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Jordan J. Paust
University of Houston

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Terror, Repression and the Alternatives

JORDAN J. PAUST*

Things fall apart; the centre cannot hold,
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

(W.B. Yeats)**

INTRODUCTION

It "damn nearly destroyed us" between the wars, Kenneth Clark wrote in his work Civilisation; "it is lack of confidence, more than anything else, that kills a civilisation."1 These are prophetic remarks, if shifted to our focus in the late 1970's. The threats posed by private and governmental strategies of terror as well as the responding measures of governments in the name of anti-terror or "national security" demonstrate an obvious danger to civilization as it is known in the United States.

The human rights of our world citizenry are, very often, literally under "a state of siege" or at a minimum ignored by power elites as well as their enemies. "Innocence" is of course, a relative concept; but far too many are killed, injured or imprisoned—all without a fair trial of their relative "guilt"—by terrorists and anti-terrorists. Indeed, an alarming laxity of any distinction and a blurring of even feigned categories is on the increase. As Yeats might aver, the ceremonial adequacy of norms that prohibit murder, assault, detention, torture and kidnapping of the innocents, not to mention their rights to freedom of speech and association, is too often drowned in an ideologic and political clash.2 A recent newsclipping reflects merely one instance: "Downtown Beirut degenerated into anarchy with street slayings, curb-

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* A.B. 1965, J.D. 1968, U.C.L.A.; LL.M. 1972, University of Virginia; J.S.D. Candidate, Yale University. Associate Professor of Law, University of Houston.

** THE SECOND COMING (1924). Instead of Christ, Yeats had in mind the Russian Revolution and, later, Italian Fascism. See Mack, Knox, McGallard, Pasinetti, Hugo, Wellek, Douglas, II World Masterpieces 1488 (3rd. ed. 1973). In a sense he was correct in equating leftist and rightist extremes. I disagree, however, that "the best lack all conviction."


side executions and kidnappings commonplace. At least 50 persons were killed and more than 100 wounded over the past 24 hours . . . ."

There is moreover, an alarming increase among state elites and counter groups of anti-democratic and anti-individual or machine-oriented thinking, a thinking which lessens the value and dignity of individual human beings as well as the politico-legal need for humanistic distinction between targets. When Yassir Arafat blurs the distinction between children and military combatants with an arrogant, blatantly obscurant remark that targeting inside Israel involves "military operations, not terrorism—we are doing our best not to harm civilians," he mirrors an attitude expressed by Lieutenant Calley at his court-martial, that he killed women, children and babies to defend his men and his country, or by former President Nixon that his lists of "enemies" and concomitant illegalities were needed to defend the office of the Presidency and a democratic society. Nixon later added that the President is like a "sovereign" and can ignore constitutional prohibitions and federal law to protect "national security."

Nixon was wrong. The case law is fairly clear that the President, as any governmental official, must obey the law, and that in the United States the people alone are sovereign. A governmental dictatorship has not yet been

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8 Houston Post, May 22, 1976, at 15, col. 3 (UPI). Barely more "selective" are the murders in Argentina, see, e.g., N.Y. Times, March 22, 1976, at 6, col. 1; id. Aug. 21, 1976, at 1, col. 1; id. June 7, 1976, at 3, col. 1. In Ethiopia, killing is claimed to be "a revolutionary act in itself . . . a way of expressing it [revolution], of proving that it is still going on." N.Y. Times, Feb. 1., 1978, at 3, col. 4.

9 See H. MARCUSE, SOVIET-MARXISM: A CRITICAL ANALYSIS (1961); N.Y. Times, Oct. 13, 1974, at 34, col. 1; id. Oct. 3, 1974, at 2, col. 4; id. Sept. 27, 1974, at 1, col. 6; id. Sept. 15, 1974, Sec. 4, at 4, col. 3. In times of perceived crisis these approaches are furthered. See also McDougal, Lasswell & Chen, Non-Conforming Political Opinion and Human Rights: Transnational Protection Against Discrimination, 2 YALE STUDIES IN WORLD PUB. ORDER 1 (1975); T. GURR, WHY MEN REBEL (1970); H. ARENDT, TOTALITARIANISM (1968); C. FRIEDRICH, Z. BRZEZINSKI, TOTALITARIAN Dictatorship and Autocracy (1961); H. LASSWELL, NATIONAL SECURITY and INDIVIDUAL FREEDOM (1950); warning of a withholding of information and an undermining of the press.

9 Houston Post, Feb. 9, 1976, at 8 D, col. 1 (UPI report of Arafat's interview on NBC's Meet the Press); contra N.Y. Times, June 5, 1975, at 3, col. 6 (Arafat praises explosion in Jerusalem's main square killing 13 and wounding 72.) See also N.Y. Times, March 12, 1978, at 2, col.6 (PDAH admits seizing busload of 60 civilians, half of whom were children—30 dead, 80 wounded; N.Y. Times, March 14, 1978, at 17, col. 1; N.Y. Times, April 20, 1974, at 13, 5 (tourists are enemies); and N.Y. Times, Nov. 20, 1974, at 1, col. 2 (PDELTP "military" action).


9 See Houston Post, March 12, 1976, at 1, col. 6 (UPI).


9 See preamble, U.S. Constitution; Afroyim v. Rusk, 387 U.S. 253, 257 (1967) (Black, J.); McCullough v. Maryland, 17 U.S. (4 Wheat) 316, 403-05 (1819); and Paust,
willingly accepted, but Nixon very nearly destroyed democracy in the name of "national security." It would be foolish to allow governmental officials to bring the United States closer to such destruction in the name of anti-terror, especially if terrorism in this country poses far less danger to lives and wellbeing than drunken or reckless driving, industrial accidents and industrial pollution.

Nevertheless, writers in this symposium and others address the question whether there should be restraints upon freedoms of speech and publication, including controls of the media, because of certain threats posed by those who would use the strategy of terrorism. This discussion might deal both with "outsiders" who utilize terrorism to facilitate change and "insiders" who seek to use terrorist tactics (repression) to maintain the status quo. Some, including Ambassador Andrew Young, have even suggested that new federal laws or new Supreme Court interpretations of the first amendment should restrict press coverage of terrorist incidents. What seems to worry Ambassador Young and others are the mirror-effects of publicity for private terrorist kidnappings and hijackings, the "glorification" of such events, the creation of anti-hero recognition through publicity, and the use of the media by the terrorists to further propagandize their deeds. These are important concerns, but far more important are the needs in a democracy for a relatively free press and, as Kenneth Clark reminds, the maintenance of a minimal level of confidence.

So far, President Carter has refused to circumvent human and constitutional rights to free speech and press. Instead, he seeks "discussion and sober consideration" by the news media of "the definable boundaries of legitimate coverage" of terrorist incidents and "has no desire to seek legislation or to otherwise impose a solution." In the following pages one can discover the international legal norms that are relevant to such a discussion and consideration. An additional section of this article offers a survey of overly broad and/or internationally impermissible approaches to control of the media in the name of anti-terror and national security. Such are useful to keep in mind when considering how they have developed, how they have been utilized and how far restraints on media responses to terrorism can be tolerated without a loss of democratic freedoms. Indeed, in a world that increasingly reeks of dictatorship and tight, sometimes brutal, controls over people who

supra note 6, at 241-44 and 252. See also Reid v. Covert, 354 U.S. 1, 5-6 (1957) (Black, J.); Calder v. Bull, 3 U.S. (5 Dall.) 386, 388 (1798); Ware v. Hylton, 3 U.S. (3 Dall.) 198, 199 (1796) (Chase, J.); E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948).


11 See id. See also Reston, TERRORISTS AND THE PRESS, N.Y. Times, March 11, 1977, at 27, col. 5. The fact that someone "uses" a relatively free press should hardly concern people like Young or Reston. See also N.Y. Times, March 15, 1977, at 34, col. 1 (editorial).

12 See note 1 supra & text accompanying.

seek to receive and impart information we must be mindful of the global threats to our own democracy and to fundamental human rights if we are to assess more realistically the competing legal policies at stake, relevant trends in decision, contextual conditions, projected future needs and events, and the alternatives for policy-serving decision.14

Following a discussion of the relevant international legal policies at stake and trends in state control and repression of freedoms of speech and press, there is an exploration of viable alternatives to governmental control. Within this final section one can identify the various suggestions made by other writers to date, the ways in which international legal standards are integrated into domestic law, and the suggestions of the author that our primary effort should not be to control the media but to foster media awareness of the various problems posed by terrorism and a code of ethics or guidelines for free but responsible reporting of terrorist incidents, background, demands, governmental responses, and so forth.

For the author, it is inconceivable that the United States would adopt the broad legislative or executive approaches of other states which regulate any support of or sympathy with terrorists and their aims, any criticism of the government or governmental responsive measures, and any "false" presentation of fact or "distortion" of news. Further, it is inconceivable that such measures could withstand the international human rights test of necessity within democratic limits or the challenge likely to occur under the first amendment to the United States Constitution.15 The media can play useful roles in response to terrorism, however, and the media and government have already shown that cooperative approaches can be creative and highly successful.16 Instead of media control, the focus should be upon cooperative approaches in response to terrorism. Additionally, United States foreign policy should include a constant, affirmative striving to ensure respect for the fundamental human rights of freedom of speech and press and to oppose the denial of such rights by oppressive governments.17

GENERAL INTERNATIONAL LEGAL POLICIES AT STAKE

There are several competing international legal policies at stake in most cases of state claims to control the media. One relevant set of very broadly phrased policies is contained in the United Nations Charter. Charter norms

14See also McDougal, Lasswell, Reisman, Theories About International Law: Prologue to a Configurative Jurisprudence, 8 VA. J. INT'L L. 188 (1968).
15Concerning the U.S. Constitutional Challenge, see Paust, Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction, 12 STANFORD J. INT'L STUDIES 79, 97-98 (1977) [hereinafter cited as Response to Terrorism], citing New York Times v. United States, 403 U.S. 713 (1971), and other cases.
16See generally, Patience Key to Method in Handling Terrorists, Houston Post, Jan. 18, 1976, at 4B, col. 5; N.Y. Times, Dec. 25, 1975, at 1, col. 5.
which might be relevant in any given case are: (a) the principle of equal rights and self-determination of peoples; (b) the duty of all states to take joint and separate action to achieve "universal respect for, and observance of, human rights and fundamental freedoms for all," and (c) the prohibition of the threat or use of force by a state in any manner inconsistent with the purposes of the United Nations. Further, article 2, paragraph 7 of the Charter generally prohibits intervention of the United Nations and foreign states into "matters which are essentially within the domestic jurisdiction" of a state. This provision has potential application to a claim by one state to prohibit news or other coverage by international media or the media of another state of terrorist "matters" that are "essentially within" the domestic concern of the state in which the relevant events take place.

Interrelated with these norms, especially the obligation to take action for the achievement of a universal implementation of human rights and fundamental freedoms, are other treaty and United Nations General Assembly formulations of a more specific human rights content. Also relevant in certain parts of the globe are the regional treaties on human rights which define or supplement content for signatories and set up implementary mechanisms including individual petition procedures and regional courts. Because the regional conventions apply to "everyone" or "all persons" within the jurisdiction...
tion of a signator, they are also potentially applicable to any United States journalist, tourist or other person traveling abroad.\textsuperscript{25}

Specific human rights norms contained in these documents demonstrate a pervasive formal expectation that all human beings have the right to freedom of opinion and expression. The 1948 Universal Declaration of Human Rights\textsuperscript{26} sets forth several relevant normative expectations,\textsuperscript{27} but those most directly relevant to media access to information and individual access to the media are contained in Article 19 of the Declaration, which reads:

Everyone has the right to freedom to opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.\textsuperscript{28}

In contrast to its expressions of freedom or right is another article of the Universal Declaration which conditions these freedoms and rights or makes them relative. Article 29, paragraph 2, sets forth the types of social or governmental interests that may, in appropriate circumstances, obviate or condition, for example, the right to freedom of opinion and expression. It states:

In the exercise of his rights and freedoms, everyone shall be subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

\textsuperscript{25}See art. 1 of each convention, supra note 24. Thus, U.S. journalists can pursue regional remedies under these conventions even though the U.S. is not a party to them. See also Paust, Human Rights, Human Relations and Overseas Command, 3 ARMY LAW. 1 (Jan. 1973).

\textsuperscript{26}See note 23 supra.

\textsuperscript{27}Also relevant are the provisions in art. 18, which set forth the right of every person "to freedom of thought, conscience and religion" and include the "freedom, either alone or in company with others and in public or private, to manifest his religion or belief in teaching" or practice. Article 26 recognizes an interconnected right to education, and art. 20 recognized the "freedom of peaceful assembly and association" that may also be relevant to media group formation or the formation of any group that intends to publish information for its members and/or others. Article 1 of the Declaration provides that all human beings "are born free and equal in dignity and rights." Article 2 provides that all rights and freedoms are to be implemented "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; thus adding other sets of impermissible human right distinctions among individuals to those mentioned in the U.N. Charter and quite importantly, with regard to state claims to control the media, proscribing distinctions made on the basis of "political or other opinion" as such. Article 7 supplements these with the expectation that "(a)ll are equal before the law and are entitled without any discrimination to equal protection of the law." Article 7 also contains a phrase, however, that when integrated with the requirements of art. 29, \textsuperscript{\textdagger}2 (e.g., a just requirement in a democratic society), might allow the state to control the media in certain cases so as to protect others from "any incitement to . . . discrimination" in violation of the Universal Declaration (e.g., on the basis of race, sex or political opinion). Comparable provisions are found in the 1966 Covenant. See supra note 23, arts. 20 and 26; but see id. art. 5(2).

\textsuperscript{28}The language "regardless of frontiers" seems to obviate acceptance of a state claim, such as that of the U.S.S.R., to control all access of its citizens to foreign media under art. 2(7) of the Charter. See also notes 21-22 supra.
The Declaration provideth and it taketh away, but not entirely. Although the state can impose limitations on, for example, the right to freedom of opinion and expression, there are strict limits to the limitations.

The first such limit is that any deprivation of a relevant human right by the state must be "determined by law." Thus excluded and impermissible are so called extralegal or extraconstitutional deprivations by state agents or agencies. The second qualification of state imposed deprivation is that the relevant limitation must be "solely for the purpose of": (1) implementing the relative rights and freedoms of other individuals, groups or society as a whole, and (2) meeting just requirements of morality, public order and welfare. The words "solely," "and" and "requirements" are significant conditioning words. Third, limitations are only legally available in a state whose politico-idealologic processes match that of a "democratic society." Indeed, the state imposed limitations must relate to the "just requirements" of "a democratic society." Thus, ideologically relevant conclusions such as "just" and "democratic" are necessarily a part of the consideration of whether or not a particular limitation of human rights or freedoms by a given state is permissible. This is not surprising, however, in view of several ideologically and politically significant rights and expectations expressed elsewhere in the Universal Declaration and in the United Nations Charter itself.

The 1966 Covenant does not mention "democratic society" in connection with free speech provisions but does with regard to peaceful assembly and freedom of association. Nevertheless, the 1966 Covenant recognizes the right of self-determination, which is nearly equivalent. See The Universal Declaration, supra, note 23, art. 1, 4(1), 18-22. See also id. art. 5(2). The 1950 European Convention does contain the language "democratic society." See European Convention, supra note 24, arts. 9-11. Art. 32(2) of the 1969 American Convention contains the language "democratic society" in connection with general limitations. See American Convention, supra note 24.

Concerning the European Convention and the additional need thereunder for "strictly required" measures in time of "public emergency which threatens the life of the nation," see Partsch, Experiences Regarding the War and Emergency Clause (Article 15) of the European Convention on Human Rights, 1 ISRAEL Y.B. ON HUMAN RIGHTS, 327 (1971), adding that such measures "lose their legitimacy after life has normalized or the absolute necessity no longer exists." Id. at 322. See also the Lawless Case, 5 EUR. CON. ON HUMAN RIGHTS Y.B. 320 (1969), the first case in the European Court of Human Rights and one involving a secret army, an emergency of an "exceptional . . . crisis" nature, and an increase in terrorist activities over a long period.

The only European case directly involving freedom of speech resulted in a Commission finding of a violation of the right to free speech but, while the matter was pending before the European Court, the plaintiff-complainant withdrew his case after local law was amended to correct the deprivation. See DeBecker v. Belgium, 2 EUR. CONV. ON HUMAN RIGHTS Y.B. 214 (1960); 3 id. at 486 (1961).

