

TRYING CASES IN THE MEDIA: A COMPARATIVE OVERVIEW

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I INTRODUCTION

Foreigners to the United States are usually struck by the harshness of its conflicts between justice and the mass media. The O.J. Simpson trial, in particular, is frequently cited as a clear illustration of the difficulty of harmonizing a strong commitment to freedom of the press and principles of fair trial in a time of “saturation coverage.”¹ In the same vein, distinguished U.S. scholars, discussing the Duke lacrosse case,² have argued that trial by media is a phenomenon “as American as the apple pie.”³

If it is undeniable that the tension between a sensationalist, commercially motivated press and fair-trial rights in the United States has reached a degree unmatched in the rest of the world,⁴ it would be naïve to look at this matter and the problems involved as only American legal curiosities. A simple glance at the

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1. See G. Stuart Adam, *The Thicket of Rules North of the Border*, in COVERING THE COURTS: FREE PRESS, FAIR TRIALS & JOURNALISTIC PERFORMANCE 25 (Robert Giles & Robert W. Snyder eds., 1999); John M. Rosen, *Free Press vs. Fair Trial: Could OJ Happen in Canada?*, 4 SW. J. L. & TRADE AM. 5, 5 (1997); Joanne Armstrong Brandwood, Note, *You Say “Fair Trial” and I Say “Free Press”: British and American Approaches to Protecting Defendants’ Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1413 n.5, 1430–31 (2000).

2. See generally STUART TAYLOR, JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2007) (detailing the story of the case and the frenzy that surrounded it); Susan Hanley Kosse, *Race, Riches & Reporters: Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243 (2007) (examining “media narratives from the recent high profile Duke case, [and] comparing them to media narratives of previous rape cases to ascertain whether race and class are changing these narratives”).

3. Hodding Carter III, Opening Address at Duke University School of Law Symposium Conference *The Court of Public Opinion: The Practice and Ethics of Trying Cases in the Media* (Sept. 28–29, 2007) (Webcast available at <http://www.law.duke.edu/webcast/?match=Court+of+Public+Opinion>).

4. See Gavin Phillipson, *Trial by Media: The Betrayal of the First Amendment’s Purpose*, 71 LAW & CONTEMP. PROBS. 15, 15–16 (Autumn 2008). For a good description of the clash between the phenomenon of “saturation coverage” and fair-trials principles in the United States, see generally Mark J. Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOYOLA L.A. L. REV. 1167, 1171 (2006).

most recent books and international symposia on this topic shows that similar questions are discussed in almost every jurisdiction and cannot be automatically linked to the peculiar framework of the American legal process.⁵

Obviously, a precise set of institutional factors may explain the great social relevance of the “trial by media” in the United States. Among the more-important factors are the almost limitless discretion and political role of the state prosecutor (whose perverse linkage to intense media coverage of alleged crimes became immediately apparent in the Duke lacrosse case),⁶ the jury trial,⁷ the strict rules of evidence,⁸ and the “absolutist” view of the First Amendment.⁹

Significant as they are, these factors cannot be taken by themselves as determinative of the conflicts implied in the relationships between the mass media and the judicial process. Indeed, comparable questions have also arisen in countries like Germany and France with nonadversarial (or at least *less* adversarial) models of criminal procedure.¹⁰ In contrast to most jurisdictions in the United States, the prosecutor in those countries is a civil servant appointed and not elected,¹¹ and the mixed-bench system replaces the all-lay jury.¹²

5. See, e.g., Colloquium, *Le public: un partenaire? Les relations entre les médias et la Justice*, EUROPÄISCHES FORUM FÜR ANGEWANDTE KRIMINALPOLITIK (2006), available at http://www.europaforum-kriminalpolitik.net/franz/html/fr_tagung.htm (F.R.G.); Colloquium, *Judiciary and the Media*, EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY (2006), available at <http://www.csm.it/ENCJ/pdf/RelazioneFinaleJudiciaryAndTheMedia-IT.pdf>; Symposium, *Justice and the Media*, Cracow, COUNCIL OF EUROPE (2005), available at http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/meetings/Conferences/default_en.asp.

6. See Abby L. Dennis, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseeder of Power*, 57 DUKE L.J. 131, 132–33 (2007). On prosecutorial discretion in the United States, see Gerard E. Lynch, *Prosecution: Prosecutorial Discretion*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1246–47 (Joshua Dressler ed., 2d ed. 2002).

7. See Uli Widmaier, *Jury und Medien—Zu einem elementaren verfassungsrechtlichen Problem in den USA*, 57 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 407, 407–08 (2004) (F.R.G.); see also RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 110–12 (2003).

8. Some categories of evidence—inadmissible at trial—are often disclosed by the media, with a resulting risk of prejudicing proceedings. See Michael Chesterman, *Contempt: In the Common Law, But Not the Civil Law*, 46 INT’L & COMP. L.Q. 521, 540–41 (1997). On the relationships between common-law rules on evidence and trial by jury, see MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 7–57 (1997).

9. See Frederick Schauer, *The Exceptional First Amendment*, KSG Working Paper No. RWP05-021 (Feb. 2005), at 17, available at SSRN: <http://ssrn.com/abstract=668543> (describing how other countries have refused to expand freedom of expression laws to match those of the United States). See generally Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167 (2001); Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377 (2006).

10. The dichotomy between inquisitorial and accusatorial systems of criminal justice relies on simple “ideal-types,” rarely present in their pure form, but nonetheless useful for the sake of model-building. See, e.g., MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 3–6 (1986); Thomas Weigend, *Criminal Procedure: Comparative Aspects*, in ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 6, at 444, 446. On the gradual convergence between the two approaches, see also Gaëtan Di Marino, *L’implantation et les remises en cause des dogmes accusatoire et inquisitoire* (Introductory Report of the Colloquium, *Inquisitoire-Accusatoire: un effacement des dogmes en procédure pénale?*), 68 REV. INT’L DROIT PÉN. 17, 25–30 (1997)(Fr.).

11. For a comparative overview, see Joachim Herrmann, *The Role of the Prosecutor or Procurator: Synthesis Report*, 63 REV. INT’L. DROIT PÉN. 533, 539–40 (1992) (Fr.); Barbara Huber, *The Office of*

Criminal trials are under the spotlight for many reasons.¹³ Media scrutiny of criminal proceedings is everywhere considered essential to democracy and, as the renowned Dreyfus affair taught, it fosters effective safeguards against miscarriages of justice.¹⁴ Interest in crime news is generally high and attracts public curiosity, especially if prominent persons, sex, and mystery are involved.¹⁵ Yet a criminal trial, with all its rituals, taboos, and symbols,¹⁶ easily turns into a spectacle, which has entertainment value and therefore gives newspapers and broadcasters strong commercial incentives to cover it.¹⁷

Its entertainment value aside, the problem of court-related speech is more general and far reaching. As has been carefully explained by system theorists, it has to be looked upon as a general problem of dialogic interaction between different systems of communication—the law and the media—with which every open society has to deal.¹⁸ A comparative perspective is therefore needed in or-

the State Prosecutor in Europe: An Overview, 63 REV. INT'L. DROIT PÉN. 557, 562–68 (1997); with specific reference to Germany, see Mirjan R. Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 503–04 (1975); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 320 (1995).

12. Under the mixed-bench system, followed by many European jurisdictions, lay assessors sit alongside professional judges and jointly decide guilt and the level of punishment. For a comparative overview, see Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239, 243 (1970); Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 366 (1977). In Continental Europe, only major crimes are tried by a mixed bench; by contrast, lesser indictable offenses, which represent the great majority of cases, are decided by professional judges sitting alone in court. See Thomas Weigend, *Criminal Procedure: Comparative Aspects*, in ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 6, at 444, 446.

13. Media interference with the judicial process is by no means limited to the reporting of criminal cases; it may affect other areas of law as well. See Winfried Hassemer, *Vorverurteilung durch die Medien?*, 38 NJW 1921, 1925 (1985) (F.R.G.). One of the most important decisions on freedom of speech by the European Court of Human Rights, *Sunday Times v. United Kingdom*, arose out of the publication of an article focusing on the *civil* litigation resulting from the thalidomide tragedy. App. No. 6538/74, 2 Eur. H.R. Rep. 245 (1979), available at <http://cmiskp.echr.coe.int/#!/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=165&sessionId=14267936&skin=hudoc-en&attachment=true>.

14. The Dreyfus case represents one of the best examples of the beneficial function of media scrutiny on the administration of justice. See Vincenzo Marinelli, *Structure et fonctions de la présomption d'innocence*, in LA PRÉSOMPTION D'INNOCENCE EN DROIT COMPARÉ 47, 53 (Centre Français de droit comparé ed., 1998). In that case, the aggressive press campaigns, and in particular the pieces written by Émile Zola, contributed to prevent the perpetuation of a patent injustice. See ROBERT MICHAELIS, RECHTSPFLEGE UND POLITIK IN DER AFFÄRE DREYFUS 1, 11 (1965). See generally PATRICE BOUSSEL, L'AFFAIRE DREYFUS ET LA PRESSE (1960).

15. See Robert Reiner, Sonia Livingstone & Jessica Allen, *From Law and Order to Lynch Mobs: Crime News Since the Second World War*, in CRIMINAL VISIONS: MEDIA REPRESENTATIONS OF CRIME AND JUSTICE 13, 13 (Paul Mason ed., 2003) (“Deviance is the quintessential element of newsworthiness.”).

16. For insightful descriptions of trial rituals, see FRANCO CORDERO, RITI E SAPIENZA DEL DIRITTO 310–672 (1981). See also ANTOINE GARAPON, DEL GIUDICARE: SAGGIO SUL RITUALE GIUDIZIARIO 7–169 (2007) (translating BIEN JUGER: ESSAI SUR LE RITUEL JUDICIAIRE into Italian) (Italy).

17. See Bill Loges & Sandra Ball-Rokeach, *Mass Media and Crime*, in ENCYCLOPEDIA OF CRIME AND JUSTICE, *supra* note 6, at 988, 989.

18. See Richard Nobles & David Schiff, *A Story of Miscarriage: Law in the Media*, 31 J.L. & SOC'Y 221, 222 (2004) (applying to the issue of media-justice interference the analytical tools developed by

der to better evaluate regulatory options available to any legal system, the actual set of values protected or sacrificed by different national policies, and the feasibility of law reforms. This article will offer some insights on the issue of court-related speech restraints from the point of view of comparative law.

Part II below will provide a general analytical framework, isolating and discussing three basic models of regulation. I will argue that the leading conceptual dichotomy of “free press versus fair trial,” as a product of thinking in terms of the English and U.S. models, is culturally biased and reflects the typical common-law perception of the interests at stake in the relationship between justice and the media. Part III will focus on some selected Continental European experiences, usually disregarded by the mainstream literature on the subject. The principle techniques employed for restricting media freedom to cover judicial proceedings will be analyzed to show that protecting an impartial administration of justice should not be the only rationale for interferences with freedom of expression.

It should be made clear from the outset that this article will not deal extensively with all the questions raised by media interference with pending proceedings. The focus will be on speech restraints during the pretrial stage. Other issues pertaining to the main hearing or the post-trial phase, such as trial broadcasting or the clash between freedom of the press and the resocialization interest of the defendant (*droit à l'oubli*), will be set aside, although they are important for any comparative analyses of the relationship between justice and the media.

II

JUSTICE AND THE MEDIA: A COMPARATIVE-LAW PERSPECTIVE

A. General Framework

It is not uncommon to approach the topic of justice and the media from a comparative perspective. Criminological research makes extensive use of comparative analyses to investigate mass-media depictions of crime and to assess the impact of media accounts, descriptions, and explanations on social behavior.¹⁹ The regulation of media freedom to report and cover judicial proceedings

NIKLAS LUHMANN, *DIE REALITÄT DER MASSEN MEDIEN* 17–28 (1995); *see also* Winfried Hassemer, *Il diritto attraverso i media: messa in scena della realtà?*, 9 *ARS INTERPRETANDI* 147, 159–61 (2004) (Italy).

19. *See, e.g.*, MARIA KAFATOU-HAEUSERMANN, *THE MEDIA–CRIME NEXUS REVISITED: ON THE RE-CONSTRUCTION OF CRIME AND LAW-AND-ORDER IN CRIME-APPEAL PROGRAMMING* 173 (2007) (discussing the results of empirical analyses about the features and effects of crime TV programs in various European countries). *See also* the essays collected in *IMAGES OF CRIME II: REPRESENTATIONS OF CRIME AND THE CRIMINAL IN POLITICS, SOCIETY, THE MEDIA AND THE ARTS* (Hans Jörg Albrecht ed., 2004).

has also been the subject of several inquiries using the functional methodology of comparative law.²⁰

Model building is one of the critical issues of comparative research. In the mainstream (Anglo American) literature, two principal models have framed the discussion on the topic of court-related speech restraints.²¹

1. Protecting Speech: The U.S. Approach

The first model is based upon the idea that the free press and the unimpeded administration of justice are not per se conflicting ideals, but are rather mutually supportive.²² Legal reporting, in particular, is highly valued since it increases public confidence in the law and enhances deterrence of deviant behaviors. Moreover, it is beneficial to democracy because it provides an external

20. Among the most significant works, see ERIC BARENDT, *FREEDOM OF SPEECH* 312 (2005) (contrasting how England's media "may be liable for contempt of court" for publishing criminal defendants' previous convictions, with the U.S. media's First Amendment "entitle[ment]" to publish such information); JOACHIM BORNKAMM, *PRESSEFREIHEIT UND FAIRNEß DES STRAFVERFAHRENS: DIE GRENZEN DER BERICHTERSTATTUNG ÜBER SCHWEBENDE STRAFVERFAHREN IM ENGLISCHEN, AMERIKANISCHEN UND DEUTSCHEN RECHT* (1980) (comparing English, U.S., and German approaches to the free press-fair trial issue); YVONNE BRAUN, *MEDIENBERICHTERSTATTUNG ÜBER STRAFVERFAHREN IM DEUTSCHEN UND ENGLISCHEN RECHT* (1998) (analyzing the English and German experiences); IAN CRAM, *A VIRTUE LESS CLOISTERED: COURTS, SPEECH AND CONSTITUTIONS* (2002) (citing cases from around the world, and comparing approaches); BARENDT VAN NIEKERK, *THE CLOISTERED VIRTUE; FREEDOM OF SPEECH AND THE ADMINISTRATION OF JUSTICE IN THE WESTERN WORLD* (1987) (containing case-study analyses from different European jurisdictions); Marcel Lemonde, *Justice and the Media, in EUROPEAN CRIMINAL PROCEDURES* 688 (Mireille Delmas-Marty & J.R. Spencer eds., 2002); John R. Spencer, *Le rôle des médias dans les procédures judiciaires: approche comparative, in LA PRÉSOMPTION D'INNOCENCE EN DROIT COMPARÉ, supra* note 14, at 83 (comparing English and Continental approaches to court-related speech regulation); Michael Chesterman, *OJ and the Dingo: How Media Publicity for Criminal Jury Trials is Dealt with in Australia and America*, 45 AM. J. COMP. L. 109 (1997) (comparing the two systems from the perspective of an Australian lawyer); Stephen J. Krause, *Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial*, 76 B.U. L. REV. 537 (1996) ("[T]he United States should enact a statute similar to the [British] Contempt of Court Act of 1981 . . ."). See also Tammy Joe Evans, *Fair Trials vs. Free Speech: Canadian Publication Bans Versus the United States Media*, 2 SW. U. J. L. & TRADE AM. 203 (1995) (comparing Canadian and U.S. approaches to free speech and their interactions); Sally Walker, *Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared*, 40 INT'L & COMP. L.Q. 583, 583 (1991); Joachim Scherer, *Justiz und Masseurien: Kontrollierende oder kontrollierte Medienöffentlichkeit?*, 39 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 38, 42-70 (1979) (comparing Anglo American and German approaches); Jacob S. Ziegel, *Some Aspects of the Law of Contempt of Court in Canada, England and the United States*, 6 MCGILL L.J. 229 (1959) (comparing how the contempt power operates in different jurisdictions).

