
HELSINKI WATCH

THE FUND FOR FREE EXPRESSION

DIVISIONS OF HUMAN RIGHTS WATCH

March 1993

Volume 5; Issue 3

**Freedom of Expression
in the United Kingdom**

Recent Developments

CONTENTS

Introduction.....	1
Official Secrecy	1
Libel.....	9
Privacy and Press Regulation	14
Public Order.....	16
Broadcasting and Films	19
Film and Video Regulation.....	22
Anti-Terrorism Laws	23
Obscenity Laws	25
Music Censorship	26
Whistleblowing in the National Health Service	28
British Bill of Rights Movement	29
Recommendations.....	31

(212) 972-8400 (tel)
(212) 972-0905 (fax)

(202) 371-6592 (tel)
(202) 371-0124 (fax)

INTRODUCTION

Britain has historically been a society with great respect for the tradition of freedom of the press. In recent years, however, there has been a significant increase in restrictions on liberty in the United Kingdom. Not only have press freedoms been threatened with increasing restrictions, but broadcasting has faced similar challenges, and the right to protest has been limited.

In October 1991, Helsinki Watch and the Fund for Free Expression issued "Restricted Subjects: Freedom of Expression in the United Kingdom". Since that time, there have been several significant developments for freedom of speech in the U.K. Some have been positive: revelations after the death of British press magnate Robert Maxwell have led to a re-examination of British libel laws, the Court of Appeal has adopted the standards of the European Convention on Human Rights for free speech in the absence of common law on the subject, and the re-elected Tory government under John Major has moved towards more openness in government, including the first official recognition of MI6, the Secret Intelligence Service. Others have been negative: regulating bodies for press and the media are multiplying, Scotland Yard's Obscene Publications Squad has impounded record albums under the Obscene Publications Act and the government has sued to force a television network and a production company to disclose the names of confidential sources under the Prevention of Terrorism Act. The current government is opposed to enacting both a British Bill of Rights and a Freedom of Information Act.

OFFICIAL SECRECY

The British government, like many other governments, cites national security as a justification for shielding itself from scrutiny. The Official Secrets Act, which provides criminal penalties for revealing a broad range of foreign policy, defense and military information, regardless of public interest implications, is just one of a number of secrecy laws screening government actions from the public eye. Although the Conservative government, now in its fourth consecutive term, has introduced a number of reforms calculated to provide more open government, it is hostile to the increasingly strong movement to implement a Freedom of Information Act similar to the one in the United States.

(1) Open Government and Freedom of Information

On November 7, 1991, a private member's bill was introduced by Richard Shepherd, Conservative MP for Aldridge Brownhills and a co-chairman of the Campaign for Freedom of Information. The draft legislation, based partly on U.S. freedom of information laws, permitted the Government to withhold information only if it could show that disclosure could genuinely harm the national interest in fields such as defense, international relations, and the security and intelligence services. This could be overridden if disclosure was in the public interest.¹ (A later report had Shepherd challenging ministers to support a Freedom of Information Bill being introduced in the Commons in January, 1992.²)

¹ "Parliament and Politics: Tory MP sponsors bill to reform secrecy laws," Colin Brown, *The Independent*, November 8, 1991, p. 9; "Private Members Bills; MP renews effort to relax laws on secrecy," Jonathan Petre, *The Daily Telegraph*, November 8, 1991, p. 4; "Tory MP prepares secrecy legislation," *Financial Times*, November 8, 1991, Sect. I, p. 9; see also "Bill aims to open official files," Richard Norton-Taylor, *The Guardian*, November 4, 1991.

² "Parliament and Politics: Ministers challenged on Freedom Bill," Colin Brown, *The Independent*, January 14, 1992, p. 7.

Freedom of information became a major issue in the 1992 general election. The Labor Party pledged to introduce a right to information act in its first parliamentary session.³ The Liberal Democrats pledged to abolish the Official Secrets Act and replace it with a Freedom of Information Act.⁴ Since the election, both parties reaffirmed their commitment to freedom of information in their fall 1992 party conferences.⁵

The victorious Conservative party made no such pledge. However, one of Prime Minister John Major's central policies for the fourth term of Conservative government was more open government. William Waldegrave, the Cabinet minister in charge of the Citizen's Charter and the Civil Service, was put in charge of reforms of Government departments in order to minimize secrecy restrictions. A survey among Whitehall departments uncovered over 150 separate secrecy clauses, many with criminal penalties. Conservatives report that legislation to end these and other restrictions is expected to be in place by the end of the year. As long as the Tories remain in power, the Official Secrets Act is likely to remain in place, and a Freedom of Information Act is not likely to be endorsed.⁶

On May 14, 1992, Foreign Secretary Douglas Hurd ordered a wide-ranging security review of Foreign Office files from 30 years ago or more, many from World War II. It was projected that some would be reclassified altogether, while other files would be made available to historians.⁷ However, Hurd dismissed a Freedom of Information Act as "a mechanistic approach to reform which produces conflict rather than progress." Instead, he said, "[w]e are pursuing a Tory route to reform -- promoting informed choice, greater accountability and a steady diminution of the categories of information which remain under a cloak of secrecy."⁸ On May 19, the membership of more than 20 Cabinet committees, together with confidential procedural guidance to Ministers, were published for the first time.⁹

Some of the information which is restricted under current law includes the names of slaughterhouses whose licenses to export to the European Community have been revoked on the ground of

³ "Hattersley seeks to end secrecy; Freedom of information," Ivo Dawney, *Financial Times*, February 21, 1992, Sect. I, p. 13.

⁴ "Parliament and Politics: Robert Maclennan at the launch of the Liberal Democrats' 'The Heart of Society'," *The Independent*, March 3, 1992, p. 8.

⁵ "The Labor Party in Blackpool: Active Government is Smith's vision," Stephen Goodwin, *The Independent*, September 30, 1992, p. 8; "Secrecy reform pledged," Robert Morgan, *The Times*, October 2, 1992; "The Liberal Democrats in Harrogate: Decisions of the day," *The Independent*, September 15, 1992, p. 4.

⁶ "Major vows war on Sir Humphreys," David Wastell, *The Sunday Telegraph*, May 10, 1992, p. 2; "Waldegrave to make state less secret," *The Independent*, May 10, 1992, p. 1.

⁷ "Secret files to be opened," Jon Hibbs, *The Daily Telegraph*, May 15, 1992, p. 2; see also "Ban on official papers is under review," Donald MacIntyre, *The Independent*, August 9, 1992, p.2; "Whitehall slowly reveals its secrets," Michael Evans, *The Times*, August 15, 1992.

⁸ "Hurd backs increased freedom of information," Anthony Bevins, *The Independent*, May 15, 1992, p. 7.

⁹ "Open Government: Secrecy ends today for 20 of Cabinet's committees," Phillip Johnston, *The Daily Telegraph*, May 19, 1992, p. 13.

hygiene; Department of Transportation safety and pollution tests; orders to ferry operators to bring their safety procedures up to legally required standards; the results of police disciplinary hearings; and the findings of fire brigade inspections of railway stations.¹⁰

In July 1992, a decision came down which upheld as legal the decision of the Secretary of State to refuse to disclose the report of a board of enquiry about a soldier's death to his parents. Kirk Sancto died in 1985, in a collision between two boats engaged in "non-operational duties" in the Falkland Islands. The initial report sent to his parents indicated that he was under the influence of alcohol at the time of the collision, but evidence at the inquest demonstrated that he was not. Although the Army later informed the parents that the boat had been "handled in a responsible fashion," the Secretary of State refused to disclose the official army report of the board of enquiry into Sancto's death. Justice Rose of the Queen's Bench Divisional Court ruled that, in the absence of a Freedom of Information Act, the decision of the Secretary of State for Defense was not subject to judicial review, and there was no legal duty to disclose the report. The justice expressed his sympathy for the parents and stated that this was a situation for Parliament, rather than the courts, to remedy.¹¹

A potential new European Community official secrets act, with several levels of secrecy and a 30-year period for declassification, has met with opposition by Britain. British MEP Alex Falconer raised objections to the act, saying, "The people of Europe need more access to information, not heavy-handed secrecy laws."¹² However, other reports commented that critics believed the proposal bore "obvious marks" of British government pressure to tighten up on all information.¹³ The act would allow almost any document to be classified, and would provide stiff penalties for leaking information, whether it was done in the public interest or not. Member states would be able to decide what information was classified. The proposal would have bypassed the European Parliament, except that Falconer, who sits on the Legal Affairs Committee, objected to a draft "going through on a nod" directly to the Council of Ministers. Instead, he secured a debate on the proposal in the European Parliament.¹⁴

(2) Freedom of Information

Labour MP Mark Fisher's Right to Know Bill, published on February 9, 1993,¹⁵ galvanized much cross-party support, and on February 19, became the first such proposal in a generation to gain a Second Reading in the House of Commons.¹⁶

¹⁰ "A little light on the secret life of Sir Robin Butler," Peter Jenkins, *The Independent*, May 21, 1992, p. 27.

¹¹ *Regina v. Secretary of State for Defense*, Ex parte Sancto, Queen's Bench Divisional Court, July 24, 1992, Mr. Justice Rose; "Outrageous decision not unlawful," *The Times*, September 9, 1992; "Law Report: No right to Army report on death," Paul Magrath, *The Independent*, August 19, 1992, p. 22.

¹² "EC's secrecy plan is amusing idea," Boris Johnson, *The Daily Telegraph*, July 18, 1992, p. 9.