This is not unusual when one recognizes that a commitment to human rights and "the dignity and worth of the human person" (U.N. CHARTER, preamble) is an ideologically relevant commitment. See generally, McDougall, Lasswell, Reisman, supra note 14; Faust, supra note 15, at 85-87, 93, and 115. See also Faust, Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content, forthcoming; McDougall, Jurisprudence for a Free Society, 1 GA. L. REV. 1 (1966).
To generalize, the Universal Declaration and the U.N. Charter express a fundamental demand of individuals to human dignity and of political societies to self-determination. Neither of these demands is ideologically neutral, for both stand in opposition to the denial of the dignity and worth of each individual member of society and to the thwarting of self-determination through totalitarian controls manipulated by "rightniks" or "leftniks" or by any political elite which denies a full and free participation of all persons in the political process of a given society—the full and free determination of an aggregate self.

What is even more significant with regard to the ideologically and politically loaded phrase "democratic society" that is set forth in Article 29 of the Universal Declaration is the more specific content contained in Article 21 of the Declaration. Individual worth, freedom, dignity and equality are all important ideologic components of democracy, and Article 21 mirrors these in the first two paragraphs to the extent that they recognize the right of every person "to take part in" the governmental process of one's country and to "equal access to public service." The more significant content of Article 21, however, is set forth in paragraph 3:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by secret vote or by equivalent free voting procedures.

A "democratic society," the Universal Declaration affirms, is one in which the "will of the people" is the basis of authority. The authority of the government exists lawfully on no other basis, in no other form.

With the above in mind, one can begin to explore potential uses of the more objective indicators of "just requirements" and "democratic society." For example, it hardly seems probable that any relatively objective decision-maker would accept a state claim to prohibit the free expression of political ideas by the vast majority of the population of such a state under the guise of anti-terrorist controls, even when many of the members of such a populace are "sympathizers" with non-state terrorist political and ideologic goals which

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31See generally Paust, Human Dignity, supra note 30. The preamble to the U.N. Charter, which is as relevant as the articles of a treaty to its meaning, (for example see Vienna Convention on the Law of Treaties, U.N.T.S. (1969), art. 31(2), reprinted at 63 AM. J. INT'L L. 875 (1969)) reaffirms both the "dignity and worth of the human person" and the "equal rights of men and women." Article 1, ¶ 3 and art. 55, ¶ 3 of the Charter add the expectation that human rights and fundamental freedoms shall be implemented "without distinction as to race, sex, language, or religion." Moreover, as mentioned, art. 1, ¶ 2 of the Charter affirms the ideologically loaded principle of self-determination.


33See also supra note 32.
include the demand for self-determination and a change in the government. Such a state would hardly be one with a "democratic" society composed of individuals who were treated with equal dignity and worth by the government, and such a government would hardly be one which reflected the "will of the people." Not only would such a government be non-democratic and, since it did not allow the will of the people to be expressed, one without a basis in authority, but the claim of such a government to control the free expression of political ideas by the vast majority of the population would hardly serve "the just requirements" of a democratic society.

Thus, a claim by such a government to regulate the political content of newspapers, radio and television under the guise of anti-terrorist controls should be denied on the basis of Articles 18 and 19 of the Universal Declaration. These articles declare the rights to freedom of thought, conscience, opinion, expression, the receipt and dissemination of information and ideas which are not permissibly limited by Article 29(2) under the circumstances, as interpreted and supplemented by consideration of Articles 1, 2, 7 and 21. Furthermore, such a governmental claim would not only violate relevant human rights norms but would also thwart the right of the people of such a state to self-determination. To the extent that force was used to police the prohibition of a free political expression, arguably Article 2, paragraph 4 of the United Nations Charter would also be violated, for the government would be using force in a manner inconsistent with the purposes of the U.N. Charter (i.e., in violation of human rights and the right of the people to self-determination).4

4Id.; Paust, A Survey of Possible Responses to International Terrorism: Prevention, Punishment, and Cooperative Action, 5 GA. J. INT'L & COMP. L. 431, 460-62 (1975). Such a conclusion about appropriate interpretation of the Charter is now clearly supported by the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation. Relevant provisions of the Declaration express the expectation of the international community that "all peoples have the right freely to determine" their political, economic, social and cultural processes; that "every State has the duty to respect this right" and "the duty to promote" the realization of self-determination; and, as expressed twice in the same instrument, that every state "has the duty to refrain from any forcible action which deprives" a relevant people "of their right to self-determination and freedom and independence." U.N.G.A. Res. 2625, 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) (unanimous vote).

The Declaration on Principles of International Law also supplements art. 21 of the Universal Declaration of Human Rights, for its equates self-determination, and thus authority, with a freely expressed, consensual will of the people. As the Declaration states, a state that complies with the principle of equal rights and self-determination is one "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." Id. A state that complies with the principle of equal rights and self-determination is one possessed of a government representing each and every person, the whole people, belonging to its territory and a government that represents each and every person "without distinction as to race, creed or colour." No other state complies; no other political elite maintains its control in accordance with the "right" to self-determination. Indeed, without a free participation of a given people in the governmental process, it would be incorrect to state that such a people enjoy "the right freely to determine . . . their political status" and it would surely be incorrect to state that the political elite governs in accordance with "the freely expressed will of the peoples concerned."
Also relevant to our inquiry are the developing legal principles that might apply to journalists in specific transnational contexts. The United Nations General Assembly has recognized one of these, the expectation that journalists should be provided special protection in times of international armed conflict. In view of all that will be disclosed in this article, that is rather an amazing accomplishment for the General Assembly since in times of relative peace journalists in many of the member countries are imprisoned without trial, tortured and murdered. One would think then that when more was supposedly at stake, in time of war or violent insurgency, insecure state elites would be even less likely to permit freedoms of speech and press much less special journalist protection. Nevertheless, the General Assembly resolutions press for the recognition of such special protection by the conferees at Geneva that seek to formulate two new Protocols for supplementation of existing laws of armed conflict and human rights.

A second major development is the documented expectation, which is not "technically" legally binding, in the Final Act of the Conference on Security and Cooperation in Europe at Helsinki on August 1, 1975 (the Helsinki agreement). The thirty-four signatories to the Helsinki agreement expressed their "aim": "to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and the exchange of information with other countries, and to improve the conditions under which journalists from one participating state exercise their profession in another participating state. . . ." More specifically, the signatories expressed their "intention" to "facilitate the improvement of the dissemination, on their territory, of newspapers and printed publications . . . from the other participating states. . . . And, for our purposes, there was a significant expression of intent to ease visa and travel restrictions for journalists and to improve upon two important needs of a free media through increase of "the opportunities for journalists . . . to communicate personally with their sources, including organizations and official institutions" and the enabling of journalists: "to transmit completely, normally and rapidly by means recognized by the participating states to the information organs which they represent, the results of their professional activity, including tape recordings and

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37 Journalist provisions reprinted at U.S. Dep't State, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975, at 256-58 (E. McDowell ed. 1976); entire text reprinted at 75 DEP'T STATE BULL. 323 (Sept. 1, 1975); cf. id., Art. X (states will "pay due regard to and implement the provisions in the Final Act").

38 Id.
undeveloped film, for the purpose of publication or of broadcasting on the radio or television.39"

The Helsinki agreement, as the reader probably knows, also expressed an important commitment of the signators to the implementation of human rights for their own people.40 In legal effect, however, such a pledge is merely a reaffirmation of member duties under Articles 55(c) and 56 of the United Nations Charter.41 The Charter, moreover, supercedes any inconsistent agreement between states.42

**Suspect and Unlawful Patterns of State Practice**

Actions against enemies of the king were always conducted in an exceptional manner; the procedure was simplified as much as possible; flimsy proofs which would not have sufficed for ordinary crimes were accepted: the endeavour was to make a terrible and profoundly intimidating example. All this is to be found in Robespierre's legislation . . . The proof necessary to condemn the enemies of the people is any kind . . . Juries in giving their verdict should be guided solely by what love of their country indicates . . . ' We have in this celebrated Terrorist Law the strongest expression of the theory of the predominance of the State.43

So wrote Georges Sorel about the rise of the cult of "the state," political courts, "imaginary crimes" and a terrorist law of the 1700's. After reading the following survey of state power, martial "laws" and "courts," and the imprisonment of journalists and others who dare to defy or who are merely "suspect" one wonders how far society has progressed. If it is true, as assumed here, that in the name of "national security" power elites demonstrate their own insecurity, then much of the power wielded by state elites is insecure or the perceptions of much of the world's state power elites are that their power is insecure, or both.

39Id.
40See id., Art. VII: "The participating states will respect human right and fundamental freedoms. . . . [and] will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights."
41A similar reaffirmation of this legal expectation is documented in the Proclamation of Tehran, for the International Conference on Human Rights in 1968. Stressing freedom and individual dignity, the Proclamation stated that gross denials of human rights arising from discrimination on grounds of belief or expressions of opinion, among others, outrages the conscience of mankind and endangers the foundations of freedom, justice and peace in the world. U.N. Doc. A/Conf. 32/41 (1968), reprinted at I. Brownlie, Basic Documents on Human Rights 253 (Oxford 1971). The Proclamation also stressed that "It is imperative that the members of the international community fulfil their solemn obligations to promote and encourage respect for human rights" and that the Universal Declaration of Human Rights "states a common understanding of the peoples of the world concerning the inalienable and inviolate rights of all . . . and constitutes an obligation for the members of the international community." Id. See also supra note 18 concerning the domestic relevance of such an expectation, especially with regard to the ninth amendment, see Paust supra note 6.
42See U.N. Charter, art. 103. This was expressly recognized in the Helsinki Final Act, supra note 32, Art. X.
A pervasive insecurity is evident in a world dominated by the state political system, with its hedges against international concern like Article 2(7) of the U.N. Charter.44 What is perhaps equally pervasive is an oppression of "the people" in most of the states on our globe and, concomitantly, a denial of their basic human rights. The oppression that our forefathers were concerned about and fought in the 17th Century has not subsided elsewhere, it has intensified. A recent Freedom House survey,45 to cite merely one piece of evidence, classifies states as "free," "partly free" and "not free." Their results are shocking. About one half of the states and one half of the world's population are "not free,"46 and one could have serious reservations about some of the "partly free" classifications (e.g., South Africa, Nicaragua, Indonesia, to name a few). Added together, the not free and only partly free comprise 80.3% of the world's population. The following pages demonstrate, to a certain extent, why this is so. Further, with such a widespread oppression in mind, one must seriously question at this time in our history whether all of the legal pronouncements and practices of states actually represent authority. Most certainly if the will of the people is not reflected in state elite pronouncements and practice, then there may be no demonstrated opinio juris or generally shared legal expectation by mere state pronouncements alone which constitutes the basis of lawful authority recognized in Article 21 of the Universal Declaration of Human Rights. There should be no confusion then that law violators can determine the nature and content of law. Nevertheless, the focus here is on suspect and unlawful patterns, with an analysis of comparative trends in oppression.

In their study of non-conforming political opinion and human rights, Professors McDougal, Lasswell and Chen disclose related trends of repression of non-conformist political and other expression.47 They add that in modern times there has been more tolerance of religious non-conformists but substantially increased intolerance of political non-conformists within state systems;48 but, as the present article demonstrates, when religious leaders speak out about social injustices and violations of human rights by state elites they are often equated with terrorists and political dissenters. When they are, they suffer similar treatment and deprivation at the hands of power elites and their agents. Many of the findings of McDougal, Lasswell and Chen are also relevant to control of the media in the name of national security, the suppression of dissent and the exploitation of all media for systematic indoctrination.49

46Id.
47See McDougal, Lasswell & Chen, supra note 4, and authorities cited therein.
48Id. at 2.
49See id. at 4-5.
Far worse, as the present study also demonstrates: "For non-conformers in general, due process of law is a luxury: arbitrary arrest, detention, trial (or non-trial), and imprisonment are the trademarks of contemporary political barbarism."  

South Africa

One of the significant and growing threats to democracy, self-determination and human rights is posed in the practice of certain governments that seek to control and manipulate the media in the name of anti-terrorism. One such government is that of South Africa. Indeed, the present government of South Africa has employed the very sort of controls over the free expression of political ideas by the vast majority of the people in South Africa that were condemned in previous discussion of legal policies at stake as impermissible claims, claims which do not serve "the just requirements" of a "democratic society." Moreover, the actions of that government carried out in the name of anti-terror led recently to world condemnation.

The South African government has taken action not only to control media coverage and ideas but to ban the principal black newspaper, which was also the second largest South African daily, and arrest its editor. It also has outlawed the Christian Institute of Southern Africa and its ecumenical head for criticism of the government's racist apartheid policies and its publications which disclosed the use of detention without trial and demanded an inquiry into the deaths of detainees. Other black political groups have been outlawed and some fifty people have joined the ranks of other political detainees or arrestees jailed or assigned the inhumane and degrading punishment of "banning." In South Africa, the arrest, detention or banning of newspaper editors and journalists is not unusual. Indeed, there had been

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50Ibid. at 7.


54See, e.g., N.Y. Times, Feb. 26, 1978, at 5, col. 6; N.Y. Times, Dec. 15, 1977, at 7, col. 1 (editor Woods); N.Y. Times, Nov. 3, 1977, at 12, col. 3 (PEN study discloses 12 writers under banning orders); N.Y. Times, Oct. 27, 1977, at 8, col. 1; N.Y. Times, April 29, 1977, at 12, col. 3 (Amnesty International discloses names of six journalists detained, but some names were omitted purposely); N.Y. Times, Feb. 23, 1977, at 2, col. 3 (South African photographer who won top journalism prize had previously been detained twice, for 2-1/2 months and 23 months); N.Y. Times, Dec. 21, 1976, at 12, col. 3 (mentioning nine detained journalists, only one of which was listed by Amnesty International); N.Y. Times, Dec. 15, 1976, at 12, col. 3 (mentioning 7 arrests and 3 detentions ranging from several hours to several weeks, none of which were listed by Amnesty International); South Africa Threatens Restraints on the Press, N.Y. Times, Aug. 15, 1976, at 1, col. 3 (4 journalists arrested); Editor Sentenced by South Africa, N.Y. Times, Feb. 15, 1976, at 21, col. 1.
veiled threats against, and a reprimand of, another major newspaper just twelve days before the deprivations imposed on the black newspaper and its personnel.\textsuperscript{55}

The South African Information Minister told foreign correspondents that the closing of the major black newspaper "should be construed by other newspapers as a warning 'not to abuse' the right of criticism [and that] the Government would not hesitate to close other publications 'if the state is endangered or law and order threatened.'"\textsuperscript{56} It had not hesitated before, and will probably continue not to hesitate\textsuperscript{57} until more effective sanctions are imposed by the international community for South Africa's violations of human rights, fundamental freedoms and the principle of self-determination. The blatant arrogance of its disregard for human rights, much less the restraints on an otherwise broad power to limit relevant rights where necessary to protect certain "just requirements" in a "democratic society," is also evident in the Justice Minister's formal statement on the bannings and detentions. "Endangered" and "threatened" were the words that the Information Minister utilized in an attempt to justify the government's acts.\textsuperscript{58}

The Justice Minister, while also disclosing some of the relevant "due" process approaches of a secrified government, added the following justification for bannings and detentions:

committees consisting of a regional magistrate as chairman and two other lawyers as assessors were appointed in terms of Section 17 of the Internal Security Act (1950) to make factual reports in relation to certain organizations and publications.

The facts contained in these reports leave no doubt that the activities of the organizations mentioned in the Government Gazette endanger the maintenance of law and order, and the publications mentioned in the Government Gazette serve, inter alia, as means for expressing views the publication of which is calculated to endanger the maintenance of public order.\textsuperscript{59}

The Minister's concluding threat portends an even broader base of insecurity: "Persons who believe that the Government will allow itself to be \textit{intimidated...}"

\textsuperscript{56}See N.Y. Times, Oct. 20, 1977, at 10, col. 1. See also infra note 60.
\textsuperscript{57}Indeed, later at least five foreign correspondents were arrested and detained a few hours. See N.Y. Times, Jan. 23, 1978, at 7, col. 1.
\textsuperscript{58}The Justice Minister repeated the word "endanger" three times and seemed to stress "unrest" between blacks and whites as well as the government claim that a "small group of anarchists" are manipulating "organizations, publications, people, and almost exclusively the young people, to create a revolutionary climate and to organize unrest." See id. (text of statement). Apparently contributing to the unrest, however, is the fact that blacks cannot vote in South Africa and must suffer the evils of apartheid. See notes 70-77 infra. Moreover, there is a fundamental unreality about statements that anarchists would organize anything, much less control organizations.
\textsuperscript{59}Id.
and prescribed to are making a big mistake." No one should be mistaken about the activities of an intimidated elitist government that is hardly mindful of democratic principles however.

After the earlier newspaper and organizational bans and detentions the United States issued a warning to South Africa, but Prime Minister Vorster termed the U.S. warning "irrelevant."

A mandatory arms embargo was soon unanimously approved by the United Nations Security Council, however, which reiterated a United Nations abhorrence of the racist governmental policy of apartheid and condemned South Africa for, among other things, its "acts of repression" and "defiant continuance of the system of apartheid." Private groups, such as the United States National Council of Churches and the American Society of Newspaper Editors, added their voices to the growing public protest of South Africa's illegal measures of suppression, terror and apartheid, but the South African government remains intransigent.

