authority in the courts. Nor does it mean that when the courts do something about which a paper, or even the media in general disagrees, this is illegitimate. But it does mean that on a wider level there is a relationship between the media and the legitimacy of the courts.

If that is accepted, what are the implications for contempt of court, and for the restriction of media speech on court-related matters? It is, at least in part, this. The wholesale restriction of media speech must be wrong, as it is this that helps establish the authority of the Court in the first place. In other words, restricting such speech by the media on the grounds that it can undermine the authority of the Court must be wrong in principle, as it is in part such media speech that establishes the authority of the Court, and measures out its limits.

This is not to say that all and every media speech act ought to be legitimate and protected. Those specific acts by the media that challenge the acceptable result of the courts may well be illegitimate. Given the processes that the courts have established, media speech that, for example, in a specific trial reveals forbidden facts to a jury, may be restrictable. But that is on a smaller scale than I'm attempting to address. It is on a larger scale that wider policy restrictions on media speech are illegitimate on the grounds that they may tend to undermine the authority of the courts. Such a rationale is an explicit justification for the restriction of media speech in the jurisprudence of the European Court of Human Rights.¹²⁴

It ought not to be so. The relationship between the authority of the courts and the people's trust is a delicate thing, and is in part mediated by, influenced by, and expressed by the media. Wide bans are inappropriate. And indeed, wide-ranging justifications for restrictions on media speech of the sort authorised by the ECHR may actually damage the authority of the courts. If the courts don't permit the sort of legitimate scrutiny of their affairs, even if it questions their authority, that is accepted in modern liberal democratic societies by the media, they risk forfeiting the trust of

¹²³ Footnote 26 above.

¹²⁴ See above.

the public, forfeiting the acceptability of their judgments, and forfeiting their authority.

So, in short, even if the jurisdiction of contempt of court may be under threat from the internet, we shouldn't mourn its passing. Parts of it are inappropriate in the first place. In a modern world, the best way of keeping the streams of justice pure is not always to keep the media from them.

6.1 The internet

And finally, is the Court's attempt to restrict the flow of information (and disinformation, and opinion) to the jury from the media ultimately futile? There are certain facts about the internet and the courts that underpin this view. First, information is freely available on the internet. Second, domestic courts have no jurisdiction over large and significant parts of it: it is mostly extra-territorial. Third, those parts of the internet that the courts do have jurisdiction over, their jurisdiction is limited: first, because given the existence of mirror sites, any material removed from one site may be replicated on another; second, because of the historical nature of the internet, much material is impossible to remove completely. Archives exist. Given those facts, does that not mean that contempt has become unenforceable?

The traditional answer has been to distinguish between a recent publication and a historic one, and to distinguish between the internet as newspaper and the internet as library. Yet the immediate ability to search historically makes such a distinction pointless. Historic information is available now, and is often indistinguishable from contemporary information. But can that not be dealt with by removing information from the historic portions of the internet? Sadly not. That would not deal with the mischief, as there are archives on the internet which contain the historical record of the page before it was altered¹²⁵. Once there, the information is always there. Somewhere.

Perhaps, then, it could be argued that such archival searches require special skills and knowledge, and so can be discounted from an evaluation of the enforceability of the contempt laws. It could be so argued, but it's not convincing. Something that is difficult and requires special skills today will not always do so. Caches, for example, short term historical records of the internet, are readily available today on Google. And the rate of development of the main search engines is remarkable, so it is not safe to build a policy on the expectation that archival searches will always remain a tricky thing to do.

Perhaps, even if the internet does prove a challenge to the enforceability of the contempt laws, there may still be reasons for keeping it. It still has a chilling effect on the media, and without it – whatever's on the internet – there'd be a feeding frenzy. But that argument is based on the observation that now there are different ways of distributing news, and one can ignore the internet and still chill the newspapers and the broadcasters. However, this ignores the fact that newspapers, television, radio and the internet are all converging. It won't be long before they are all delivered by the same means. And it is seriously possible that the editorial control which journalists currently have over the content of the news will disappear, and the audience (or

¹²⁵ See, for example, www.archive.org.

reader, or listener) will have the power to gather news, order it, publish it and disseminate it. The risks that these two things – convergence, and loss of editorial control – pose to the authority of the Court will only increase.

In short, because the internet is outside the jurisdiction of the Court, easily searchable, and historical in nature, the law of contempt risks becoming unenforceable. And because of the way that it is developing, that risk is being magnified.

What is a judge to do? If he or she tells his jury not to look for information about the case, he risks piquing their curiosity. If he or she doesn't, how are they to know they are to ignore it? Neutralising measures, sequestration, directions, movement of trials, postponements and jury vetting and *voire dire*s may be the only solution. These are the traditional solutions resorted to in jurisdictions that don't have the doctrine of contempt of court. But, if judges currently place a higher value on the value of free speech and the freedom of the press than they have traditionally, such measures could – as well as being a necessity – be a virtue.

7 Conclusion

I started by noting that the journalists have encroached on what has traditionally been considered the Court's territory, reporting matters that would have in the past been prohibited under the rules of contempt of court. I wondered why this was so. I have found five reasons why. Two relate to the way that the law has changed, restricting less media speech than before. The first of these relates to the fact that the law protects fewer processes and qualities now than it did, focussing on the protection of the outcome of a trial, and in particular concentrating on protecting juries from media influence. The second relates to the change in the threshold for what is considered to be prohibited speech. More is permitted now.

The reason for these changes does not seem to be merely the influence of the European Court of Human Rights. There appears to be a fundamental change in the judges' evaluation of the benefits of a free press. That is the third reason.

I've pointed out that there's been no change in the law since the turn of the millennium, and so any recent change in media practice must be for other reasons. I've looked to the attitude of the Attorney General, which provides a fourth explanation for the current liberality.

And fifth, I've observed that the relaxation on the rules of what the press can report is consistent with a wider lack of confidence in the criminal process in particular as being insufficiently truth-finding.

What is the future for contempt? I described that part of the authority of the judiciary is bound up in the media, and hence restricting media expression may damage the thing it is trying to protect. I ended by pointing out that all this could be moot, if the internet subverts the authority of the Court. If the Court can no longer regulate what the jury hear and read outside of a court, the Court will have to take other steps to preserve the integrity of the trial process. Instead of stopping the ears of the jury, it may have to trust the jury to ignore what it hears. And after all, that's not an alien concept to the law: our system is founded on the necessity of trusting the jury.

The law may have to change. However, there is precedent for change. Right at the dawn of the jurisdiction, when contempt started to regulate the media, a judge laid this out as a principle:

The law upon such subjects [the legitimacy of court reporting] must bend to the approved usages of society, though still acting upon the same principle, that what is hurtful and indicates malice should be punished, and that what is beneficial and bona fide should be protected.”¹²⁶

17,600 words

¹²⁶ Campbell CJ, *Lewis v Levy* (1858) 120 ER 610