¹³ "Freedom of Speech: Brussels plans stringent EC official secrecy law," Simon Jones, *The Independent*, June 8, 1992, p. 10.

¹⁴ *Id.*

¹⁵ "Right to know Bill is published," Patricia Wynn Davies, *The Independent*, February 10, 1993, p. 8.

¹⁶ "Decades of lobbying bears fruit at last," Michael Dynes, *The Times*, February 20, 1993.

The Bill, which would create a right of access to records held by public authorities, subject to security, commercial, legal and privacy exceptions, would create a public interest defense to Official Secret Act charges and give people access to their employment records. It would also force companies which employ fifty people or more to reveal information in their annual reports involving safety standards, successful actions against them for consumer, environmental safety and anti-discrimination violations, and pension funds. There would be a commissioner and tribunal to assist those who believed information was wrongfully withheld, and an overriding presumption of disclosure in the public interest.¹⁷

Fisher commented that "Secrecy is a corrosive disease. This bill will change the culture of decision-making and begin the end of secrecy which is an increasing British disease."¹⁸

The second reading, which was carried by a vote of 168 to two,¹⁹ means that the bill will go before the Commons committee dealing with private members' bills, where it will be subject to more detailed study. William Waldegrave, the public service minister, is scheduled to publish a "white paper" on open government this summer.

¹⁷ "Right to know Bill is published," Patricia Wynn Davies, *The Independent*, February 10, 1993, p. 8.

¹⁸ "MPs give backing to 'right to know' bill," Arthur Leathley and Robert Morgan, *The Times*, February 20, 1993.

¹⁹ "MPs in show of support for Right to Know Bill," Stephen Goodwin, *The Independent*, February 20, 1993, p. 4.

(3) *Spycatcher*

Spycatcher, the memoirs of former British MI5 agent Peter Wright, has been the cause celebre of the official secrets reform movement. It involved the British law of confidence, which provides that government employees in the military, security and intelligence realms have a lifelong duty not to disclose information obtained in the course of their work. The British government successfully enjoined seven newspapers from printing excerpts from, or articles about, the book. It also unsuccessfully went to court in Australia to try to block the book's publication there. Meanwhile, *Spycatcher* reached bestseller status in the United States, was available all over the world, and copies were brought into Britain on a regular basis.

The injunctions against the newspapers were eventually overturned by the Law Lords on the practical grounds that all damage to the interest of the Crown had already been done.²⁰ As of January 20, 1992, the British government had spent £2,221,503 on the case, exclusive of officials' time or the contempt proceedings.²¹

On November 26, 1991, the European Court of Human Rights handed down its decision in the two *Spycatcher* cases, brought by *The Observer* and *The Guardian* and by *The Times*.²² The court held that the restraint, by interlocutory injunction, of the publication of details and extracts from *Spycatcher* after it had already been published overseas constituted a violation of Article 10 of the European Convention on Human Rights, which guarantees freedom of expression. However, the majority of the court held that the Article 10 violation outweighed Britain's national security interests only for the period from July 30, 1987, the time of the American publication, until October 13, 1988, when the Law Lords lifted the injunction. During the prior period, July 11, 1986 to July 29, 1987, the exception under Article 10(2), "maintaining the authority of the judiciary" was stronger than the public interest in making the information available. This was because the right of the Attorney General as a litigant pending trial would have been permanently damaged if publication had been permitted, since his claim for a permanent injunction was based on evidence of the potential damage that publication of *Spycatcher* would cause to MI5.²³ "It was not then known precisely what the book would contain, and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say something new. And it was not unreasonable to suppose that where a former senior employee of a security service...proposed to publish, without authorization, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service..."²⁴ A sizable minority (10, to a majority of 14), dissented, holding in various separate opinions that the injunction was invalid during both periods, on Article 10 grounds.²⁵

²⁰ "What Britain Needs to Learn about a Free Press," Andrew Neil, *The Washington Post*, January 23, 1989.

²¹ *Hansard*, January 20, 1992; quoted in *Civil Liberty Agenda*, Summer 1992, p. 7.

²² *The Observer and the Guardian v. United Kingdom*, (1992) 14 EHRR 153 (E. Ct. Human Rts., 1991), and *The Sunday Times v. United Kingdom (No. 2)*, (1992) 14 EHRR 229 (E. Ct. Human Rts., 1991).

²³ *Id.*

²⁴ *The Observer and the Guardian v. United Kingdom*, (1992) 14 EHRR 153 at par. 61.

²⁵ See generally, *The Observer and the Guardian v. United Kingdom*, (1991) 14 EHRR 153, partial dissents by Judges Pettiti,

Two additional questions must still be decided by the European Court, both involving *The Times*. First, it must be determined whether *The Times* breached a duty of confidence by publishing material that it received from Wright, and that it knew or should have known was disclosed in breach of his duty to the Crown. Second, it must also be decided whether *The Times* can be held in contempt for having violated the spirit of the injunction against the other newspapers, which was clearly intended to prevent publication of any information derived from *Spycatcher* or its author. These issues, which were part of a separate application, are due to be decided in 1993.²⁶

Meanwhile, Peter Wright published a sequel, *Spycatcher's Encyclopedia of Espionage*, in Australia in October 1991. Neither it, nor the original *Spycatcher* are officially available in Britain, and Wright, who lives in Tasmania, faces arrest under the Official Secrets Act if he should return to Britain.²⁷

(4) D-Notices

Public information is also controlled by the "D-Notice" system. Members of the Defense, Press and Broadcasting Committee, which includes representatives of the Ministry of Defense, the Home Office and the Foreign Office, review material that may be sensitive. The committee then issues "Private and Confidential Notices", known as "D-Notices," which can recommend the suppression or delay of stories. Although the group has no official status, its guidelines are generally followed.

On September 23, 1992, at a seminar sponsored by the International Press Institute, Stewart Purvis, a member of the D-Notice committee for the past year, called for its abolition. "The structure is more about limiting information than releasing information," he said, "...the emphasis is hardly on more open government." He said that instead government departments should deal with the media directly, answering questions and giving guidelines.²⁸

In October of 1992, a committee was appointed to undertake a thorough review of the system. The committee, headed by Sir Christopher France, Permanent Secretary at the Ministry of Defense, includes representatives of the main broadcasting organizations, and the national and regional press. The review is set to "consider the purpose, scope and operation of the system in the light of the changed international scene and of the Government's commitment to greater openness," said Archie Hamilton, Minister of State for the Armed Forces. The review is scheduled to be completed by spring of 1993.²⁹

(5) MI6 and the Security Service Bill

Walsh, de Meyer, Valticos, Martens, Pekkanen and Morenilla.

²⁶ "Spycatcher: The Legal and Broader Significance of the European Court's Judgment," Article 19 *censorship news*, no. 8, December 1991, p. 5.

²⁷"Union leaders in Moscow plot says spycatcher," Robert Porter, *The Sunday Telegraph*, January 29, 1992, p. 7.

²⁸ "D-notice committee's abolition is urged," Maggie Brown, *The Independent*, September 24, 1992, p. 4.

²⁹ "D-notice system to be 'thoroughly' reviewed," Nicholas Timmins, *The Independent*, October 27, 1992, p. 6.

On May 6, 1992, Prime Minister Major publicly acknowledged, for the first time ever, the existence of the Secret Intelligence Service, better known as MI6. This follows the 1988 passage of the Security Service Bill, which put the Security Service, or MI5, on a statutory footing for the first time. Major said that the Government would soon introduce legislation to put MI6 on a statutory basis, and identified Sir Colin McColl as the head of the organization. The Secret Intelligence Service provides foreign intelligence and overseas support for the Government's foreign, defense, and economic policies. It was originally formed in 1909, and is soon to move to new headquarters in Vauxhall Cross, London.³⁰

The Security Service Act provides for an independent watchdog responsible for monitoring warrants issued to MI5 for entering homes or business premises, and a similar watchdog set-up was expected to be implemented for MI6.³¹ There has been a campaign in the House of Commons for both MI5 and MI6 to be subject to independent parliamentary monitoring, and the cabinet committee agreed in principle to set up a "watchdog" committee. This "watchdog" would have authority to review domestic and overseas intelligence policies, and might be given the right to investigate particular intelligence operations. The government has reported that the necessary legislation would be passed within a year of the June 1992 announcement.³²

However, there are differences of opinion on how much openness is acceptable. Although Stella Rimington, the head of MI5, expressed her willingness to testify before a Parliamentary committee, the Home Secretary, Kenneth Clarke, blocked her appearance. He told the Prime Minister that the scrutiny would set an undesirable precedent for security chiefs, which would ultimately make them publicly accountable for all aspects of their work.³³ He did later tell MPs that, although he opposed a formal committee appearance, he would not veto an informal chat. Meanwhile, Rimington is reported to have been lunching with newspaper editors.³⁴

³⁰ "Secrecy on MI6 is lifted," George Jones, *The Daily Telegraph*, May 7, 1992, p. 1.

³¹ "MI6 chief named as secrecy is lifted," Michael Evans, *The Times*, May 7, 1992.

³² "Cabinet plans watchdog for secret services," Philip Stephens, *Financial Times*, June 29, 1992, p. 8.

³³ "Clarke blocks spy chief grilling," Valerie Elliott and David Wastell, *Sunday Telegraph*, July 26, 1992, p. 4.

³⁴ "Security chief likely to 'chat' with MPs," Heather Mills, *The Independent*, November 5, 1992, p. 4.