60Id. (emphasis added). See also specific language of the Terrorism Act (e.g., "embarrass"), note 81 infra.

61In the next few weeks 626 blacks, including 198 schoolchildren, were arrested for passbook-law violations (all blacks must carry a passbook and obtain permission to enter white areas, which include nearly all of South Africa's urban areas) or other "crimes" after a six hour, house-to-house sweep by police of a black township near Pretoria. See N.Y. Times, Nov. 11, 1977, at 1, col. 1 (Schoolchildren had been boycotting classes to protest the inferior black education systems.).


64See N.Y. Times, Nov. 5, 1977, at 1, col. 6; id. at 7, col. 1 (text of U.N. Security Council Resolution); N.Y. Times, Nov. 3, 1977, at 1, col. 4. The fact of the U.N. Security Council mandatory sanctions also demonstrates the increasing expectation that such systematic violations of human rights are of international concern and thus not essentially domestic matters within art. 2(7) of the Charter. In this case the Security Council also declared that South Africa's policies and activities contribute to a threat to the peace.

Later the U.N. General Assembly voted to ask the Security Council to impose an additional oil embargo against South Africa. See N.Y. Times, Dec. 17, 1977, at 9, col. 1.


66See also, Vorster Says Whites Can Withstand U.N. Pressure, N.Y. Times, Nov. 9, 1977, at 6, col. 1.
It will be difficult, to say the least, to compel such a government to fulfil its treaty obligations to implement human rights and fundamental freedoms for its own people and to refrain from further impermissible measures of force, controls and manipulations of the media. South Africa has been violating relevant norms for over twenty-five years and the violence is increasing. Although its racist and oppressive governmental policies have continued to be strong catalysts for the general development of human right sanction efforts, those efforts have not yet been effective. In South Africa, the 1950 Suppression of Communism Act, the 1960 Emergency Regulations, the 1965 Official Secrets Act, to name a few, not only continue in force but multiply. To date, South Africa remains the first and only state member of the United Nations to have a mandatory economic sanction imposed against it. The first stone has been cast. Here, a review of South African legislative enactments and the actual controls imposed is useful not merely to throw stones (I would throw boulders) but for comparison with those of other states and an awareness of the potential, if not real, abuses of governmental power there and elsewhere.

The South African government began its totalitarian efforts at control in 1950 with the adoption of the Population Registration Act, No. 30, and the Suppression of Communism Act, No. 44. Already mixed marriages were prohibited by the Prohibition of Mixed Marriages Act, No. 55 of 1949, and illicit sex between africans and whites was prohibited by the Immorality Amendment Act, No. 21 of 1950. The Population Registration Act furthered apartheid controls by classifying the population by race and requiring the compilation of population registers and the issuance of identity cards.

6See N.Y. Times, Nov. 11, 1977, at 6, col. 1, quoting from a National Council of Churches statement that "more than 1,000 African students and young people protesting apartheid were killed by the police in 1976," not to mention those injured or arrested. At least 45 have died in detention. See N.Y. Times, Sept. 20, 1977, at 5, col. 1. See also note 88 infra.
6See, e.g., J. CAREY, supra note 23, at 84, 95, 143, passim (1971).
6One might even ask whether South Africa's legislatively approved manipulation of the media has become a model for other governments that, in the name of anti-terror, seek to control political dissent and detain or "ban" political opponents of governmental control and other dissidents or nonconformists. In any event, legislative or executive decrees that attempt to justify (at least domestically) similar controls are being increasingly formulated by developing and developed countries, "Souniks" and "Norniks" in every region of the globe, and many are similar to those developed by South Africa. South Africa even defends its controls by pointing to the hypocrisy of other governments that condemn South Africa for its control of the media; but the context of racial apartheid, with blatant racism and the widespread denial of human dignity, has united numerous governments and private groups against such action more often than in any other cases.
6Id.
6See also, Unterhalter, Apartheid Legislation and Our Inherited Understanding of the Law, in LAW, JUSTICE AND SOCIETY 11, 14 (P. Randall ed. 1972); MacArthur, Apartheid, the Courts and the Legal Profession, in id. at 35, 37-39, a report of the legal Commission of the Study Project on Christianity in Apartheid Society. One contributor points out that under these or similar laws one out of four African adults is arrested each year, thus producing significant "penological and social" effects. See van Niekerk, The Police in the Apartheid Society, in id. at 51, 59.
The Suppression of Communism Act allowed the Minister of Justice “to ban organizations and publications and to prohibit gatherings if he considered that these were furthering or were likely to further the aims of communism.”

Newer legislation or executive measures made the controls of free speech and press even more certain. In 1960, the Governor-General proclaimed a state of emergency throughout most of the country after the Sharpeville killings and other violent acts. Far-reaching emergency regulations were promulgated which permitted magistrates and commissioned officers to detain people “if this was considered desirable in the interests of public order or of the person concerned” and made it an offense to disclose the names of those persons detained unless the Minister of the Interior consented.”

Other restraints of speech or publication included the following:

(a) It was made an offence to utter, issue, or distribute any subversive statement, which was defined as a statement likely to subvert the Government's authority; to incite others to resist or oppose measures taken under the emergency regulations; to cause feelings of hostility towards others; or to cause alarm.

(b) It was also made an offence to threaten anyone with harm unless he took a certain course of action; and to incite anyone to stay away from or retard his work, or to protest against any law with intent to exact concessions or to achieve any political or economic aim.

(c) The Minister of the Interior was empowered to order any newspaper or periodical to cease publication if he considered that it had systematically published matter of a subversive nature. He could order any association considered by him to be subversive to discontinue its activities.

Apparently there were many protests of such laws with an intent to exact a political aim (perhaps democracy), for nearly 12,000 people were detained during the first year of the operation of these regulations. Also at this time, emergency regulations were promulgated for the blacks in the Transkei under which similar forms of detention were implemented and offenses were created.

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1See id. at 94-95.
2Id. at 95.
3Id. (by government admission).
4See id. at 111; N.Y. Times, Aug. 15, 1976, at 1, col. 3 (4 journalists arrested under the Communism Act). If the Minister's discretion to prohibit publications was not broad enough with words such as "furthering" or "likely to further," certainly the definition of "communism" provided potentially new inroads on the freedoms of speech and press. As the South African Institute of Race Relations explains:

In this Act the term "communism" was very widely defined, to include not only the doctrine of Marxian socialism, but also any doctrine or scheme which aims at bringing about any political, industrial, social, or economic change within South Africa by promotion of disturbance or disorder, or by unlawful acts or omissions, or which aims at the encouragement of feelings of hostility between black and white, the consequences of which are calculated to further the achievement of doctrines or schemes such as those mentioned.

Id. If the subsequent actions of the Minister et al. are any clue, apparently there are a lot of "communists" in South Africa.

5Id. at 89. See also id. at 111; N.Y. Times, Aug. 15, 1976, at 1, col. 3 (4 journalists arrested under the Communism Act). If the Minister's discretion to prohibit publications was not broad enough with words such as "furthering" or "likely to further," certainly the definition of "communism" provided potentially new inroads on the freedoms of speech and press. As the South African Institute of Race Relations explains:

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to punish those "present at an unlawful meeting" or those who "make any statement or perform any action likely to have the effect of interfering with the authority of the state" or "one of its officials." Rarely have totalitarian controls been so expressly permitted.

In 1962, the General Law Amendment Act made it an offense to record, reproduce or disseminate any speech, writing or recording thereof, made anywhere, at any time, by a person prohibited from attending public gatherings. In 1965, the Official Secrets Amendment Act, No. 65, made it a crime for any person to have "in his possession or under his control any sketch, plan, model, article, note, document or information which to . . . any military or police matter and who publishes it or directly or indirectly communicates it to any person in any manner for any purpose prejudicial to the safety or interests of the state." In 1967, the Terrorism Act, No. 83, defined "terrorism" in an overly broad manner, shifted the burden onto those detained or arrested (which almost always occurs when the government has no proof that will support a conviction of ordinary crime) to prove an intention not to commit terrorism, prohibited any ordinary trial of the accused, prohibited even a summary trial without written approval of the Attorney-General, authorized detention without trial of suspects and any person believed to be "withholding information relating to terrorists or to offenses under the Act," prohibited any court of law from pronouncing on the validity of any action taken, and prohibited media or other access to a detained person or to information about such a person except as approved by a relevant government official.

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77Id. at 98 (emphasis added). See also N.Y. Times, Sept. 16, 1977, at 1, col. 2 (political gatherings banned); N.Y. Times, Aug. 9, 1977, at 1, col. 2 (public meetings banned). The 1967 Terrorism Act also prohibited certain acts intended "to embarrass the administration of the affairs of the State." See Dugard, South West Africa and the "Terrorist Trial", 64 AM. J. INT'L L. 19, 22 (1970).

78See also N.Y. Times, Oct. 27, 1977, at 8, col. 1, depicting the jurisprudential base of the white government and followers (which is positivist) as "an almost obsessive concern with legalisms." On related dangers of positivism in general (which the author terms negativism), see Paust, The Concept of Norm: A Consideration of the Jurisprudential Views of Hart, Kelsen and McDougal—Lasswell, forthcoming; Paust, supra note 6; McDougal, Lasswell & Reisman, supra note 13; Fuller, Positivism and Fidelity to Law, 71 HARV. L. REV. 630, 659 (1958); Unterhalter, MacArthur & van Niekerk, supra note 72.

79See HORRELL, supra note 70, at 99 and 112.

80Id. at 103. See also id. at 115. As the reader might have noted, such would prohibit far more than the Pentagon Papers, including as it does any information which relates to any military or police matter.

81For example, Section 2 of the Terrorism Act lists twelve outcomes which comprise activity directed at endangering "the maintenance of law and order" to include acts engaged in: (a) to cause or promote general dislocation, (b) to cripple or prejudice any industry, (c) to encourage feelings of hostility between white and other inhabitants of the Republic [acts which the Government itself might easily be judged to have engaged in], and (d) to embarrass the administration or the affairs of the State. The burden of proof is placed on the accused to show that the acts were not engaged in for such purposes. See also infra note 82.

82See id. at 107-08. See also, Unterhalter, supra note 72, at 17; van Niekerk, id. at 61; Dugard, South African Lawyers and the Liberal Heritage of the Law, in LAW, JUSTICE AND SOCIE-
In each case when several detained persons were tortured by the government or had been secretly detained, the judiciary refused to investigate the matter or openly approved the power of the legislature with positivist justifications of judicial impotence comparable to those of our own Rehnquist and Black or the Nazi judges of the past. As South African law professor John Dugard reports, when Chief Justice Steyn was asked about the failure of the courts to inquire into such matters he replied, in a typically positivist fashion: “It would be an evil day for the administration of justice if our courts should deviate from the well recognized tradition of giving politics as wide a berth as their work permits . . . it is not our function to write an indignant codicil to the will of Parliament.”

So confused about evil, justice, tradition, authority functions and the dignity of courts and human beings are the South African judges in general, Professor Dugard seems to say, that their positivistic deference to raw power has added “to an increasingly evil legislative order” in a way not unlike the myopic and unrealistic positivism of German lawyers of the 1930s. Perhaps like the earlier German lawyers South African positivists allow a pretense of law and authority when hundreds of thousands are detained, thousands are...
killed,\textsuperscript{88} unknown numbers are tortured,\textsuperscript{69} and the courts and the media\textsuperscript{90} are controlled or finally closed. That pretense has been maintained even as law and authority crumble. And one can easily predict that if change toward implementation of human rights and dignity is not allowed through a resurgent flow of free expression and association it will occur increasingly in violent ways or, with the advent of increased totalitarian controls, not at all. Neither law nor authority would fare well in such a future.

\textit{The Remainder of Africa}

Looking at the Freedom House map, one sees hardly a country in Africa labeled as "free" or "partly free."\textsuperscript{91} The Congo, Kenya, Liberia and Nigeria are among the few listed as "partly free," but Kenya is listed along with the "not free" Ghana, Somalia and Tanzania in an Amnesty International list of states that imprison journalists.\textsuperscript{92} Nigeria, despite the Freedom House label, has been ruled by decree under a "state of emergency" and the broad powers of the Armed Forces and Police (Special Powers) Decree No. 24 of 1967 for ten years. Under such, the Inspector General of Police or the Chief of Staff can order detention of anyone without trial "on being satisfied of the necessity for doing so in the national interest."\textsuperscript{93} The Nigerian military has ruled since January 1966 and still forbids "political activities."\textsuperscript{94} Not surprisingly, Nigeria restricts freedom of speech and press, and intends to form a "national" press agency.\textsuperscript{95}

The United States Department of State reports human rights violations in Ethiopia and Zaire,\textsuperscript{96} and Amnesty International reports oppression in much of the rest of Africa.\textsuperscript{97} One clear example of a terrorist government is that of Idi Amin of Uganda—the murderer of hundreds of thousands, including

\textsuperscript{88}See note 67 supra. See also AMNESTY INTERNATIONAL, supra note 64, at 126-37; and van Nickerk, supra note 72, at 61.

\textsuperscript{89}See AMNESTY INTERNATIONAL, supra note 65, at 123-28. See also supra note 67; N.Y. Times, Jan. 19, 1978, at 53, col. 6 (routine police torture).

\textsuperscript{90}Beyond the threats to and closings of newspapers as such, I include here the arrests and detention of journalists by the South African government over a period of several years (with exact figures still unknown). See notes 51 and 54 supra.

\textsuperscript{91}See N.Y. Times, Dec. 22, 1976, at 12, col. 2.

\textsuperscript{92}See N.Y. Times, April 5, 1978, at 10, col. 3 (Ghana); N.Y. Times, Sept. 6, 1977, at 6, col. 3. Kenya was listed as imprisoning at least 5; now it is at least 6. See N.Y. Times, Dec. 12, 1977, at 16, col. 1.

\textsuperscript{93}See N.Y. Times, April 29, 1977, at 12, col. 3. A recent example is reported at N.Y. Times, Jan. 4, 1978, at 9, col. 3.


\textsuperscript{95}See N.Y. Times, Aug. 1, 1977, at 8, col. 6.


\textsuperscript{97}See AMNESTY INTERNATIONAL, supra note 65, at 112-38.
writers who insult the tyrant. If ever tyrannicide is justifiable, it must be in the case of Idi Amin.

Another African tyrant, who imprisons reporters from the United States, is the world's first self-proclaimed socialist Emperor, Bokassa I of the Central African Empire. Last "but not least" on our list is the illegal regime in Rhodesia—a regime condemned and subject to mandatory sanctions by the United Nations Security Council (but not a member of the U.N.). Strict censorship of all news media exists in Rhodesia in order (what else?) to "help fight terrorism and subversion." In Rhodesia, as in so many areas of our globe in the 1970s, writers and religious leaders who criticize the government and its deprivations of basic human rights are themselves imprisoned.

Argentina

Curiously, the 1976 Freedom House survey listed South Africa as a "partly free" country, although 80 per cent are black, and one wonders then how much worse the governmental controls of free expression and publication must be in Argentina, which is listed by the survey as "not free." Nevertheless, there is no questioning of the fact that Argentina imposes strict controls over the media and general political dissent under anti-terrorism and other legislative or martial measures. A recent study by Playwrights, Publishers, Essayists, Editorialists and Novelists [commonly known as P.E.N.], a private writers' organization, also attributes to Argentina the largest number of victims arrested, detained or simply "abducted" for their writings (in fact, 119 of the listed 606 writers persecuted in some 55 countries).

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98 See, e.g., N.Y. Times, Aug. 18, 1977, at 4, col. 4 (playwright, theater director and a Ministry of Culture under-secretary). See also AMNESTY INTERNATIONAL, supra note 65, at 134-36 (mentioning detention of British journalists).

99 See N.Y. Times, Aug. 18, 1977, at 1, col. 5.


103 See note 45 supra.

104 See "55 Nations Are Charged With Repressing Writers," N.Y. Times, Nov. 3, 1977, at 12, col. 3; see also N.Y. Times, March 12, 1978, at 22, col. 1. Only a few of these were listed by Amnesty International, but Amnesty International chooses to avoid a full disclosure of names of those held by certain countries (like Argentina) so that rights are better pursued by other means. See N.Y. Times, April 9, 1977, at 12, col. 3. One reads of detained or disappearing Argentine journalists too often in the last few years. See N.Y. Times, Nov. 12, 1977, at 3, col. 3 (jailed newspaper publisher); N.Y. Times, Nov. 11, 1977, at 7, col. 3 (AP editor vanishes); N.Y. Times, April 17, 1977, at 5, col. 1 (journalist abducted and 3 newspaper executives of La Opinion...
The military junta has gone even further in its effort to curb dissent, however, by issuing a special decree against an already jailed publisher of the newspaper La Opinion. The publisher was held under a power described as "the disposition of the executive power" and the new decree deprived him of any remaining civil rights, authorized indefinite detention without military trial or a civilian court order, and placed all of his property in state custody. Even human rights advocates who disappear in Argentina (or fellow media persons who disappear and in effect become nonpersons as well) do not lose their property to the state—their family or relatives have at least whatever property is left after the dissenter is himself extinguished.