21. In particular, see CRAM, *supra* note 20, at 77, 78 (outlining both the "scrutiny of government model" and the "administration of justice model").

22. For a detailed analysis of this model, see BARENDT, *supra* note 20, at 322-23; Chesterman, *supra* note 20, at 124; Alfredo Garcia, *Clash of the Titans: The Difficult Reconciliation of a Fair Trial and a Free Press in Modern American Society*, 32 SANTA CLARA L. REV. 1107, 1109-33 (1992); Brandwood, *supra* note 1, at 1415. On the gradual dismissal of contempt of court, see Krause, *supra* note 20, at 552-55; on the problem of gag orders' admissibility, see Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 LOY. L.A. ENT. L.J. 311, at 314 (1997); Jonathan Eric Pahl, Note, *Court-Ordered Restrictions on Trial Participant Speech*, 57 DUKE L.J. 1113 (2008); on the issue of media liability for unfair legal reporting, see Note, *Media Liability for Reporting Suspects' Identities: A Comparative Analysis*, 120 HARV. L. REV. 1043, 1047 (2007).

check on police, prosecutorial, and judicial authorities and guards against miscarriages of justice. Therefore, any interference with media freedom to access, report, and comment upon ongoing trials is *prima facie* unlawful. Almost completely banned are prior restraints, though the court may order limitations on the extrajudicial speech of trial participants. If an irresponsible piece of journalism results in prejudice to the proceedings, the legal system does not provide for a strong and effective set of sanctions against the parties responsible for the wrongdoing. Restrictive contempt-of-court laws are generally considered incompatible with the constitutional guarantee of free speech. Even defamation law is media friendly, making it difficult for affected parties to recover from media organizations for unfair or biased coverage. To sum up, this model grants wide immunity to the press and resorts only to procedural devices aimed at neutralizing the effect of prejudicial publicity. Among the most common are *voir dire*, special jury instructions, sequestration, postponement, change of venue, and reversal of conviction on appeal.

The United States typically relies on this model. In an important line of cases, the U.S. Supreme Court has struck a peculiar balance between the principles of free speech and fair trial, attaching great weight—undoubtedly greater than in any other Western country—to the former.²³ In particular, the legal regime of trial-related reporting in the United States is characterized by the following elements:

1. virtual absence of deterrent penal sanctions aimed to prevent prejudicial publicity,
2. hostility toward prior restraints on the press,
3. limited speech restrictions directed toward trial participants (gag orders), and
4. extensive use of procedural techniques aimed at neutralizing the impact of prejudicial publicity.

2. Protecting Justice: The English Approach

The second model is concerned with the threats posed by the media to an unimpeded and impartial administration of justice.²⁴ Fair trials and public confi-

23. Among the more important rulings on the relationship between the First Amendment and fair-trial rights, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (holding prior restraint in a murder case was unconstitutional and did not serve the defendant's rights); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that certain press behavior may be so prejudicial as to interfere with defendants' due-process rights); and *Bridges v. California*, 314 U.S. 274 (1941) (reversing contempt of court convictions editorials published in local newspapers regarding a pending trial). On the limitation of freedom of speech of trial participants, see *Genitle v. State Bar of Nevada*, 501 U.S. 1030 (1991) (allowing State Bars to regulate lawyers' public statements that have a "substantial likelihood of material prejudice"). On the particular issue of disclosure of rape victims' identities, see *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding for a rape victim whose privacy was invaded unlawfully when a newspaper, violating Florida law, published the victims' names), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (finding that rape victims' privacy rights fade when their names appear in the public judicial record).

24. See generally ARLIDGE, EADY & SMITH, ON CONTEMPT 63 (David Eady & A.T.H. Smith eds., 2005); CRAM, *supra* note 20, at 78; HELEN FENWICK & GAVIN PHILLIPSON, MEDIA FREEDOM UNDER THE HUMAN RIGHTS ACT 180–97 (2006); CHRISTOPHER J. MILLER, CONTEMPT OF COURT 207 (2000);

dence in the courts as the proper forum for settlement of disputes is given greater weight than the goals served by an unrestrained freedom of the press. As a consequence, the exercise of free speech respecting ongoing proceedings is more strictly limited. Instead of resorting only to neutralizing devices, this model makes extensive use of penal sanctions—under the doctrine of contempt of court—in order to curb disclosure of facts or statements of opinion that threaten to prejudice the proceedings. In addition, statutory-based or court-ordered prior restraints are admitted when necessary to prevent the reporting of specific items of prejudicial information. Furthermore, affected parties would find it easier to recover under defamation law, and their actions would not be automatically trumped by free speech. This model accepts restricting the free flow of information in order to protect the right of the accused to a fair trial and to safeguard public confidence in the administration of justice.

This is the traditional common-law approach, followed in England and other Commonwealth countries (for example, Canada, Australia, and New Zealand). Compared to the first model, such a legal regime displays the following features:

1. heavy penal sanctions for the publication of materials that may interfere with the due course of justice,
2. use of prior restraints aimed at preventing publication of specified items of information,
3. use of protective orders directed at trial participants, and
4. ancillary recourse to procedural devices (such as judicial warnings to ignore prejudicial publicity, change of venue, and jury discharge).

B. Refining the Model

The general outline sketched thus far has the advantage of making an extremely broad and heterogeneous subject matter more easily manageable, though it appears to be lacking in at least two respects.

First, it reflects a static understanding of the law, giving insufficient visibility to the processes of change and evolution underway in many legal systems. Above all, it takes for granted a radical opposition between the U.S. and the other common-law experiences, although this divide, undisputable at its conceptual core, is becoming day by day more nuanced and less clear-cut in its operative applications. The phenomenon of “constitutionalization” of private law and of speech claims,²⁵ in particular, has been altering the traditional balance be-

Krause, *supra* note 20, at 539; A.T.H. Smith, *Free Press and Fair Trial: Challenges and Change*, in FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION 123, 127 (Jack Beatson & Yvonne Cripps eds., 2000) [hereinafter Smith, *Free Press and Fair Trial*]; Spencer, *Le rôle des médias*, *supra* note 20, at 86; Walker, *supra* note 20, at 584; Brandwood, *supra* note 1, at 1430–35. For the earlier developments, see Donald M. Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 17, 17–20 (1965).

25. This phenomenon has interested both common-law and civil-law countries. See generally HELEN FENWICK & GAVIN PHILLIPSON, *supra* note 24, at 4–12 (discussing the “constitutionalization of areas of media law directly affecting the freedom to broadcast or publish” in English law); DONALD P.

tween fair trial and free press. As a consequence, the polarization of the models has been watered down, and the noted “isolation” of U.S. law partly mitigated.

The evolution of Canadian law after the introduction of the Charter of Rights and Freedoms is illustrative. The *Dagenais* decision of the Supreme Court of Canada, in particular, shows the difficulty in keeping the common-law approach to restrictive orders and post-publication sanctions in line with a stronger guarantee of free speech.²⁶ “There is no doubt that the decision in *Dagenais* has moved the Canadian law of contempt closer to the position which obtains in the United States of America.”²⁷

Most relevant, from the same point of view, is the experience of the United Kingdom. As is well known, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms²⁸ has strongly influenced the evolution of English law in the field of court-related speech.²⁹ The judgment of the European Court of Human Rights in *Sunday Times v. United Kingdom*³⁰ led to

KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 419 (1997) (providing an overview of the German experience); BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE 406 (2002); Christian Huffman, Note, *Has the Charter Freed the Press? A Comparison of the Effects of United States and Canadian Constitutional Provisions on the Freedom of the Press to Attend and Cover Criminal Trials*, in 11 MICH. ST. U. DET. C.L. J. INT’L L. 141, 156 (2002) (providing an analysis of the impact of the Canadian Charter of Rights and Freedoms of 1982 on media freedom to cover criminal trials).

26. Before the introduction of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982, ch. 11, the balance between fair-trial and other administration-of-justice concerns, on the one hand, and freedom of the press, on the other, showed a clear prevalence accorded to the former. Since the Charter introduced an express guarantee of “freedom of the press and other media of communication,” Art. 2*b*, the Canadian courts started gradually to reformulate the traditional *sub judice* rule, showing a more-tolerant attitude toward trial-related reporting; this trend was backed up by the landmark ruling of the Canadian Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*, 3 S.C.R. 835 (1994), which held that a publication ban could be issued only if (1) it is necessary to avoid a serious threat to the fairness of the trial; (2) there are no other devices, reasonably available, apt to secure a fair trial; and (3) the means adopted are proportionate to the ends pursued. This ruling was in contrast with the traditional stance adopted by Canadian case law. As the majority observed, “[T]he traditional common-law rule governing publication bans—that there be a real and substantial risk of interference with the right to a fair trial—emphasized the right to a fair trial over the free-expression interests of those affected by the ban and, in the context of post-Charter Canadian society, does not provide sufficient protection for freedom of expression. When two protected rights come into conflict, Charter principles require a balance to be achieved that fully respects the importance of both rights. Given that publications bans, by their definition, curtail the freedom of expression of third parties, the common-law rule must be adapted so as to require a consideration of both the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights.” *Id.* at 6. For an assessment of the implications of this decision on the regulation of publication bans and *sub judice* contempt, see CRAM, *supra* note 20, at 102–04; Ann Riehle, *Canada’s “Barbie and Ken” Murder Case: The Death Knell of Publication Bans?*, 7 IND. INT’L & COMP. L. REV. 193, 208–12 (1996).

27. MILLER, *supra* note 24, at 302.

28. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

29. Nigel V. Lowe, *The English Law of Contempt of Court and Article 10 of the European Convention on Human Rights*, in THE EFFECT ON ENGLISH DOMESTIC LAW OF MEMBERSHIP OF THE EUROPEAN COMMUNITIES AND OF RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 318 (Michael P. Furmston et al. eds., 1983); Smith, *Free Press and Fair Trial*, *supra* note 24, at 123.

30. See *Sunday Times v. United Kingdom*, App. No. 6538/74, 2 Eur. H.R. Rep. 245 (1979).

the 1981 enactment of the Contempt of Court Act. This statute was intended to effect a “permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech.”³¹ The Act significantly narrowed the scope of application of post-publication sanctions and created a special defense of public interest.³² Since then, domestic courts have interpreted and implemented the contempt provisions in a way consistent with the principle of freedom of expression enshrined in Article 10 (1) of the Convention.³³

The second critical remark pertains to the narrow range of the jurisdictions considered. To single out the systems that should be included in the comparison is a critical issue of any model-building process. Far from being a cognitively neutral stage, it may significantly affect the general outcomes of the study.³⁴ As a matter of fact, most of the works published in English on court-related speech focus their attention only on common-law jurisdictions. By contrast, civil-law experiences are rarely taken into account and analyzed on a comparative basis.³⁵

This choice might be defended as consistent with the methodological canon of similarity.³⁶ Nonetheless, it has serious shortcomings. In particular, it presents the danger of reducing the entire problem of media interference with justice to the single issue of *trial fairness*. This is understandable, since in a common-law context inflammatory pretrial publicity is likely to prejudice the proceedings, particularly by influencing the potential jurors.³⁷ Therefore, a lawyer called

31. See Smith, *Free Press and Fair Trial*, *supra* note 24, at 123 (citing Lloyd, L.J., in *A-G v. Newspaper Publ'n plc.*, [1988] 1 Ch. 333, 382 D-F (U.K.)).

32. Under the common-law doctrine of contempt, it was illegal for the media to prejudge a case in any manner, or to publish any material or comment in advance of trial suggesting its possible or favored outcome. For this absolute prejudgment rule, see *A-G v. Times Newspapers Ltd.*, [1974] A.C. 273, (1973) 3 All E.R. 54 (H.L.). After the introduction of the Contempt of Court Act, 1981, c. 49, a publication that usurps the functions of courts by “prejudging” a case is not considered unlawful per se, but only if it “creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.” § 2(2). Furthermore, the media may be held strictly liable for contempt of court only if the proceedings are “active,” § 3, and they can take advantage of the newly created special defense of public interest. Under § 5 of the Act, “a publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the proceedings.” § 5.

33. On the latest developments, see ARLIDGE, EADY & SMITH, *supra* note 24, at 51, observing “a changing climate in the context of free press versus fair trial.” Significant, from this point of view, is the restrictive stance recently taken by the English courts regarding the power to order the postponement of publication under § 4(2) of the Contempt of Court Act, and the power to grant injunctions to restrain contempts. See FENWICK & PHILLIPSON, *supra* note 24, at 210–23.

34. See Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 383, 407–11 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

35. This has been recognized by CRAM, *supra* note 20, at 183, noting that “few scholars based in common law jurisdictions have ventured to consider the regulation of court-related expression under civil law systems.”

36. See KONRAD ZWEIGERT–HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34–35 (Tony Weir trans., 1998).

37. It is commonly assumed that jurors have a limited ability to withstand prejudicial coverage. For literature supporting that assumption, see Edmond Costantini & Joel King, *The Partial Juror: Correlates and Causes of Prejudgement*, 15 LAW & SOC'Y REV. 9, 36–38 (1981); Christina A. Studebaker &

upon to deal with “trial by media,” will be concerned, above all, with avoiding the obstacles that the exercise of freedom of speech might present to a fair trial. Other legitimate grounds, though, could justify a restriction of the free flow of information, even in the absence of any risks to an unimpeded and impartial administration of justice, and these tend to be systematically overshadowed by the mainstream literature on this topic.