LIBEL

Britain's libel law is among the most favorable for plaintiffs in the world. Contrary to U.S. law, in England, the burden of proof is on the defendant to assert the truth of the allegations. British juries tend to be extremely generous to libel plaintiffs as well. Plaintiffs from other jurisdictions, including the U.S., sometimes choose to bring libel actions in Britain because of these more favorable conditions. These plaintiffs have included Sylvester Stallone, Armand Hammer and Bianca Jagger.³⁵

In the wake of the many revelations after the death of the press baron Robert Maxwell, it became clear that reporters had known a great deal about his questionable business dealings, but were afraid to report them for fear of being forced to defend a libel suit. This led to much discussion of Britain's libel laws, but no reform. However, there were several interesting legal developments involving libel. The Court of Appeal refused to extend libel laws to a municipal governing body, adopting Article 10 of the ECCHR as its standard. In New York, a state court judge refused to enforce a British libel judgment on First Amendment grounds, thus challenging Britain's status as a libel haven of sorts.

(1) Robert Maxwell and the Ensuing Call for Reform

In autumn of 1991, Robert Maxwell sued the BBC program Panorama for libel and malicious falsehood after a segment in which the Maxwell empire was examined,³⁶ and sued author Seymour Hersh for allegations in his book, *The Samson Option*.³⁷ On November 5, Maxwell disappeared, presumed dead, from his yacht the *Lady Ghislaine*. In Britain, a libel action dies along with the plaintiff,³⁸ so Maxwell's many suits came to a halt. However, in the wake of his death, many of his business improprieties came to light. Moreover, members of the press began to admit that they had been aware of some of these improprieties, but had not reported on them because of their fear of a libel prosecution. "Maxwell's skilful use of the law of libel made sure that many unpalatable truths remained concealed... Crooks with deep pockets are well protected [under British libel law], while writers and broadcasters have to assess the considerable risks involved in publishing what they know. Maxwell was an excellent example of how ill served the public can be by the law of libel. Journalists who took him on were not trying to write about his private life or produce salacious gossip column pieces. They were trying to unravel his business dealings in the public interest."³⁹ There were calls for a standard like that in the United States, as set forth in *New York Times v. Sullivan*, where plaintiffs must prove that an allegation is both false and malicious and where public figures must meet a stiffer test than private individuals.⁴⁰

³⁵ *Media Law*, Geoffrey Robertson, Q.C. and Andrew Nicol, (3rd ed., Penguin Books, 1992), p. 38.

³⁶ "Maxwell sues BBC over Panorama," Raymond Snood and Bronwen Maddox, *Financial Times*, September 25, 1991.

³⁷ "Media Baron Sues Seymour Hersh," Glenn Frankel, *The Washington Post*, October 25, 1991, p. B1.

³⁸ Robertson, *Media Law*, p. 55.

³⁹ "How the libel laws helped Maxwell get away with it," David Hooper, *The Daily Telegraph*, December 7, 1991, p. 14.

⁴⁰ "Bad King Bob and the law that propped up his bully-boy court," Robert Harris, *Sunday Times*, December 8, 1991, "Lessons from Maxwell," *The Economist*, December 14, 1991, p. 16 (UK ed.).

(2) Other Significant Developments

Fear of libel continues to be a major motivating factor in Britain. Paul Alexander, author of a recently published biography of poet Sylvia Plath, *Rough Magic*, cannot find a British publisher for his work. He is convinced this is due to the influence of Ted Hughes, the poet laureate of Great Britain, who was married to Plath, and who is treated critically in the book. Hughes has a litigious reputation and many connections in the British publishing industry. Anne Stevenson's *Bitter Fame*, also about Plath, which paints Hughes quite favorably and was written with a great deal of assistance from Hughes' sister Olwyn, had no trouble finding a British publisher.⁴¹

Outrageous verdicts continue, as well. A general practitioner, Dr. Malcolm Smith, was awarded £150,000, as well as £100,000 in court costs, against his former partner, Dr. Alannah Houston, by a jury which found her guilty of slandering him by accusing him of sexual harassment. Dr. Houston, who claims never to have made the remark, and who was unable to afford representation by an attorney, said the verdict would drive her into bankruptcy.⁴² Sara Keays, former mistress of former Conservative party chairman, Cecil Parkinson, was awarded £105,000 in libel damages following an article in a woman's magazine which referred to her as a "bimbo" who had sought to profit from revelations about her relationship.⁴³ Esther Rantzen, a television host and sponsor of a children's charity, was awarded £250,000 in libel damages over allegations that she had covered up for an alleged pedophile who was teaching school in Kent.⁴⁴

A particularly disturbing development potentially restricts the right of free exchange of thought in letters to the editors of newspapers and other periodicals. An article in the *Daily Telegraph*, by Vladimir Telnikoff, a Russian emigre, suggested that ethnic Russians rather than Russian minorities should be hired by the BBC Russian service, since they are more in tune with the ideals and beliefs of the Russian majority. Vladimir Matusевич, a Russian Jew employed by another overseas radio broadcasting service, Radio Liberty, wrote a letter to the editor accusing Telnikoff of anti-semitism. Telnikoff sued for libel. The House of Lords found that the judge had acted properly in holding that the basis of the decision was to be the letter alone, not the letter in conjunction with the original article. In context the letter was much less likely to have been found libelous. The defendant, a private individual of no great means, was found liable in the amount of £240,000, an amount which he has no hope of ever paying. The case has been appealed to the European Court of Human Rights.⁴⁵

(3) *Derbyshire County Council v. Times Newspapers Ltd.*

⁴¹ "The Transom: The Long Arm of Ted Hughes," Clare McHugh, *The New York Observer*, March 2, 1992, p. 3.

⁴² "Doctor wins pounds 150,000 damages," Adam Sage, *The Independent*, October 26, 1991, p. 1.

⁴³ "Sara Keays awarded £105,000 for libel," Richard Savill, *The Daily Telegraph*, February 20, 1992, p. 1.

⁴⁴ "Rantzen wins £250,000 for cover-up slur," Ben Fenton, *The Daily Telegraph*, December 17, 1991, p. 3.

⁴⁵ Telnikoff v. Matusевич, [1991] 4 All ER 817, [1991] 3 WLR 952, (House of Lords, November 14, 1991); conversation with Sandra Coliver, Legal Officer, Article 19, August 20, 1992.

On February 19, 1992, the Court of Appeal held that Government departments, councils and other public bodies could not sue for libel. In reaching its decision, the Court looked to Article 10 of the European Convention on Human Rights, as well as Article 19 of the International Covenant on Civil and Political Rights (which it incorporated in its Article 10 discussion), and the U.S. standard of *New York Times v. Sullivan*.⁴⁶ The justices held that although Article 10 had not been incorporated into British law, it was appropriate to consider it where common law was uncertain, and even to take it into account otherwise. Overruling a lower court verdict, which had allowed the suit and had not considered Article 10, the Court indicated that local authorities and government departments ought to be denied remedies in libel, on the grounds that the press should be free to criticize the conduct of affairs by government authorities. Moreover, the council may still sue for malicious falsehood (a higher standard of proof), and individual members of the council, if named, could sue for libel.⁴⁷

Frances D'Souza, director of Article 19, applauded the judgment, saying "This judgment recognizes the public interest by allowing critical reporting of public bodies...This is a landmark judgment. The excessive and punitive libel laws have long been a hindrance to proper debate on matters of public interest."⁴⁸

The judgement was appealed to the House of Lords, where, in a unanimous ruling on February 18, 1993, the Law Lords upheld the lower court decision.

In his opinion, Lord Keith of Kinkel held that "It is of the highest public importance that a democratically elected governmental body, or indeed any government body, should be open to uninhibited public criticism."⁴⁹ However, rather than bases the ruling on an adoption of Article 10 of the European Convention on Human Rights, Lord Keith held that the English common law contains equally strong guarantees of free speech. The ruling also acknowledged the influence of the First Amendment of the U.S. Constitution. Anthony Lester, QC, counsel for the Sunday Times, commented that "[w]hat is so terrific is that the law lords unanimously said that free speech is a fundamental part of our common law. They were quite unequivocal that freedom of expression can be given greater precedence than other public interest except where really necessary."⁵⁰

(4) *Bachchan v. India Abroad Publications*

In April 1992, Judge Shirley Fingerhood of the New York Supreme Court⁵¹ refused to enforce an

⁴⁶ *Derbyshire County Council v. Times Newspapers Ltd.*, Court of Appeal, (Civil Division) February 19, 1992, [1992] 1 Q.B. 770, [1992] 3 All E R 65, [1992] 3 WLR 28, 90 LGR 221; Appeal from 15 March 1991, [1991] 4 All E R 795.

⁴⁷ *Id.*

⁴⁸ "Government bodies not entitled to sue for libel," Adam Sage, *The Independent*, February 20, 1992, p. 1.

⁴⁹ "Law lords rule out libel action by elected bodies," Adam Sage, *The Independent*, February 19, 1993, p. 8.

⁵⁰ "Sunday Times' famous victory for free speech," Ian Birrell, *The Sunday Times*, February 21, 1993.