Much of the killing and stifling of human rights to freedom of expression and publication is obviously carried out extralegally; but Argentina also has its overly broad anti-terrorist decrees to control the media and those who dissent. In 1974, two such laws were enacted—a broad anti-terrorism bill that was harsher than that of the previous government and defined and prohibited "incitement to violence" and "illicit associations" so broadly "as to stifle legitimate political dissent as well as left-wing terrorism;" and an expansion of the ban on names of anti-government organizations to a ban on news coverage of terrorist acts and kidnappings altogether. The media now is disappear); N.Y. Times, Dec. 31, 1976, at 4, col. 1 (journalists in detention); N.Y. Times, Nov. 10, 1976, at 6, col. 1 (arrest of Spanish press agency manager); N.Y. Times, Feb. 15, 1976, at 2, col. 3; Houston Chronicle, May 20, 1975, at 6, col. 1 (reporter killed by right-wing death squad). Even dissenting nuns and relatives of detainees are arrested. See N.Y. Times, Jan. 29, 1978, at 12, col. 14. This seems to result from an expansion of private and governmental counter-terror. See also N.Y. Times, Aug. 21, 1976, at 1, col. 1; N.Y. Times, April 4, 1976, at 1, col. 7; N.Y. Times, March 22, 1976, at 6, col. 1; N.Y. Times, March 13, 1977, at E4, col. 4; AMNESTY INTERNATIONAL, supra note 65, at 182-83. Hardly with any sort of precedent, however, have been more recent actions of the military junta which led to the seizure and arrest of several Argentine and foreign journalists covering the demonstration of some three hundred and fifty women in front of the congress building who were protesting the disappearance of thousands in recent years. See N.Y. Times, Oct. 16, 1977, at 33, col. 4. Cf., N.Y. Times, Nov. 10, 1976, at 6, col. 1 (arrest of Spanish press agency manager); N.Y. Times, April 29, 1977, at 12, col. 3 (Paraguayan journalist arrested one year earlier; listed by Amnesty Int'l). Among the foreign journalists arrested were "Sally Chardy of NBC Radio, Diane Page of United Press International, David Dow of CBS-TV and Gus Bono of The Wall Street Journal." Id. It took the intervention of the United States Embassy to achieve the release of the U.S. journalists, but others were apparently held by the government.

See N.Y. Times, Nov. 12, 1977, at 3, col. 3. See also N.Y. Times, Jan. 29, 1978, at 12, col. 4, adding that "some 3,607 persons remain at the disposition of the executive power" by official count (including many foreign nationals). The publisher is apparently lucky to be alive, if he still is, for three other executives from his paper had disappeared the month after he was arrested. See note 104 supra.

See N.Y. Times, Sept. 22, 1977, at 9, col. 1 (found in detention some two weeks later).

See note 104 supra; see also Houston Post, Feb. 4, 1978, at 8A, col. 5 (AP).


Id. at 3-4, adding that other laws had already banned the printing of anti-government communiques. Already Decree No. 1454 (1973) had prohibited the press from mentioning the names of two anti-government guerrilla groups (the ERP and the Montoneros).
"prohibited from reporting, mentioning or commenting on political violence unless the events published are issued by the government or security forces."110 As in South Africa and so many other states that defile authority, "the judicial system cannot investigate the action of security forces under the emergency laws that have been in effect since the overthrow by the armed forces" of the former President.111 The new military junta is now safely entrenched behind anti-terrorist curbs of the media and the judiciary, but the disappearance of media persons, human rights advocates and numerous attorneys112 continues.

Chile

More widely known are the restraints and deprivations imposed by the present Chilean regime against its own people. P.E.N. lists Chile as the third most oppressive state against writers, with a listing of fifty-seven such victims.113 The Freedom House survey also lists Chile among the nation-states that are "not free."114 In fact, as the New York Times reports:

Since 1973 Chile has been governed by the right-wing junta led by Gen. Augusto Pinochet, commander of the army, who calls his regime "an authoritarian democracy." Under the junta that overthrew the government of Salvador Allende Gossens, all periodicals have come under government control, the universities have been purged of critics, opponents have been jailed and tortured and all political parties have been banned.115

In 1977, President Pinochet's military-backed regime, indicated even more strongly why an "authoritarian democracy" is double-speak about a "state of siege." Pinochet's regime prohibited "the existence, organization, activities and propaganda" of all the remaining non-Marxist political parties in

112See id. (mentioning the detention and/or disappearance of at least ten lawyers and one judicial employee), adding: "Some prisoners are found dead after shootouts described in security communiques as armed conflicts with subversives. Other have been killed while officially listed as 'trying to escape' . . ."—others are later released from detention or found dead in vacant lots or elsewhere. In 1975 report for the International Commission of Jurists, Dr. Fragoso of Brazil listed 6 defense lawyers who have been murdered from Nov. 1973 to March 1975 and 32 lawyers then being held in detention. See H. FRAGOSO, REPORT ON ARGENTINA (Int'l Comm. of Jurists 1975).
113With regard to the treatment of lawyers in other countries, see infra re: South Korea and the Federal Republic of Germany.
114See N.Y. Times, Nov. 3, 1977, at 12, col. 3 (just 21 behind the Soviet Union). See also N.Y. Times, April 29, 1977, at 12, col. 3 (Amnesty Int'l list of imprisoned journalists—some names omitted for this country).
The President has also publicly stated that there will be no elections in Chile for ten years—thus admitting that self-determination will not exist in Chile for the near future. Further, the judiciary is without power to implement human rights and Chilean law against such a governmental control. In the guise of “national security” a military commander can close any radio station or newspaper in Chile and confiscate publications. A 1975 Decree Law increased penalties for media persons who commit national security offenses and also made it a crime to carry pamphlets constituting propaganda for outlawed parties. A 1976 Decree Law expanded censorship and allowed the military to close down any news media for printing or broadcasting false or exaggerated reports or news that causes “alarm or disgust.”

Now, the repression has been greatly expanded. Besides banning all political parties, the regime has announced new work restrictions, the censorship of mail and new press restrictions, “including a ban on unauthorized printing of news magazines or newspapers and the importing of foreign publications.” The totalitarian attempts of the present regime have thus made it a leading violator of fundamental human rights. It has surpassed the broadest controls of its predecessor, the anti-democratic, anti-communist, pro-socialist Allende regime.

Other Latin American States

In addition to the overly broad controls of free speech and publication extant in Argentina and Chile, impermissibly restrictive anti-terrorist and national security measures can be found in other Latin American states. Without apparent attention to human right conditions of necessity for meeting “just requirements” in a “democratic society,” Uruguay’s Decree Law No. 393/973 authorized the governmental prohibition of: “the publication, by means of oral, written or televised media [of] all information, commentaries or impressions which directly or indirectly mentions or refers to those persons who conspire against the nation or against antisubversive operations,

116See N.Y. Times, March 13, 1977, at 18, col. 3. Marxist political parties were banned in 1973 when the military took over. See id.; Chilean Decree Laws, No. 77 (1973), No. 1009 (May 5, 1975). See also N.Y. Times, Dec. 4, 1977, at 13, col. 1 (seven labor leaders confined); N.Y. Times, Sept. 6, 1977, at 6, col. 3 (4 Legislators held without trial).


118See note 175 infra; N.Y. Times, Feb. 15, 1976, at 12, col. 1. These powers have been exercised. See N.Y. Times, Jan. 31, 1977, at 4, col. 4.


120See N.Y. Times, March 13, 1977, at 18, col. 3.


122See also H. COOPER, TERRORISM AND THE MEDIA, supra note 110, at 149. Some inkling of Allende regime violations is documented in Amnesty International, supra note 65, at 189-90.
excluding official communication."\textsuperscript{124} Other Uruguayan decrees also seek to curb any criticism of government measures taken against "terrorists"\textsuperscript{125} as well as any public disclosure of the acts defined in the Military Penal Code as "Offenses which Injure the Nation."\textsuperscript{126} Amnesty International lists at least thirteen journalists being held by the Uruguyan government.\textsuperscript{127}

Prohibitions of the public defense of acts categorized as a crime and/or a person convicted of a crime can also be found among the laws of Paraguay\textsuperscript{128} and Brazil.\textsuperscript{129} Paraguay also prohibits public advocacy, by any means, of "hatred among Paraguayans, or the destruction of the social classes;" the occupancy of public buildings as an act of protest; public insult of any of the symbols of the state; and "calumny or defamation of the President, the Executive or Legislative Ministers, or the members of the Supreme Court."\textsuperscript{130} Bolivia prohibits oral or written matter that incites others to disobedience of laws and resolutions of the government and any act or deed which interferes with the realization of the development of the country.\textsuperscript{131} Even our closest Latin neighbor, Mexico, controls the importation of newsprint and indirectly controls much of the newspaper and television media.\textsuperscript{132} It should not surprise anyone that Cuba and Haiti do the same even more directly and to a greater extent. Journalists are imprisoned in both countries.\textsuperscript{133}

Nicaragua has been ruled by the iron hand of the Somoza family for over forty years.\textsuperscript{134} The United States Department of State report to Congress adds

\textsuperscript{124}Decree-Law No. 393/973 (1973). \textit{See also} Uruguay Decree-Law No. 655/972 (Sept. 28, 1972).

\textsuperscript{125}See Uruguay Decree-Law No. 655/972 (Sept. 28, 1972) and Decree-Law No. 393/973 (June 19, 1973), art. 5. \textit{See also} N.Y. Times, March 13, 1977, at E4, col. 4.

\textsuperscript{126}See Uruguay Law No. 14,068, Article 148 (July 12, 1972) (Congressional legislation amending the Military Penal Code, which applies to everyone).

\textsuperscript{127}See N.Y. Times, April 29, 1977, at 12, col. 5. It is also listed as "not free" by Freedom House. N.Y. Times, Dec. 22, 1976, at 12, col. 2.


\textsuperscript{129}See Brazil Decree Law No. 898 (Sept. 29, 1969), art. 47 (with greater penalties attached when use is made of the press, radio or television). \textit{See also} "Military in Brazil Plays By Own Rules," N.Y. Times, Aug. 3, 1977, at 7, col. 1.


\textsuperscript{130}See Paraguay Law, note 128, \textit{supra}, arts. 4, 6 and 7. \textit{See also} Amnesty International, \textit{Matchbox} 14 (Fall 1977) (9 lawyers, doctors and writers arrested).

\textsuperscript{131}See Bolivia Supreme Decree No. 10763 (March 12, 1973), art. 1, sec. H. Concerning allegations of "systematic terror" against leftist opponents of the government and the use of torture, see Amnesty International, \textit{supra} note 65, at 183-85.

\textsuperscript{132}See N.Y. Times, Nov. 24, 1977, at 7, col. 1.

\textsuperscript{133}See Amnesty International list, N.Y. Times, April 29, 1977, at 12, col. 3 (some others in Cuba and Haiti are not publicly listed). \textit{See also} Amnesty International, \textit{supra} note 64, at 179 and 190-91 (including a Cuban poet named Padilla).

\textsuperscript{134}See Amnesty International, \textit{supra} note 65, at 203.
that Nicaragua has been under a state of siege since 1974, with the suspension of constitutional guarantees as well as censorship and harassment of the press. Anti-terrorism provisions of the Penal Code prohibit the threat of harm "by means of correspondence, radio, telephone, telegraph, broadsheets, figure drawings on walls, or elsewhere, or analogous means" for the purpose of disturbing public order, or sowing or causing unrest in the land. Also prohibited is the explicit and direct incitement "to rebellion or sedition, publicly or in the press . . . even though the rebellion or sedition does not materialize." Further prohibitions include the joining of "Communist parties, parties upholding Communist or similar ideas, or any internationally organized party" as well as the assistance or participation in activities of such parties, including the "preparation, printing, introduction, or distribution of any propaganda into the country." In December of 1974, Nicaraguan freedoms, such as they were, suffered new blows. A decree of martial law, still operative, allowed the President to suspend any form of media "and order the necessary measures to determine responsibility."

The Soviet Union

Not any less oppressive have been the media and free speech controls of the Soviet Union. The government not only controls the media, but owns and operates newspaper, television and radio forms of news and communication. One might suspect that such forms of direct control of speech and publication would be sufficient even for insecure security persons, even for a dictatorship of "the proletariat," but apparently this is not the case. P.E.N. describes the Soviet Union as the second leading offender (after Argentina and just ahead of Chile) among states that persecute publishers and writers. The P.E.N. study lists seventy-eight writers as victims, with seven as internees in work camps and twenty-two as prisoners in psychiatric confinement in the Soviet Union and other East European communist countries.
In 1973 there were forty-six known cases of political dissidents being confined to mental hospitals.\footnote{See AMNESTY INTERNATIONAL, supra note 64, at 176. One such prisoner is Vladimir Gershuni who was charged in 1970 under the Penal Code, art. 190-1, with “the distribution of deliberately false fabrications discrediting the Soviet social and political system.” Id. at 12. Truth is apparently so important to the Soviets. During the pre-trial detention, Mr. Gershuni had been diagnosed by state psychiatrists from the now infamous Serbsky Institute as a person of unsound mind, no doubt because of his active support for human rights in the Soviet Union, which included the signing of petitions and the writing of pamphlets, and his criticism of the Soviet intervention into Czechoslovakia and the continued imprisonment of Major-General Grigorenko, a well known Russian dissident, in a mental hospital. See id. at 11-13. Mr. Gershuni’s punishment was thereafter ordered by the court—confinement to a mental hospital.

As Amnesty International notes, “[t]he psychiatric confinement of dissenters was widely practised in the early 1950’s . . . Since 1965 . . . there has been increasing evidence of the re-emergence of this practice.” Further, as the published list by Amnesty International in April, 1977 of over one hundred journalists held discloses, one of the seven journalists detained in the Soviet Union was imprisoned in a psychiatric hospital.\footnote{See AMNESTY INTERNATIONAL supra note 64, at 177.}

Other developments include the prevention of two Soviet human rights activists, Vladimir Slepak and Anatoly Shcharansky (members of the group Other Helsinki (human rights) watch group members arrested include: V. Rtskhiladze, Z. Gamsakhurdia, M. Kostava. See N.Y. Times, Jan. 28, 1978, at 3, col. 3. The list also excluded the writers and publishers of underground newspapers and typewritten samizdat journals who have been sent to labor camps or psychiatric institutions. See AMNESTY INTERNATIONAL, supra note 65, at 12, 174; INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, BULLETIN 6-7 (April 1976). See also INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, BULLETIN 1-3 (Sept. 1974) (Bukovsky, Plyushch, Litvinov); id. at 5-4 (Oct. 1976) (Tverdokhlebov).}
that had included Ginzburg and Orlov) from speaking to a Los Angeles Times reporter Robert Toth who subsequently called the incident a violation of the Helsinki agreement. Shcharansky was later arrested and a soviet lawyer was expelled for trying to defend him. Three months after the arrest of Shcharansky, Toth was himself detained by the Soviets and questioned several days about his newspaper stories and contacts with the Ginzburg-Orlov group, nine of whom then had been jailed. Soon thereafter, a sculptor was jailed who had honored the United States bicentennial, and another writer, of an underground book criticizing the Soviet detention of political dissenter in mental hospitals, was ordered to leave the country. So fearful of human rights are the Soviet elite that even the United States Ambassador to the Soviet Union was prevented from delivering a traditional July 4th speech over Soviet television “after he declined to delete a section alluding to the human rights policy of the Carter Administration.” In fact, on human rights day (December 10th) the Soviets confined twenty human rights advocates to their apartments, cut off some of their phones, and took at least four into custody, all in a vain attempt to prevent a silent demonstration in Pushkin Square in Moscow.

It is hardly conceivable that human rights to freedom of speech and publication exist in the Soviet Union. Indeed, the control of speech and thought are openly avowed aims of the party elites. Freedom of speech means freedom of correct speech, and even then several forms of media are directly controlled. Further, the Soviets are well known for their refusal to allow foreign television, radio, books, newspapers and other forms of information to flow freely across their borders.

