LIONEL COHEN LECTURE: THE JUDICIARY AND THE MEDIA*

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I am an English judge speaking in Jerusalem at a lecture to honor the memory of an Englishman who was the first member of the English Jewish Community to be appointed to the House of Lords, now the Supreme Court of the United Kingdom. That was 60 years ago in 1951. So this is an important anniversary.

This evening, I am seeking to highlight some of the issues that relate to the role of the media and the role of the judiciary in upholding the rule of law, and the interaction of their relationships in a democratic society that respects the rule of law. My experience is British, but my intention is to address questions that arise in any civilized democracy. The essential principles are unaffected by geography.

My overwhelming belief is that the most emphatic feature of the relationship between the judiciary and the media is that the independence of the judiciary and the independence of the media are both fundamental to the continued exercise, and indeed the survival, of the liberties that we sometimes take for granted. I have said before, and I do not apologize for saying it again, these are critical independences, which are linked but separate. As far as I can discover, there never has been, and there is no community in the world in which an independent press flourishes while the judiciary is subservient to the executive or government, or where an independent judiciary is allowed to perform its true constitutional function while, at the same time, the press is fettered by the executive. Try as I can, I can find no such community. And this serves to reinforce my essential feeling that, in any community governed by the rule of law, the independence of the media and the independence of the judiciary are both of crucial importance to the liberties of the community at large. Both must be preserved. And when I speak of preservation I do not mean preserved like a museum piece, mildly tolerated as somewhat idiosyncratic vestiges of an interesting but ancient past; rather, I mean preserved in the sense that Archbishop Fénelon urged the value of moderation, but moderation not as an insipid response for beliefs not very strongly held, but rather moderation at white heat. The preservation of both independences involves white-heat commitment.

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But, and it is a very important but, what I am not saying is that the independence of the judiciary should somehow reduce the responsibility of the press to offer reasoned criticism of judges and their decisions, or that judges should be inhibited when applying the law as they find it to be, and even when the media does not like it. That is because the law in a democratic country binds the judges just as much as it binds the media.

There is this important further emphasis. Our independences mean that we are independent of each other as well as the executive or other authority of the state. Sometimes tensions are inevitable. Sometimes criticisms by one side or the other are unfair, or are thought by the recipient of the criticism to be unfair. Sometimes, perhaps, we are not as alert as we should be to the realities of the way in which each of us must perform our functions within constitutional arrangements based on the rule of law. So these are twin independences—independent of course, of each other—but fundamental to communities where there is a proper respect for the rule of law. I am not today seeking to address the quite different considerations that can arise in countries that are not blessed with this respect. These independences provide the context in which questions like defamation, reporting restrictions, websites, tweeting, confidentiality and privacy claims, undercover reporting, investigative reporting and freedom of information, and the modern buzzword in England, super-injunctions, are all engaged. Each of these is perhaps worth a lecture on its own, and I do not propose to give you one on each of them. But they do indicate how wide and how important to society as a whole the engagement between the judiciary and the media must be, and how greatly it impacts on the day to day lives of our communities.

There are two further overarching themes. For us to be blessed with an independent media, the independent media has to survive. This is not a charity. We are dealing with businesses. If they are insolvent, the printing presses (or the modern equivalent) cannot roll. The same applies to television, save where there is a form of public funding. Public funding itself is a great problem. What would be devastating, in my mind, is a not unimaginable situation by which the local newspaper may die, to be replaced by some sort of handout from the local authority, no doubt extolling everything done by the authority, and silent about its errors. The public will not be properly informed by spin doctors employed on behalf of the government of the day, or local authorities. So, the survival of these businesses is crucial. It is no good considering the independence of the press, if there is no press to be independent.