⁵¹ The Supreme Court is New York's lowest state court, not its highest, which is called the Court of Appeals.

award worth \$70,450 in a libel decision handed down by London's High Court. This was the first known instance where an American court was asked to enforce a British libel judgment. Foreign judgments are generally upheld by U.S. courts.⁵²

The British Court had found India Abroad Publications, a New York-based news agency, liable for distributing a story about Ajitabh Bachchan, an Indian businessman, which it had picked up from a Swedish newspaper, linking him with a Swedish arms manufacturer charged with paying kickbacks to the Indian government. British jurisdiction was based solely on the circulation in Britain (total 1000) of two Indian newspapers which had picked up the story from the India Abroad wire service. Since India Abroad did not have assets available in Britain, plaintiff brought an action in New York to collect.⁵³

Judge Fingerhood decided the case under N.Y. CPLR s 5304(b)(4), which says that a foreign judgment "need not be recognized if...the cause of the action on which the judgment is based is repugnant to the public policy of this state." Judge Fingerhood ruled that British libel law violates First Amendment standards for two reasons. First, under British law, the burden of proving the truth of the allegation is on the media defendant. However, under *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, placing that burden on defendant would be unconstitutional because of the fear that liability would have a "chilling" effect on speech. Additionally, not even the "less forbidding" constitutional requirement for a private figure was met - to show that a media defendant was at fault. "It is true that England and the United States share many common law principles of law. Nevertheless, a significant difference between the two jurisdictions lies in England's lack of an equivalent to the First Amendment to the United States Constitution. The protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution."⁵⁴

There are no plans to appeal the ruling at this time.⁵⁵

PRIVACY AND PRESS REGULATION

In the wake of the Maxwell experience, there is a movement for British libel reform. There is also a call for a statutory right to privacy for individuals, against intrusions that are purely salacious.⁵⁶

⁵² "Bachchan v. India Abroad. Non Recognition of British Libel Judgements: The American Revolution Revisited," Laura R. Handman and Robert D. Balin, *Communications Lawyer*, Vol. 10, no. 3. Fall 1992, p. 1, 21; "A N.Y. Court Refuses to Enforce Decision in U.K. Libel Case," Robin Pogrebin, *The New York Observer*, May 4, 1992, p. 1.

⁵³ *Id.* Handman and Balin, the U.S. attorneys for India Abroad, put forth an interesting theory in their article. They suggest that former Indian Prime Minister Rajiv Gandhi's associates may have been taking revenge on India Abroad for its involvement in an earlier investigative report, and using England's libel laws as their weapon. Handman and Balin, *supra* at p. 21.

⁵⁴ *Bachchan v. India Abroad Publications Incorporated*, Index #28692/91, S.Ct. New York (NY County), Shirley Fingerhood, J., April 13, 1992.

⁵⁵ Conversation with Geoffrey Robertson, Q.C., (who provided an affidavit as expert witness on defendant's behalf), August 14, 1992.

⁵⁶ "Lessons from Maxwell," *The Economist*, December 14, 1991, p. 16 (U.K. edition).

Along with concern about the excessive libel laws in Britain, there is a contravening concern about the excesses of the tabloid press. This is particularly notable with the recent spate of interest in the marriages of various offspring of the Royal family. Notably, press reports of problems in the marriage of Prince Charles and Princess Diana were widely regarded as too intrusive. A Gallup poll taken in the wake of these revelations showed that nine out of ten adults favored some kind of privacy law.⁵⁷ The Press Complaints Commission received a huge number of complaints. However, when topless photos appeared of the less popular Duchess of York vacationing with her American "financial advisor", there was considerably less outcry.⁵⁸ The Royal scandals did lead to greater support in the Tory party for privacy laws.⁵⁹

Another dimension of the privacy argument applies to private individuals whose rights are trampled on. For example, in the Paddy Ashdown scandal, where the leader of the liberal Democrats was discovered to have had a long-term extramarital affair, it has been suggested that while he is a figure of public interest, the privacy of his former girlfriend should have been protected, since she is not.⁶⁰ Roy Hattersley, the Shadow Home Secretary, is among those who have called for the introduction of a privacy law protect "the small people rather than the large ones." This issue is seen as being closely related to the institution of a statutory press complaints council.⁶¹ Ironically, David Mellor, the National Heritage Secretary, who was in charge of the review of the press and the way the complaints commission conducted self-regulation, was himself a victim of the tabloid press. Revelations about his affair with actress Antonia de Sancha, and his family's acceptance of a vacation from Mona Bouwens, daughter of a PLO lobbyist, led to his September 24 resignation.⁶²

One of the major supporters of a statutory right to privacy is Geoffrey Robertson, a barrister known for his work defending free speech and freedom of the press. Robertson stated that, "The right to privacy is recognized by all human rights' conventions as fundamental. Britain's continuing inability to safeguard the privacy of its citizens against media intrusion remains one of the blackest marks on our civil liberties record."⁶³ "An effective remedy -- the right to bring a civil action, legally aided where appropriate -- is precisely what English law does not, at present, offer."⁶⁴ Robertson contends that privacy laws, which he

⁵⁷ "Survey indicates support for law on privacy," Edward Pilkington, *The Independent*, August 8, 1992, p. 4.

⁵⁸ "Photos of duchess draw one complaint," Alan Hamilton, *The Times*, August 22, 1992; "Foreign press flocks to follow up story," David Connett, *The Independent*, August 22, 1992, p. 3; "Media: The commission has no clothes," Michael Leapman, *The Independent*, August 29, 1992, p. 4.

⁵⁹ "Tories urge tough law on privacy," Philip Johnston, *The Daily Telegraph*, August 24, 1992, p. 3.

⁶⁰ "Protection of privacy," Joe Rogaly, *Financial Times*, February 7, 1991, p. 13.

⁶¹ "Hattersley calls for law on privacy," Jane Thynne, *The Daily Telegraph*, June 15, 1992, p. 2.

⁶² "Pols Jab London Tabs," Eugene Robinson, *Washington Post*, October 6, 1992, p. A17; "Tabloids Can't Resist a Tory's Torrid Affair," Taki, *The New York Observer*, August 10 - August 17, 1992, p. 20.

⁶³ "Intrusion -- a question for 12 good readers," Geoffrey Robertson, QC, *The Daily Telegraph*, February 8, 1992, p. 12.

⁶⁴ *Id.*

says exist in most civilized countries, have been impeded in their development in England by what he calls a "clever confidence trick," -- self-regulation by the press. He suggests a code of conduct which defines intolerable conduct, in as much detail as possible, and gives victims the right to sue in the courts for compensation and damages if they could prove a breach of the code which the newspaper could not justify on public interest grounds. The burden of proving the story was not in the public interest would be on the plaintiff. Ideally, this legislation would be accompanied by restrictions on prior restraints, reform of the libel laws, and enactment of freedom of information legislation.⁶⁵

The privacy laws, at least insofar as they regard the print media, might be enforced by the courts. However, if enacted, it is likely that a statutory governing body would be authorized to oversee the laws.

Currently, the press is answerable to the Press Complaints Commission, which is a self-regulating body composed primarily of representatives of the press industry, that adjudicates complaints brought against it by members of the public. It was founded in 1991 to replace the earlier Press Council, and is currently under review by Sir David Calcutt, whose report on the same topic several years ago led to the PCC's formation.⁶⁶ Like its predecessor, the PCC has been accused of bias in favor of the press. After the government review, it is possible that it will be replaced by a statutory body. In the first six months of operation in 1991, the PCC received 714 complaints, adjudicated 18, and upheld 10.⁶⁷ A number of bodies that have made submissions to the new Calcutt inquiry have come out denouncing the privacy law and supporting the retention of the non-statutory Press Complaints Commission in some form. These include the Guild of British Newspaper Editors,⁶⁸ the Liberal Democrats,⁶⁹ the Law Society,⁷⁰ and the Press Complaints Commission itself.⁷¹ The head of the Press Complaints Commission, Lord McGregor of Durris, said privacy laws would threaten freedom of the press, noting "a free press is not a nice press."⁷² The Queen's press secretary testified to Calcutt on the Royal family's concerns about the press's intrusion into its privacy.⁷³

Article 19, the International Centre Against Censorship, submitted a statement to the commission opposing any further statutory regulation of the press, including any privacy law, until the right of free

⁶⁵ *Id.*

⁶⁶ "So far it's been good news," David Newell, *The Times*, August 4, 1992.

⁶⁷ "The gospel of self-regulation," Melinda Wittstock, *The Times*, August 7, 1991.

⁶⁸ "Editors denounce privacy law drive," *The Times*, October 8, 1992.

⁶⁹ "Lib Dems wants cash bonds to curb press," Sheila Gunn, *The Times*, October 15, 1992. It should be noted that the Liberal Democrats proposed that each newspaper provide a cash bond to the PCC, to help it enforce its rulings.

⁷⁰ *Id.*

⁷¹ "Press commission rejects privacy law," Melinda Wittstock, *The Times*, October 19, 1992.

⁷² "Watchdog's head rejects demand for intrusion law," Richard Ford, *The Times*, August 21, 1992.