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145 See N.Y. Times, March 8, 1977, at 10, col. 3.
147 See id.; N.Y. Times, June 12, 1977, at 16, col. 1. Toth was subsequently released after a U.S. intervention on his behalf. Later a Soviet lawyer was expelled from the country, apparently for trying to defend Shcharansky. See N.Y. Times, Dec. 5, 1977, at 16, col. 4.
148 See N.Y. Times, June 17, 1977, at 10, col. 3.
149 See N.Y. Times, Dec. 3, 1977, at 4, col. 5 (Mr. Podrabinek). He was later arrested while trying to participate in a silent human rights protest with others. See N.Y. Times, Dec. 11, 1977, at 1, col. 4.
150 See N.Y. Times, July 5, 1977, at 1, col. 4. A portion of the bothersome speech read: “Americans will continue to state publicly their belief in human rights and their hope that violations of these rights, wherever they may occur, will end.” Id.
151 See N.Y. Times, Dec. 11, 1977, at 1, col. 4.
153 See, e.g., LEECH, OLIVER AND SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 299, 302-03 (1973); G. Zhukov, supra note 153, at 275-74; J. GREEN, THE UNITED NATIONS AND HUMAN
of the will of the people,\textsuperscript{155} the Soviet elites have been ardent advocates of an international effort to change freedom of information rights through adoption of severe restraints upon the activities of foreign news media persons. From 1972, the Soviets have pressed for the approval by UNESCO of resolutions recognizing state "responsibility" (and control) over the mass media within state boundaries.\textsuperscript{156} Although such efforts have been challenged by the international press\textsuperscript{157} and have not led to any formal resolutions, a 1976 working group within a UNESCO conference adopted a Soviet sponsored draft.\textsuperscript{158} The matter comes up again in 1978.

Although the Soviets are scarcely attentive to human right provisions of the United Nations Charter, the 1948 Universal Declaration of Human Rights,\textsuperscript{159} the 1966 Covenant on Civil and Political Rights\textsuperscript{160} or the limitations thereunder which are to be, under the circumstances, necessary to meet the "just requirements" of a "democratic society," the Soviets do argue with vigor that Article 2(7) of the United Nations Charter allows the party elite a free hand to control its people and their thoughts. They are fairly clear about their claim that although human rights are a part of "binding" law which "must be granted and observed in all countries,"\textsuperscript{161} the direct implementation of human rights is an "internal affair" of the state,\textsuperscript{162} although they often

\textsuperscript{155}Dissenting views are dismissed from the "will" much like the justification offered in Pravda that opponents of socialism (e.g., human rights advocates) are "enemies" and "just a handful of individuals who do not represent anyone or anything and are far removed from the Soviet people." See N.Y. Times, Feb. 13, 1977, at 1, col. 4. See also N.Y. Times, March 22, 1977, at 14, col. 1 (speech by Brezhnev). See also notes 137, 141 infra.


\textsuperscript{157}See N.Y. Times, June 10, 1977, at 9, col. 1 (International Press Institute resolution urges UNESCO to "adhere to UNESCO's own constitutional commitment to the free flow of information"); N.Y. Times, Nov. 21, 1976, at 7, col. 1; N.Y. Times, July 1, 1976, at 3, col. 5.

\textsuperscript{158}See N.Y. Times, Nov. 23, 1976, at 6, col. 1.

\textsuperscript{159}Although the Soviets refused to vote for the Universal Declaration in 1948, they have subsequently considered the Declaration to be a part of customary and Charter Law. See J. CAREY, supra note 23, at 88, 130; I. BROWNLE, BASIC DOCUMENTS ON HUMAN RIGHTS 106 (1971); Movchan, \textit{The Human Rights Problem in Present-Day International Law}, in CONTEMPORARY INTERNATIONAL LAW, \textit{supra} note 153, at 235-37, 246 (principles of law secured in the Charter, legal force not to be doubted, rule of law binding on all states, must be granted and observed in all countries).

\textsuperscript{160}The U.S.S.R. is now a party to this treaty.


\textsuperscript{162}See Movchan, \textit{The Human Rights Problem in Present-day International Law}, in CONTEMPORARY INTERNATIONAL LAW, \textit{supra} note 153, at 238-40, adding: "direct regulation of human rights and freedoms . . . is an internal affair of this state. . . ."; and Tunkin, \textit{supra} note 161, at 82-83. See also notes 163, 164, and 171, infra.
lack consistency in argument when they criticize others. Similarly, the Soviets argue that the principle of self-determination allows Soviet elites the "right to be complete masters in their own home." Thus, outside concern about denials of human rights by the Soviet state, instead of being a matter of international concern, is viewed by the power elites as an interference "in the internal affairs of the Soviet Union"—the same attempt at justification offered by so many violators of human rights of "the people."

Quite often the Soviet attempt at justification for state totalitarian controls rests upon jurisprudential views inherited from the legal positivists of the 19th Century. International law, for the Soviets, is the "will of states." Individuals are nearly irrelevant. Much like the followers of John Austin (who might well have influenced Marx and Engels) or Hans Kelsen who attempt to justify, as authoritative, the raw power exercised by governmental elites in South Africa, Rhodesia, Uganda, and elsewhere, the Soviets argue that:

> The supremacy of the state means subordination to it of all persons and organizations within the bounds of state territory.
> The state has supreme power over all organizations and persons . . . . All these . . . are bound to submit to it . . . . Only the will of the sovereign state, expressed in state power, becomes a law. . . .

No wonder the Soviets press for more controls of the international media. Such are the machinations of power elites who ignore or reject the standard of authority proclaimed in Article 21 of the Universal Declaration of Human Rights, the authority and will of the people.

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163 See Starushenko, Abolition of Colonialism and International Law, in CONTEMPORARY INTERNATIONAL LAW, supra note 153, at 81. See also id. at 92; note 171, infra.
164 See, N.Y. Times, March 22, 1977, at 14, col. 1 (speech by Brezhnev); note 162 supra.
165 See also J.N. HAZARD, COMMUNISTS AND THEIR LAW 69-70 (1969) (positivism pushed to its logical extreme); Paust, supra note 6, at 236.
166 See, e.g., G. Tunkin, Peaceful Coexistence and International Law, supra note 153, at 19, 32. See also id. at 164, 167, 175 (I. Lukashuk).
167 See A. Movchan, supra note 162, at 239-40.
168 See notes 83-87 supra.
170 This was the justification given by Dean A. KIAPI, of the Law School at the Makerere University (Kampala, Uganda), during a speech at the University of Houston (April 26, 1976) ("Kelsen provides the answer"—i.e., the effective power is to be considered an equivalent of authority).
171 See Ushakov, International Law and Sovereignty, CONTEMPORARY INTERNATIONAL LAW, supra note 153, at 99-101. See also id. at 102-03, 106-07, citing Hobbes, Spinoza and Hegel.
Ushakov might just as well have cited John Austin for these thoughts. See J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832). Here, however, there is no misreading of Kelsen concerning his theory that international law supercedes such state power. See Ushakov, supra at 110 See also id. at 178.
Other East European States

The patterns of oppression of free speech and publication identifiable in the Soviet Union are, perhaps not too surprisingly, repeated in much of Eastern Europe. Amnesty International has listed the names of nine journalists imprisoned for political reasons in Czechoslovakia, East Germany and Yugoslavia.\(^{122}\) The 1977 United States Department of State country reports to Congress disclosed the fact that in Yugoslavia, the only Eastern European state receiving United States aid at the time, the government “consistently violates certain rights, particularly those pertaining to critical political expression.”\(^{172}\)

With the outspoken approval of more realistic dissent against state deprivations of human rights and dignity by President Carter and the signing of Charter 77 (a manifesto demanding broader freedoms) by many Czechoslovakian human rights advocates,\(^{174}\) the Czech government apparently felt the need to crack down on such nonsense. The crack-down was hard; the anti-human rights campaign of February and March, 1977 in Czechoslovakia left many dissenters dead or imprisoned. An official statement described the manifesto as illegal and unconstitutional, since the formal constitutional right to free speech “must be exercised solely in keeping the interests of the working people of Czechoslovakia”\(^{175}\)—as defined by the controlling elites. Stressing the communist theory of objective crime, the Communist Party newspaper declared: “Regardless of whether they are politically naive or politically insidious, they [the human rights advocates] are objectively playing a sorry role in the actions of rabid anti-Communism.”\(^{176}\) Thereafter, at least twenty signers of the Charter, including a radio commentator, were dismissed from their jobs,\(^{177}\) several others were imprisoned,\(^{178}\) one died during

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\(^{122}\)See N.Y. Times, April 29, 1977, at 12, col. 3 (but some names from these countries are omitted). Not listed were 3 persons imprisoned for spreading hostile propaganda and subsequently released (Djurovic, Veselica, Miklacic). See N.Y. Times, Nov. 25, 1977, at 2, col. 4. Also not listed were the poet and writer Ignjatovic and his lawyer, Popovic, jailed for hostile propaganda (in and out of court). See INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, BULLETIN 3-4 (Oct. 1976).

\(^{172}\)See N.Y. Times, March 13, 1977, at 1, col. 6. One such violation involves the conviction of the democratic socialist writer Mihajlo Mihajlov for “spreading hostile propaganda” in articles published abroad. See INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, BULLETIN 7 (April 1976). His imprisonment is also reported by the the 1977 Amnesty International report, see note 172 supra. Mihajlov was released on November 24, 1977 as part of an amnesty declared for 218 political prisoners. See N.Y. Times, Nov. 26, 1977, at 6, col. 4; id., Nov. 27, 1977, at 7, col. 1. For this he received a seven year sentence to be served in solitary confinement.


\(^{178}\)See N.Y. Times, Feb. 6, 1977, at 5, col. 1.

\(^{175}\)See N.Y. Times, March 23, 1977, at 8, col. 3.

\(^{176}\)See N.Y. Times, Feb. 26, 1977, at 2, col. 6; N.Y. Times, Feb. 18, 1977, at 3, col. 2. At least 4 were journalists, playwrights or theater persons. See also N.Y. Times, March 16, 1977, at 2, col. 3 (arrest of playwright Havel and confinement of former Foreign Minister Hajek).
interrogation, and a foreign reporter was detained and questioned for several hours concerning his contacts with the Czech human rights advocates. The government also passed Decree Law, No. 58, prohibiting public criticism of the government by any Czech emigre while abroad and placing anyone in jeopardy (e.g., family or friends) who maintains contact with such an emigre.

It was, to say the least, a chilled late winter for human rights advocates in the Soviet Union, Yugoslavia and Czechoslovakia. Similar arrests occurred in Rumania, apparently under a 1974 law that prohibits publications that foster public unrest, violation of normal behavior or socialist morality, or criticism of a foreign state. In East Germany freedoms of speech and publication apparently fare no better.

West European States

There are few known actual restrictions on the media in Western Europe, but several state constitutional or legislative provisions are potentially thwarting of human rights to free expression. Exceptions include Turkey and Spain.

In Turkey, the Constitution and Penal Code provide several types of bases for press censorship and more general prohibitions of free speech. Under Article 22 of the Turkish Constitution, restrictions are possible "in the interests of national security and public morale, in order to prevent offences against the honour and the private rights of the individual, or the soliciting of punishable acts, and in order to ensure the proper exercise of judiciary"

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181 See R. Sharlett, supra note 179.
182 See N.Y. Times, July 1, 1977, at 3, col. 4; N.Y. Times, Feb. 18, 1977, at 1, col. 2 (disclosing that at least one human rights advocate arrested was a novelist). See also N.Y. Times, Nov. 25, 1977, at 2, col. 3 (The writer, Goma, now in exile, was held six weeks for participating in the writing of open letters demanding political changes and charges that other are in jails, labor camps and physiatric hospitals for political reasons); INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, BULLETIN 8 (Oct. 1976) (sentence of dissident DeMetrescu and subsequent release); Amnesty International, Matchbox [newspaper], at 9 (Fall 1977) (seven human rights protesters jailed after sending a letter to President Carter).
184 Concerning imprisonment and torture of media persons in Turkey, see N.Y. Times, April 29, 1977, at 12, col. 3; and AMNESTY INTERNATIONAL, supra note 65, at 171.
powers." Article 22 also provides detailed provisions concerning press sanctions following censorship. Article 26 of the Constitution permits further restrictions "for the protection of the territorial and national integrity of the State," and Article 11 of the Constitution provides that no constitutional right or liberty may be used with the intent to suppress human rights of others or to destroy the territorial or national integrity of the state. There is, however, no stated need for demonstration of the necessity of a restrictive measure in order to serve the just requirements mentioned in relevant human rights instruments.

A recent report furnished by the government of Turkey discloses an even broader set of criteria for control:

According to the information furnished in that report, Article 142 of the Turkish Penal Code makes it a criminal offence to engage in communist, fascist or racist propaganda or propaganda aimed at undermining or destroying national feelings, or to approve of such acts. Article 163 of the Turkish Penal Code punishes any anti-laicist propaganda motivated by personal or political interests which aims at establishing the basic order of the State on religious precepts and convictions. Finally, Article 140 stipulates that anyone is liable to punishment who, in foreign countries, "disseminates false, exaggerated or tendentious information on the domestic situation of the country which is detrimental to her reputation or political influence or who, in foreign countries, commits and other act detrimental to the national interest.

We had better refrain from commenting on such.

The Spanish Constitution is potentially broader in its protection of the state, for freedom of expression is guaranteed only "in so far as its exercise does not interfere with the fundamental principles of the State." Censorship exists in Spain but it is apparently less severe than in prior years. Journalists are detained or imprisoned there for political reasons, and on several occasions the media has been ordered not to report at all about police investigations into terrorist incidents and activities or government investigations into the practice of torture engaged in by state officials. A 1975 Anti-terrorist Decree Law imposed severe penalties against anyone who publicly defended or fostered outlawed ideologies (i.e., "Communist,

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185 See also VIIITH CONGRESS OF THE INTERNATIONAL SOCIETY FOR MILITARY LAW AND LAW OF WAR, GENERAL REPORT, HUMAN RIGHTS IN THE ARMED FORCES: FREEDOM OF OPINION AND EXPRESSION 16 and 21 (1976).
186 Id. at 23. See also id. at 25, citing Penal Code, Article 161, applicable in time of war. Turkey, it should be noted, adopts the unaccepted "passive personality" theory of jurisdictional competence that would permit punishment of aliens for acts committed abroad.
187 SPANISH CONST. art. 12 (emphasis added).
188 See INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, BULLETIN 9 (Oct. 1976).
189 See N.Y. Times, April 29, at 12, col. 3; see also id., March 1, 1978, at 10, col. 1 (trial of actors in play for "insulting the armed forces").
190 See N.Y. Times, Feb. 16, 1977, at 10, col. 5; N.Y. Times, June 18, 1975, at 9, col. 1. On the practice of torture in Spain, see also AMNESTY INTERNATIONAL, supra note 65, at 165-68.
anarchist, separatist and other groups which advocate violence"; anyone who declared "their approval" of or sought to justify "terrorist acts;" anyone who praised "those committing such acts;" anyone who criticized the legal sanctions punishing them; and anyone who sought "to diminish the independence and prestige of the courts by means of demonstrations of solidarity with the defendants." Terrorist suspects could be held incommunicado—thus without the protection of the media—and the state could "suspend the publication of materials and/or the right to exercise the profession of a publisher, editor and news writer" for the types of support or criticism outlined above. The press has since been ordered to remain silent in several instances and detainees can still be held incommunicado.

The Spanish government had defended its 1975 Anti-terrorist Decree Law as one not dissimilar to those recently enacted in France, Italy and the United Kingdom and under consideration in the Federal Republic of Germany. Although it is no defense to violations of fundamental human rights that there exist other state violators, Spain's assertion was, factually, too nearly correct. Those countries do prohibit a free dissemination of information. For example, Italy punishes offenses against "the personality" of the state as well as the dissemination of "propaganda" for outlawed organizations. Article 21 of the Italian Constitution also permits restrictions of expression and public demonstrations that are contra bonos mores (against public morals). Such has been interpreted to allow restriction on the basis of the protection of the rights of others or overriding interests of the public weal, regardless of the necessity for such restrictions. Similar constitutional or penal restrictions exist in France, Belgium, Switzerland, and Denmark. All prohibit speech or writings used to solicit the commission of a criminal offense.

In the United Kingdom, the 1974 Prevention of Terrorism Act prohibits several types of speech or conduct associated with free speech and/or the

191 Decree Law (Aug. 27, 1975), art. 10.
192 See id., arts. 13 and 19. An estimated 500 government critics were apprehended within the first six months of the implementation of the decree, but it was opposed by several segments of the Spanish population, including the Spanish Bar Association, and the portions of the 1975 decree which directly muzzled the media were deleted in a revised anti-terrorist decree. See INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, BULLETIN 8, (April 1976); and Spain Decree Law (Feb. 6, 1976).
193 See note 190 supra. Further, the Spanish government has suspended constitutional rights from time to time by anti-terrorist decrees. See N.Y. Times, Jan. 29, 1977, at 1, col. 1.
196 See also note 185 supra, at 19, 21.
197 Id. at 19-20, citing arts. 10 and 11 of the Declaration of Human and Civic Rights.
198 Id. at 24, citing Belgium Penal Code, art. 97.
199 Id. at 20.
200 Id. at 19, citing Denmark Constitution, art. 77.
201 Id. at 22-23. See also id. at 20 (Belgium).
freedom of association. Under Part I of the Act, criminal penalties can be imposed after summary conviction on any person merely for professing to belong to an outlawed organization; for solicitation of support for such an organization; for arranging, helping to arrange, managing or addressing any meeting of three or more persons knowing that the meeting is "to support or further the activities of a proscribed organization;" or for wearing "any item of dress" or wearing, carrying or displaying "any article in such a way as to arouse reasonable apprehension that he is a member or supporter of a proscribed organization." Let the brightly dressed tourists beware! Such is the sad state of the rights of Englishmen in the 1970s.