My second theme is that some of these financial considerations have to be examined in the context of the way in which the modern world of communications is developing. We are living in the middle of a technological revolution. You will be interested to remember that in 1984 the Police and Criminal Evidence Act was enacted. This made very careful structured provision for the retention of fingerprint,

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intimate samples, and samples generally, and their destruction. The legislation did not include any reference to DNA profiles or biometric data. Suddenly DNA evidence arrived. It has become crucial. Its impact has been amazing. This new knowledge has enabled the guilty who would otherwise have escaped justice to be convicted, and the innocent who have been the victims of injustice to be acquitted. A similar development has occurred with the technology that applies to the world of communications. It is already astounding, and I suspect that the technology that lies ahead will have impacts on the way in which all our lives are lived, not least in the context of the development and survival of the media, which in truth are unimaginable. But whether we can imagine the future or not, and perhaps more so if we cannot, it has to be a future in which, whatever changes may occur, an independent media will survive.

So, as we face a new technological revolution, let us go back to the start of all this, with a few thoughts, to give a sense of historical perspective to our technological revolution.

Gutenberg has a lot to answer for. Yet he, and Caxton, and others, produced what we now take for granted, but at the time was an invention of cataclysmic consequences: the printing press. The invention of the printing press is one of the seminal moments in the history of the world, which because there have been others since is nowadays in danger of being underestimated. Imagine a world in which every single copy of the Bible in existence had to be—laboriously, painstakingly and sometimes gloriously in its embellishments—copied out word by word by hand. Imagine a world in which every idea had to be communicated orally. Now imagine the change: the Bible in print, capable of being read by an increasingly literate population—increasingly literate because they have the printed book. Imagine Copernicus writing but not printing *On the Revolutions of the Celestial Spheres* in 1543 and—instead of telling the world that the earth was not the centre of the universe—being confined to paternal chats around the table with his family in Poland.

As you allow your imaginations to wander, remember, and this is certainly not imagination, how the authorities sought very urgently to control the demon they believed that Gutenberg and others had released. The *Tridentine Index* is but one example. There was a new College of Propaganda. In the words of Cardinal Bellarmine: "Libertas credendi perniciosa est ... nam nihil aliud est quam libertas errandi." (Freedom of belief is pernicious ... it is nothing but the freedom to be wrong.)

In England, control of the press was established by a Star Chamber Order of 1586.[1] Strict limits were set on the numbers of printers who were allowed to prac-

[1] For much of this information I am indebted to ROBERT HARGREAVES, THE FIRST FREEDOM—A HISTORY OF FREE SPEECH (2002).

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tice, the number of presses they could own, and the number of people they could employ. Every book had to be licensed. And to make sure this worked, authority was granted to the Company of Stationers to damage and destroy any presses that did not conform to the Star Chamber Order. Archbishop Laud who was one of those who vehemently supported the control of the printing press and bemoaned the old days, for now the members of the Company of Stationers had become interested only in gain, with the result that some of the workmanship was so slovenly that a 1631 edition of the Bible printed the seventh commandment so that it read: "Thou shalt commit adultery."

Late Elizabethan and early Stuart England was a ferment of ideas, religion, and politics. Profound questions of constitutional importance were raised, such as whether *rex est lex* or *rex est lex loquens* and whether the King was subject to the law. Tracts, papers, and sermons—and, perhaps symbolic of it all, John Lilburne smuggling an account of his sufferings ordered by the Star Chamber for the distribution of copies of an unlicensed pamphlet, known as a "Work of the Beast"—gave wings to the press. From this ferment the press—that is the press as we now know it, not the machines that printed papers, tracts, and sermons—gradually emerged. To begin with they were known as Corantos. I cannot resist the observation that it was soon being said that something was as true as a Coranto—meaning that it was all lies. The following words were written in the early 17th century about the Corantos:

> Ordinarily they have as many lies as lines. They are new and old in five days ... they meddle with other men's affairs. ... if they write good news of our side it is seldom true; but if it is bad it is almost too true. I wish them to write either not at all, or less, or more true: the best news is when we hear no news.