1. Protecting Personality: The Continental Approach

If one looks to the other side of the Atlantic, the overall picture is different. Not only the solutions, but also attitudes toward the interests at stake in regulating court-related expression significantly differ. The Anglo-American tradition pays great attention to the clash between free press and fair trials, but it tends to underestimate the problem of the implications of biased media coverage on a criminal suspect’s personal sphere.³⁸ Continental lawyers, by contrast, seem *relatively* less concerned with the issue of trial fairness than with the need for safeguarding the privacy, personal dignity, and presumption of innocence of trial participants against interference by the media.³⁹

This, again, may be easily explained by looking at the underlying institutional framework and at some other cultural and social factors that shape the Continental stance. On the one hand, the nonadversarial system of criminal

Steven D. Penrod, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 PSYCHOL. PUB. POL’Y & L. 428, 428 (1997). Some recent empirical studies have shown, however, that the actual rate of influence of media publicity is significantly smaller than expected. See MICHAEL CHESTERMAN, JANET CHAN & SHELLEY HAMPTON, *MANAGING PREJUDICIAL PUBLICITY: AN EMPIRICAL STUDY OF CRIMINAL JURY TRIALS IN NEW SOUTH WALES 196* (2001) (Austl.). On the other hand, it is a widely shared belief that professional judges are less vulnerable to press campaigns and biased media coverage of court proceedings. See, e.g., *Craxi v. Italy* (No. 2), App. No. 34896/97, Eur. Ct. H.R. at [104] (Mar. 5, 2003), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=7933&sessionId=14267202&skin=hudoc-en&attachment=true>. It is also commonly assumed that trained judges sitting on a mixed bench have the ability to minimize the impact of juror bias. See BORNKAMM, *supra* note 24, at 207. See generally Gerhard Casper & Hans Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135, 136 (1972) (considering “the role of the lay judges in the mixed tribunals of the German criminal courts”).

38. This is especially true for the American experience. See, e.g., Note, *Media Liability for Reporting Suspects’ Identities*, *supra* note 22, at 1043. It can generally be assumed, however, that in all common-law jurisdictions the focus of suspect-reporting regulation is not so much on privacy and dignity, but rather on trial fairness. See, e.g., YVONNE BRAUN, *MEDIENBERICHTERSTATTUNG ÜBER STRAFVERFAHREN IM DEUTSCHEN UND ENGLISCHEN RECHT*, *supra* note 20, at 105. Regarding disclosure of a suspect’s identity, see Roderick Munday, *Name Suppression: An Adjunct to the Presumption of Innocence and to Mitigation of Sentence*, CRIM. L. REV. 680, 682 (1991) (“If English law is normally averse to granting anonymity to witnesses (and even to victims of crime) and to forbidding the publication of their names and personal details, such reluctance has been almost total when it comes to the identification of defendants.”); Heleen Scheer, *Publicity and the Presumption of Innocence*, 52 CAMBRIDGE L.J. 37, 37–42 (1993). The only exception of some relevance is the protection of juvenile offenders and victims of sexual offences. See JAMIE CAMERON, *LA VIE PRIVÉE DE LA VICTIME ET LE PRINCIPE DE LA PUBLICITÉ DES DÉBATS* 49 (2003) (Can.); CRAM, *supra* note 20, at 134–60; JOSEPH JACONELLI, *OPEN JUSTICE: A CRITIQUE OF THE PUBLIC TRIAL* 161, 212 (2002).

39. See Claus Roxin, *Strafrechtliche und Strafprozessuale Probleme der Vorverurteilung*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 153, 157 (1991) (F.R.G.); Spencer, *supra* note 20, at 85; Scherer, *supra* note 20, at 70–76 (comparing the *Lebach* decision of the German Constitutional Court and the U.S. Supreme Court’s *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)).

procedure and the smaller lay involvement in the justice process substantially reduce the likelihood of prejudice to the proceedings.⁴⁰ On the other hand, the peculiar constitutional vision of privacy as dignity⁴¹ and the typical European doctrine of state obligations to protect fundamental rights⁴² tend to shift the focus of the conflict from the vertical relationships between defendants and the courts to the horizontal relationships between defendants and the mass media.⁴³ This shift is clearly reflected in the changing meaning of the principle of presumption of innocence, which is no longer regarded as a simple “procedural” safeguard internal to criminal proceedings, but also as a “substantial” right to be asserted vis-à-vis private parties.⁴⁴

Taking into account the Continental European experiences may therefore enhance the general understanding of the problems involved in the regulation of court-related speech, since it sheds light on a particular dimension of the conflict between justice and mass media that is often overlooked. As a first step, the taxonomy discussed so far may be usefully enriched by isolating a third model of court-related speech regulation.⁴⁵ The underlying assumption of this model is that media coverage of pending trials might be at odds not only with the fairness and impartiality of the proceedings, but also with other individual and societal interests. In particular, presumption of innocence of the defendant and reputation and privacy of trial participants are highly valued. Accordingly, freedom of expression may be subjected to various restrictions in order to further these interests. Narrowly focused prior restraints are provided for, on either a statutory or a judicial basis. Penal post-publication sanctions are frequently employed, especially as general-deterrent devices against the violation of the rules on pretrial secrecy. Also increasingly relevant is the role of private-law remedies, such as injunctive relief, rectification orders, and damages. Some

40. See, e.g., BORNKAMM, *supra* note 20, at 207, 217; Chesterman, *supra* note 8, at 541, 558; Jörg Soehring, *Presse, Persönlichkeitsrechte und ‘Vorverurteilungen,’* 88 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 518, 526 (1986) (F.R.G.).

41. See EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 41–54 (2002); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004).

42. See generally Dieter Grimm, *The Protective Function of the State*, in EUROPEAN AND US CONSTITUTIONALISM 119–27 (Georg Nolte, ed. 2005); Heike Krieger, *The Protective Function of the State in the United States and Europe: A Right to State Protection? Comment*, *ivi*, at 153–164; Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT’L. J. CONST. L. 79, 89 (2003).

43. This is a critical point: the European attitude to protect presumption of innocence as against private parties and in particular the media, see *infra* III.E.2, starkly contrasts with the U.S. resistance to hold nonstate actors bound to respect fundamental rights, such as fair-trial rights. See Hans A. Linde, *Fair Trials and Press Freedom—Two Rights against the State*, 13 WILLAMETTE L.J. 211, 216–18 (1977).

44. See Robert Badinter, *La présomption d’innocence, histoire et modernité*, in LE DROIT PRIVÉ FRANÇAIS À LA FIN DU XX^e SIÈCLE: ÉTUDES OFFERTES À PIERRE CATALA 133, 145 (2001) (Fr.); Antoine Buchet, *La présomption d’innocence au regard de la convention européenne des droits de l’homme et des libertés fondamentales*, in LA PRÉSOMPTION D’INNOCENCE EN DROIT COMPARÉ, *supra* note 14, at 27. For further discussion of this shift, see *infra* III.E.2.

45. See generally BORNKAMM, *supra* note 20, at 217, 247; YVONNE BRAUN, MEDIENBERICHTERSTATTUNG ÜBER STRAFVERFAHREN IM DEUTSCHEN UND ENGLISCHEN RECHT, *supra* note 20, at 71, 105.

neutralizing measures, such as change of venue, are admitted in theory but rarely applied in practice. It should be noted that, by preventing the publication of information likely to infringe reputational and dignity interests, this model enhances the quality of legal reporting and therefore affords an indirect protection of the interest in trial fairness (differently from the common-law approach, in which dignity interests are indirectly guaranteed by the institution of contempt of court).

III

COURT-RELATED SPEECH RESTRAINTS IN CONTINENTAL EXPERIENCES

A. Civilian Equivalents of the *Sub Judice* Rule

Under the traditional common-law stance, protection of the proper functioning of the trial process represents one of the most compelling grounds for restraining freedom of speech.⁴⁶ The law of contempt, in particular, prohibits publications that are thought likely to interfere with the course of justice in a particular case (*sub judice* rule).⁴⁷ In the United Kingdom, the Contempt of Court Act of 1981 introduced a strict-liability rule with respect to publications that create “a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.”⁴⁸

The institution of contempt of court is frequently referred to as one of the typical features of common-law systems.⁴⁹ This does not mean, however, that conduct punishable as contempt under the *sub judice* rule is always allowed or tolerated in civil-law jurisdictions. Laws concerning pretrial secrecy limit the disclosure of specific items of information, which would be also protected—although under a different rationale—by the law of contempt.⁵⁰ In addition, some legal systems have enacted provisions specifically aimed at preventing prejudicial influences on the key actors in trials.

Interesting examples may be found in both Austria and France. In Austria, the problem of prejudicial publicity was dealt with as early as 1862. Article VIII of the *Strafgesetznovelle* of 1862 provided that “whoever, while a criminal procedure is still pending, publishes in print media statements regarding the value of evidence, and the assumed outcome of the proceedings . . . , in a way capable

46. See, e.g., Trevor R.S. Allan, *Common Law Constitutionalism and Freedom of Speech*, in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION* 17, 31–33 (Jack Beatson & Yvonne Cripps eds., 2000).

47. Publications may be found to be interfering with the judicial process if they create a risk of seriously impairing the court’s impartiality or exert improper influence on key actors of the trial, such as the judge, the jurors, the witnesses, or the parties to the proceeding. Conduct typically treated as contempt by English courts are direct or indirect statements of guilt, prejudging the merits of the case, publication of inadmissible evidence (such as prior convictions of the accused), pressure on witnesses, publication of the photograph of an accused when identification is an issue at trial. For a detailed overview, see ARLIDGE, EADY & SMITH, *supra* note 24, at 359; MILLER, *supra* note 24, at 305.

48. Contempt of Court Act, 1981, c.49, § 2.

49. See CLAUS ROXIN, *STRAFVERFAHRENSRECHT* 479 (1993); Chesterman, *supra* note 8, at 521.

50. See *infra* III.B.

of influencing public opinion and hence prejudicing the decision by the court, is punishable from one up to three months imprisonment.”⁵¹

This was conceived as a typical press crime: reference is made only to statements published in “print media” (*Druckschriften*). As a consequence, the development of electronics made it necessary to amend this provision to encompass other kinds of publications as well. This task was accomplished by the Media Act of 1981 (as amended in 1992).⁵² Section 23 of the Media Act, entitled “Prohibited influence on criminal proceedings,” states that “[a]nyone who discusses, subsequent to the indictment . . . [and] before the judgment at first instance in criminal proceedings, the probable outcome of those proceedings or the value of evidence in a way capable [*geeignet*] of influencing the outcome of the proceedings shall be punished by the court with up to 180 day-fines.”⁵³

Provisions aimed at protecting the fairness of proceedings and the role of courts as legitimate forums for settlement of disputes may be found in France as well. Article 227 of the Criminal Code was enacted in 1958 “in conscious imitation of contempt and amid a chorus of indignant opposition from the media.”⁵⁴ It introduced a mechanism similar to the *sub judice* rule, imposing fines and imprisonment on “who[]ever has published, before a definitive court decision, commentaries which tend to exert pressure on the statement of witnesses or on decisions of the judge . . . or on the judgment.”⁵⁵ This provision has now been repealed and substituted by Article 434-16 of the new Criminal Code of 1994, which prohibits “[t]he publication, prior to the pronouncement of the final judicial decision, of comments tending to exert pressure on the testimony of witnesses or on the decision of the judicial investigating authority or trial court.”⁵⁶ Although this provision displays some similarities to its English counterpart, it is not exactly equivalent: common-law contempt requires a simple “influence” on the proceedings; Article 434-16 is confined to publications resulting in “pres-

51. Betreffend einige Ergänzungen des Allgemeinen und des Militaer-Strafgesetzes 8 Reichsgesetzblatt [RGBl.], at 161, 163 (Dec. 17, 1862), translated by author, available at <http://alex.onb.ac.at/cgicontent/anno-plus?apm=0&aid=rgb&datum=18630004&zoom=2&seite=00000161&x=20&y=6>. This article was slightly amended in 1929 by Art. VIII of the *Strafgesetznovelle*, Womit einige Bestimmungen des Strafgesetzes, des Preßgesetzes und des Einführungsgesetzes zur Strafprozeßordnung abgeändert werden [Strafgesetznovelle] 440 Bundesgesetzblatt Teil I [BGBI. I], at 1815 (Dec. 20, 1929), available at <http://anno.onb.ac.at/cgi-content/anno-plus?aid=bg&datum=19290004&seite=00001815>.

52. Most European countries have enacted special statutes aimed at guaranteeing and regulating the exercise of freedom of the press. See Pnina Lahav, *An Outline for a General Theory of Press Law in Democracy*, in PRESS LAWS IN MODERN DEMOCRACIES: A COMPARATIVE STUDY 346 (Pnina Lahav ed., 1985).

53. Bundesgesetz über die Presse und andere Publizistische Medien [MedG] BGBI. No. 314/1981, § 23 (as amended by subsequent laws), translated in Worm v. Austria, App. No. 83/1996/702/894, Eur. Ct. H.R. at [23] (Aug. 29, 1997), <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=668&sessionId=7866883&skin=hudoc-en&attachment=true>.

54. See Chesterman, *supra* note 8, at 539.

55. On this provision, see VAN NIEKERK, *supra* note 20, at 118.

56. See JEAN LARGUIER & ANNE-MARIE LARGUIER, *DROIT PÉNAL SPÉCIAL* 409 (2002).

tures.” The objective element of the crime is therefore more narrowly framed, in light of the fact that it requires efforts devoted to exert a pressure.⁵⁷

However, the most striking differences between the English and the Continental approaches are not to be found in black-letter law, but in the enforcement of such rules. In Britain, the list of precedents dealing with the *sub judice* rule is impressive.⁵⁸ Every journalist or publisher is aware of the risks involved in reporting on criminal matters. Although the recent trend is definitely more liberal than in the past and the policy of issuing guidelines is increasingly preferred to tough prosecution,⁵⁹ infringing these rules is still risky and can trigger heavy sanctions. Therefore, the media is on average cautious in disclosing facts or expressing statements of opinion likely to interfere with pending proceedings. It has been reported, for instance, that *The New York Times* has recently stopped online readers in England from accessing an article that disclosed the identities of some individuals suspected of acts of terrorism.⁶⁰ By the same token, in July 2007 some British newspapers refrained from publishing the photos of Mohammed Asha, a doctor allegedly involved in a plot to bomb the Glasgow Airport. Scotland Yard had expressly requested that media organizations not publish photos of people involved in the case, arguing that the identification of the suspects could be an issue in any trials concerning the plot.⁶¹

By contrast, media reporting that is likely to have an impact upon judicial proceedings is rarely prosecuted on the Continent. This is the case in France, whose Article 434-16 of the Penal Code is seldom enforced, as confirmed by the dearth of precedents.⁶² The Austrian experience is only slightly different. On the one hand, Section 23 of the Media Act has been paid more attention than its French counterpart. Indeed, some applications of this provision are quite interesting and worthy of reflection.⁶³ On the other hand, Austrian commentators

57. See Chesterman, *supra* note 8, at 539.

58. This abundance is evidenced by the ponderous volume on contempt of court by MILLER, *supra* note 24, at 207 (discussing the *sub judice* rule and providing an overview of the English case-law).

59. See the Preface to the Third Edition of ALRIDGE, EADY & SMITH ON CONTEMPT, *supra* note 24, at V.

60. See Note, *Media Liability for Reporting Suspects' Identities*, *supra* note 22, at 1047.

61. Eric Pfanner, *Did Photos of Suspects Break Law? In Era of Global News, U.K. Journalists Chafe at Restrictions on Coverage*, INT'L HERALD TRIB., July 9, 2007, at 10.