In West Germany, the government apparently has not gone quite that far, even after recent terrorist incidents and, what some have termed, a resurgent anti-intellectualism and a conservative intolerance amidst the stresses and uncertainties of this quarter century's economic difficulties. However, the West German Penal Code prohibits the dissemination of written matter or use of the radio in order to "glorify violence" or to incite others to racial hatred. The West German Constitution also allows media restrictions in order to protect the rights of others, including "the protection of youth" and "personal honour," apparently without the human rights law need to demonstrate the necessity for such action. Newer anti-terrorist measures have banned communists and members of other groups agitating against the state from teaching and certain civil service jobs, and have also denied terrorists in prison any access to their own attorneys. There have also been news "blackouts" concerning the anti-terrorist activities of the government. What is as yet unknown is the reason why such overly broad restraints of fundamental human rights and freedoms, which are in no way related to the standard of necessity within democratic process limits, have not been
challenged under the 1950 European Convention on Human Rights, through
the world’s presently most viable international protection machinery.\textsuperscript{210}

\textit{The Peoples Republic of China}

The governmental suppression of free speech and publication is so effec-
tive in China that little is known about actual arrests and restraints. As the
New York Times reports:

China is in many ways the most tightly controlled nation on earth. Part of
the explanation resides in the history of China, where the concept of in-
dividual freedom has alway been weak and the concept of social and political
conformity has been strong. Today, Communism has combined the confor-
mist tradition of the Chinese past with the techniques and organization of
modern totalitarianism to create a unique system for controlling people’s
lives.

In a real sense, Chinese society itself is organized as a security system as
much as it is organized as an economic system or a social system. Every con-
stituent organization shares responsibility for security and control.

China imposes controls over areas of life that are matters of free in-
dividual choice even in other authoritarian countries and police states.\textsuperscript{211}

In a very real sense, the re-education of the dissenter mentioned by Plato in
philosophic writings\textsuperscript{212} and implemented so well by Mao Tse-tung must add
to the controls and to our lack of knowledge thereof.\textsuperscript{213} Foreign reporters
have been expelled from China for writing about the problems concerning
human rights deprivations there, however, so we have some input.\textsuperscript{214}

\textit{South Korea And Other Asian States}

North Korea has been described by Amnesty International as “a
thoroughly inaccessible country”\textsuperscript{215} and by \textit{Le Monde} as the “most closed
society in the world.”\textsuperscript{216} What we know about South Korea, which is describ-
ed by Freedom House as “partly free,”\textsuperscript{217} however, is appalling. South Korea

\textsuperscript{210}See 1950 European Convention on Human Rights, 213 U.N.T.S. 221 (1950), arts. 5-11;
19-60. See generally, L. Sohn, T. Buergenthal, \textit{International Protection of Human Rights
999-1265} (1973).

\textsuperscript{211} N.Y. Times, Oct. 11, 1977, at 2, col. 3. Freedom House lists China as “not free.” See
N.Y. Times, Dec. 22, 1976, at 12, col. 2. See also Amnesty International, \textit{supra} note 65, at
141; McDougal, Lasswell & Chen, \textit{supra} note 4, at 4 n.8, 6 n.11; N.Y. Times, Dec. 23, 1975, at
3, col. 1; N.Y. Times, Dec. 28, 1974, at 4, col. 3.


\textsuperscript{213} See also Literature of Dissent Rises in China, N.Y. Times, Dec. 13, 1977, at 1, col. 1,
disclosing cases of forced re-education and censorship and the fact that during the Cultural
Revolution all writings except Mao’s were banned.

\textsuperscript{214}See N.Y. Times, Nov. 26, 1977, at 7, col. 1 (Canadian reporter).

\textsuperscript{215} See Amnesty International, \textit{supra} note 65, at 144.

\textsuperscript{216} See note 45 \textit{supra}.

\textsuperscript{217} Freedom House.
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prohibits "anti-national" organizations as well as certain conduct potentially thwarting of a free media, such as praising, encouraging or assisting anti-national organizations. South Korea also punishes "[a] person who insults or defames the envoy of a foreign country" another overly broad measure potentially thwarting of free speech and publication. Perhaps the broadest attempt at communication control by decree is contained in the South Korean Presidential emergency measure of 1975 which prohibits fabrication or dissemination of any "falsehood," the making of any false presentation of fact, or any public defamation of the emergency measures. Similarly broad measures of media control for "social purification" purposes include bans on certain music, certain words, and purportedly obscene T-shirts.

In South Korea, journalists and writers are imprisoned for political reasons, former or present political and religious leaders are imprisoned for criticism of the government and human rights activists and lawyers who criticize the government or demand freedom of the press and an end to the persecution are themselves imprisoned or followed constantly by police. In South Korea, most of the arrests are made secretly "and all mention of them [is] censored from the Korean press, television, and radio." In my opinion, then, it is hazardous to list South Korea as even "partly free" and I seriously question the long-term relevance to our foreign policy interests of our continued support of such a dictatorship.

Similarly, one must question the Freedom House listing of Indonesia and the Philippines as "partly free." At least twenty-one legislators are being held in Indonesia without trial, the worst record in this instance. Indonesia has an equally poor record with regard to imprisoned journalists, at least twenty. Recently, Indonesian military officers ordered the closing of seven

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218See National Security Law (No. 549); Anti-communist Law (No. 643).
219See KOREAN PENAL CODE, Pt. II, Chpt. 4, art. 108(2).
221See N.Y. Times, Sept. 20, 1976, at 11, col. 1. One of the "subversive" songs banned is "We Shall Overcome."
222See N.Y. Times, April 29, 1977, at 12, col. 3; N.Y. Times, April 17, 1977, at 13, col. 1 (poet and 4 journalists). See also McDougall, Lasswell, & Chen, supra note 4, at 8 n.18; DIGEST OF UNITED STATES PRACTICE, supra note 220.
226See also Cohen, Lawyers, Politics, and Despotism in Korea, 61 A.B.A.J. 730 (1975).
227See note 91 supra.
228See N.Y. Times, Sept. 6, 1977, at 6, col. 3.
229See N.Y. Times, Nov. 11, 1977, at 9, col. 1; N.Y. Times, April 29, 1977, at 12, col. 3.
newspapers. An official of the Association of American Publishers has stated that Indonesian officials admit to some "750,000 arrests after 1965, and those figures do not include the half million people officially estimated to have been killed in reprisals after the unsuccessful coup." The official adds:

In 1975 Indonesian Foreign Minister Adam Malik claimed that "only" about 20,000 political prisoners were still being held, but Amnesty International has determined that there are at least 55,000 . . . probably about 100,000.

As the former Indonesian Prosecutor General, Sugih Arto, explained to foreign journalists in Jakarta in 1971, "Local commanders have the power to arrest and interrogate any person under suspicion of being a threat to national security. These people can be held for an unlimited period [without reporting] such security arrests to the central command in Jakarta."

In the Philippines the oppressive patterns are repeated, but to a lesser extent. Journalists, legislators, religious leaders, and human rights advocates who speak out have been imprisoned without trial—most of them since President Marcos proclaimed martial law in September 1972. Unfortunately, freedom of speech and press is worse in much of Asia, including Vietnam, Cambodia, Thailand, Malaysia, and Burma. Press restrictions and political imprisonment of journalists also exist in Taiwan and Singapore, states that Freedom House lists as "partly free."

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232Id. Such numbers are confirmed at N.Y. Times, Dec. 21, 1977, at 9, col. 1.


234See Notes 228-29 supra; Activist Clergy Bear Burden of Arrests in the Philippines, N.Y. Times, Nov. 12, 1977, at 2, col. 3; N.Y. Times, July 31, 1977, at 9, col. 1 (International Commission of Jurists report denials of free speech and press, habeas corpus, and so forth); Amnesty International, Matchbox 9, 15-16 (Fall 1977); DIGEST OF UNITED STATES PRACTICE. supra note 220, at 228-29; Marcos refers to his government as "constitutional authoritarianism." See Power of Philippine Ruler Growing, N.Y. Times, Jan. 9, 1978, at 1, col. 5. A similar term is used in Chile, see text accompanying note 207 supra.

235See N.Y. Times, April 29, 1977, at 12, col. 3.


237See N.Y. Times, Oct. 7, 1977, at 8, col. 1 (press censorship as well as dictation as to what to print). See also Burma Seditious Meetings Act, art. 4; BURMA PENAL CODE, art. 124B.

238See note 235 supra; N.Y. Times, June 27, 1977, at 9, col. 1; N.Y. Times, Nov. 29, 1976, at 5, col. 1. See also AMNESTY INTERNATIONAL, supra note 65, at 140 (under martial law for over two decades); McDougal, Lasswell & Chen, supra note 4, at 6 n.12, 8 n.18.

239See note 235 supra; AMNESTY INTERNATIONAL, Matchbox 5 (Fall 1977). See also AMNESTY INTERNATIONAL, supra note 65, at 141, adding: "Throughout the 1960's and early 1970's the Singapore government used political detention as an instrument for containing dissent."

240See note 45 supra.
Further toward the west, freedoms of speech and press and the principle of self-determination are similarly thwarted—now much more in Afghanistan, Nepal and Pakistan than in India. India, however, suffered greatly under Indira Gandhi's Emergency Proclamation of June 26, 1975, another overly broad national security measure that suspended freedoms of speech and press and led to the imprisonment of thousands. Such measures were denounced by many as violations both of international human rights and domestic law, which might have contributed to Indira Gandhi's downfall.

As in so many cases, the normal judicial processes were halted under power elite (the word is either "national" or "state") security measures. Lawyers who were not jailed, in self-imposed exile, or in the service of the state, as well as the more normal legal writs of habeas corpus, were rendered politically and legally nugatory. Instead of human rights and international standards of authority, "matters of state" and the "functioning of public service and administration" conditioned the Indian Supreme Court decisions to uphold government claims to control the Indian people and their thoughts. Courts easily fall in line when political leaders, journalists, attorneys and others outside the judicial halls are imprisoned; but this court went a little further. Not only did the Supreme Court refuse the writ of habeas corpus, and thus exclude word from the imprisoned, but it also refused to see the government's files on detainees who could not be charged with ordinary crime: "[m]aterial and information on which orders of preventive detention are passed necessarily belong to a class of documents whose disclosure would impair the proper functioning of [the state as well as its] intelligence reports."

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With the Indian Emergency Proclamation, there came the suspension of several human rights and constitutional freedoms, including a ban on anti-government organizations, protest marches and demonstrations, parliamentary elections (the word was "postponed"), the Press Council, and freedoms of speech and press. See N.Y. Times, Feb. 18, 1976, at 10, col. 1; N.Y. Times, Jan. 29, 1976, at 3, col. 1; N.Y. Times, Jan. 18, 1976, at 12, col. 1. In fact, at least thirty members of Parliament were imprisoned, five U.S. journalists were expelled, two British journalists were expelled, and the Indian Information Ministry controlled the content of all newspapers under a law that sought "the prevention of publication of objectionable matter" and administrative "guidelines" to prevent criticism and "defamation" of Indira Gandhi and those still in the government. See id.; V. Nanda, supra note 234, at 30-33.

242See supra note 234; and N.Y. Times, March 5, 1976, at 6, col. 4.

243See Nanda, supra note 241, at 27-30; N.Y. Times, April 29, 1976, at 1, col. 5; N.Y. Times, July 30, 1975, at 2, col. 1; N.Y. Times, July 24, 1975, at 1, col. 7. See also N.Y. Times, Dec. 21, 1977, at 12, col. 1 (full judicial powers have not yet been restored).

244See Nanda, supra note 241, at 25 and 28-30, noting, however, occasional outcries and bar resolutions and the government's response: "even the families and relatives of such attorneys were not spared police wrath."

245See id., at 29, citing Chief Justice Ray in one of the decisions.
whose confidentiality is beyond reasonable question." That is how controls are cemented and how courts abdicate their responsibility not only under domestic law but under international law.

Professor Ved Nanda has also documented the extent to which decrees or legislation in India prohibited speech. He writes that such measures prohibited "any words, signs or visible representations considered defamatory . . . or which are likely to [b]ring into hatred or contempt or excite disaffection towards the Government . . . [as well as] 'any activity prejudicial to the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, public order, decency or morality.'" One would almost speculate that somewhere there exists a school for the learning of comparative approaches to repression. Also prohibited in the India versions was publication of "opposition speeches in Parliament, details of court proceedings, names of detainees and their places of detention, demonstrations . . . and matters critical of the government," in response to which Professor Nanda added: "This blanket of silence imposed on the Indian press and people denies not only the freedom of expression but the concomitant right to impart and receive information, a right basic to democratic society."

If Professor Nanda were writing about India's neighbor, Pakistan, the same conclusions might well inescapably follow. Pakistan, so competitive with India in many ways, also censures its media and imprisons its legislators, its journalists and critics. Although the new military regime announced recently that radio and television media were to be free from controls, pro-government journalists were substituted for ousted pro-former-government journalists in the government controlled group of newspapers. Additionally, the government announcement noted that the electronic media were bound "by Islamic ideology, national integrity and Pakistan's cultural values." Two months later, some thirty journalists and newspaper workers were arrested during a protest over the closing of an Urdu-language paper. Still prohibited under the Prevention of Anti-National Activities Act is "anything" that has "anti-national" effects, "whether by committing an act or by words,

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247 Id. at 31-32.
248 Id. at 32.
249 Id. at 33. See also id. at 57-58 (flagrant violations not justified under human rights instruments as "strictly required by the exigencies" of a serious national emergency).
250 See N.Y. Times, Sept. 6, 1977, at 6, col. 3 (Pakistan is second only to Indonesia in present imprisonment of legislators). See also N.Y. Times, March 1, 1978, at 6, col. 3 (political activity blamed).
253 Id.
254 See N.Y. Times, Dec. 8, 1977, at B6, col. 3. See also note 251 supra.
either spoken or written, or by signs or by visible representation or otherwise” [tourists beware here as well], including the disclaiming, questioning or disrupting of “sovereignty” and the expression of views “that the citizens of Pakistan comprise more than one nationality.”

An anti-terrorist Pakistani Presidential proclamation empowered “special” courts to try violations of the Anti-National Activities Act, as well as other acts and rules, and placed the ultimate burden of proof on the accused to show his innocence. Another broad measure empowers the government to make such rules as appear to it as necessary or expedient for ensuring the security, public safety, public interest, or the defense of Pakistan.

The Middle East

Freedom House lists all of the Middle East except Israel as being either “not free” or “partly free.” With such governmental conditions, it is not surprising to read of the political imprisonment of journalists and curtailment of press freedoms or open governmental control. Apparently unique to the region, however, is the abduction of foreign journalists from one Mid-East country to another. In Lebanon new government censorship, administered directly by the National Security Agency, and bans on newspapers that criticize new censorship decrees, publish false news or publish reports of violence within Lebanon have changed Lebanon’s reputation as the state with the freest media in the Arab world. The reputation of other Mid-East states has not changed for the better. For example, Amnesty International reports tight controls over criticism of the government in Iraq and Syria, and, as an example of a similar prohibition, the Iranian Criminal Code prescribes the use in public of “offending terms” against the Shah.