I recount this because the issue of the irresponsible press, the press that should perhaps be curbed, the press that is not conformable, the press that is intrusive and unreliable, is not itself a new story. Tempting as it is, we must beware the demon trap. The price that must be paid for an independent press is that it will sometimes be irresponsible, inaccurate, and unconformable. This is what independence means, but most important of all it means not conformable to the executive. My belief is that the freedom of the press is no less than an aspect of the first freedom—in President Roosevelt's memorable phrase—that every citizen enjoys, namely freedom of speech.

I love the story—the true story—of the Bow Street magistrate in London who in the middle of the last World War had before him six Peace Pledge Union members who were charged under, I believe, the then Public Order Act with distributing pacifist literature at a time of national peril when conscientious objection to warfare was hardly a popular cause. The charges were dismissed. The magistrate observed:

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> This is a free country. We are fighting to keep it a free country, as I understand it.

I do so hope that this judicial observation, made at such a difficult time, continues to inform all those who would seek to legislate in ways that hinder or restrain our freedoms to speak as we believe and express unpopular opinions. Mind you, I do not go as far as Samuel Johnson, who summarized the problem in this way:

> Every man has a right to utter what he thinks truth, and every other man has a right to knock him down for it.

That, I would suggest, goes a little too far. And equally, of course, we have to be careful not to find ourselves, in Oliver Wendell-Holmes' famous example, seeking to defend the freedom of an individual to falsely yell out "Fire, Fire!" in a crowded theatre, so that in the panic to get out injury and death are occasioned.

From these strange beginnings there gradually emerged our media, the role of the newspaper man, and many years later newspaper woman, and the press as we know it today, at any rate before the invention of television. And at the same time, some elements of the constitutional arrangements relating to judges and the judiciary can begin to be discerned. The Civil War in England established that the King was not above the law and that the law was not the King speaking. After Charles I was beheaded, and his son James II had been thrown out, the principle of security of judicial tenure was established in England. Judges could not be dismissed from office on the whim of the King or hold office for only so long as he thought they were behaving properly. It was a far cry from the incarceration of Sir Edward Coke, Chief Justice, in the Tower of London and the deprivation of his office in 1616.

It would be comforting and pleasant to say that, looking back over the history since those turbulent times, the relationship between the judiciary and the press—and from now on I shall refer to all elements of public communication, including television, as "the media"—has always been relaxed and pleasant and without unfair criticism on either side, with words or judgments only ever offered in a spirit of constructive co-operation. But that would not be true. There was still a very long way to go. In reality, the main dispute was between the press and parliament. The House of Commons in the 18th century continually asserted that any printed account of their discussions was an offence that merited severe punishment. This was the classic example of the assertion of a privilege embraced to meet one problem, that of an over-powerful monarch, being deployed long after the monarch had ceased to exercise any significant authority, with the privilege being defended in part just because it was a privilege. For example, in 1760, four newspapers reported that a vote of thanks had been given to Admiral Hawke following the naval victory of great significance at Quiberon Bay. Yet this was described by the House of Commons as a "high indignity."

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Then along came John Wilkes. In 1762, in a newspaper called *The North Briton*, he wrote the great clarion call, the trumpet sound, the immortal words:

> The liberty of the press is the birthright of a Briton, and is justly esteemed the firmest bulwark of the liberties of this country.

Remove the word "Briton" and it applies to every civilized country that embraces the rule of law.

The phrase was adapted by Lord Bingham of Cornhill, then Lord Chief Justice, when he referred to:

> ... that fair trial which is the birthright of every British citizen.[2]

Remove the word "British" and this too applies to any civilized country. If, as I believe, Lord Bingham was deliberately echoing the language used by John Wilkes 250 or so years earlier, it was a compliment—imitation being the sincerest from of flattery—that John Wilkes himself would have found astonishing. But, and this is a crucial but, it is to be observed that Wilkes was describing the liberty of the press as the birthright of each citizen, not, we must notice, as the birthright of the owners of the newspaper in question, or its editors, journalists, or publishers. This leads me to wonder how he would have addressed the stark question whether the rights of the press as a whole should prevail over the right of the individual citizen to a fair trial. I suspect his answer might surprise those who, like me, regard him as a man like the rest of us: a man of many flaws but also of truly heroic qualities. This in truth is where the crunch comes, where the judicial system and the proper functioning of the media interact and on occasions conflict.