62. Emmanuel Derieux, *Secret de l'instruction et droit à l'information*, 386 LES PETITES AFFICHES 6 (June 11, 1997); only a few (old) precedents are reported in the short commentaries edited by HERVE PELLETIER & JEAN PERFETTI, CODE PÉNAL, *sub* Art. 434-16 (2005); YVES MAYAUD, CODE PÉNAL, *sub* Art. 434-16 (2008).

63. See, e.g., Oberlandesgericht [OLG] [Court of Appeals] Wien Dec. 11, 1989, 27 Bs 329/89, in MEDIEN UND RECHT 16 (1990). In 1989 some journalists were convicted because they published and commented on a poll in which the readers were invited to express their opinions about the outcome of a criminal trial, taking side either for the solution given by the jury or by the judge. Here, the enforcement of Section 23 of the Media Act was directed at protecting the role of courts as the proper forum for the settlement of legal disputes and at insulating jurors and judges from external influences. Such “speech” was considered particularly objectionable as coming close to a trial carried out not *in the name of the People*, but rather *by the People*. Interestingly, a similar rule has been introduced in France by the new Article 35^{ter} (2) of the Press Act of 1881, as amended by Law No. 2000-516 of June 15, 2000. This provision prohibits any person from carrying out, publishing, or commenting on an opinion poll concerning either the guilt of an individual charged with a crime or the proper sentence. It is

have observed that, in light of the particular procedural constraints and different payoffs for the parties, the most effective way to counter adverse publicity is not criminal prosecution, but civil action.⁶⁴ Sections 7a and 7b of the Media Act offer a consistent basis for redress against infringements of the presumption of innocence and other personal interests by the mass media. As a matter of fact, most of the Austrian judgments have been rendered under the heading of Sections 7a and 7b.⁶⁵ Relatively few, by contrast, are rulings pertaining to Section 23 of the Media Act.⁶⁶

B. Pretrial Secrecy

Despite the relevance of the French and Austrian models, most civil-law jurisdictions have resisted the introduction of a *sub judice* rule.⁶⁷ One argument for its rejection has been that any provision prohibiting the publication of items of information or statements of opinion likely to obstruct or prejudice a trial would be exceedingly vague and would run counter to the principle of determinacy of penal sanctions (*Bestimmtheitsgebot*).⁶⁸ Another is the concern that such a rule would be overprotective, chilling open debate and public scrutiny on the workings of the justice system.⁶⁹ Arguments of this kind have shaped the discussion in Germany, where a bill directed at the introduction of a “contempt by publication” rule was actually proposed in 1962 but never enacted.⁷⁰ It is likely that similar thoughts lie behind the underenforcement of the French and Austrian provisions.

By contrast, concerns for freedom of speech tend to vanish when pretrial secrecy (*secret de l'instruction*) is taken into account. Penal sanctions directed at preventing the disclosure of specific information are laid down by many Euro-

also forbidden to publish information, such as an Internet address, capable of facilitating access to such opinion polls or open consultations. See generally Emmanuel Derieux, *La loi du 15 juin 2000 et le droit de la communication*, 389 LES PETITES AFFICHES 16 (July 18, 2000).

64. BRANDSTETTER & SCHMID, KOMMENTAR ZUM MEDIENGESETZ 248 (1999).

65. For an analysis of Sections 7a and 7b and references to some Austrian cases, see *infra* III.E.1–2. See also GERHARD LITZKA & IRIS STREBINGER, MEDIENGESETZ: KURZKOMMENTAR 64–71, 248 (2005) (providing an overview of Austrian case law under Sections 7a and 7b and noting the small number of convictions under Section 23 of the Media Act).

66. The experience has been similar under Article VIII of the *Strafgesetznovelle* 1862, 440 BGB1.I, at 1815 (as amended in 1929). See BORNKAMM, *supra* note 20, at 234–35.

67. Hassemer, *supra* note 13, at 1924, talks about an enduring “skepticism” toward the doctrine of contempt of court.

68. See Roxin, *supra* note 39, at 155.

69. BORNKAMM, *supra* note 20, at 231; Hassemer, *supra* note 13, at 1927; Roxin, *supra* note 39, at 155.

70. See Section 452 of the Government Bill of 1962, *Störung der Rechtspflege* (reproduced in BORNKAMM, *supra* note 20, at 229 n.49). For a discussion of this bill and an analysis of the previous legislative proposals aimed at controlling prejudicial publicity, see BRAUN, *supra* note 20, at 182; Roxin, *supra* note 39, at 154–55; Rolf Stürner, *Schutz des Gerichtsverfahrens vor öffentlicher Einflußnahme?*, 33 JURISTEN ZEITUNG [JZ] 161, 163 (1978). Among the first proponents of a stricter media regulation, see also EBERHARD SCHMID, JUSTIZ UND PUBLIZISTIK 61 (1968).

pean legal systems, as in France⁷¹ or in Italy.⁷² Even countries, such as Germany, that have resisted the introduction of a *sub judice* rule commonly rely upon such prohibitions.⁷³

How can this inconsistency be explained? Arguably, cultural and institutional factors have determined the approach taken by the legal systems. The presence of an all-lay jury, the rules of evidence, but also the unique role played by the judiciary in the evolution of the English society⁷⁴ are some of the crucial elements that explain the great relevance of the law of contempt in the Anglo American context. By the same token, the legacies of a nonadversarial model of criminal procedure arguably lie beneath rules proscribing the disclosure of items of information or documents in the pretrial stage.⁷⁵

Adversarial systems are based on the idea of openness of the judicial proceedings.⁷⁶ Consequently, they are suspicious of any form of “secrecy” in the administration of justice, according to the principle that “justice should not only be done, but should manifestly and undoubtedly be seen to be done.”⁷⁷ By contrast, the so-called inquisitorial models cannot get rid of some sort of secrecy.⁷⁸

71. Article 11 of the French Code of Criminal Procedure provides that “except where the law provides otherwise and subject to the defendant’s rights, the enquiry and investigation proceedings are secret.” CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 11. It also states that “any person contributing to such proceedings is subjected to professional secrecy under the conditions and subject to the penalties set out by articles 226-13 and 226-14 of the Criminal Code” *Id.* (English translation provided by the official Web site “Legifrance,” available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=34&r=3886#art16975>). See MICHELE LAURE RASSAT, TRAITÉ DE PROCÉDURE PÉNALE 588 (2001).

72. Although Italy uses a (mixed) adversarial model of criminal procedure, see William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT’L LAW 1, 2–3, 7, 10, 35 (1992), the principle of secrecy has not been abandoned. Article 329 of the Code of Criminal Procedure prohibits the disclosure of specific items of information until the moment when the accused is allowed to have knowledge of them. CODICE DI PROCEDURA PENALE [C.P.P.] art. 329. Article 114 (1) of the Code of Criminal Procedure forbids the partial or total publication of any documents covered by secrecy. Art. 114(1). Penalties for the breach of such provisions are laid down by Article 684 of the Penal Code. CODICE PENALE [C.P.] art. 684. For details, see FRANCESCA M. MOLINARI, IL SEGRETO INVESTIGATIVO 203–18 (2003).

73. Section 353d(3) of the German Penal Code provides that
 whoever . . . publicly communicates, verbatim, essential parts or all of the accusatory pleading or other official documents of a criminal proceeding, a proceeding to impose a civil penalty or a disciplinary proceeding, before they have been argued in a public hearing or the proceeding has been concluded, shall be punished with imprisonment for no more than one year or a fine.
 Strafgesetzbuch [StGB] § 353d(3) (translation to English provided by the Federal Ministry of Justice and available at <http://www.iuscomp.org/gla/statutes/StGB.htm>). For a detailed analysis of the problems involved in the relationship between media freedom and pretrial secrecy, see Thomas Weigend, *Medienöffentlichkeit des Ermittlungsverfahrens?*, in ALTERNATIV-ENTWURF STRAFJUSTIZ UND MEDIEN 33 (Arbeitskreis AE ed., 2004).

74. See RONALD L. GOLDFARB, THE CONTEMPT POWER 9–16 (1963); Chesterman, *supra* note 8, at 547–57.

75. See Lemonde, *supra* note 20, at 691.

76. See JACONELLI, *supra* note 38, at 1–67.

77. Lord Hewart, C.J., in *R v. Sussex Justices, ex parte McCarthy*, (1924) 1 K.B. 256, 259.

78. See FRANCO CORDERO, PROCEDURA PENALE 350 (2006).

This is true for the preparatory stage, while the main hearing is generally open to the public.⁷⁹

Without going into further details, it is worth inquiring into the aims pursued and the practical import of such rules. It is commonly argued that their rationale is twofold.⁸⁰ On the one hand, consistent with an inquisitorial framework, they pursue the goal of enhancing the chances of a proper investigation, since an unrestrained diffusion of the information gathered by the prosecutor and the police could arguably obstruct the acquisition of further evidence.⁸¹ On the other, they are directed at the protection of a suspect's personality interests. It is feared, in other words, that the publication of documents and materials pertaining to the preparatory stage would expose an individual's presumption of innocence, reputation, and privacy to peril before any conclusive evidence of guilt is given.

C. The Gap between the Law in the Books and the Law in Action

In theory, the deterrent effect of penal sanctions should ensure results similar to those afforded by the English *sub judice* rule. In practice, however, the rules on secrecy are frequently circumvented, and the efficacy of such statutory devices is highly questionable.⁸² In Italy, for instance, it is not unusual for prominent defendants to learn of a notice of prosecution (*informazione di garanzia*) through the newspapers rather than through an official communication by prosecutorial authorities.⁸³ In the same vein, witness statements or wiretapping transcripts are often published by the press in violation of law, with the consequence of nullifying the provisions on pretrial secrecy. As it has become sadly apparent in some recent murder cases, trial by media is a phenomenon all too common in Italy.⁸⁴

79. See European Convention, *supra* note 28, Article 6 (1), which states the principle that "judgment shall be pronounced publicly," but admits that

the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

80. See MOLINARI, *supra* note 72, at 251–52; Derieux, *supra* note 62, at 6; Weigend, *supra* note 73, at 36. See also the discussion in *Dupuis v. France*, App. No. 1914/02, Eur. Ct. H.R. at [32], [44] (Nov. 12, 2007), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62703&sessionId=14267304&skin=hudoc-en&attachment=true> (stressing that the rules on pretrial secrecy pursue legitimate aims, since they are directed at the protection of a defendant's reputation, presumption of innocence, and the authority and impartiality of the judiciary).

81. See Weigend, *supra* note 73, at 47.

82. See GLAUCO GIOSTRA, *PROCESSO PENALE E INFORMAZIONE* 231–76 (1989) (Italy); Lemonde, *supra* note 20, at 700–07.

83. See MICHELE BONETTI, *RISERVATEZZA E PROCESSO PENALE* 153 (2003).

84. See Magnus Linklater, *Whether Meredith or Madeleine, It's Trial by Media*, THE TIMES, Nov. 14, 2007, at 19 (discussing the attitudes of Italian mass media toward the criminal proceedings concerning the murder of an English student in Perugia); Luca Marafioti, *Il circolo vizioso cronaca-indagini conduce all'errore giudiziario*, IL RIFORMISTA, Nov. 21, 2007, at 6.

Similar results have been reported in France and Belgium, whereas in Germany the situation seems only slightly better.⁸⁵ Several reasons may explain the observed clash between theory and practice. First, most of the provisions on pretrial secrecy are affected by a structural underinclusiveness. Due to poor drafting, their scope of application is exceedingly narrow and the chances of effective enforcement are by themselves quite small.⁸⁶ For instance, Article 11 of the French Code of Criminal Procedure is not directly binding on journalists;⁸⁷ on the other hand, Section 353*d*, n. 3 of the German Penal Code, although applicable to the media, prevents only the verbatim publication of entire or partial excerpts of the official documents and not accounts inspired by them.⁸⁸

Second, in many cases the primary sources of the information illegally published are prosecutorial authorities and police services.⁸⁹ Therefore, law enforcement has no strong incentive to actually prosecute breaches of the rules on pretrial secrecy. Moreover, regulations allowing journalists to not disclose the sources of their information add an additional barrier to the effective enforcement of these provisions.⁹⁰

85. See ANTOINE GARAPON, *I CUSTODI DEI DIRITTI: GIUSTIZIA E DEMOCRAZIA* 61 (1997) (translating *LE GARDIEN DES PROMESSES: JUSTICE ET DÉMOCRATIE* into Italian); Lemonde, *supra* note 20, at 698–707.

86. See Weigend, *supra* note 73, at 40.

87. Since Article 11 subjects to professional secrecy “any person contributing to such proceedings,” it is undisputed that only the public authorities involved in the proceedings (judges, prosecutors, policemen, et cetera) are bound by such a provision, but not the media and other trial participants (such as the defendant, the witness, the *partie civile*, or their lawyers). See EMMANUEL DERIEUX, *DROIT DES MÉDIAS* 97 (2001); RASSAT, *supra* note 71, at 589; GASTON STEFANI, GEORGES LEVASSEUR & BERNARD BOULOC, *PROCÉDURE PÉNALE* 568 (2001); Danièle Mayer, *L’information du public par la presse sur les affaires en cours d’instruction*, *RECUEIL DALLOZ*, chronique 80 (1995). However, the media could be held accountable not only for complicity in the principal offence of unlawful disclosure, but also for the crime of *revel*. See Derieux, *supra* note 62. This crime consists of “the concealment, retention or transfer [of] a thing, or acting as an intermediary in its transfer, knowing that that thing was obtained by a felony or misdemeanour”; and also in the “the act of knowingly benefiting in any manner from the product of a felony or misdemeanour.” LARGUIER & LARGUIER, *supra* note 56, at 272 (discussing Art. 321-1 of the Penal Code). According to the case law, a journalist could be convicted for the crime of “receiving” if he publishes information obtained in breach of pretrial or professional secrecy and is aware that the sources were illegal. See the decisions cited by Lyn François, *Le droit de la presse et la diffamation devant la Cour européenne des droits de l’homme*, *REVUE DU DROIT PUBLIC* 684, 685 (2005). This is quite a tough solution and indeed has been found by the European Court of Human Rights to contrast with Article 10 of the European Convention of Human Rights. See Dupuis v. France, App. No. 1914/02, Eur. Ct. H.R. at [44]–[49] (Nov. 12, 2007), <http://cmiskp.echr.coe.int/tpk197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62703&sessionId=14267304&skin=hudoc-en&attachment=true>.

88. See Jürgen-Peter Graf, *Sub § 353d*, in MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH, IV, at 2088 (Wolfgang Joecks & Klaus Miebach eds., 2006); Roxin, *supra* note 39, at 156.

89. See GIOSTRA, *supra* note 82, at 236. For some critical remarks about the information politics of police and prosecutorial authorities in Germany, see Roxin, *supra* note 39, at 158.