⁷³ "Queen seeks curb on press invasion of royal privacy," Ian Birrell and Maurice Chittenden, *Sunday Times*, October 25, 1992.

speech is guaranteed in the United Kingdom law.⁷⁴

Louis Blom-Cooper, a former chair of the Press Council in its waning days, called for the introduction of a civil privacy statute paired with the abolition of criminal libel, and recommends a proposed statutory Commission on Press Freedom and Responsibility which would be independent of the industry, while balancing the two functions of press complaints adjudication with preservation of the free press.⁷⁵

A private members' bill promoted in Parliament by Clive Soley, a Labor MP, has gained support from not only Labor MPs, but some members of the Liberal Democrat and Conservative parties as well. This bill, the Freedom and Responsibility of the Press Bill, would abolish the Press Complaints Commission in favor of an Independent Press Authority, which would both set high standards for journalistic ethics and defend press freedom.⁷⁶

For its second reading, set for February 1993, Soley promised to add a freedom of expression guarantee to the original bill.⁷⁷ There were two parliamentary committees examining privacy this fall -- an unofficial Commons committee organized by Soley in connection with his bill, and the National Heritage Committee,⁷⁸ which has been instructed by Peter Brooke, the National Heritage Secretary who replaced David Mellor to explore areas for inclusion in a new privacy bill.⁷⁹

Further revelations in the breakup of the royal marriage led to both increased calls for privacy laws and also to some embarrassment when a letter from Lord McGregor of Durriss to Sir David Calcutt was leaked. Lord McGregor, after the serialization in *The Sunday Times* of Andrew Morton's book "Diana: Her True Story," had published a PCC statement which condemned the excerpts as "an odious exhibition of journalists dabbling their fingers in the stuff of other people's souls." McGregor was later told by Andrew Knight, executive chairman of News International, *The Sunday Times'* parent group, that the Princess was helping to supply information to the tabloids about her marriage. He said she would confirm this by making herself available to be photographed at the home of Carolyn Bartholomew, one of Morton's principal sources. The Princess promptly did so. The Prince has also been implicated in feeding information, although there is no direct evidence.⁸⁰ However, some of the Prince's friends have been implicated in feeding the

⁷⁴ "United Kingdom: Submission to Government Review of Press Self-Regulation and Privacy," *Article 19*, Issue 21, December 7, 1992.

⁷⁵ "Press commission rejects privacy law," Melinda Wittstock, *The Times*, October 19, 1992; "Freedom and Responsibility: The future of press regulation in Britain," Louis Blom-Cooper, *Index on Censorship*, March 1992, p. 2 at 6.

⁷⁶ "Bill seeks to create 'guard dog' for press," Melinda Wittstock, *The Times*, October 23, 1992; "Tories back proposal for press watchdog," Patricia Wynn Davies, *The Independent*, October 23, 1992, p. 5.

⁷⁷ "Editors force press bill concession," Patricia Wynn Davies, *The Independent*, December 16, 1992, p. 6.

⁷⁸ "Editors attack plan for press watchdog," Sheila Gunn, *The Times*, December 16, 1992.

⁷⁹ "Legal leash prepared for newshounds," David Wastell and Valerie Elliott, *Sunday Telegraph*, November 1, 1992, p. 2.

⁸⁰ "Calcutt: curse or cure?" Stuart Wavell, *Sunday Times*, January 17, 1993.

press, whether with or without his consent.⁸¹

A summer 1992 scandal of tapes of a phone conversation of Diana with a friend and possible lover was matched the following January, when a tape containing a transcript of an explicit conversation between Prince Charles and his friend Camilla Parker-Bowles was published, first in Australia, and later in several British papers.⁸²

Meanwhile, on January 14, Calcutt's report, *A Review of Self-Regulation*, was published, having been much leaked in the week before its official release. The report singles out for criticism the Press Complaints Commission, on the grounds that it is not effective and does not command confidence of either the press or the public. He attacked it for being too press-dominated and recommended a publicly-funded tribunal with powers to investigate and adjudicate, to issue restraining orders and to fine, to draw up and maintain a code of practice. The maximum fine for individuals would be £5,000 and for a publication no more than 1% of its annual net revenue. Further, he proposed three new criminal offenses which can be committed by reporters and photographers: physical trespassing, electronic eavesdropping, and long range photography onto private property.⁸³

John Major and Peter Brooke have let it be known they are opposed to a statutory tribunal with powers to fine, but would support the new laws against eavesdropping and trespass.⁸⁴ Lay members of the Press Complaints Commission expressed outrage that their independence was called into question by Calcutt⁸⁵ while the newspaper editors on the PCC seriously considered giving up their majority, and appointing more lay members.⁸⁶ Newspaper editors and legal bodies reacted with anger and concern over the report.⁸⁷

PUBLIC ORDER

The Public Order Act of 1986, which gives police extensive power over demonstrations, marches and assemblies, continues to be used to ban anyone suspected of being a hippy or new ager from

⁸¹"Public relations battle with no prisoners taken," Ian MacKinnon and Kathy Marks, *The Independent*, January 13, 1993.

⁸²"Camp followers become media messengers to fuel battle royal in the press," Alan Hamilton, Tony Dave and Brian MacArther, *The Times*, January 13, 1993.

⁸³"The press has failed to curb its wildest excesses," Arthur Leathley, *The Times*, January 15, 1993.

⁸⁴"Major rejects legal curbs on the press," Patricia Wynn Davies, *The Independent*, January 13, 1993, p. 1; "Brooke backs laws to protect privacy," Philip Webster, *The Times*, January 15, 1992.

⁸⁵"Press body lay members angered by Calcutt," Raymond Snoddy, *Financial Times*, January 16, 1993.

⁸⁶"Editors act on Calcutt report," David Wastell, *Sunday Telegraph*, January 17, 1992, p. 2.

⁸⁷"Calcutt and the Press: Editors attack creation of anti-intrusion crime," Jane Thynne, *The Daily Telegraph*, January 15, 1993, p. 2.

Stonehenge at the time of the summer solstice.⁸⁸ It is also used to prosecute those who have arranged peaceful protests,⁸⁹ anti-apartheid demonstrators,⁹⁰ and anti-abortion protestors.⁹¹ One of the most recent prosecutions under the act was of Bill Galbraith, a Cheltenham businessman who was said to have described John Taylor, a Conservative parliamentary candidate, as a "bloody nigger," at the meeting of the Cheltenham Conservative Association where Taylor had been nominated.⁹² Galbraith died of cancer while awaiting trial,⁹³ while Taylor was defeated in the election.⁹⁴

BROADCASTING AND FILMS

Electronic media in Britain are regulated by a broadcasting ban and by multiple regulatory bodies.

(1) Broadcasting Ban

Since 1988, broadcast interviews with the Irish Republican Army, its political arm, the Sinn Fein, and other Republican and Loyalist groups in Northern Ireland, have been forbidden. A person's face may be seen, and his or her words may be heard, but not spoken in his or her own voice. Instead, there must be subtitles, or an actor must provide a voice-over.

However, Gerry Adams, the Sinn Fein MP, was interviewed on February 4, 1992 on BBC radio and television, in spite of the broadcasting ban on IRA supporters. The BBC said he was used because he was the first witness on the scene of the occurrence being reported on. The Home Office said: "The guidance was issued to the various television companies. It is for them to seek the advice of their lawyers as to whether they are remaining within the guidance from the Home Secretary. Presumably the BBC have done that."⁹⁵

When dealing directly with questions about the IRA, however, the BBC has proved more cautious. On September 1, 1992, the BBC silenced and subtitled a portion of a broadcast interview with Bernadette Devlin McAliskey, a former MP from Northern Ireland. Mrs. McAliskey did not claim membership in the Sinn Fein or the IRA, and condemned the IRA's use of violence, but did express sympathy for its goals. She called her silencing "defamatory, derisory and dangerous," and was reported to be considering legal action

⁸⁸ "Stonehenge hippie alert yields few sightings," Steve Boggan, *The Independent*, June 20, 1992, p. 3.

⁸⁹ "Public protest law that went wrong," John Wadham, *The Times*, February 26, 1992.

⁹⁰ "Bench must give trials undivided attention," *The Times*, February 20, 1992.

⁹¹ "Law Report: Acquittals in anti-abortion protest upheld," Paul Magrath, *The Independent*, September 18, 1991, p. 8.

⁹² "Race hatred case filed against Cheltenham Tory," Peter Victor, *The Times*, April 13, 1991.

⁹³ "Tory at Centre of Cheltenham race row dies," Paul Stokes, *The Daily Telegraph*, October 29, 1991, p. 10.

⁹⁴ "Election '92: Black Tory defeated in Cheltenham," Michael Fleet, *The Daily Telegraph*, April 10, 1992, p. 1.

⁹⁵ "Adams gives TV interview," *The Independent*, February 5, 1992, p. 2.

in the European Court of Human Rights against the BBC.⁹⁶

In response to the incident and the reaction it provoked, the BBC director general, Sir Michael Checkland, said he would make "strong representations" to get the broadcasting ban lifted.⁹⁷

(2) Broadcasting Regulatory Groups

British broadcasters are subject to multiple regulatory bodies. In the first place, the BBC is subject to its Board of Governors, while the independent stations, under the 1990 Broadcasting Act, are subject to the Independent Television Commission. Additionally, there is the Broadcasting Complaints Commission, a statutory body appointed by the Home Secretary to investigate and issue public rulings concerning complaints of unfair treatment, invasions of privacy, or offensive programming by broadcasters. In 1991, another group was given statutory existence -- the Broadcasting Standards Council, whose purpose is to monitor sex, violence, taste and decency.

BBC.