It is important, to my thinking, to emphasize that the role of the judiciary is to ensure that justice is done according to law within whichever system, in whichever field, one citizen is seeking redress or justice or is subject to criticism or prosecution. Judges are servants of the community. They are vested with responsibilities, and very wide powers, as servants of the community. They are not human beings vested with innate authority nor are they deprived of the universal human characteristic of fallibility. When they exercise their office, they are exercising it as officers of justice. The wisdom of Montaigne, at the end of his three great volumes of essays, applies to judges and all those in authority of any kind. They should have in mind at all times,

> No matter how high the throne upon which we are sitting, we are always sitting on our own backside.

In the exercise of these functions, the judge cannot allow his own individual preferences or prejudices to prevail. He cannot, because he has been the subject of a

[2] R v. Bentley, [2001] 1 Cr. App. R. 307.

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scurrilous article in a newspaper, resolve litigation against the press if that is not what the law requires, and he cannot find for the press just because he has received a commendation from it. If we all gave judgment in accordance with our personal preferences, just think of the chaos and uncertainty that would follow. Indeed, if we did so, we would be in breach of our judicial oath, "to do right ... in accordance with the law."

So when the clashes come between the media and the judiciary, the issue is not personal. The judgment does not represent a judicial whim. When a judge finds for one side or the other, he is not reflecting a personal predilection. When he imposes a sentence, he does so in accordance with sentencing principle, or guidance, or statute. He may, of course, be wrong, but that is not because he is exercising a personal preference in a way that is open to criticism, but because he has mistakenly applied the law as he believed it to be. Or, no less likely, he may be right because he has applied the law as it is, when it appears to the media that the consequences of the law correctly applied are inappropriate or wrong.

There are occasions when the media's criticism of the judiciary amounts to vituperative or unjust personal criticism, when that criticism should be directed at the legal principles that bind the judge. As a result of some clear-thinking legal journalists, as well as a greater effort by or on behalf of the judiciary to engage with these issues, I believe that there is a greater understanding of these matters among the media in England than there used to be, although the understanding is not yet as universal as I should like it to be. The problem with unfair direct personal criticism is, first, of course, that it is unfair; second, that it is difficult if not impossible for the judge to answer, because inevitably it would mean commenting on a case that he has tried or decided, when everything that needs to be said about the decision should have been dealt with in the judgment, so that for the judge that must be the end of it; and finally, and perhaps in the end most importantly if we are discussing the independence of the media and the judiciary, that it has a corrosive long-term effect on the public's view of the judiciary and the exercise of its functions.

This is not a deferential age, and I do not want it ever to revert to deference. But it does matter to the welfare of the community and the preservation of the independence of the judiciary that the confidence of the community in its judiciary should not be undermined. If it is undermined, then it becomes that much less difficult for the government of the day or the legislature (and in a democratic society who knows what the will of the electorate may produce at any election) to introduce legislation that gradually restricts the discretion available to a judge and ultimately instructs him how to exercise his responsibilities. What price then the independence of the judiciary? How will the citizen be sure, when he takes on the government of the day, or any of the large institutions of the state, that the judge before whom the litigation is being conducted is truly independent of the government or the institution?

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In England, one of the most powerful examples of this potential difficulty arises in the context of the Human Rights Act 1998 and the incorporation of the European Convention on Human Rights into domestic law. The Convention, when originally written, was produced for a war-torn Europe in which a man or woman could be removed from his or her home without warning and taken to a concentration camp for no other reason than the wish or whim of someone exercising authority. The Convention was designed for the basic protections that were provided and had for some years been provided at common law: no arrest without reasonable grounds, no incarceration without due judicial process, and so on. It was largely written by British lawyers, and if you read the Convention carefully you will see the ancient strands of common law in it. And then in the Human Rights Act it was incorporated into British law. It has resulted in a number of judgments that have excited huge criticism. Indeed the words "human rights" are sometimes described in language that might suggest that they stand not for the noblest ideals but, using polite language, for woolly nonsense. Now that is a point of view. In a free country, it is a view that is entitled to be expressed, and it can be expressed in the media as well as by the couple having a chat together over a pint of beer in the pub or a glass of wine in the wine-bar.