90. As is well known, in Europe journalists are granted special protection with respect to the disclosure of the sources of information. See *Goodwin v. United Kingdom*, App. No. 17488/90, 22 Eur. H.R. Rep. 123, [46] (1996), available at <http://cmiskp.echr.coe.int/tpk197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=555&sessionId=14267304&skin=hudoc-en&attachment=true>; *Roemen v. Luxembourg*, App. No. 51772/99, Eur. Ct. H.R. at [46], [57]–[60] (May 25, 2003), <http://cmiskp.echr.coe.int/tpk197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=3538&sessionId=14267304&skin=hudoc-en&attachment=true>;

Most importantly, the policy supporting pretrial secrecy is losing social acceptance and appears in many respects to be outdated.⁹¹ The underlying assumption of this model is that whereas the main hearing should be entirely open to the public, the preliminary stage—when evidence is being collected and the public charge is being prepared—should remain secret. However, people are much more interested in the preparatory stage, rather than in the main hearing.⁹² The latter, in a civilian context, is a highly technical event, lacking the dramatic aura typical of common-law trials, and is therefore not as spectacular. The former, on the contrary, is the moment of mystery and suspense, with the highest news and entertainment value.

In a media-dominated atmosphere, to maintain a veil of silence on the pretrial stage—especially when it lasts for a long time⁹³—appears utopian. This sort of utopia is all but harmless, however, since the circulation of unchecked information may actually have much more serious and lasting effects on the reputation and personal dignity of the defendants than a transparent and truthful disclosure. Not surprisingly, several scholars have made a case for the abandonment of the traditional approach, advocating the need for more and better information relating to the preparatory stage.⁹⁴ Legislative reforms in this direction have been undertaken in some jurisdictions.⁹⁵

D. Information Politics

The process of information exchange between judicial authorities, police officers, public prosecutors, and the media is one of the most critical points for any reform.⁹⁶ Journalists receive much of their information concerning criminal

Roger Errera, *Freedom of Speech in Europe and in the USA*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 42, at 43–44.

91. See Lemonde, *supra* note 20, at 701–02; Weigend, *supra* note 73, at 33.

92. Hassemer, *supra* note 13, at 1927.

93. Particularly instructive, from this point of view, is the situation of fact in *Dupuis*: pretrial secrecy was breached three years after the beginning of the investigations; the criminal proceedings lasted about twelve years. App. No. 1914/02, Eur. Ct. H.R. at [25], [44] (Nov. 12, 2007), <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62703&sessionId=14267304&skin=hudoc-en&attachment=true>. It is clear that the public's right to know is frustrated when trials last so long. Consequently the media, especially in State-affair cases like *Dupuis*, have a greater incentive to circumvent the rules on pretrial secrecy.

94. See ALTERNATIV-ENTWURF STRAFJUSTIZ UND MEDIEN, *supra* note 73, at 18; Derieux, *supra* note 62; Lemonde, *supra* note 20, at 691–92.

95. In France, for instance, the Law No. 2000-516 of June 15, 2000, art. 96, amending art. 11 of the Code of Criminal Procedure, has reduced the strictness of the principle of *secret de l'instruction*. The new text of art. 11, third sentence, provides that, although the pretrial stage remains secret, “in order to prevent the dissemination of incomplete or inaccurate information,” the district prosecutor may, “on his own motion or at the request of the investigating court or parties, publicise objective matters related to the procedure that convey no judgment as to whether the charges brought against the defendants are well founded.” See *id.* See generally Pierre Cramier, *Présomption d'innocence, droits des victimes et liberté de l'information (Les modifications apportées à la législation sur la presse par la loi du 15 juin 2000)*, 391 LES PETITES AFFICHES 6 (Jan. 14, 2002).

96. See Hassemer, *supra* note 13, at 1928; Bernd J. Fehn & Heinz M. Horst, *Behördliche Pressearbeit bei strafprozessualen Maßnahmen: Zum Spannungsfeld zwischen öffentlichen Informations und Geheimhaltungsinteressen*, ARCHIV FÜR PRESSERECHT [AFP] 13 (2007) (F.R.G.); Jochen Schroers,

proceedings from law-enforcement sources and prosecutors.⁹⁷ The rules on pre-trial secrecy give some guidance about the items of information that should not be disclosed to the public. By contrast, the statutes generally say nothing about the interactions between public authorities and the media.

This matter is commonly left to professional ethics. It is not surprising, therefore, that the practices of information policy tend to vary significantly across Europe.⁹⁸ On the one hand, there are models in which judges' and prosecutors' freedom of speech is highly valued and not subjected to severe constraints.⁹⁹ On the other, there are systems in which official communication with the media is regulated according to the principle of hierarchical authority and therefore remains under stricter control.¹⁰⁰

Versteckte Probleme bei der Zusammenarbeit zwischen Staatsanwaltschaften und Medien, 43 NJW 969 (1996) (F.R.G.). On the information exchange between trial participants and reporters, see generally C. Thomas Dienes, *Trial Participants in the Newsgathering Process*, 34 U. RICH. L. REV. 1107 (2001) (arguing "for strict scrutiny review of direct restraints on lawyer speech and of indirect restraints on news-gathering based on the personal and societal interests implicated").

97. This trend is pervasive. See BORNKAMM, *supra* note 20, at 241; Robert E. Drechsel, *An Alternative View of Media–Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial & Free Press Issue*, 18 HOFSTRA L. REV. 1, 35 (1989) (noting that data from Minnesota show "the heavy reliance of journalists on law enforcement sources and prosecutors confirm the appropriateness of focusing attention on those sources when attempting to control pretrial publicity"); Lia Sava, *Il rapporto tra magistrato e organi di informazione nella fase delle indagini preliminari: punti fermi e problemi aperti nell'esperienza concreta*, unpublished manuscript presented at the Conference on "Magistratura e mass media," organized by the Italian Judicial Council (CSM), Rome, April 3, 2006, at 33 (on file with author); Brandwood, *supra* note 1, at 1448.

98. For details, see the national reports presented at the Council of Europe Symposium on "Justice and the Media," Cracow (Pol.), April 25–26, 2005, http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/meetings/Conferences/default_en.asp.

99. This has been the law in action in Italy for a long time, where judicial and prosecutorial authorities have on occasion frankly abused their freedom of speech, contributing to a kind of "spectacularization" of justice. See Lemonde, *supra* note 20, at 706–07; Sava, *supra* note 97, at 2, 32–33. However, a recent reform has severely restricted judges' and public prosecutors' discretion in interacting with the media. An act passed in 2006 has strengthened the rules of professional conduct, preventing judges from revealing documents covered by pretrial secrecy and by issuing statements and giving interviews about persons involved in pending proceedings, if this may cause prejudice to the rights of others. Leg. Decree No. 109 of Feb. 23, 2006, Art. 2*u*, v, *Gazzetta Ufficiale della Repubblica Italiana* [Gazz. Uff.] of Mar. 21, 2006, no. 67, as amended by Law No. 469 of Oct. 24, 2006, *Gazz. Uff. of Oct. 24, 2006*, no. 248. Furthermore, the power of briefing the media about ongoing activities has been conferred only to the head of the public prosecutor's office (*Procuratore della Repubblica*) and her representatives. Art. 5 [1], Leg. Decree No. 106 of Feb. 20, 2006, art. 5[1], *Gazz. Uff. of Mar. 20, 2006*, no. 66. Consequently, no deputy prosecutor shall have the right to inform the press or issue public statements about the office's activity. Leg. Decree No. 106 of Feb. 20, 2006, art. 5[3]. The violation of these rules may expose both judges and public prosecutors to disciplinary proceedings. See generally Riccardo Fuzio, *Le dichiarazioni dei magistrati agli organi di informazione: limiti e rilevanza disciplinare*, 130 *Foro Italiano V* [Foro It. V] 70 (2007) (discussing the issue of public statements by judges and prosecutors under the new regulation); Federico Sorrentino, *Prime osservazioni sulla nuova disciplina degli illeciti disciplinari dei magistrati*, *QUESTIONE GIUSTIZIA* 54 (2007) (providing an overview of the reform of disciplinary proceedings).

100. This is the case in Germany, where only a limited number of public officials are authorized to give information to the press. See Lemonde, *supra* note 20, at 698–99. Usually the head of the public prosecutor's office is in charge of the contacts with the press in the preliminary stage: "[N]o deputy prosecutor, or officer in charge of the investigation has the right to inform the press, and this ban is well respected (failure by an individual to respect this ban would have repercussions on his career)." *Id.* at 698. Press offices are also to be found in main regional police departments. See ANNEGRET KREISEL, *OPFERSCHUTZ UND MEDIENINTERESSE* 45 (2004).

Rather than focus on the various national experiences, it is worth recalling a recent Recommendation of the Committee of Ministers of the Council of Europe, “on the provision of information through the media in relation to criminal proceedings.”¹⁰¹ This Recommendation is nonbinding, but it has persuasive value. Indeed, it was recently cited and taken into account by the European Court of Human Rights in *Dupuis v. France*.¹⁰²

After having recalled the right of the public to receive information about the activities of judicial authorities and police services and the freedom of the media to provide it, the Recommendation lays down some substantial and procedural criteria, which should be observed by member states in regulating the provision of information to the media. The first substantial limit is represented by respecting the presumption of innocence. According to Principle 2, appended to the Recommendation, “opinions and information relating to on going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.”¹⁰³ The violation of this principle, which is also applicable to nonjudicial authorities, may give rise to an action for damages against the state.¹⁰⁴ Furthermore, Principle 10 provides that “in the context of criminal proceedings, particularly those involving juries or lay judges, judicial authorities and police services should abstain from publicly providing information which bears a risk of substantial prejudice to the fairness of the proceedings.”¹⁰⁵ This is also consistent with the Strasbourg case law.¹⁰⁶

101. COUNCIL OF EUROPE, RECOMMENDATION REC (2003) 13 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE PROVISION OF INFORMATION THROUGH THE MEDIA IN RELATION TO CRIMINAL PROCEEDINGS (adopted July 10, 2003).

102. App. No. 1914/02, Eur. Ct. H.R. at [20], [42] (Nov. 12, 2007), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62703&sessionId=14267304&skin=hudoc-en&attachment=true>.

103. RECOMMENDATION REC (2003) 13, *supra* note 101, at app. *Principles concerning the provision of information through the media in relation to criminal proceedings*, Principle 2.

104. This principle was confirmed by the European Court of Human Rights in the leading case *Alenet de Ribemont v. France*, App. No. 15175/89, Eur. Ct. H.R. at [35]–[36] (Feb. 10, 1995), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=61929&sessionId=14267304&skin=hudoc-en&attachment=true> (holding that “presumption of innocence may be infringed not only by a judge or court but also by other public authorities”), and more recently in *Y.B. v. Turkey*, App. Nos. 48173/99, 48319/99 Eur. Ct. H.R. at [44], [47]–[51] (Jan. 28, 2005) <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=9404&sessionId=14267541&skin=hudoc-en&attachment=true>.

105. RECOMMENDATION REC (2003) 13, *supra* note 101, at app. *Principles concerning the provision of information through the media in relation to criminal proceedings*, Principle 10.

106. See *Buscemi v. Italy*, App. No. 29569/95, Eur. Ct. H.R. at [68] (Sept. 16, 1999), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=885&sessionId=14267936&skin=hudoc-en&attachment=true> (“The judicial authorities are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges. That discretion should dissuade them from making use of the press, even when provoked. It is the higher demands of justice and the elevated nature of judicial office which impose that duty.”).

The second substantial constraint protects the privacy of trial participants.¹⁰⁷ Particular care should also be taken to avoid any disclosure of a witness' identity, "unless a witness has given his or her prior consent, the identification of a witness is of public concern, or the testimony has already been given in public."¹⁰⁸

Regarding procedural criteria, the Recommendation stresses the importance of nondiscrimination and regular provision of information in high-profile cases. According to Principle 4, "when journalists have lawfully obtained information in the context of on going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request."¹⁰⁹ With respect to high-profile cases, "judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of the investigations and police enquiries or delay or impede the outcome of the proceedings."¹¹⁰ In general, it is recommended that the provision of information should be carried out "through press conferences by authorised officers or similar authorised means."¹¹¹

Last, Principle 7 prohibits the exploitation of information about ongoing criminal proceedings "for commercial purposes or purposes other than those relevant to the enforcement of the law."¹¹² The issue of "checkbook journalism," for example, has been intensively discussed in recent years in Europe and abroad.¹¹³ Some countries have enacted statutes comparable to the U.S. "Son of Sam" laws, with the aim of preventing criminals from profiting from the commercial exploitation of the criminal event at the (emotional and material) ex-

107. RECOMMENDATION REC (2003) 13, *supra* note 101, at app. *Principles concerning the provision of information through the media in relation to criminal proceedings*, Principle 8. See *Craxi v. Italy* (No. 2), App. No. 25337/94, Eur. Ct. H.R. at [66]–[76] (Mar. 5, 2003), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=7933&sessionId=14267202&skin=hudoc-en&attachment=true> (holding the State responsible for the publication in some newspapers of telephone interceptions of a strictly private nature, in violation of the right to private life guaranteed by art. 8 of the Convention. Such interceptions had been carried out by the police, investigating corruption charges brought against the plaintiff, and filed in the public prosecutor's registry. Either by a malfunction of the registry or by communication with one of the parties to the proceedings, some journalists came in possession of the bulk of the transcripts and published them. Referring to the doctrine of positive obligations to protect fundamental rights, the Court affirmed the State's liability on two grounds: (1) the authorities failed to provide safe custody of the transcripts, and (2) no effective inquiry was carried out after the violation to sanction the persons responsible for the wrong doing).

108. RECOMMENDATION REC (2003) 13, *supra* note 101, at app. *Principles Concerning the Provision of Information Through the Media in Relation to Criminal Proceedings*, Principle 16.

109. *Id.* at Principle 4.

110. *Id.* at Principle 6.

111. *Id.* at Principle 5.

112. *Id.* at Principle 7.

113. See JACONELLI, *supra* note 38, at 266; KREISEL, *supra* note 100, at 161; Louis Blom-Cooper, *Cheque-book Journalism on Display*, PUB. L. 378 (2003); Colin Munro, *When Criminals Sell Their Stories*, PUB. L. 55, 58 (2006); Lutz Tillmanns, *Mediale Vermarktung von Verbrechen und Grundsätze eines fair trial*, http://www.kanzlei-prof-schweizer.de/bibliothek/content/tillmanns_mediale_vermarktung.html (last visited Nov. 29, 2007).

pense of their victims.¹¹⁴ Similarly, some Press Councils have chosen to strictly limit the admissibility of payments to witnesses (and sometimes to criminals), in order to avoid prejudicing proceedings.¹¹⁵ In light of these findings, it seems appropriate to recommend that public bodies should also abstain from exploiting information pertaining to criminal proceedings for financial reasons or for purposes other than those relevant to law enforcement.

E. Private-Law Remedies

Penal provisions on pretrial secrecy are not the only sources of court-related speech restraints. They represent just a single element of a more-complex mosaic and are of limited practical importance. These provisions are supplemented in most Continental legal systems by private-law remedies aimed at furthering the interests in the privacy, dignity, and reputation of trial participants.