The BBC engaged in a significant piece of self-censorship last year when, bowing to pressure, it dropped plans to air the controversial film "The Last Temptation of Christ." The BBC claimed that although it had purchased rights to the film, it had never actually intended to show it.⁹⁸ A frightening aspect to this controversy is that when several peers protested the possibility of the film being shown, in the House of Lords, Lord Orr-Ewing drew a comparison to the "Satanic Verses" affair, asking "Does the minister recall the reaction when Salman Rushdie published a book that was badly received, understandably, by the Muslims? It would be wise if the home secretary, who is obligated by the charter of the BBC, got into touch with the churches and suggested that this is deeply offensive to the 70 per cent of people of this country who look on themselves as Christian."⁹⁹ Echoing Lord Orr-Ewing, the Archbishop of Canterbury defended the "passionate reaction" of Muslims to Rushdie's novel, by comparing it to Christian outrage about the possible showing of "The Last Temptation."¹⁰⁰ In a year-end summary of the BBC's top complaints of 1991, the potential showing of the Last Temptation came out on top.¹⁰¹ The Broadcasting Standards Council received a record number of complaints about the film: 1,054.¹⁰²

⁹⁶ "BBC 'blanks out' voice of former Ulster MP," Stephen Ward, *The Independent*, September 2, 1992, p. 2; "Liberal Democrat Conference: BBC to challenge ban on Sinn Fein," Jane Thynne, *The Daily Telegraph*, September 15, 1992.

⁹⁷ "Liberal Democrat Conference: BBC to challenge ban on Sinn Fein," Jane Thynne, *supra*; "BBC calls for lifting of broadcasting ban," Stephen Ward, *The Independent*, September 15, 1992, p. 2.

⁹⁸ "BBC drops Last Temptation Film," Philip Johnston, *The Daily Telegraph*, November 5, 1991, p. 1; "'Temptation' has no screening slot," *The Independent*, November 5, 1991, p. 2.

⁹⁹ "Peers protest at TV showing of Christ film," John Winder, *The Times*, October 23, 1991.

¹⁰⁰ "Rushdie did hurt Muslims says Carey," Damian Thompson, *The Daily Telegraph*, November 23, 1991, p. 3.

¹⁰¹ "Television/Feedback," *The Independent*, January 7, 1992, p. 24.

¹⁰² "Unscreened film draws complaints," *The Independent*, July 8, 1992, p. 7.

The BBC's Panorama news program lost out on a scoop about Terry Waite's alleged connections with Oliver North, even though it had been holding the story for four years, because Tony Hall, the BBC's director of news and current affairs ruled that it would be bad taste to show it before Waite had set foot on British soil. Another network broke the story first.¹⁰³

A BBC program, "A Time To Dance," about the obsessive love of a married man in his fifties and a much younger woman, had a pivotal sex scene cut for fear of offending viewers after outraged reaction to a rape scene in the first episode. The program was shown after the 9:00 "watershed" and was broadcast with warnings, but BBC officials decided this was insufficient.¹⁰⁴

ITV.

The Independent Television Commission also had its difficulties with news events. A program which Channel 4, one of the independent stations, had planned to broadcast, was blocked by the ITC. It showed horrific pictures of the Baghdad bunker bombed by American forces during the Gulf War, including young bodies being brought out. The clip, part of a documentary about victims of the Gulf War, lasted only twenty seconds, but was considered too much for an early evening time slot. "We acknowledge the validity of the programme, but it is not thought suitable to broadcast a film which shows images of dead children at a time when parents with young families would be watching," said the Commission's James Conway. However, another, more political motive was suspected. Sir Bernard Braine of the House of Commons said, "It is necessary that they make it very, very clear that the allies would not have known that this bunker was full of refugees. Neither the RAF nor the US Air Force would have deliberately bombed women and children."¹⁰⁵

Broadcasting Complaints Commission.

The Broadcasting Complaints Commission was not much in the news except that its new head, Rev. Canon Peter Pilkington, took over on July 1, 1992. Known as an educational traditionalist, Pilkington was not a favored choice of broadcasters, who would have preferred someone with experience in the industry, and was considered an unknown quantity.¹⁰⁶ The BCC added an "oddly defensive"¹⁰⁷ rider to its July 1992 annual report, addressing the argument that the number of different complaints bodies for television and radio in the U.K. threatens freedom of expression. "The BCC have, after all, been in existence since 1981 and are not in any sense a regulatory body. They issue no code and make no rules; their only function is to

¹⁰³ "Explain that," *The Times*, November 20, 1991.

¹⁰⁴ "Viewers make BBC think it's a time to censor; 'A Time to Dance' is the latest instance of television's new sensitivity to angry public criticisms, says Martin Wroe," Martin Wroe, *The Independent*, January 19, 1992, p. 8.

¹⁰⁵ "A ban on the horrors of the Baghdad bunker," *The Daily Telegraph*, October 1, 1991, p. 17.

¹⁰⁶ "In praise of traditional values," John Rae, *The Times*, February 18, 1992; "Media and Marketing," Cassandra Jardine, *The Daily Telegraph*, July 1, 1992, p. 12.

¹⁰⁷ "Talk of the Trade: Freedom to complain," *The Independent*, July 22, 1992, p. 15.

deal with individual complaints as they arise."¹⁰⁸

One notable BCC complaint upheld in the last year was a BBC Dispatches documentary "The AIDS Catch", in June 1991, about the work of Professor Peter Duesberg of the University of California at Berkeley. Professor Duesberg believes that HIV is not the cause of AIDS. In August 1991, the BCC ruled that the program had treated the subject unfairly and was "likely to have confused many viewers about the risk of HIV infection."¹⁰⁹

The Broadcasting Standards Council.

The watchdog body that has been most active since October 1991 was indisputably the Broadcasting Standards Council. First given a chartered mandate in January of 1991, the BSC has been active, issuing warnings and conducting surveys. The Council does not censor, but responds to viewer complaints after the programs have been aired. Upheld complaints are published in the BSC bulletin, and sometimes reported in the press. In extreme cases, broadcasters can be ordered to announce findings against themselves on the air, but that has not yet happened.¹¹⁰

By June 1991, six months after coming into its statutory powers, the BSC had received 748 complaints from the viewing public and had upheld fewer than ten. Although the largest number, over half, concerned matters of taste and decency (one-third of those involving "bad language"), and smaller numbers involved sex and violence, the BSC saw itself as being primarily concerned with violence. Colin Shaw, the Council's secretary, said, "[The television industry] thought there would be an obsession with sex, but in fact we have shown a steady concern over violence instead. In fact I think we are demonstrating that there's not a great deal that can't be shown."¹¹¹ However, when its next annual report was released, in July of 1992, the BSC had received almost 2,700 complaints during the year, of which 878 were within its remit. Of these, nearly 50 percent concerned matters of "taste and decency", about 25 percent involved sex scenes, and only 8 percent of the complaints were about violence. The top number of complaints were about the never-shown "The Last Temptation of Christ," followed by television ads for "Freddie's Dead," the last of the Nightmare on Elm Street films, and for "Jacob's Ladder." The next most complained-of program was a morning talk show on which members of the Chippendales male striptease dancers performed.¹¹²

The BSC was seen as perhaps one regulating body too many. During the 1992 campaign, both Labor and the Liberal Democrats pledged to abolish it outright if they were elected. The Conservatives were said to favor merging it with the Broadcasting Complaints Commission. Its chairman, Lord Rees-Mogg, called for the merger. "We must give the public a much stronger voice. We need a broad-based ombudsman,

¹⁰⁸ *Id.*

¹⁰⁹ "The Spreading of a Terrible Myth," Steven Connor, *The Independent*, May 14, 1992, p. 25.

¹¹⁰ "Watchdogs who keep their own council," Patrick Stoddart, *Sunday Times*, June 16, 1991; "TV swearing before 9pm is disliked," Maggie Brown, *The Independent*, July 18, 1991, p. 3.

¹¹¹ *Id.*

¹¹² "Unscreened film draws complaints," *The Independent*, July 8, 1992, p. 7.

a strong representative of public views and interests to counterbalance the BBC governors and the ITC."¹¹³ However, since the April election, no steps have been taken towards any abolishment.

Complaints ranged from sexist, racist and homophobic jokes, to sex scenes, scenes of violence and horror, and bad language. The American lifeguard series "Baywatch" was censured because it was too violent and depicted women in a degrading manner.¹¹⁴ Programs showing cultural differences were also subject to possible criticism. An episode of Michael Palin's "Around the World in Eighty Days," which showed a live snake being disembowelled in a restaurant in China, was held to have been shown too early in the evening.¹¹⁵ Similarly, a Channel 4 documentary on the Falklands War was criticized for a strong swear word used by a soldier. It was deemed to reflect a feeling too intense to edit, but to be inappropriate at its 5:00 p.m. time slot.¹¹⁶ Notable among non-censured complaints was a derogatory reference to homosexuals in a BBC2 comedy, which the BSC commented was part of a "long tradition of homosexuality as a subject for comedy...To proscribe any area of life as invariably unsuited for comic treatment would be a wrongheaded way of achieving fair treatment for minorities."¹¹⁷

The BSC sponsored a number of surveys about what viewers want and don't want. Not surprisingly, the public feels that survivors of disaster or tragedy should be treated with more sensitivity by the media.¹¹⁸ In a widely reported survey of 56 viewers (not exactly a wide sample), it was determined that the most disliked obscenities were, in order, cunt, motherfucker, cocksucker, nigger and fuck, but that fuck was rapidly losing its power to shock. Further, these viewers preferred that obscenities be used only when justified by the context of the program.¹¹⁹ "Children, Television and Morality" told us that children often fail to understand the storylines of the programs they watch,¹²⁰ while teenagers are more upset by watching scenes of cruelty to animals than they are by sex or violence. They find racism unpardonable, censorship unfair, and bad language acceptable.¹²¹ "Women Viewing Violence" concluded that television had increased women's fear of rape and violent crime. Disturbingly, there was a negative reaction to the Oscar-winning American film "The Accused," which deals with the barroom gang rape of a young woman. "There was considerable concern about the appropriateness of a Hollywood film -- one essentially premised upon entertainment value -- as the most suitable vehicle for dealing with this troubling subject."¹²² A study jointly

¹¹³ "TV watchdog to go after the election," Jane Thynne, *The Daily Telegraph*, March 9, 1992, p. 2; "What the parties stand for," *The Sunday Times*, March 15, 1992.