However, what needs to be examined in the criticism of "human rights" and the judgments that make reference to those rights is that the incorporation of the Convention, along with the statutory requirement that the decisions of the European Court of Justice must be applied (whether we judges in the United Kingdom agree with them or not) and the decisions of the European Court of Human Rights must be taken into account, represents the law of the United Kingdom as decided in parliament by the ordinary legislative process. Judges are obliged to apply the legislation enacted by the United Kingdom's sovereign parliament, and the European Communities Act 1972 and the Human Rights Act 1998 are two such acts—no more and no less.

In my view, these misunderstandings should be avoided and the opportunity for them should be reduced. That is not to say that justifiable criticism should not be made of judges or that judicial decisions should be immune from criticism. But when the judiciary is criticized in the media, it should be on the basis of an understanding of the limits and obligations imposed on the judge by the law.

We must go further. So it is that, in England, judges with administrative responsibilities, for example, the senior judge in the Crown Court of—say—Leeds or Manchester is encouraged to have a working relationship with the editor of the local newspapers. Thus, if it appears that a judge has said something outrageous or absurd in his sentencing remarks, at least it can be checked before it goes into print whether he actually said what has been attributed to him or, if he did indeed say it, whether there was a context that explains it. A record of what the judge actually said should

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be made available. In that way, what might be a misguided headline is avoided. On the other hand, if the judge did indeed utter a remark that, whatever the context, was absurd, or stupid, or revealed a prejudice, why then, it should be reported and criticized for absurdity, stupidity, or prejudice.

About ten years ago, the practice known as "door-stepping" of judges who had given a controversial decision started to develop. However, with the assistance of the Press Complaints Commission and the cooperation of newspaper editors, the practice has largely died down. The reason why it developed was reporters' ignorance of the fact that a judge cannot comment on his decision. There is no point in door-stepping a judge who cannot and is not permitted to explain why he has decided or spoken as he did. If the judge is not permitted to speak, then door-stepping him is oppressive because it cannot produce any further public information.

In addition, some ten years ago, shortly after it was founded, the Society of Editors became increasingly and, if I may say so, justifiably concerned at the number of orders being issued up and down the country, the effect of which was to prevent reporting of this or that case or this or that feature of it. Some of these orders undoubtedly contravened the principle of open justice and did not fall under the exceptions to that principle. On the other hand, it is not realistic for a newspaper in some place remote from London to take immediate proceedings to set the order aside, not least because the proceedings in question might well be over before the process could be begun. In any event, this all costs money at a time when newspapers are relatively short of resources. The judiciary and lawyers from the media therefore worked together to produce easily read, manageable texts for use in the Crown Court and the Magistrates Court in which the essential principles are set out. They have become valuable handbooks that are used regularly up and down the country whenever a question of reporting restrictions arises. It is open to a newspaper reporter or a representative of a local newspaper to draw the attention of the court to the contents of these handbooks, so as to avoid the expense of employing lawyers for this purpose. The result is that fewer inappropriate reporting restrictions are imposed or, if they are, that they are quickly removed without the independence of either side being diminished.