Indeed, unfair media coverage of criminal cases may not only hinder the proper functioning of justice, but also infringe fundamental rights of the parties to the proceedings, irrespective of its outcomes.¹¹⁶ Stigma and humiliation may derive from a suspect's simply being charged, adhering to the individual even after acquittal (labeling effect).¹¹⁷ Indeed, the court of public opinion can impose ancillary reputational sanctions, which are independent from the judicial ascertainment of truth and which tend to persist long after the conclusion of the proceedings.¹¹⁸

Also, the personal well-being of the victim or the witness of a criminal offense may be seriously affected by an unrestrained exercise of media freedom.¹¹⁹

114. Particularly significant is the German Law of 1998 on victims' guarantees (*Opferanspruchssicherungsgesetz*); for a detailed analysis, see MEIKO STENGER, *DAS OPFERANSPRUCHSSICHERUNGSGESETZ: DER ZUGRIFF DES OPFERS EINER STRAFTAT AUF DIE MEDIENERLÖSE DES TÄTERS UNTER BERÜCKSICHTIGUNG GRENZÜBERSCHREITENDER SACHVERHALTE* (2006); Magdalene Kläver, '*Dornröschenschlaf*' des *Opferanspruchssicherungsgesetzes*, *JURISTISCHE RUNDSCHAU* 177 (2004).

115. In England in 1996, after the trial of Rosemary West, *R v. West*, (1996) 2 Cr. App. R. 374, the Lord Chancellor's Department promoted a discussion paper on "payments to witnesses," which was followed by another consultation paper in March 2002. Eventually, it was decided to leave the matter to self-regulation. See ARLIDGE, EADY & SMITH, *supra* note 24. Accordingly, the Press Complaints Commission has amended its Code of Practice by prohibiting—or at least strictly limiting—payments to witnesses and criminals. See Louis Blom-Cooper, *supra* note 113, at 378–79.

116. See Joachim Bornkamm, *Die Berichterstattung über schwebende Strafverfahren und das Persönlichkeitsrecht des Beschuldigten*, *NStZ* 102 (1983) (F.R.G.); Franz Riklin & Frank Höpfel, *Verletzung der Unschuldsumutung*, in *ALTERNATIV-ENTWURF STRAFJUSTIZ UND MEDIEN*, *supra* note 73, at 54.

117. See Scheer, *supra* note 39, at 39. For an illustrative case of unfair media reporting with nefarious personal consequences, see Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 5, 1963, 16 NJW 904 (F.R.G.), in which a commercial agent, before any conviction, was depicted in the press as one of the instigators of a gang of burglars and dealers in stolen goods.

118. "Ancillary sanction" (*zusätzliche Strafe*) is the expression used by Bornkamm, *supra* note 116, at 108. See also Vincenzo Zeno-Zencovich, *Comunicazione, reputazione, sanzione*, *DIRITTO DELL'INFORMAZIONE E DELL'INFORMATICA* 263, 271 (2007) (Italy) (providing an insightful analysis of "reputational sanctions").

119. See KREISEL, *supra* note 100, at 11; Heinz Schöch, *Schutz von Verletzten*, in *ALTERNATIV-ENTWURF STRAFJUSTIZ UND MEDIEN*, *supra* note 73, at 79.

In the United States, for instance, surveys have suggested that many victims do not report a rape to public authorities for fear of publicity and loss of privacy.¹²⁰

Continental legal systems have long since developed an articulated complex of rules and doctrines directed at the protection of personality rights against interference by nonstate actors.¹²¹ Such remedies as injunctions, rectifications, and damages, commonly granted by either civil code or special statutory provisions, are now being increasingly employed as means of controlling the exercise of free speech regarding legal reporting. Arguably, if well-structured, private-law devices may contribute to qualitatively enhancing the level of media coverage of pending proceedings without excessively curbing the watch-dog function of the press. They represent a valid alternative to the “repressive” model of penal prosecution, which is frequently either overprotective¹²² or ineffective¹²³ and should therefore be regarded as an *extrema ratio*.¹²⁴

1. Disclosure of a Suspect’s Identity and the Anonymity Interest

Media freedom to provide information about ongoing proceedings frequently eclipses the suspect’s interest in anonymity. Indeed, the bare fact that an individual has been publicly depicted as a suspect, though not necessarily formally charged with a criminal offense, may strongly prejudice his or her social dignity.¹²⁵ Obviously, the prejudice is even greater if publicity is given to a charge or an indictment.

Some legal systems, such as that in the United States, proceed from the assumption that knowledge of a suspect’s identity is by itself a matter of public concern and therefore resolve the conflict between free speech and the ano-

120. See Daniel M. Murdock, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA. L. REV. 1177, 1177 (2007) (reporting that, according to a recent survey, “66% of women surveyed stated that they ‘would be more likely to report rapes if their identities would be protected,’ and 86% of the surveyed group thought that rape victims ‘would be “less likely” to report rapes if those victims believed that the news media would disclose their names”). As is well known, in the United States the protection of a rape victim’s identity has become a contested issue since the decisions of the U.S. Supreme Court in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). See also *Star-Telegram, Inc. v. Doe*, 915 S.W. 2d 471 (Tex. 1995). For a comparative overview, see CAMERON, *supra* note 38, at 57.

121. See generally GUIDO ALPA & GIORGIO RESTA, *LE PERSONE FISICHE E I DIRITTI DELLA PERSONALITÀ* 361 (2006) (Italy) (providing a historical and comparative analysis of the development of the category of “personality rights” in European Continental law); FRANÇOIS RIGAU, *LA PROTECTION DE LA VIE PRIVÉE ET DES AUTRES BIENS DE LA PERSONNALITÉ* (1990) (discussing French law on privacy and related rights and comparing it with the experience of several other countries); STIG STRÖMHOLM, *RIGHT OF PRIVACY AND RIGHTS OF THE PERSONALITY: A COMPARATIVE SURVEY* (1967) (presenting in-depth analysis of personality- and privacy-rights protections in different jurisdictions); Adrian Popovici, *Personality Rights—A Civil Law Concept*, 50 LOY. L. REV. 349 (2004) (discussing “personality rights” in the civil law, and problems associated with it, using Quebec as a case study).

122. In the common-law context, see FENWICK & PHILLIPSON, *supra* note 244, at 303–10.

123. See *supra* III.C.

124. See Riklin & Höpfel, *supra* note 116, at 58; Roxin, *supra* note 39, at 157.

125. Bornkamm, *supra* note 116, at 103.

nymity interest in favor of the former.¹²⁶ By contrast, Continental jurisdictions accord considerable weight to a defendant's anonymity interest—especially if he or she is a juvenile—and cope with the underlying conflict through a balancing process. The nature of the offense, the defendant's status (public figure versus ordinary citizen), and the value of the evidence gathered are factors most commonly taken into account when deciding whether a defendant's identity is admissible.

This matter has been extensively discussed and litigated in Austria, Switzerland, and Germany.¹²⁷ The legal systems in those countries rely on assuming that the publication of a suspect's identity is not per se a matter of public interest. Therefore, as a general principle, his or her name and photograph cannot be freely dispersed prior to a trial judgment.¹²⁸ However, publication of such information may be deemed lawful if it is proved that the society has a specific interest in receiving that information.¹²⁹ This is the case, for instance, when (1) the al-

126. See *Smith v. Daily Mail Publ'g*, 443 U.S. 97 (1979) (declaring unconstitutional a state law barring publication of the names of charged juvenile offenders as long as the information was obtained lawfully and no substantial state interests exist); *Okla. Publ'g Co. v. Okla. District Court*, 430 U.S. 308 (1977) (finding a pretrial order preventing the press from disclosing the identity of an eleven-year-old boy accused of murder to be unlawful under the First Amendment because the information was lawfully obtained during a detention hearing); *Macon Tele. Publ'g Co. v. Tatum*, 436 S.E.2d 655, 658 (Ga. 1993) (holding that "... Tatum, who committed a homicide, however justified, lost her right to keep her name private. . . . [because she] became the object of a legitimate public interest and the newspaper had the right under the Federal and State Constitutions to accurately report the facts regarding the incident, including her name."); see also Note, *Media Liability for Reporting Suspects' Identities*, *supra* note 22, at 1044; For reform proposals, see Jaime N. Morris, Note, *The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases*, 44 B.C. L. REV. 901 (2003) ("[A]llowing a high-profile criminal defendant to proceed anonymously can safeguard a defendant's right to a fair trial . . .").

127. See BRAUN, *supra* note 20, at 71, 86; Robert Hauser, *Das Prinzip der Öffentlichkeit der Gerichtsverhandlung und der Schutz der Persönlichkeit*, in RECHT UND RECHTSDURCHSETZUNG: FESTSCHRIFT FÜR H.U. WALDER ZUM 65. GEBERTSTAG, at 165, 183 (Isaak Meier ed., 1994) (Switz.); Gerda Müller, *Probleme der Gerichtsberichterstattung*, 60 NJW 1617 (2007) (F.R.G.); Franz Riklin & Frank Höpfel, *Schutz von Beschuldigten vor identifizierender Berichterstattung*, in ALTERNATIV-ENTWURF STRAFJUSTIZ UND MEDIEN, *supra* note 73, at 71. See also JÖRG SOEHRING, PRESSERECHT: RECHERCHE, BERICHTERSTATTUNG, ANSPRÜCHE IM RECHT DER PRESSE UND DES RUNDFUNKS 348 (1995) (F.R.G.).

128. Particularly significant, in this perspective, are the general principles laid down by the German Constitutional Court in the famous *Lebach* decision on the resocialization interest of the convicted. See *Entscheidungen des Bundesverfassungsgerichts [BVerfG]* May 6, 1973, 26 NJW 1226, translated into English in KOMMERS, *supra* note 25, at 418 (holding that "the interest in receiving information is not absolute. The central importance of the right to personality requires not only vigilance on behalf of the inviolable, innermost personal sphere of the accused but also a strict regard for the principle of proportionality. The invasion of the personal sphere is limited to the need to satisfy adequately the public's interest in receiving information, while the harm inflicted upon the accused must be proportional to the seriousness of the offense or to its importance otherwise for the public. Consequently, it is not always permissible to disclose the name, release a picture, or use some other means of identifying the perpetrator."). With specific reference to the issue of identity disclosure before final judgment, see BGH Dec. 7, 1999, 53 NJW 2000 (1036); OLG Braunschweig Oct. 24, 1974, 28 NJW 651. For a detailed analysis of this issue, see MARTIN LÖFFLER & REINHART RICKER, HANDBUCH DES PRESSERECHTS 328–29 (2005); Bornkamm, *supra* note 116, at 104; Müller, *supra* note 127, at 1618; Riklin & Höpfel, *supra* note 127, at 71; Weigend, *supra* note 73, at 42–44.

129. See BGH Dec. 7, 1999, 53 NJW 1036 (F.R.G.); BGH Nov. 15, 2005, 59 NJW 599 (F.R.G.).

leged crime is a major and not a lesser indictable offence,¹³⁰ (2) the defendant is a public figure,¹³¹ and (3) the suspect's identity is already in the public domain.

Interestingly, this is judge-made law in Germany and Switzerland. Even the decisions of the German Press Council grant extensive protection to the anonymity interest and conform to Guideline 8.1 (1) of the German Press-Code,¹³² which provides that the press, when reporting on crimes, investigations, or trials, "shall not usually publish any information in words or pictures that would enable identification of victims and perpetrators."¹³³

By contrast, in Austria this matter is specifically regulated by statute.¹³⁴ Section 7a of the Media Act, introduced in 1992, provides that the name or likeness of a person who "has been the victim of an offence punishable by the courts" or "is suspected of having committed, or has been convicted of, a punishable offence" cannot be published "where legitimate interests of that person are thereby injured and there is no predominant public interest in the publication of such details on account of the person's position in society, of some other connection with public life, or of other reasons."¹³⁵ This is a general clause that leaves much room for judicial discretion.¹³⁶ However, the statute makes clear that the interest in anonymity always trumps the right of the public to be in-

130. However, there are lesser indictable offenses that in some situations result in public concern. For an interesting case concerning an alleged fraud committed by a liquidator of a company, see OLG Brandenburg Dec. 15, 1995, 48 NJW 886 (887-88) (F.R.G.) (holding that financial crimes may also result in public concern and justify the publication of a suspect's name and likeness).

131. For example, see BGH Nov. 15, 2005, 59 NJW 599 (F.R.G.), concerning a violation of the speed limits by Prince Ernst August von Hannover. An earlier decision concerns serious criminal offenses allegedly committed by a former member of the national-socialist party. See OLG Frankfurt Sept. 6, 1979, 33 NJW 597 (F.R.G.).

132. To some extent, this protection is even more than that extended by the ordinary courts. See the detailed analysis by LENA WALLENHORST, *MEDIENPERSÖNLICHKEITSRECHT UND SELBSTKONTROLLE DER PRESSE: EINE VERGLEICHENDE UNTERSUCHUNG ZUM DEUTSCHEN UND ENGLISCHEN RECHT* 401 (2007) (detailing the extent of the protection). See also HENNING MÜNCH, *DER SCHUTZ DES EINZELNEN VOR PRESSEVERÖFFENTLICHUNGEN DURCH DEN DEUTSCHEN PRESSERAT UND DIE BRITISCHE PRESS COMPLAINTS COMMISSION* 210-13 (2001) (providing a comparative analysis of English and German decisions and underlying the relevance of a suspect's anonymity interest). For an outline of the various European self-regulation models, see Vincenzo Zencovich, *Press Codes in Europe*, in *THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA* 395 (Helmut Koziol & Alexander Warzilek eds., 2006).

133. Guideline 8.1 (5) of the Press Code also makes clear that full disclosure is allowed as regards public officials and elected representatives, "if there is a connection between a public office or mandate and a crime." The same is said for famous people "if the crime [for] which they are accused is contrary to their public image." See GERMAN PRESS CODE (German Press Council 2006), available at <http://www.presserat.de/Press-Code.227.0.html>.

134. For a general introduction to the Austrian laws on the protection of personality interests, see Helmut Koziol & Alexander Warzilek, *Der Schutz der Persönlichkeitsrechte gegenüber Massenmedien in Österreich*, in *THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA*, *supra* note 132, at 3.

135. MedG BGBl. No. 314/1981, § 7a, translated in News Verlags GmbH & Co. KG v. Austria, App. No. 31457/96, Eur. Ct. H.R. at [33] (Apr. 11, 2000), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=1168&sessionId=14267936&skin=hudoc-en&attachment=true>.