Even Israel, the most democratic state in the area, imprisons Arab scholars and writers without charges or a trial. Israel has detained Arabs

257 Defense of Pakistan Ordinance (1971).
258 See N.Y. Times, Dec. 22, 1976, at 12, col. 2. See also AMNESTY INTERNATIONAL, supra note 65, at 205-17.
259 See N.Y. Times, April 29, 1977, at 12, col. 3 (Bahrain, Syria).
261 See N.Y. Times, Aug. 10, 1977, at 2, col. 3 (French journalist abducted in Lebanon and taken to Syria).
262 See N.Y. Times, Jan. 12, 1978, at 6, col. 6; N.Y. Times, July 16, 1977, at 5, col. 1; N.Y. Times, July 5, 1977, at 4, col. 3; N.Y. Times, June 6, 1977, at 13, col. 1, adding justifications that the press was responsible for “fanning the Civil War” and “importing foreign ideologies.”
263 See AMNESTY INTERNATIONAL, supra note 65, at 210-11 and 217.
264 IRAN CRIM. CODE, Sec. III, art. 81.
265 See INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, BULLETIN 11-12 (April 1976). See also Hassoueyn v. Minister of Defense, 51 JUDGMENTS OF THE SUP. CT. 272 (Case No. 128/59, Israel)
for political and military reasons under inherited British Mandate Emergency (Defense) Regulations,\textsuperscript{266} regulations that prominent Israelis had previously condemned.\textsuperscript{267} The regulations also provide for censorship and restrictions upon freedoms of speech and press. The actual military decisions made thereunder are rarely reviewed by Israeli civilian courts—the reason: state security.\textsuperscript{268}

Although Israel has allowed the publication of newspapers that are very critical of Israel and governmental practices,\textsuperscript{269} publication of any paper is subject to license requirements under "paragraph 4 of the Newspapers Ordinance, a remnant of the British Mandatory government."\textsuperscript{270} Under the ordinance, the Minister of the Interior can ban any newspaper publication "if in his opinion it is likely to 'disturb the peace' or if it 'publishes false reports' likely to cause alarm or despair,"\textsuperscript{271} very broad criteria that one finds in the emergency decrees of several "not free" states. Military regulations also prohibit the free importation of publications and provide for five years of imprisonment and/or fines in case of violation.\textsuperscript{272} Also relevant to prohibitions of free speech and press are the Israeli bans on certain political organizations and the placing of individuals under "special supervision" and detention.\textsuperscript{273}

\textbf{ALTERNATIVES TO GOVERNMENTAL CONTROL}

\textit{The Role of the Judiciary}

The Supreme Court decision concerning publication of the classified Pentagon Papers makes it highly unlikely that the Court will allow broad (forced residence imposed upon writer of a pamphlet seeking support of a political party). The court refused to review acts of the military in the above case, as in many others. \textit{See note 268 infra.}

\textsuperscript{266}British Mandate Emergency Regulations.
\textsuperscript{268}\textit{See, e.g., Ismail Ali v. The Inspector of Police, 7 JUDGMENTS OF THE SUP. CT. 913 (Case No. 197/55, Israel); Subhi Al-Ayyubi v. Minister of Defense, 10 JUDGMENTS OF THE SUP. CT. 105 (Case No. 46/56, Israel); Hassoueyn v. Minister of Defense, 31 JUDGMENTS OF THE SUP. CT. 272 (Case No. 126/59, Israel); Abu Hili v. Govt. of Israel, 27 P.D. 169 (Israel 1973); Harnon, \textit{Evidence Excluded by State Interest}, 3 ISRAEL L. REV. 387 (1968). I am grateful to Sami Jadallah, J.D. Indiana University, 1977, for research in this area.}
\textsuperscript{269}\textit{See Stendel, The Rights of the Arab Minority in Israel, 1 ISRAEL Y.B. ON HUMAN RIGHTS 134, 148 (1971). See also M. Shamgar, The Observance of International Law in the Administered Territories, 1 ISRAEL Y.B. ON HUMAN RIGHTS 262, 272 (1971). All news organizations, however, are under military censorship. N.Y. Times, March 19, 1978, at 11, col. 1.}
\textsuperscript{270}Stendel, supra note 269, at 148.
\textsuperscript{271}Id. at 149; cf. Kol Ha'am Co Ltd., 7 P.D. 871, \textit{cited id.} ("reasonable likelihood" test, emphasis added). \textit{See also Sabri Jiryes 18(4) P.D. 679, cited id. at 145.}
\textsuperscript{272}See id. at 442-43 (Importation and Distribution of Newspapers Order).
\textsuperscript{273}See id. at 144-47, 427-28; notes 265-67 supra.
legislative and/or executive controls of the media such as those extant in far too many foreign countries. In the Pentagon Papers case Justice Brennan declared that only "proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."\textsuperscript{274} In another Supreme Court case, Justice Black also stressed the need for open criticism of governmental officials and agencies "[b]ecause of the very nature of or democracy," adding that "[g]overnment censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise [of an indirect measure] than if it should be attempted directly."\textsuperscript{275} Additionally, it has been declared that the "basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda . . . ."\textsuperscript{276} More directly relevant to the survey of foreign trends in human right oppression and the dangers posed to our own society, however, are the words of Justice White:

\begin{quote}
We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.\textsuperscript{277}
\end{quote}

Nevertheless, in our constitutional history there are judicial expressions so overly broad in their permission of state control of the media as to serve the interests of totalitarians and obviate the shared meanings of freedom of speech and democracy. One such case, one that could have been cited by power elites in South Africa or South Korea, is \textit{Gitlow v. New York}.\textsuperscript{278} In \textit{Gitlow}, the Court stated: "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."\textsuperscript{279} I must question such criteria for control however, for these very standards are far too ill-defined, too broad for

\begin{footnotes}
\textsuperscript{278}268 U.S. 652 (1925).
\textsuperscript{279}Id. at 667.
\end{footnotes}
the maintenance of a free competition of ideas, criticism of governmental officials and their actions and a free flow of information which is needed for rational decision and the process of authority whereby the will of the people is informed, shaped and expressed. Words such as "inimical to," "tending," and "disturb" are so obviously broad as potentially to allow the sorts of totalitarian controls of music, speech and press that one finds, for example, in South Korea or the Soviet Union. Further, such overly broad criteria would not meet the test for permissible state derogations of human rights to free speech and press that one finds some twenty-three years after the court opinion was written in the 1948 Universal Declaration of Human Rights. The test there is necessity within democratic limits, not things "tending," things that "disturb" or things "inimical." Although "just" and "strict" requirements might relate to the same type of public concerns mentioned in Gitlow (e.g., general welfare, morality and public order), the degree of public danger that authorizes restrictions on the individual must be so high as to pose a "just requirement" or "strict requirement" under the circumstances—something even beyond "clear and present danger." Similarly, a "compelling" interest may hardly be the same as a "just" and "strict" requirement under specific circumstances. Although dangers to "compelling" interests may be more important than dangers to any sort of interest, neither might necessitate action or pose such a clear and present danger that measures of restraint are justly required. More compatible with the human rights standard are other qualifying words of the Supreme Court. For example, in Brandenburg v. Ohio the Court pointed out that mere advocacy of violence is permissible, that there must be advocacy "directed to inciting or producing imminent lawless action" and it must be likely that such action will result before permissible restraints may be imposed. In Dennis v. United States, language also appears that supplements either a necessity or "imminent lawless action" test. Several other cases add a related qualification that is somewhat akin to the human rights "strict requirement" test, for the courts have declared that prior restraints of free speech "cannot be

280 See, e.g., 1948 Universal Declaration of Human Rights, art. 29(2); 1966 Covenant on Civil, and Political Rights, arts. 4(1), 18(3), 19(3); cf. art. 20 (incitement to violence).
284 Id. at 447.
285 See note 276 supra, at 510 ("as is necessary to avoid the danger"), citing Judge Hand, 183 F.2d 212; and id. at 585 ("must be some immediate injury to society . . ."). Douglas, J., dissenting; contra id. at 581 ("the teaching of methods of terror and other seditious conduct should be beyond the pale," Douglas, J., dissenting). The "necessary to avoid the danger" test was also cited in Nebraska Press Assoc. v. Stuart, 427 U.S. 559, 562 (1976); see also id. at 571 ("necessity") (Powell, J., concurring).
upheld if reasonable alternatives are available having a lesser impact on first amendment freedoms."^{286}

Furthermore, in consideration of the interests at stake and which relate to the necessity of "imminent lawless action" tests, "governmental" interests\(^{287}\) as such should never be confused with the "just requirements of morality, public order and the general welfare in a democratic society." These are not simplistically always the same. For these and similar reasons, I cannot accept the claim that "incitement to violence" is always a justification for governmental control of the media when violence is imminent. Contrary to certain case language,\(^{288}\) the problem demands, like so many others, an awareness of all relevant features of context and all legal policies at stake.\(^{289}\) In certain contexts, violence may be necessary to oppose a tyrant or an oppressive government.\(^{290}\) As President Abraham Lincoln said even in the midst of civil war: "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending, or their revolutionary right to dismember or overthrow it."\(^{291}\) Indeed, state constitutions within the United States consistently recognize the right of the people "to reform, alter, or abolish government" in any way they so desire.\(^{292}\) Violence engaged in by the predominant majority of a society for such purposes could be constitutionally permissible and thus not "lawless" within the meaning of \textit{Brandenburg}.\(^{293}\)

A final comment on the judiciary concerns the three general methods whereby international legal standards, such as the right to freedom of speech and press and the standard of "just" and "strict" requirements within democratic limits, are incorporable under constitutional law. The three methods of incorporation are: (1) direct incorporation of human rights law as


\^{287}\textit{For evidence of use of "governmental" interests, see note 282 supra; Paust, supra note 6, at 243.}


\^{289}\textit{See also} McDougal, Laswell & Chen, \textit{supra} note 4, at 15.


\^{291}\textit{First Inaugural Address, LINCOLN'S STORIES AND SPEECHES 212 (E. Allen ed. 1900), cf. id. at 209-10.}

\^{292}\textit{See Paust, supra note 6, at 243 n.36, 262 (right of revolution). See also} DECLARATION OF INDEPENDENCE (1776); DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS (1775).

\^{293}\textit{See also supra} notes 290-92; and J. PAUST & A. BLAUSTEIN, WAR CRIMES JURISDICTION AND DUE PROCESS: A CASE STUDY OF BANGLADESH (1974).
supreme law of the land under article VI, clause 2 of the United States Constitution, with use of judicial precedent like The Paquete Habana case; indirect incorporation of human rights law as part of relevant standards useable by judicial and other decision-makers confronted with the task of interpreting the specific content of amendments to the Constitution (such as the first, fifth or eighth amendments); and (3) mirrored, equivalent incorporation of human rights law as reflective of a part of the relevant constitutional rights of all persons that are retained under the ninth amendment to the United States Constitution. An awareness of the rich and complex interpenetrations of international and domestic legal processes is critical to an adequate approach to decision about free speech and press and the values of human dignity. Furthermore, awareness of the ways in which international legal standards are integrated into domestic law will allow the courts to pattern their decisions in accordance with global expectations. In particular, courts can discover and utilize the preferred necessity within democratic limits test when confronted with state claims to derogate from the human and constitutional right to free speech.

Human rights are guaranteed in international law through several international treaties as well as general norms of customary law. The most significant treaty guarantee is found in the United Nations Charter which, itself, is a part of the treaty law of the United States. Since the United Nations Charter contains the express pledge of the United States to establish respect for and observance of human rights, this obligation is itself a part of the supreme law of the land through article VI, section 2, of the Constitution. Thus, whether through the ninth and other amendments to the Constitution or through the United Nations Charter and article VI, section 2, United States governmental bodies must respect and ensure respect for fundamental human rights whether or not specific human right treaty provisions or specific human rights implementary legislation exist. Since these constitutional

175 U.S. 677, 700 (1900).
294 See U.N. CHARTER, preamble and arts. 1, 2, 55(c) and 56.

It can also be argued that the 1964 Civil Rights Act implemented general human rights law, since human rights are protected by art. VI, cl. 2 and the ninth amendment and are, thus, part of federal and constitutional law. In this regard, it is also significant that a Senate committee, during hearings on an alternative draft of the 1964 Civil Rights Act, seemed intent on implementing the human rights provisions of the U.N. Charter through the legislative proposal before the committee. See statements of Senator Prouty and Secretary of State Rusk, S. Res. 1932 (88th Cong., 1st Sess.) 1963, Hearings before the Committee on Commerce, 88th Cong., 1st Sess., ser. 26, pt. 1, at 285, 507 (1964). See also Heart of Atlanta Motel v. U.S., 379 U.S. 241, 291 (1964) (human dignity purpose).
amendments and relevant treaty provisions are also binding on state and local governmental bodies, it is evident that decision-making with respect to questions of human dignity must address the need for rational decision that seeks to serve general legal policies at stake and considers all of the relevant community and individual interests.

Not only must state decision-makers address and yield to the policy or provisions of "a treaty or of an international compact or agreement" when a national interest is demonstrated and the policies at stake do not impair fundamental Constitutional rights or powers, but state decisions which stand as a barrier to the fulfillment of our national pledge in the United Nations Charter to promote respect for and observance of human rights and fundamental freedoms for all must be condemned and struck down by the courts. Moreover, as declared in Asakura v. City of Seattle, the Supreme Court will strike down any state laws or municipal ordinances which conflict with international treaty law. The Supreme Court also held that international treaty law "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." Further, as the Supreme Court declared in The Paquete Habana:


Oyama v. California, 332 U.S. 633, 679 (1948) (Murphy & Rutledge, JJ., concurring). See also id. at 649-50 (Black & Douglas, JJ., concurring); United States v. Pink, 315 U.S. 203, 230-31 (1942), adding: "state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement" (emphasis added); Hines v. Davidowitz, 312 U.S. 52 (1941); United States v. Belmont, 301 U.S. 324 (1937); Nielsen v. Johnson, 279 U.S. 416 (1920); Asakura v. City of Seattle, 265 U.S. 312 (1924); Missouri v. Holland, 252 U.S. 416 (1920); Haustein v. Lynham, 100 U.S. 483 (1879); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812); and Ware v. Hylton, 3 U.S. (Dall.) 199 (1796). The only case to the contrary was a California decision made in an aura of noted racial hysteria; Sei Fujii v. Calif., 38 Cal. 2d 718, 242 P.2d 617 (1952). The Sei Fujii decision is not only contrary to every relevant U.S. Supreme Court decision but is highly controversial and, in the opinion of this author, incorrect. See Paust, supra note 6, at 233. Further, in direct conflict with the statement in Sei Fujii that certain treaty provisions are not "self-executing" and require implementing legislation at the federal level before they become part of the supreme law of the land was the holding in Asakura v. City of Seattle, supra that a treaty for the protection of certain persons "operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." See also The Paquete Habana, 175 U.S. 677 (1900); Strother v. Lucas, 37 U.S. (12 Pet.) 410, 438 (1838).

Id. See also Maiorano v. Baltimore & O.R.R., 213 U.S. 268, 272-73 (1909), stating: "A treaty . . . is the supreme law of the land, binding alike National and state Courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights;" The Paquete Habana, 175 U.S. 677 (1900); Ex parte Quirin, 317 U.S. 1, 27-28 (1942) (private rights); Hilton v. Guyot, 159 U.S. 113, 168 (1895) (private rights); Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598-99 (1884) (private rights).

In case of conflict with a Constitutional Amendment, however, treaty law must yield to the Constitution in domestic legal process. See Reid v. Covert, 354 U.S. 1, 16-17 (1957); Asakura v.
International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.303

The human right of all persons to freedom of speech are such matters of right. As the author has explained elsewhere,304 recognition of the direct integration of human right standards for judicial decision-making will guarantee more adequately both the fulfillment of our international obligations and the effective implementation of Constitutional rights.

Human rights standards have been utilized by the Court in numerous decisions. Quite often an indirect incorporation of human rights law into constitutional law has occurred through use of human rights as relevant standards of constitutional right and rights content. Thus, human rights law has been utilized either to identify the existence of rights guaranteed within the first nine amendments to the Constitution or, as an interpretive guide, to identify and clarify the more detailed content of extant constitutional rights.

As disclosed in other writings,305 the Court has also utilized broader criterial referents to generally shared legal expectation; for example: something "universally thought,"306 a dynamic and "universal sense of justice,"307 the unanimity of civilized nations of the world,308 and the international "custom of war."309 The utilization of international laws of war and human rights is not at all unusual, since a basic expectation of the Founding Fathers had been that the Rights of Man are to be protected under the Constitution310 and it is a truism that universal rights must necessarily be our own. Moreover, there is often useful detail or specificity under these international standards. It is not unlikely that a court seeking guidance and a ra-
tional approach to the serving of inherited expectations and basic legal policies would utilize international legal standards to determine the generally shared expectation about "cruelty," "inhumanity" or "human dignity" which can provide legal content to such phrases. This seems especially so when the same word or phrase is used in both international law and domestic legal process, there is a long history of such a usage, and the uniform opinio juris of humankind is quite clear.

It should be as self-evident now as it was in 1776 that human rights must necessarily be our own. Indeed, to Jefferson, Paine, Madison and others, these rights were fundamental to the process of authority and "what the people are entitled to against every government on earth . . ." But if these Rights of Man (human rights) were not specified with particularity in the Constitution, how were they to be incorporated into the constitutional framework of powers, rights and fundamental policies? In another article, the author concludes that human rights law is part of our law through specific enumerations of right or policy and through the explicit guarantee of retained rights in the ninth amendment, which states that "[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Documented human rights are sufficiently particularized to give more detailed and useful content to expressions that our courts do not hesitate to use, such as "the traditions and collective conscience of our people" or a "universal sense of justice." Human rights are not only perceived by many to be among the fundamental expectations that the courts should address, but they provide greater guidance for rational and policy-responsive decision-making. Moreover, our society arose under Natural Law expectancies of the existence of universal Rights of Man—rights that could exist even though they were not printed somewhere with black and white particularity. Today, with an improved articulation of the nature and content of the Rights of Man, it is far easier for our courts to make empirical inquiries into the actual boundaries of rights content and to identify the existence of general rights that are nowhere enumerated specifically within the Constitution. With the development of human rights law, then, there is a rich field of basic human legal expectation which is ripe for judicial discovery and use.