Another vexed topic is the world of super-injunctions. A super-injunction is an order to the effect that the very fact of the injunction should remain confidential. In some respects, it is a sensible precaution. For example, if a business has discovered that a fraud is being perpetrated on it by two or three of its employees, and injunctive relief is sought to prevent any further consequent damage to the business, the disclosure of the fact that such an order has been made may itself add to the damage that has already occurred. The business might thus be better off without the injunction, in which case the fraudsters would continue to enjoy the benefits of their dishonesty. However, when the issue of the super-injunction comes to be examined

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in the context of injunctions sought by well-known figures to protect their privacy, the issue becomes more difficult. The reasoning is the same, but privacy law is itself in a state of development. In 2011, the Master of the Rolls chaired a committee to examine the way in which super-injunctions should and should not work. The committee included judges, barristers, and solicitors representing the interests of the media and those whose work includes the representation of men and women who have sought or are likely to seek such super-injunctions. The committee published its report in May 2011. It is an example of sensible, practical cooperation between the judiciary and representatives of the media, the object of which is to ensure that processes and issues of concern to the media can be examined at the highest level in the judiciary, in effect around the table, for both increased mutual understanding and, if possible, resolution.

Of course, none of these arrangements and none of the discussions can alter existing legal principles. They have no legislative authority. And if anyone thought that the existing law could be suspended or dispensed with, they simply have to remember the fate of our King James II who was thrown out for exercising the "pretended power" to do so. But, more often than not, what is required is a sensible recognition that, without the judiciary or the media giving up one fraction of their necessary independence of each other, they can nevertheless examine problems of importance to either or indeed both of them and no longer pretend that these problems do not exist, as I think was the case not so very long ago, or hope that they will somehow blow away in some gentle breeze.

I speak only for myself, but I very much doubt if there is any judge in England and Wales who does not recognize the crucial role played by an independent press in our affairs, crucial not only to the wider public in the entire political arena but also to the administration of justice. Now is not the time for me to go through the time-honored reasons. But one, perhaps, is enough. It was Pliny the Younger who in Roman times pointed out that when they are sitting in judgment, the judges are themselves on trial. The presence of the media in our courts represents the public's entitlement to assess that justice is being done. And it is not just an emotional reaction that leads us to become immensely troubled by the operation of secret justice. It is principle. It is not enough to demand open justice when it suits you or for causes that you deem to be appropriate. The principle of open justice has to apply to those who may be unpopular. It is rather the same as freedom of speech. It is all well and good proclaiming the freedom of speech of those who speak words with which you agree. The greater difficulty is to preach freedom of speech for those whose words you find repulsive. So the principle is open justice, that justice should be done openly, but the primary function of the courts is indeed to do justice. That is the paramount requirement. And we need to take care not be too deferential or prim about this. Of course there are occasions when the media, like judges, make mis-

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takes. Occasionally they go too far. Then perhaps we would be wise to remember the eloquent plea made by Oliver Cromwell in 1650, just before he himself dispensed with parliament and assumed dictatorial powers at least as great as those claimed by Charles I, which he enforced more effectively, rapidly forgetting everything that he had written in this letter:

> Your pretended fear lest error should come in, is like a man who would keep all wine out of the country, lest men should be drunk. It would be found an unjust and unwise jealousy to deprive a man of his natural liberty upon a supposition he may abuse it.

In recent years, without there being a high profile committee looking into the issue, and perhaps without very many people even appreciating that the process has been continuing or what it encompasses, there has been a careful re-analysis of huge areas of the work of the courts where, for one reason or another, there has been a lack of understanding between the judiciary and the media and where apparent restrictions on reporting have gradually been developing, in effect because of Cromwell's concern that the drinking of wine should be prevented because some people might get drunk.

I have already touched on the cooperation between the Society of Editors and the judiciary for the production of guides to reporting restrictions in the Crown Court and the Magistrates Court. I have also referred to the committee examining super-injunctions. I have publicly expressed my profound concern that London has been described as the libel capital of the world. In a sense, whether this is true or not, like so many aspects of the administration of justice, if that is the perception it is actually as alarming as if were true. In recent judgments, British courts have reaffirmed the entitlement to express honest opinions without running foul of an action for defamation.[3] Lord Justice Jackson's report,[4] criticized in many quarters, has sought to address the dire financial consequences of the unsuccessful defense by the media of defamation proceedings. A further consultation on defamation, this time on the initiative of the government, has also taken place.[5] The courts have affirmed the right of the media to attend cases before the Court of Protection, which is the court that protects the interests of those who cannot conduct their own affairs,[6] and the Family Division is re-examining the way in which greater openness in proceedings in relation to children can be obtained.