136. For a detailed analysis of this rule and its judicial implementation, see ERNST SWOBODA, *DAS RECHT DER PRESSE: HANDBUCH FÜR DIE PRAXIS* 64 (1997).

formed when (1) the disclosure of a victim's identity determines an interference with his or her "strictly private life" or exposure, and (2) the suspect is a juvenile or the publication relates to a lesser indictable offence (*Vergehen*) or may disproportionately prejudice the person's advancement. Damages sustained on account of an unlawful disclosure are recoverable within a maximum award of 20,000 €. In addition, injunctions may be ordered by the courts on the basis of the special statutory rules on right to likeness.¹³⁷

To sum up, these legal systems afford the anonymity interest a broad and articulated protection. The practice of the news media is notably consistent with the law on the books. In Austria and Germany, the press voluntarily refrains from publishing names or photographs of defendants until they have been convicted. The opposite holds true, however, for high-profile cases or prominent defendants.¹³⁸ In France, on the contrary, courts seem less inclined to guarantee the anonymity interest, at least when the publication of the suspect's name or likeness does not threaten the right to respect of presumption of innocence.¹³⁹ In both France and Italy, though, special legislative provisions prohibit the publication of photographs of persons with handcuffs—and victims of sexual offenses¹⁴⁰—without their previous consent.¹⁴¹

Italian media show no self-restraint in disclosing a suspect's identity, excepting only juvenile defendants. Nonetheless, introduction of the Data Protection Act of 1996 may foreshadow the slow modification of such contestable behavior. Indeed, several decisions of the Data Protection Authority have stated that the publication of a suspect's identification photographs is possible without his

137. Section 78 of Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [The Copyright Act] BGBl. No. 111/1936 provides "Images of persons shall neither be exhibited publicly, nor in any way made accessible to the public, where injury would be caused to the legitimate interests of the persons concerned or, in the event that they have died without having authorised or ordered publication, those of a close relative" (translated in News Verlags GmbH & Co., App. No. 31457/96, Eur. Ct. H.R. at [32]). For courts' option to invoke injunctions, see SWOBODA, *supra* note 136, at 128; Koziol & Warzilek, *supra* note 134, at 19.

138. See BORNKAMM, *supra* note 20, at 248, 250–51. For some statistics concerning victims' and defendants' identity-disclosure rate, see KREISEL, *supra* note 100, at 136. The right to anonymity is respected in Sweden and in the Netherlands, as well. See Krause, *supra* note 20, at 551 n.118 (citing *The Right of Anonymity*, 131 NEW L.J. 1121, 1121 (1981) (on Sweden); Scheer, *supra* note 38, at 38 (1993) (on the Netherlands).

139. Chambre civil [Cass. civ.] [Civil Chamber], June 20, 2002, JURIS CLASSEUR PÉRIODIQUE [JCP] 2002, IV, No. 2394, 1594; Cass. civ., July 12, 2001, JCP 2002, II, No. 10152, 1798; Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, July 7, 1993, JCP 1994, II, No. 22306, 313. On the issue of identity disclosure and the solution adopted by French case law, see Jacques Ravanas, *Droit des personnes: la liberté d'information dans les affaires judiciaires en cours*, JCP 2002, II, No. 10152, 1799 (2002); Christophe Bigot, *Protection des droits de la personnalité et liberté de l'information*, RECUEIL DALLOZ, chronique 235, 236 (1998).

140. See Art. 39 *quinquies* French Press Act 1881; C.P. art. 734 (Italy).

141. See Art. 92 of the French Law No. 2000-516 of June 15, 2000, which adds to the Press Act 1881 an Art. 35^{ter} I; Art. 114 (6 *bis*) of the Italian Code of Criminal Procedure and Art. 8 of the Italian Press Code of Practice applying to journalism and privacy. See also BONETTI, *supra* note 83, at 185.

consent only for reasons of public interest, and namely for investigation and justice purposes.¹⁴²

2. Unfair Legal Reporting and the Presumption of Innocence

If the press discloses a suspect's identity, freedom of speech collides with the individual's interests in privacy and anonymity. The publication concerns a fact that is true but that the individual wishes to conceal. If the alleged crime is a major offense or if the suspect is a public figure, the anonymity interest will be trumped by the public's right to be informed. Even in this framework, though, the freedom of the press to report about pending proceedings is not unlimited.¹⁴³

Most frequently, media coverage of criminal proceedings affects the suspect's rights to honor and reputation. To suggest that an individual is guilty of a criminal offense constitutes libel in most European jurisdictions.¹⁴⁴ However, the truth of the allegation is commonly admitted as a valid defense and discharges the defendant from liability,¹⁴⁵ so no claim for defamation will lie for a person depicted in a newspaper article as guilty of a criminal offense who is eventually convicted of that offense.¹⁴⁶

142. See, e.g., Data Prot. Auth., Apr. 13, 1999, web doc. no. 39077; Data Prot. Auth., Mar. 19, 2003, web doc. no. 1053451; Data Prot. Auth., Nov. 26, 2003, web doc. no. 1053631, *all available at* <http://www.garantepriacy.it> (prohibiting the publication of identification photos of persons under arrest); Trib. Milano, 9-11-2004, in *PRIVACY E GIORNALISMO* 220 (Mauro Paissan ed., 2nd ed. 2006) (confirming the Data Protection Authority's last quoted decision). For some comments on the stance taken by the Data Protection Authority, see BONETTI, *supra* note 83, at 190.

143. See, e.g., *OLG Brandenburg*, Dec. 15, 1995, 48 NJW 885 (F.R.G.) (considering lawful the disclosure of a suspect's identity, but awarding damages for the unfair content of the article).

144. In many Continental jurisdictions, defamation is both a crime and a tort. See Alexander Warzilek, *Comparative Report*, in *THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA*, *supra* note 132, at 620.

145. In many jurisdictions, this principle applies if sufficient research has been carried out and the statement is expressed in a formally correct and impartial fashion. The journalist in such a case will not be held liable for defamation even if the accused is eventually acquitted and the allegation results therefore shown to be untrue. See generally 2 CHRISTIAN VON BAR, *THE COMMON EUROPEAN LAW OF TORTS* 103 (2000) (providing a comparative analysis of the law of reputation in several European countries and noting that journalists, as a matter of principle, "are not subject to an *obligation de résultat*, [that is] if sufficient research has been carried out, they are not liable for an objectively untrue statement"). With specific reference to legal reporting, see Müller, *supra* note 127, at 1618. Particularly significant in this respect is the development of English law after the landmark decision of the House of Lords in *Reynolds v. Times Newspapers Ltd.*, (2001) 2 A.C. 127 (expanding significantly the defense of qualified privilege in libel suits and identifying a nonexhaustive list of ten factors to be considered in evaluating the defamatory nature of a publication); Rogers, *The Protection of Personality Rights against Invasions by Mass Media in England*, in *THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA*, *supra* note 132, at 59, 69 (discussing the impact of *Reynolds* on the English law of defamation).

146. See BORNKAMM, *supra* note 20, at 252 n.29 (quoting several German decisions that dismissed damage claims for the violation of a suspect's personality right, on the ground that the plaintiff was eventually convicted at trial). See also the rule stated by Section 190 of the German Penal Code [StGB], concerning the truth defense in defamation proceedings:

If the asserted or disseminated fact is a crime, then the proof of the truth thereof shall be considered to have been provided, if a final judgment of conviction for the act has been entered against the person insulted. The proof of the truth is, on the other hand, excluded, if the insulted person had been acquitted in a final judgment before the assertion or dissemination.

Yet reputation is not the only interest that may be infringed by an unfair media report. Many legal systems afford specific protection to the presumption of innocence. According to Article 6 (2) of the European Convention of Human Rights, “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” The deduction that is generally drawn from this principle is that *at trial* the defendant is presumed innocent until guilt is proven. The European Court of Human Rights has ruled on several occasions, though, that the presumption of innocence as applied should be even more broadly recognized:¹⁴⁷ namely, every citizen has the right not to be *publicly shown as being guilty of a criminal offense before final conviction*.¹⁴⁸

Article 6 (2) of the Convention immediately binds only public authorities. However, more recently, the principle of presumption of innocence has been applied increasingly also to “horizontal” relationships between private parties.¹⁴⁹ This does not imply, obviously, that an individual is entitled to be considered innocent by any other citizens. It rather means that when a controversy is brought before a court, presumption of innocence should be employed as a normative parameter for the solution of the dispute and more generally for the interpretation and implementation of private-law provisions (*mittelbare Drittwirkung*, or indirect effect of fundamental rights).¹⁵⁰ This is consistent with the doctrine of “positive obligations” of the state, developed by the European Court of Human Rights and employed by several national courts as well.¹⁵¹

In this perspective, German law has been pathbreaking. German courts started as early as the 1980s to widen the protection afforded by the general

(English translation available at <http://www.iuscomp.org/gla/statutes/StGB.htm#190>).

147. See *Allenet de Ribemont v. France*, App. No. 15175/89, Eur. Ct. H.R. (Feb. 10, 1995), <http://cmiskp.echr.coe.int/tpk197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=61929&sessionId=14267304&skin=hudoc-en&attachment=true>; *Y.B. v. Turkey*, App. Nos. 48173/99, 48319/99 Eur. Ct. H.R. (Jan. 28, 2005), <http://cmiskp.echr.coe.int/tpk197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=9404&sessionId=14267541&skin=hudoc-en&attachment=true>.

148. See, e.g., Badinter, *supra* note 44, at 133, 145 (2001); Kristian Kühl, *Persönlichkeitsschutz des Tatverdächtigen durch die Unschuldsvermutung*, in *BEITRÄGE ZUM SCHUTZ DER PERSÖNLICHKEIT UND IHRER SCHÖPFERISCHEN LEISTUNGEN: FESTSCHRIFT FÜR HEINRICH HUBMANN ZUM 70. GEBURTSTAG*, at 241, 246–47 (Hans Forkel & Alfons Kraft eds., 1985) (F.R.G.).

149. See PETER SZCZEKALLA, *DIE SOGENANNTE GRUNDRICHTLICHEN SCHUTZPFLICHTEN IM DEUTSCHEN UND EUROPÄISCHEN RECHT* 780–82 (2002) (F.R.G.); Badinter, *supra* note 44, at 145–46; Christoph Grabenwarter, *Justiz- und Verfahrensgrundrechte*, in *EUROPÄISCHE GRUNDRICHTEN UND GRUNDFREIHEITEN* 126, 138–39 (Dirk Ehlers ed., 2003) (F.R.G.).

150. See BORNKAMM, *supra* note 20, at 254–55; Bornkamm, *supra* note 116, at 104–05; KLAUS WASSERBURG, *DER SCHUTZ DER PERSÖNLICHKEIT IM RECHT DER MEDIEN* 179 (1988) (F.R.G.); Kühl, *supra* note 148, at 248–52; Karlheinz Meyer, *Grenzen der Unschuldsvermutung*, in *FESTSCHRIFT FÜR HERBERT TRÖNDLE ZUM 70. GEBURTSTAG* 61, 63 (Hans-Heinrich Jescheck & Theo Vogler eds., 1989) (F.R.G.); Riklin & Höpfel, *supra* note 116, at 53–55.

151. On the doctrine of positive obligations (or *Schutzpflichten*), see ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 349 (2006); STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 215 (2006); Frédéric Sudre, *Les ‘obligations positives’ dans la jurisprudence européenne des droits de l’homme*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE* 1359, 1361 (Paul Mahoney et al. eds., 2000). On the problems of state action and *Drittwirkung* in comparative perspective, see also VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1413, 1414 (1999).

clauses on personality rights in order to encompass a right to respect of presumption of innocence.¹⁵² For instance, in one renowned case, a media company was held liable for damages for having published an article in which a senior immigration officer, charged with the offense of having granted residence permits to a group of Syrian terrorists in exchange for money, was depicted as guilty. The court stressed that the presumption of innocence is a constitutive element of the general right of the personality¹⁵³ and is violated if a person is openly treated as guilty of a criminal offense before guilt is proved according to law. Injunctive relief and damages are available to the plaintiff, and the defendant is not discharged from liability by tendering evidence of the truth of the allegation.¹⁵⁴

This solution has been criticized on occasions by some scholars who fear its chilling effect on freedom of speech.¹⁵⁵ Indeed, the German Supreme Court has underlined the necessity of balancing the presumption of innocence with freedom of expression and has singled out articulated criteria that should guarantee the fairness of the reporting.¹⁵⁶ However, the idea that the presumption of innocence should be employed as a normative parameter in order to achieve an affordable balance between the free press and an individual's personality rights has gained wider acceptance.¹⁵⁷ Significantly, even the Press Code of 2001 has openly recognized a press duty to respect the presumption of innocence, stating that "[r]eports on investigations, criminal court proceedings and other formal procedures must be free from prejudice. The principle of the presumption of innocence also applies to the Press."¹⁵⁸

France and Austria have taken a similar stance. In 1993 the French Civil Code was amended to strengthen the protection afforded to the presumption of

152. See, e.g., OLG Köln June 2, 1987, 40 NJW 2682 (2684) (according injunctive relief and damages for the violation of presumption of innocence by the press); OLG Frankfurt Sept. 6, 1979, 33 NJW 597 (admitting an indirect third-party effect of the European Convention of Human Rights, but stressing the necessity of a balance of the conflicting interests).

153. On the dogmatic distinction between general and special personality rights see VON BAR, *supra* note 145, at 93.

154. OLG Köln June 2, 1987, 40 NJW 2682 (2684).

155. For an example of recent criticism, see Weigend, *supra* note 73, at 46–47.

156. BGH Dec. 7, 1999, 53 NJW 1036 (identifying a nonexhaustive list of factors to be used in determining whether a media report has infringed personality rights of the suspect plaintiff (among these factors are: seriousness of the allegation; evidence supporting the statements; prohibition of anticipatory statements of guilt (*Vorverurteilung*); impartiality; tone of the article; nature of the information and the extent to which the subject matter is a matter of public concern)). For a detailed analysis of these criteria, see Müller, *supra* note 127, at 1617–18; Erich Steffen, *Sub § 6 LPG*, in *PRESSERECHT: KOMMENTAR ZU DEN DEUTSCHEN LANDESPRESSEGESETZEN* 381–86 (2006).

157. See BORNKAMM, *supra* note 20, at 266; CARL-FRIEDRICH STUCKENBERG, *UNTERSUCHUNGEN ZUR UNSCHULDSVERMUTUNG* 147 (1998); Hassemer, *supra* note 13, at 1923; Kühl, *supra* note 148, at 250; Meyer, *supra* note 150, at 63; Soehring, *supra* note 127, at 522; Riklin & Frank, *supra* note 116, at 53–55.