Furthermore, when utilizing basic human rights law to supplement retained rights of our people under the ninth amendment the courts will not only be performing a more rational, objective decisional task than the use of phrases such as "traditions and collective conscience" or a "universal sense of

311See IV WRITINGS OF THOMAS JEFFERSON 477 (Ford ed. 1894). See also note 297 supra.
313See also note 6 supra; Louisiana ex rel. Francis v. Reswebar, 329 U.S. 459 (1947); People of Saipan v. U.S. Dept of Interior, 502 F.2d 90 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975); Ex parte Quirin, 317 U.S. 1 (1942).
justice" seems to suggest, but the courts will be performing a proper judicial function—the discovery and interpretation of fundamental rights of man which already exist and are retained by the people under the ninth amendment.

Some Recommendations

Although very few writers have addressed the problem of media roles in response to terrorism, all known writings recognize the special problem of media sensationalism, advertisement and propagation of terrorism. All writers also recognize a special responsibility of the free media to avoid being unduly manipulated by terrorists and contributing too much to the undesirable effects of terrorism; but all stress, significantly, that the media must be free from governmental control. Governmental censorship is uniformly condemned.

Perhaps exemplifying all writings to date is the Final Document of a private Conference on Terrorism and Political Crimes held in 1973 in Italy. Relevant portions of the document read:

1. The problem of sensational press reports concerning terrorism, which encourage and promote future terrorism, suggests that the mass media has the responsibility of exercising restraint in this regard.
2. Recognizing the basic human rights to free speech and freedom of information, and condemning any attempts at censorship, it is nonetheless necessary that the mass media establish guidelines and procedures for reports on terrorism and violence.
3. Consideration should be given by the mass media to the establishment of a press council or council of editors, representing all forms of mass media, which would meet periodically to regulate this problem. (Such a procedure is presently employed in certain countries).

One of the conference participants, Franco Salomone, presented a paper on terrorism and the media. The paper pointed out that newspapers and other printed media may pose fewer problems with regard to actual sensationalizing and shock effects as compared to the effects of electronic media (e.g., radio and television), since the printed media reaches fewer members of any given populace and often reaches them after terrorist events have become known through the electronic media. Such a fact might lead to certain distinctions in media responsibility and responses, but Salomone was unwilling to explore

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315See note 6 supra.
the matter further. In fact, he rightly pointed out that in order to decide these and similar questions "we must have some empirical data to indicate among other things the degree to which any restrictions on the mass media are likely to have a beneficial effect on the control of terrorism." He added: "There is no data on this point and therefore it is difficult to propose any plan on the basis of untested if not uncertain assumptions." All the more reason exists, therefore, to avoid deprivations of human rights to free speech and press.

With regard to media standards, Salomone felt that these should be voluntary, developed by the media in cooperation with "competent governmental agencies and public interest groups," and implemented through the media. A similar approach was advocated by the editor of the conference document, Professor Cherif Bassiouni, Attorney Clarence Mann and myself during a two-year study of responses to terrorism by members of a working group of the American Society of International Law. Within the published results of the A.S.I.L. study, Clarence Mann pointed out several relevant concerns that "deserve more attention by the media in establishing professional guidelines for the industry as a whole," but seemed to emphasize what generally became a working group consensus—that "what is 'newsworthy' must remain within the good judgment of editors and reporters..."

The problem, Mann suggests, is a difficult one considering the many competing needs, the fact that the "news media has no set policy for reporting terrorist incidents," and the fact that "there can be no simple formula for determining appropriate media response" in the multifarious instances that might arise. Indeed, the competing interests at stake in any given context may be so tightly intertwined that simple solutions will become useless, even dangerous. As Mann suggests, "if publicity is a major motivating factor for [some forms of] terrorism, will news suppression have a substantial preventive effect [or will] it not as likely . . . provoke even more visible forms of terrorism which cannot be ignored, such as more frequent bombings of public places," and so forth? There is also the danger that controls of the media will become points of contention between the government and terrorists and might well place the government in an unfavorable light domestically and abroad.

For further study by the news media Mann suggests consideration of five competing interests and four approaches to self-restraint or meeting the needs identified. His five interests are: (1) the public's need for information through

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Id. at 45.

Id.

Id. at 46.

C. Mann, Personnel and Property of Transnational Corporations, Legal Aspects of International Terrorism (ASIL 1978), forthcoming.

See id.

Id. See also N.Y. Times, March 15, 1977, at 34, col. 1 (editorial); N.Y. Times, May 26, 1978, at 24, col. 6 (editorial).
a free press, (2) the need for safety and well-being of "target victims," (3) the need to not unduly hamper law enforcement efforts, (4) the need to avoid encouragement of future acts of terrorism, and (5) the need to respect "the privacy of the victims, their families and the enterprises which employ them." Another interrelated need is for the maintenance of human rights to freedom of speech, criticism and publication. As Mann points out, the safety and well-being of victims might, in any given case, seem to demand a temporary news blackout, prevention of undue alarm or, conversely, wide publicity of terrorist demands or threats to certain members of the public. These seemingly rational responses might clash with other interests at stake. Thus, there is no avoidance of the need to consider each interest at stake, the degree to which each is at stake, and probable short and long term consequences of alternative courses of action. Other considerations, for example, might include the nature of the terrorist strategy, the types of participants involved as precipitators and various kinds of targets, the objectives of terrorist precipitators (both personal and political), the many relevant features of geographic and temporal context, the socio-politico-economic background, probable future developments and the various alternative ways of handling a terrorist incident and reporting the news.

Four means of response identified by Mann are: (1) news timing, (2) balanced coverage, (3) news tailoring, and (4) public education. Timing is an important consideration and can be an alternative to complete censorship. By temporarily withholding news of a kidnapping, for example, the media may aid both the victim and the police. Balanced coverage, a much sought but difficult to attain outcome, can be a useful counter to terrorist manipulation of the media. News tailoring is a necessary ingredient of reporting and can be utilized for a more rational serving of all preferred goals and thwarting of the undesirable effects of the process of terrorism. With regard to its educational role, Mann suggests that the media has a responsibility to educate the public concerning the dangers of terrorism for society, the impropriety of taking innocent lives in order to propagandize demands and grievances, the legitimate needs of law enforcement in a democratic society, and the non-romantic aspects of the terroristic process. All of the above concerns and approaches seem worthy of media attention, both in response to particular incidents and during attempts to formulate individual guidelines or ethical/professional considerations for the media in general.

While stressing the needs for balanced television reporting of "the emerging story which seems, for a moment, to be the more dramatic" side of a con-

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**Footnotes:**

1. Mann, *supra* note 321, at ___.
2. Id.
3. Id. at ___.
4. See id., listing some examples of balanced coverage, tailoring and timing and also citing points made at a seminar of the International Press Institute, reported by the Christian Science Monitor, May 18, 1976, at 16.
5. Id.
trover, avoidance of the "propagandizing of terrorism" as such, and avoidance of the pretense of role purity (under a "Masquerade as news pure and simple"), H.H.A. Cooper has written that the media must remain free but address the problem of media effects with "a sense of proportion" and a sense of professional responsibility. Professionalism, writes Cooper, includes roles for investigative reporting, social analysis and commentary as well as attempts at objective reporting; but of primary concern is an awareness of "the problem" and maintenance of a "sense of [professional] identity." With regard to dangers posed by "suppression" of news, he writes:

suppression of the event, which could hardly be attained in its entirety, might well, through partial revelations, half-truths, and frightening speculations, be a greater mischief. Confidence in the media would certainly be lost and authority itself called into question. The terrorist would have succeeded, incidently, in causing that very crisis of credibility that is an important secondary objective of his war on society.

Recommendations of the Author

As the reader can discern, I agree with the recommended alternatives to media control outlined above. In particular, it seems useful to stress the need for various news media to become more fully aware of the problems posed by certain forms of terrorism and certain types of media response. Just as it is too simplistic to speak of one form of terrorism (or to state that all forms have an objective to make war on society) it is too simplistic to speak of one form of media and one type of media response. The variations are nearly limitless. Nevertheless it seems useful to speak of a media responsibility, not in a legalistic sense but in a professional sense. As further investigation discloses problems and approaches to solutions, the news media should consider the formulation of professional guidelines for coverage of events, reporting, commentary and educative roles.

In any event, greater attention should be paid by the media and others to the possible relationship between terrorist strategies to produce intense fear or anxiety and the role, responses and potential contributions of the media in obviating terror effects and promoting, in a more positive way, the fundamental human rights of all members of our society. Although relevant data is scarce and must be supplemented for more rational, realistic, policy-serving

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329 See Cooper, Terrorism and the Media in Terrorism: Interdisciplinary Perspectives 142, 146 and 148-54 (Y. Alexander & S. Finger eds., 1977). A contrary opinion was expressed at the conference during which papers printed in this book were presented. See id. at 153 (media has no educational role), and B. Johnpoll, Terrorism and the Mass Media in the United States, id. at 159-60: "It is useless to discuss what the media can do...their sole role in modern society is to transmit information." The latter approach, as Cooper points out, is both unrealistic and unhelpful. See also Paust, supra note 15, at 86-87, 94-96, 98; E. Epstein, The Uses of "Terrorism": A Study in Media Bias, id. at 67-78.

330 See id. at 152-54.

331 Id. at 151-52.
choice, the news media might begin to consider individual and/or media-wide ethical or professional standards which address at least two general and interrelated problems: (1) the possible need for a temporary withholding of publication of: (a) certain kidnapping or extortion threats or incidents, (b) certain police tactical information, and (c) bloody or terror-serving aspects of an incident which add merely to the sensationalizing of a news story; and (2) the need for balanced coverage of events with regard to background and the threats of terrorism to society, democratic values and fundamental human rights.

With regard to media awareness of problems, it would seem desirable for media, law enforcement and government persons to exchange information about perceived problems, interests and legal policies at stake, trends in approaches to solutions, and possible alternative measures. In this way perhaps news media and law enforcement persons can better understand for example, the special problems posed by a terrorist-hostage situation and can begin to articulate mutually satisfactory professional approaches to such a problem. On the one hand, some police officials may desire an overly broad news blackout until suspects are in custody. Such an approach might only weaken the negotiator's position, however, as terrorists demand coverage of some sort, and as members of the public become more terrified by what they do not know as opposed to what they might learn from tailored news coverage. In fact, certain forms of news coverage can convince terrorists of the general unacceptability of their strategy and aid in the saving of lives and well-being of hostages.332 Certain types of coverage may also lessen tensions and aid the negotiating process.

On the other hand, certain news persons might demand the publication of facts that are hardly necessary for adequate coverage but thwart the efforts of law enforcement persons to lawfully protect the lives of hostages. For example, there seems no reason for disclosure of the details of police tactics or the actual locations of various police during attempts to surround terrorists and hostages, to negotiate and/or to free the hostages. Such disclosures might not only threaten the victim-hostages but also future lives and well-being in the case of other hostage incidents. If the reader is doubtful whether such would ever be a problem, one need only be reminded of the hostage incident in Washington, D.C. last year.333 During that incident a television station showed and commented upon actual locations of police teams attempting to get into position as well as the location of other persons trapped in one of the buildings controlled by the terrorists but not yet taken hostage. Moreover, the temporary withholding of news may meet the needs of the public, the media and the police in any given situation. During the Kiritsis hostage incident in

332See note 16 supra.
333See, e.g., N.Y. Times, March 11, 1977, at 1, col. 3; id., March 10, 1977, at 1, col. 6 (Hanafi Moslems take hundreds hostage and wound eleven people).
Indianapolis last year,\textsuperscript{354} one television station delayed on the scene broadcast for a few moments. Thus the television station could maintain control of news content and avoid a terror-serving, gory sensationalized effect had Kiritsis blown the head off his hostage while the cameras were rolling. If a head had been blown off there was no need for television stations to present such a spectacle, in full color, in the living room of each viewer.

The media is not powerless in the face of terrorists any more than in the face of governmental officials who seek to control events for their own power or wealth purposes. Moreover, the media need not merely report the terrorist event. As mentioned, the media, through timing, tailoring, balanced coverage and broader educative or enlightenment approaches can dissipate or channel the violent effects and fear-ridden message of terrorist events. Additionally, the media can play an effective role in formulating and implementing broad educational strategies against impermissible terrorism per se, in particular by counterposing terrorist strategy through promotion of fundamental human rights and efforts to prevent the human indignity and deprivation that occurs with use of impermissible forms of terrorist strategy.\textsuperscript{355} But all of these efforts, as well as all of the suggestions above, must come freely from a concerned, responsible media—a professional media that works cooperatively with educators, police, governmental officials and others but nevertheless avoids private and governmental control.

The only possibility of restraint that I can foresee in this society, within the limits of a democratic governmental process and a free press, is a temporarily imposed judicial ban on certain media coverage in cases of extreme, demonstrated necessity for the protection of lives and well-being. Such a restraint, a temporary restraining order (TRO), might be permissible under such circumstances since the judiciary—not merely the executive—would weigh the interests and legal policies at stake in accordance with actual fact. But TROs should be used sparingly, perhaps only against a news medium that has demonstrated unprofessional conduct and not against all forms of media.

Like Jefferson, we should be ever mindful of the threats posed to democracy from our own government and the misuse of power. If anyone had doubts about the need for free media after Nixon, Agnew, Mitchell \textit{et al}, the survey of recent trends in repression throughout much of the world should have convinced even the snarling critics of “irresponsible” journalism that executive controls are far worse. Governmental interests must not outweigh the interests of a free people in the widest shaping and sharing of enlightenment.\textsuperscript{356} As Thomas Paine expressed so well, the public has a right,
a need to know: "In the representative system the reason for everything must publicly appear. Every man is a proprietor in government, and considers it a necessary part of his business to understand . . . There can be no mystery."[337] The will of the people could hardly be served through mystery or secrecy, and there is far too much secrecy in the name of security in this country for one to permit even more inroads on authority and democratic freedoms.[338] The TRO, however, when used sparingly in cases of actual necessity and with full judicial protections is but a temporary interference with the public's right and need to know. Any governmental request for a TRO will, of course, bear "a heavy presumption against its constitutional validity"[339] and will thus be imposed only in exceptional circumstances, for a limited duration and to the extent required to protect lives and well-being.[340]

CONCLUSION

In conclusion it must be emphasized that a free press is one of our fundamental bulwarks against private and governmental terrorism. Our newspapers, radio stations, television stations and other forms of media should be free to criticize governmental illegalities, manipulations of our criminal justice system for personal or political ends, the seizure and detention of political opponents and dissidents, and the use of terrorism by governmental and private entities here and abroad. As threatening to human rights and civil liberties as the spiraling forms of death squad warfare in Argentina and Brazil are the governmental suppressions of free speech and association there, in South Africa, the Soviet Union, and in South Korea, to name a few. Probably the greatest inroads on democratic freedom in the last twenty years or so have been the increasingly tighter controls of the media, the detention and torture of political foes or dissenters and the spiraling increase in political assassination carried out by governments or their supporters—all in the name of law and order or "national" security. If the media cannot even


[338]See also, H. Marcuse, supra note 4, at 190-93, passim, recognizing the dangers posed by a 180 degree turnaround from open government and privacy of the individual towards socialization of the individual and secrecy of the government—all in the name of "security" and the "concern of the state." For related dangers in our own society, see also McDougal, Lasswell & Chen, supra note 4. As Justice Black would remind, secrecy at the expense of representative government provides no real security. New York Times v. United States, 403 U.S. 713, 719 (1971).


report these incidents of illegality, much less comment upon them, then we have traveled far along a dark road toward machine-oriented, conformist-totalitarian thinking. Alternatively, such media control may foster increasing social violence amid clashes of ignorant, non-discriminating ideologies and ever expansive gaps in value positions among peoples of the world who live interdependently with greater resource scarcities. A free media and greater attention to human and civil rights in our educational processes are two fundamental restraints that must be nurtured to grow and aid in shielding future generations from terrorism and similar assaults upon authority and human dignity.

In my opinion, the center can hold; but we must be tolerant of the views of others and relatively confident. These are more than virtues. They are, to a relative degree, essential components of democratic process. Further, as the preamble to the United Nations Charter seems to recognize, they are relevant to the strivings of generations before us toward human dignity and peace.

"Ye are the salt of the earth: but if the salt have lost his savour, wherewith shall it be salted? . . . Ye are the light of the world. A city that is set on a hill cannot be hid." 341 And so must freedom shine.