I would like to pause here for a moment. This is a particularly sensitive area, because cases involving children are profoundly sensitive, and the problems are stark.

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[3] British Chiropractic Association v. Singh, [2010] EWCA Civ 350; Joseph and another v. Spiller and others, [2010] UKSC 53.

[4] LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (2010).

[5] Ministry of Justice, Draft Defamation Bill: Consultation (2011).

[6] A v. Independent News and Media Limited, [2010] EWCA Civ 343.

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On the face of it, there can be nothing more private than the way in which unhappy parents themselves sort out the arrangements for their children if for any reason they become estranged. They only go to court when they have been unable to do so. When they do, the disputes often become bitter. Sometimes children are used as a weapon by one parent against another. These are private law cases, and it is perfectly arguable—indeed the law provides—that the proceedings should remain private, not least because of the potential harm to the children. On the other hand, public law cases can involve decisions that, on the basis of expert evidence, can result in findings of significant ill-treatment of a child or children by a parent, in some cases resulting in a conclusion that deprives that parent of access to the child or children. These are proceedings brought by authorities rather than disputes between the parents. To deprive a parent of access to his or her child is an order of profound magnitude for both the parents and the child. The case for openness is therefore much greater. Such a draconian order should only be made after a fair trial that can be perceived to have been fair. However, what possible advantage is there to anyone to publish the identity of the parent against whom such an order has been made, leading inevitably to the identification of the child who has been subjected to abuse of such a kind that access to the parent in question is prohibited. For this purpose, it cannot matter whether the child is the child of a well-known public figure or someone who would never interest even the most local of local newspapers. If the same process was taking place at a criminal trial and the child was an alleged victim of sexual abuse by a parent, the trial would take place in open court, but the child's identity would be protected by complainant anonymity, which includes a prohibition on reporting that would enable a "jigsaw" identification of the child. But it is also important to look further. In a laudable attempt to protect the interests of a child or children who would be harmed by the public revelation that their father had committed criminal offences involving child pornography (though not involving his own children), a father was made subject to an anonymity order. We took the view that this decision was wrong. We had to face the reality that, as the judgment indicated, "the criminal activities of a parent can bring misery, shame and disadvantage to their innocent children" but, if we permitted this restriction on reporting, we would be "countenancing a substantial erosion of the principle of open justice," including the free reporting of criminal trials and the proper identification of those convicted and sentenced in them. In this case, the anonymity order on the father was therefore removed.[7]

I have discussed these issues in the context of children because they exemplify why the answer to the question whether reporting restrictions of any kind should be imposed is not always straightforward. And it does not help the discussion that the

[7] R (on the application of Trinity Mirror PLC) v. Croydon Crown Court, [2008] EWCA Crim 50.

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phrase "gagging orders" is applied indiscriminately, as if the judge is always to blame, even where the restrictions on reporting are entirely based on a statute that prohibits reporting and the judge has no alternative. A judge cannot dispense with statutory provisions that provide for closed proceedings in relation to national security in the context of the Special Immigration Appeals Commission Act and the review by a court of control orders. These are special provisions for those suspected of involvement in terrorist activities where the evidence depends on material obtained through or by investigation that either cannot be disclosed because statute prevents it (e.g., Regulation of Investigatory Powers Act 2000) or because disclosure of the source would either endanger those from whom the material was obtained or reveal information to potential terrorists that would enable them to avoid detection. On other occasions, the judge is vested with a discretionary responsibility to examine whether to impose a restriction on reporting in cases where conflicting principles clash: the interests of the litigant in putting matters fully and frankly before the court, the inhibiting effect of the presence of the media, the equally powerful interests of the media in ensuring open justice, and the paramount need to ensure that justice is done.