¹¹⁴ "Television/Feedback," *The Independent*, February 14, 1992, p. 4.

¹¹⁵ "Palin snake death scene condemned," *The Daily Telegraph*, November 15, 1991, p. 7.

¹¹⁶ "Television/Feedback," *The Independent*, May 6, 1992, p. 28.

¹¹⁷ Broadcasting Standards Council Complaints Bulletin, March 14, 1991. Cited in "Liberty Watch" in *Civil Liberty Agenda*.

¹¹⁸ "Care in disaster reporting urged," Jane Thynne, *The Daily Telegraph*, July 9, 1991, p. 3.

¹¹⁹ "TV Obscenities 'should always be justified'," *The Independent*, October 25, 1991, p. 2.

¹²⁰ "Children often fail to understand TV stories," Maggie Brown, *The Independent*, May 19, 1992, p. 4.

¹²¹ "Teenagers turned off by cruelty to animals," Robert Bedlow, *The Daily Telegraph*, May 19, 1992, p. 7.

funded by the BSC, BBC and ITV found a high level of satisfaction with broadcast and newspaper coverage of the Persian Gulf War. The study found that most people would accept being misled by journalists during a war if it meant saving lives, but not to preserve morale.¹²³

(3) The Future of the Television Regulating Bodies

The future of these regulating bodies is widely disputed. The ITC had several widely-reported differences of opinion with the BSC when programs approved by the ITC for broadcast were later declared "beyond acceptable limits," by the BSC. An ITC spokeswoman commented that "It is like having two umpires."¹²⁴ Lord Rees-Mogg, chairman of the BSC, pleaded for the establishment of a general Consumer Council for Broadcasting. Despite the many watchdog groups extant, Rees-Mogg believes there is an urgent need for a body with a broader remit, taking on research and "unfashionable media industry issues" such as training and equal opportunities. He complained because unlike the ITC, the BBC does not publish regular summaries of viewer complaints received.¹²⁵

Meanwhile, the arrival of satellite broadcasting from the continent left open the possibility of unregulated broadcasting. Despite British control of distribution of pornography, and its total banning from the airwaves, a new satellite subscription channel from Holland, "Red Hot Dutch," will provide pornographic material to those who pay a fee. Under the European Directive on Transfrontier Broadcasting, which Britain has accepted, television stations may be regulated only in their country of origin. BSC director Colin Shaw said he would be monitoring the channel. However, "We have no powers. All we can do is make representations to the Government to take it up on Britain's behalf with the Community if we feel it is offensive."¹²⁶

¹²² "TV attacks put women in fear of crime," Jane Thynne, *The Daily Telegraph*, April 24, 1992, p. 7.

¹²³ "Gulf War Anniversary," by Jane Thynne, *The Daily Telegraph*, January 16, 1992, p. 4.

¹²⁴ "Low expectations from the Thatcher Years," Christopher Dunkley, *Financial Times*, July 24, 1991, p. 13; "TV swearing before 9pm is disliked," Maggie Brown, *The Independent*, July 18, 1991, p. 3; "A matter of taste," Melinda Wittstock, *The Times*, July 17, 1991.

¹²⁵ "Media and Marketing: The lady's not for spurning," Jane Thynne, *The Daily Telegraph*, July 15, 1992, p. 14.

¹²⁶ "Viewers tune to Red Hot porn TV," John Gaskell, *Sunday Telegraph*, July 19, 1992, p. 7.

FILM AND VIDEO REGULATION

Under the Video Recordings Act, videotapes as well as theatrical films fall under the ambit of the British Board of Film Classification. On May 7, 1992, thousands of "horrific uncensored video films," including purported "snuff" films, were seized by trading standards officers in raids across the country. These films, which depicted (simulated) torture, mutilation and cannibalism, had not been passed by the Board, and are thus not considered legal for viewing in the U.K.¹²⁷

On a more absurd level, Grant and Cutler, a London bookshop specializing in foreign-language texts, was forced to remove from sale a selection of French films, including classics by Renoir, Cocteau and others, as well as recordings of stage productions by Moliere, Racine and so on. Under the Video Recordings Act it is illegal to sell any videos in Britain which do not explicitly bear the Board's seal of classification, or else (as with some opera and ballet recordings) an official exemption. Even if a dubbed or subtitled version of the same film has been released to theaters in England, the unsubtitled version is still illegal. The Board argues that a film seen without subtitles and on video may create a different effect. However, the Board has not moved to prosecute sellers of Indian, Arabic and Chinese videos. Although prosecution has been considered, "it was decided that such a move would be offensive to minorities in a multi-cultural society."¹²⁸

ANTI-TERRORISM LAWS

This year, for the first time, the Prevention of Terrorism Act has been invoked in several cases to force broadcasters to produce information gathered under the understanding of journalistic confidence to aid police investigation. One network that refused to comply was fined heavily.

On April 29, 1992, a British High Court ordered the Channel Four television network and independent production company Box Productions to disclose the names of confidential sources used in the documentary "The Committee," first broadcast in October of 1991. The case marked the first time police have involved Britain's sweeping Prevention of Terrorism Act to compel journalists to reveal their sources.¹²⁹ On July 30, 1992, Channel 4 and Box Productions were fined £75,000 by the High Court for refusing to name the source after the court order.¹³⁰

The documentary alleged that a secret group of police officers in the Royal Ulster Constabulary, known as the Inner Circle, had funneled intelligence data on members of the IRA to a larger secret committee of Protestant paramilitary organizations, policemen, bankers and businessmen. The larger group, the Ulster Central Coordinating Committee, then allegedly targeted these suspects for murder and arranged the killings. The Inner Circle was also accused of thwarting a 1990 internal police investigation into the

¹²⁷ "Thousands of horror video films seized in raids," David Connett, *The Independent*, May 8, 1992, p. 6.

¹²⁸ "Red tape clogs up the video-recorded," John Russell Taylor, *The Times*, April 16, 1992.

¹²⁹ "Court Orders British TV to reveal Ulster Expose's Source," Glenn Frankel, *Washington Post*, April 30, 1992, p. A32.

¹³⁰ "Channel 4 fined 75,000 pounds," Michael Durham, *The Independent*, August 1, 1992.

intelligence leaks and allegations of collusion. One of the sources claimed to be a member of the committee, and another had served as a "liaisons officer", passing information for police to Protestant hit squads.

Police officials in Belfast reacted angrily to the program, accusing its makers of an "unjust and unsubstantiated slur". Channel Four then challenged police to investigate the allegations and handed over 80 pages of documents and 19 names of people interviewed. But police also went to court and obtained orders for additional documents and names of sources. Those court orders were upheld on appeal.

Michael Grade, the Channel Four network's chief executive, told a news conference that his network was forced to "choose between breaking the law and putting individuals' lives in certain danger. If journalists investigating terrorist activity cannot protect their sources, matters of legitimate public concern will become journalistic no-go ahead."¹³¹ Liz Forgan, Channel Four's director of programs, said "There are certain stories that will never come into the public domain unless journalists are able to protect sources whose lives are in danger."¹³²

Lord Justice Woolf held that, despite the very real dilemma they found themselves in, journalists do not have a public interest right to give a guarantee of confidentiality to a source. "To contend that...a journalist or anyone else has a right to conscientious objection which entitles him to set himself above the law if he does not agree with the court's decision is a doctrine which directly undermines the rule of law and is wholly unacceptable in a democratic society." In response, Forgan wrote that Justice Woolf's ruling in the High Court "torpedo[es] the basic public-interest argument for any journalist, print or broadcast, being able to promise a source that his or her identity will be kept secret. Without that promise a small but extremely important category of journalism becomes impossible in Britain... We need a law that expressly acknowledges the role of unfettered journalism in our society. The courts should be required to weigh motive and morality when considering the...penalty."¹³³

Subsequent to the verdict, the RUC mounted a campaign to throw doubts on the accuracy of the program, and the veracity of the informers.¹³⁴ The RUC also ran a newspaper ad denying the allegations in the program. Sir Hugh Annesley, chief constable of the RUC, denounced the program, and said the allegations were an unjust and unsubstantiated slur on the RUC. On September 29, 1992, Ben Hamilton, the main researcher for "The Committee", was arrested at his home in London. Scotland Yard announced that he would appear in Magistrates' court to face one count of perjury during the trial at the Royal Courts of Justice in London this year. Channel 4 and Box Productions stood by the show and by Mr. Hamilton.¹³⁵

On October 5, Ben Hamilton's solicitors asked the Attorney General to institute contempt proceedings against the *Sunday Times* and the *Sunday Express*. Both papers ran articles about the case

¹³¹ *Washington Post*, *supra* note 80.

¹³² "British TV Station Defies Order to Identify Source," William E. Schmidt, *The New York Times*, May 3, 1992, section 1, p. 10.

¹³³ "A law to silence whistle-blowers," Liz Forgan, *The Independent*, August 6, 1992, p. 21.

¹³⁴ "RUC considers taking channel 4 to court," Liam Clarke and Michael Prescott, *Sunday Times*, August 9, 1992.