158. See GERMAN PRESS CODE § 13 (German Press Council 2006). *Guideline* n. 13.1, second sentence, attached to Section 13, provides: "In a state based on the rule of law, the aim of court reporting must not be to punish convicted criminals socially as well by using the media as a 'pillory.' Reports should make a clear distinction between suspicion and proven guilt." On the legal value and the enforcement mechanism of the Press Code, see MÜNCH, *supra* note 132, at 161, 230.

innocence by the Criminal Procedure Code and by the general rules on personality rights.¹⁵⁹ As a consequence, Article 9-1 was introduced in the Civil Code and later modified by the law 2000-516.¹⁶⁰ The text now in force reads as follows:

Everyone has the right to respect of the presumption of innocence. Where, before any sentence, a person is publicly shown as being guilty of facts under enquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for injury suffered, may prescribe any measures, such as the insertion of a rectification or the circulation of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expenses of the natural or juridical person liable for that infringement.¹⁶¹

This provision not only creates a new *droit subjectif* that enriches and updates the traditional catalogue of personality rights;¹⁶² it also provides for a set of remedies, which may be enforced also through *interim* measures and are therefore more effective. In addition to damages, the plaintiff has been granted a right to rectification and insertion of a communiqué.¹⁶³ These remedies are autonomous from the ordinary defamation proceedings.¹⁶⁴ The values served by the new statutory device are also different: What is at stake is not simply the personal reputation, but the interest not to be named guilty of an offense before final conviction and without the guarantees surrounding any criminal proceedings. Accordingly, whereas the truth defense is commonly available in defamation proceedings, it is not under Article 9-1 of the Civil Code.¹⁶⁵

Such a regulation greatly interferes with freedom of the press, and the underlying policy might appear questionable to many observers. However, it is intended to transpose into domestic law Article 6 (2) of the European Convention of Human Rights and is perfectly coherent with the doctrine of the state's positive obligation to take action to protect the presumption of innocence from interference by nonstate actors.¹⁶⁶

In 1995, in light of the same findings, the Austrian Constitutional Court dismissed the complaints lodged by several publishers against Section 7*b* of the

159. See JEAN CARBONNIER, *DROIT CIVIL 1/LES PERSONNES* 157–58 (2000); DIANE DE BELLESCIZE & LAURENCE FRANCESCHINI, *DROIT DE LA COMMUNICATION* 412–13 (2005); Patrick Auvret, *Le droit au respect de la présomption d'innocence*, JCP 1994, I, No. 3802, 497 (1994); Emmanuel Derieux, *Limites de la liberté d'expression (Protection de la vie privée et de la présomption d'innocence)*, 392 LES PETITES AFFICHES 8 (2003); Jacques-Henri Robert, *La protection de la présomption d'innocence selon la loi du 4 janvier 1993*, in LIBERTÉ DE LA PRESSE ET DROIT PÉNAL 105 (Association française de droit pénal ed., 1994); Jacques-Henri Robert, *Sub Art. 9-1*, in JURIS CLASSEUR CIVIL 1 (2001) [hereinafter *Sub Art. 9-1*].

160. See Law No. 93-1013 of Aug. 24, 1993, art. 44; Law No. 2000-516 of June 15, 2000, art. 91.

161. See CODE CIVIL [C. CIV.] art. 9-1, English translation available at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_somA.htm.

162. See CARBONNIER, *supra* note 159, at 157; Auvret, *supra* note 159, at 499.

163. According to some scholars, a right to the sequestration of the material unlawfully published should be recognized, since Art. 9-1 refers to “any measure” capable of ending the infringement of the presumption of innocence. See *Sub Art. 9-1*, *supra* note 159, at 12.

164. See Auvret, *supra* note 159, at 498; Mayer, *supra* note 87, at 81.

165. See Karine Anterion & Olivier Moréteau, *The Protection of Personality Rights against Invasions by Mass Media in France*, in THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA, *supra* note 132, at 117, 129.

166. See Auvret, *supra* note 159, at 498.

Austrian Media Act.¹⁶⁷ Such a provision protects the presumption of innocence against infringements by the media. It reads as follows:

(1) If in any media a person suspected of having committed an offence punishable by the courts but not yet finally convicted, is presented as having already been found guilty or as author of such punishable offence and not only as suspect, the person affected is entitled to claim indemnity from the media owner for the injury suffered. The indemnity must not exceed 20,000 €, in addition § 6 second sentence shall be applied.

(2) No claims under para. 1 may be raised[:]

1. in cases of a true report on a hearing in a public session of the National Council, the Federal Council, the Federal Assembly, a Länder Parliament or any committee of the above general bodies of representation,

2. if it concerns a true report on a penal sentence in first instance and includes the mention that the sentence is not final,

3. if the person affected has admitted and not withdrawn a statement made in public or to media representatives, of having committed the offence,

4. if it was a live broadcast and employees or agents of the broadcaster were not guilty of neglecting the journalistic diligence required,

4a. if it concerns the availability for download of a website, provided that the media owner or one of his employees or agents has not failed to use due care, or

5. if it is a case of a true quotation of the statement of a third party and the public had a predominant interest in obtaining knowledge of the statement quoted.¹⁶⁸

Whereas the French courts have been quite cautious in applying Article 9-1 of the Civil Code, attempting to avoid any unnecessary restriction on the freedom of the press,¹⁶⁹ in Austria the commitment to protect the presumption of innocence has been taken more seriously. Several claims that probably would not have reached the threshold of defamation actions have been upheld under the heading of Section 7b.¹⁷⁰ For instance, making reference to a conviction for the unlawful processing of personal data without mentioning that an appeal is pending has been held to violate Article 7b of the Media Act and so gives rise to an action for damages.¹⁷¹ The same holds true if the press gives the mere im-

167. Verfassungsgerichtshof [VfGH] [constitutional court], Sept. 28, 1995, G 249/94, in 51 ÖSTERREICHISCHE JURISTEN ZEITUNG [ÖJZ] 591 (592). For a comment, see SZCZEKALLA, *supra* note 149, at 780.

168. MedG BGB1. No. 314/1981 (English translation available at http://www.ris.bka.gv.at/erv/erv_1981_314.pdf). On this provision and the previous regulations, see SWOBODA, *supra* note 136, at 73.

169. French courts have often made clear that a simple bias against the defendant does not infringe the presumption of innocence; in order to succeed, the plaintiff has to prove that the media have presented him as certainly guilty before a final conviction. See Cass. civ., July 12, 2001, JCP 2002, II, No. 10152, 1798. On the restrictive stance taken by the French case law as regards C. CIV. art. 9-1, see PHILIPPE MALAURIE & LAURENT AYNÈS, LES PERSONNES, LES INCAPACITÉS 112 (2003); Ravanas, *supra* note 139, at 1800.

170. For a detailed overview of the Austrian case law, see BRANDSTETTER & SCHMID, *supra* note 64, at 95–104; LITZKA, *supra* note 65, at 64–71.

171. Oberster Gerichtshof [OGH] [supreme court], Jan. 29, 2004, docket no. 6 Ob 306/03y, http://www.ris2.bka.gv.at/Dokumente/Justiz/JJT_20040129_OGH0002_0060OB00306_03Y0000_000/JJT_20040129_OGH0002_0060OB00306_03Y0000_000.pdf.

pression that a person convicted for some specific offense is also responsible for other crimes that have not yet been prosecuted.¹⁷²

Injunctions have also been granted against the publication of the photographs of individuals suspected of major crimes or lesser indictable offences, on the basis of the special provisions on the right to likeness.¹⁷³ This solution may be incompatible with the freedom-of-expression provision in Article 10 of the European Convention on Human Rights, as the Strasbourg court has observed.¹⁷⁴

IV

CONCLUSION

Much ink has been spilled on both sides of the Atlantic about the values served by an unrestrained exercise of freedom of the press. However, critics have pointed out that, in the realities of modern society, the dissemination of the news is part of an industrial process, which is commonly driven by business concerns and which should be regulated like any other commercial activity.¹⁷⁵

The attitudes toward media freedom to cover and report judicial proceedings are similarly ambivalent. On the one hand, it is celebrated as a “handmaiden of effective judicial administration . . . [since the press] does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”¹⁷⁶ On the other, it is increasingly depicted as a profitable

172. OGH, Mar. 14, 2000, docket no. 4 Ob 11/00x, http://www.ris2.bka.gv.at/Dokumente/Justiz/JJT_20000314_OGH0002_0040OB00011_00X0000_000/JJT_20000314_OGH0002_0040OB00011_00X0000_000.pdf.

173. See UrhG [The Copyright Act] BGBl. No. 111/1936, § 78.

174. The most recent authority on this subject is *Verlagsgruppe News GmbH v. Austria (No.2)*, App. No. 10520/02, Eur. Ct. H.R. (Mar. 14, 2007), <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=59899&sessionId=14267936&skin=hudoc-en&attachment=true>. This case involved a publisher’s complaint about an injunction ordered by the Austrian Supreme Court against the publication of a business magnate’s photograph in connection with an article reporting charges of tax evasion. The European Court of Human Rights held that the prior restraint on the press breached Article 10 because the contested ban on publication was absolute and therefore “excluded any weighing of interests between the public interest to have the information on the proceedings for tax evasion pending against Mr.] G. accompanied by his picture against the latter’s interest to have his identity protected.” *Id.* at [40]. In particular, the Austrian Supreme Court was reproached for having overlooked that the person under investigation was a public figure and the article reported on a matter of public interest. For a similar case, see also *News Verlags GmbH & Co. KG v. Austria*, App. No. 31457/96, Eur. Ct. H.R. (Apr. 11, 2000), <http://cmiskp.echr.coe.int/tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=1168&sessionId=14267936&skin=hudoc-en&attachment=true>, and the comment on this decision by Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 27 HUM. RTS. Q. 294, 313 (2005).

175. See Vincenzo Zeno-Zencovich, *Media Liability in the Information Society*, in THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA, *supra* note 132, at 539, 543. See generally Ronald H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384 (1974).

176. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

playground of a commercially motivated media industry that “capitalize[s] on the public’s apparently insatiable appetite for all things sensational.”¹⁷⁷

These two perspectives are not necessarily incompatible. It is the task of the law to prevent a socially valuable activity—such as informing the public about the workings of the justice process—from being transformed by market pressures into a “power without responsibility.”¹⁷⁸ The techniques available vary widely in intensity and character, and it should be clear that no “optimal” mix of preventive, repressive, or neutralizing measures can be singled out as a conceptual exercise.¹⁷⁹ Experience teaches us that solutions to legal problems are less the results of rational planning than the byproducts of a complex web of historical, cultural, and social factors.

This article has contrasted three models for the regulation of court-related speech: the American neutralizing approach, the English protective model, and the Continental preventive stance. Different from the Anglo American approach and consistent with the nonadversarial model of criminal procedure, civil-law systems seem to be *relatively* less concerned with the impact of media freedom to report and cover judicial proceedings on trial fairness. By contrast, civil-law systems pay greater attention to safeguard the dignitarian and reputational interests of trial participants. Most of the techniques adopted and described here—general penal sanctions, private-law remedies, professional rules of conduct—are, at their core, aimed at preventing an uncontrolled imposition of ancillary reputational sanctions by the court of public opinion. The recent trend toward the extension of the presumption of innocence to the “horizontal” relationships between the defendant and the media clearly mirrors such an attitude.

It might be argued that this model reflects a strong individualistic position and undervalues the watchdog function of the press, making a transatlantic dialogue impossible. But one should always be skeptical of absolute generalizations about legal systems. Model-building in comparative law is always a study of *relative* differences.¹⁸⁰ To assume that the American model is not concerned with privacy and dignity while the Continental approach always sacrifices free press in the name of a suspect’s personality right would be nonsensical, though European systems are more inclined than the United States to accept interference with freedom of expression aimed at protecting the fairness of trials (English law) or dignitarian interests (Continental law), or both.

Moreover, it would be a mistake not to pay attention to the dynamic dimension of the law. Every taxonomy should be flexible enough to take into account the evolution and change of legal systems. The phenomenon of the constitu-

177. Geragos, *supra* note 4, at 1168.

178. Recalling the title of the famous book by JAMES CURRAN & JEAN SEATON, *POWER WITHOUT RESPONSIBILITY: THE PRESS AND BROADCASTING IN BRITAIN* (2003).

179. See FENWICK & PHILLIPSON, *supra* note 24, at 179–80 (arguing that, in practice, “[n]o state relies exclusively on one model”).

180. See, e.g., Whitman, *supra* note 41, at 1163.

tionalization of speech claims has at least partly shortened the distance between U.S. legal experience and common-law experiences in other countries.¹⁸¹ Similarly, the most recent case law of the European Court of Human Rights shows an increasing concern for safeguarding the watchdog function of the press, especially when political speech is at stake. In an important line of authorities, from *News Verlags GmbH v. Austria*¹⁸² to *Dupuis v. France*,¹⁸³ the European Court of Human Rights has applied the principle of proportionality in order to prevent member states from imposing overreaching restrictions on the media, even if those restrictions are justified by the need to protect the privacy of trial participants or the authority and impartiality of the judiciary.¹⁸⁴ As a consequence, a process of gradual convergence also seems to be on the way from this side.

Undeniably, finding an acceptable balance among free press, fair trials, and the personality interests of trial participants is a difficult task in every legal system. It involves not merely technical issues, but value choices of the greatest relevance to any society. Comparative law cannot (and probably should not) tell us what the best solution is. However, it might enormously help us to render

181. See *supra* II.B.

182. App. No. 31457/96, Eur. Ct. H.R. (Apr. 11, 2000), <http://cmiskp.echr.coe.int/tkp197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=1168&sessionId=14267936&skin=hudoc-en&attachment=true>. Here the European Court of Human Rights had to decide whether an injunction prohibiting the publication of the photograph of a right-wing extremist arrested on suspicion of being involved with a series of letter-bombs as part of a political campaign infringed Article 10 of the Convention. The Court conceded that the injunctions pursued legitimate aims, since they were intended to protect reputation and presumption of innocence. However, it found that the “absolute prohibition on the publication of B.’s picture went further than was necessary to protect B. against defamation or against violation of the presumption of innocence.” *Id.* at [59]. Great weight was attached to the fact that the proposed publication concerned a matter of major public concern; that the instances of conduct reported upon were “offences with a political background directed against the foundations of a democratic society,” and that the defendant “being a right-wing extremist, . . . had entered the public scene well before the series of letter-bomb attacks.” *Id.* at [54].

183. App. No. 1914/02, Eur. Ct. H.R. (Nov. 12, 2007), <http://cmiskp.echr.coe.int/tkp197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=62703&sessionId=14267304&skin=hudoc-en&attachment=true>. This case is particularly significant. An application was lodged before the European Court by some journalists, sentenced in France to a fine and condemned to damages for having profited on information obtained in breach of professional and pretrial secrecy. In 1996 they published a book, entitled *Les Oreilles du Président*, concerning the scandal of illegal wire-tappings carried out by an antiterrorism unit created by President Mitterand. At that time, a senior official of Mitterand’s entourage was under investigation for the offences of unlawful wire-tapping and infringement of privacy of many French citizens. Documents excerpted from the pretrial dossier, like transcripts of the intercepted communications and other items of evidence, were published in this book. The European Court of Human Rights held that France breached Article 10 of the Convention. The interference with freedom of the press pursued legitimate aims, but was not “necessary in a democratic society.” Indeed, the European Court stressed that it was not proportionate to the aims pursued to prosecute the journalists for the crime of “receiving” since the publication focused on topics that resulted in the utmost public concern. The wire-tapping scandal was a state affair and the person under investigation was a prominent politician. Consequently, a higher degree of transparency had to be accepted as instrumental to the needs of a democratic society.

184. For a detailed overview, see FENWICK & PHILLIPSON, *supra* note 24, at 180–94; Brems, *supra* note 174, at 311–16; Mario Chiavario, *I rapporti giustizia-media nella giurisprudenza della Corte europea dei diritti dell'uomo*, 123 *Foro It. V* 209 (2000); CRAM, *supra* note 20, at 66–75.

such value choices much more transparent and to therefore better understand them.