Finally, this leads me back to where I began. The world of communications is changing fast. Gutenberg has had his hour. Some four or five centuries of hour, but the consequences of his invention, the availability to all of the printed word, is being overtaken by a new world. Imagine buying a newspaper and, as you read through it, discovering that by using a piece of modern technology you can go and get much more of that newspaper online. In today's world, I am sure that this is a necessary ingredient for a successful newspaper. On the other hand, the need to take care with online information is no less acute than it is for the publication. Naturally enough, newspapers take care to avoid defamatory statements where they cannot be justified, but is the same care exercised in relation to online information? It must be. And consider communications out of court. What is the impact of the latest smartphones, which allow users to access the entire internet? If the recently published results of one company are anything to go by, fewer and fewer books and fewer and fewer CDs are being bought. Access to both is through modern technology.

We know all this from a brief examination of communications out of court. It is now possible, as you know, for a contemporaneous report of what is being said to be put up on a television screen as the words are spoken or, more realistically, three or four seconds after they have been spoken. This brings us to the problem of Twitter, which I use as a general name to cover all kinds of live text-based communications in the modern world. The quill pen and ink went out of court when the fountain pen was invented, and candles were slowly replaced by electric light, but now we take electricity for granted. At present, interim guidance on Tweeting in court has been given for the purposes of a consultation into the use of modern technology and its

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impact on the processes of the court.[8] Obviously, we must wait until the end of the consultation, but can anyone doubt that the impact of modern technology on the judicial system and the media and the way it impinges on the relationship of the judiciary and the media should be examined now rather than later. The speed of what is happening is quite remarkable. I have already emphasized that, in my view, an independent media will survive, but the judiciary and the media may have to rethink many of the ways in which they do their work. Whatever the result of the consultation, and whatever guidance is promulgated after its conclusion, I have no doubt that it will have to be revisited again and again, because as fast as we keep up with developments the developments themselves will keep expanding. Ultimately, of course, we must be doing justice in the courts—and we must be doing open justice. My fervent hope is that the advance of new technology will make it easier for the media to be "present" in court and that the present trend for fewer and fewer reporters in every court will come to an end or, at any rate, that court proceedings will be reported.

I have commented publicly on other occasions on the potential impact of modern technology on the system of jury trials. Put briefly, there is not only the problem of the jury accessing information through the internet but also the long-term ability of the present generation of young people, who use technology at school and learn much more from looking at their screens than from listening to their teachers, to adapt to the current arrangements for jury service. For present purposes, and in the context of this lecture, there is another element to technology that merits early thinking and long-term vigilance. I put it this way because of the title of a book by Professor Susskind, the IT adviser to the Lord Chief Justice, entitled *The End of Lawyers?* It is a convincing analysis of the likely consequences of modern technology for the operation of the legal profession. It is not an assertion that but rather a question whether it will spell the end of lawyers. My concern can be summarized in this brief way. I do not intend to be portentous. I am not a wailing Cassandra, although people tend to forget that Cassandra was right that the great horse outside the walls of Troy was a trick. As the world of technology changes, we should be aware of and—I will not put it any stronger than this—alert to the possible impact of communications systems that we cannot even imagine today on judicial processes. Of course, the judiciary and media must use all the technology available to them to ensure speedy justice, ease of communication, and all the many advantages that may come their way. However, they must also be alert to any possible infringement, even innocent and unintended, of the principle that justice must be done in a public forum

[8] Judicial Office for England and Wales, A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting (2011), *available at* <http://www.judiciary.gov.uk>.

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to which the public or the media have access. In other words, if there is ever an end of lawyers, it cannot mean the end of public justice.

What I have endeavored to convey in this lecture most of all, perhaps, is that the days when the possibility of communication between the judiciary and the media was regarded as anathema and wholly wrong in principle have gone forever. This is a world of communications in which, without any infringement of the mutual indolence of the judiciary and the media, they can and should speak to each other, so as to ensure the open administration of justice and the preservation of two independencies that are of cardinal importance to the rule of law.

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