¹³⁵ "Death squads' researcher charged," Richard Ford, *The Times*, September 30, 1992.

which cast doubts on the program's conclusions as well as the methods and characters of the journalists.¹³⁶ The Committee to Protect Journalists has written the Prime Minister and the Attorney General to express its concern that Hamilton's arrest was aimed at silencing critical reporting about the situation in Northern Ireland.¹³⁷

In a similar situation in March 1992, the ABC News bureau in London was compelled to turn over to police unused portions of interviews conducted by correspondent Pierre Salinger in Tripoli with two Libyans accused of involvement in the 1988 midair bombing of the Pan Am flight over Lockerbie, Scotland. ABC originally fought the Scotland Yard subpoena, but after a ruling against it, agreed to comply because the order did not require the disclosure of confidential sources.¹³⁸

OBSCENITY LAWS

Britain's Obscene Publications Act is used, not only to regulate pornography, but also to control other forms of expression. Before the election, the Conservative party discussed the possibility of tightening up the obscenity laws.¹³⁹ However, afterwards, John Major announced that Britain already has the strongest censorship in Europe and he planned to keep it that way.¹⁴⁰ In July, 1992, the government confirmed that it would support legislation to strengthen the law on obscenity if a proposal was made which represented a real improvement on existing law, and would garner sufficient public support.¹⁴¹ However, a recent private member's bill supported by Mary Whitehouse's National Viewers' and Listeners' Association apparently did not meet that standard.¹⁴²

In July 1992, *Lord Horror*, a science fiction novel based on the historical Lord Haw-Haw (William Joyce), a British Nazi collaborator, was acquitted of obscenity charges on the grounds of its alleged anti-semitism. However, *Meng and Ecker*, a comic based on the novel, was ruled an obscene publication that should be destroyed. The books and comics were seized in 1989, in what was called the biggest literature obscenity case since the seizure of *Last Exit to Brooklyn* in 1971. The author, David Britton, meant the novels to be "an exploration of the psychotic mind," which demonstrated the horrors of the holocaust.¹⁴³

¹³⁶ "Contempt claim over RUC collusion story," David McKittrick, *The Independent*, October 6, 1992, p. 2.

¹³⁷ Letter by Anne Nelson, Executive Director of the Committee to Protect Journalists, to Prime Minister John Major, Sir Patrick Mayhew, QC, Secretary of State for Northern Ireland, and Sir Nicholas Lyell, QC, Attorney General, November 13, 1992.

¹³⁸ "Yard wants reporter's Lockerbie interviews," Patrick Cockburn, *The Independent*, March 6, 1992, p. 15; "Tripoli hardens stance on Lockerbie suspects," Patrick Cockburn, *The Independent*, March 26, 1992.

¹³⁹ "Tories consider porn-law pledge in manifesto," Philip Johnston, *The Daily Telegraph*, November 1, 1991, p. 4.

¹⁴⁰ Feminists Against Censorship, 1992 Spring Update.

¹⁴¹ "Obscenity law reform backed," *The Times*, July 1, 1992.

¹⁴² "Madonna book puts women at risk," William Weekes, *The Daily Telegraph*, October 28, 1992, p. 14; "Not so much Sex please," Arthur Leathley, *The Times*, October 28, 1992.

¹⁴³ "Legal challenge on seizure of anti-semitic fantasy," Jonathan Foster, *The Independent*, July 30, 1992, p. 5; see also "Anti-

Despite testimony by expert witnesses that the book and comic were esoteric works of science fiction with an anti-racist message that would be clear to their audience, the judge ruled that the comic, which was "much more luridly bound and likely to attract the attention of the less educated or literary reader" was "a glorification of racism and violence by some people."¹⁴⁴

A campaign was launched by journalist Moyra Bremmer to prosecute a paperback publisher under the Obscene Publications Act for issuing the works of the Marquis de Sade.¹⁴⁵ The Crown Prosecution Service ultimately declined to take action.¹⁴⁶

After a complaint from Tory MP Nicholas Winterton, police referred Madonna's book *Sex* to the Director of Public Prosecutions for advice on whether the book should be prosecuted for obscenity.¹⁴⁷ It was ultimately decided not to do so.¹⁴⁸ However, the book was condemned in Parliament by Dr. Robert Spink, an MP who was seeking support for his bill tightening obscenity law.¹⁴⁹ Meanwhile, the Harrods department store sold the Madonna book, but refused to carry a newly released book of photographs by Robert Mapplethorpe. The director of the Victoria and Albert Museum also cancelled an AIDS fundraiser, which would have featured a slideshow of works from the Mapplethorpe book, after seeing the images. The museum's public affairs director called some of the pictures "deeply repugnant."¹⁵⁰

In keeping with the British concern for kind treatment of animals, imported videos of fighting pit bulls were declared obscene by a jury. Since the videos were imported, they were prosecuted under the Customs and Excise Management Act.¹⁵¹

MUSIC CENSORSHIP

The Obscene Publications Act was also used against a record, "Efil4Zaggin," by American rap group NWA. 25,000 copies were seized, and the group's British record label, Island Records, advised retailers not to sell any remaining copies of the album which had already been distributed. Naturally, this

semitic' Haw-Haw book banned," Victoria Macdonald, *The Sunday Telegraph*, September 8, 1991, p. 3.

¹⁴⁴ "Haw Haw novel not obscene," Alan Hamilton, *The Times*, July 31, 1992, p. 2; "Hitler novel is not obscene, court rules," *The Independent*, July 31, 1992, p. 2.

¹⁴⁵ "Beyond the limits of license," Moyra Bremmer, *The Times*, August 13, 1991.

¹⁴⁶ "Another BBC chief en route to the opera?" *Sunday Times*, November 3, 1991.

¹⁴⁷ "Madonna book," *Financial Times*, October 16, 1992, p. 1.

¹⁴⁸ "Madonna book escapes prosecution," *The Independent*, October 21, 1992, p. 4.

¹⁴⁹ "Madonna book 'puts women at risk'," William Weekes, *The Daily Telegraph*, October 28, 1992, p. 14.

¹⁵⁰ "Harrods bans Mapplethorpe book," Fiametta Rocco, *The Independent*, November 1, 1992, p. 1.

¹⁵¹ Robertson, *Media Law*, p. 149; "Pit bull fight videos are ruled obscene," John Steele, *The Daily Telegraph*, January 7, 1992.

spurred interest, and the album's sales picked up considerably.¹⁵² This was the first time a record produced by a major label was confiscated in the United Kingdom. The objections against the album were primarily based on misogynistic titles like "One Less Bitch," and "Findum, Fuckum & Flee." However, as Article 19 pointed out, "If it could be demonstrated that this material is highly likely to result in acts of violence against women, a ban might perhaps be justified, but this would be extremely difficult to establish, the suspicion that it might incite violence is not enough."¹⁵³ The Redbridge Magistrates Court, after hearing expert testimony, ordered the albums returned to the group.¹⁵⁴

The case obviously had an effect on Island Records, the group's label, however, since they later dropped two songs from rapper Ice Cube's *Death Certificate* album: "Black Korea", which described the tension between Korean shopkeepers and black customers in New York and Los Angeles, and "No Vaseline", an allegedly anti-semitic attack on Ice Cube's former manager.¹⁵⁵

Subsequently a Swedish "death metal" band, Dismember, saw their imported albums seized by customs officials. Despite song titles like "Skin Her Alive," and "Bleed for Me," the Great Yarmouth Magistrates ordered the return of the albums because there was no evidence they would deprave or corrupt anyone.¹⁵⁶

Another rap record was banned, allegedly for copyright reasons, but probably for political ones as well. A slang-laden radio interview with Neil Kinnock, then-head of the Labor Party, was used as the basis for the novelty record "Rhondda Rhant Rhap" by Verbal Vandalism. Since the BBC held the copyright in the radio interview, the High Court granted an injunction to prevent further distribution of the record.¹⁵⁷

However, album seizures under obscenity statutes are only part of the music censorship problem in the U.K. Like the U.S., voluntary record-labeling has been instituted by record companies and retail chains.¹⁵⁸

Radio stations, particularly those operated by the BBC, have famously restricted their playlists. As mentioned in last year's report, an extensive list of songs were banned during the Persian Gulf War, and a song by the Pogues dealing with the Birmingham Six and Guildford Four was also banned. Some records

¹⁵² "Turning down the ghetto blasters," Sean O'Hagan, *The Times*, July 27, 1991.

¹⁵³ "Singled out for abuse," Clare Longrigg, *The Independent*, August 8, 1991, p. 17.

¹⁵⁴ "Beating the rap," *The Times*, November 11, 1991.

¹⁵⁵ "Taking the rap for their rhymes," David Toop, *The Times*, January 17, 1992; "'Racist' songs axed from top selling album," *Evening Standard*, November 29, 1991.

¹⁵⁶ "The Arts: Bob Dylan sings a song for the mob," Tony Parsons, *The Daily Telegraph*, July 10, 1992, p. 18; "Culture of sleaze," *The Independent*, July 31, 1992, p. 16.

¹⁵⁷ "BBC seeks to halt Neil rapping," *The Daily Telegraph*, November 2, 1991, p. 18; "'Kinnock rap' record is banned," *The Independent*, November 12, 1992.

¹⁵⁸ "Singled out for abuse," *supra* note 134.

are restricted to certain time periods: George Michael's "I Want Your Sex" is restricted to after the 9:00 p.m. "watershed" period, when children are presumed to be no longer listening, while "I Want to Sex You Up" by Color Me Badd does get played during the daytime, though not until the children have gone to school.¹⁵⁹ In the late 1970s, the Sex Pistols' anti-royalist "God Save the Queen," was banned from the radio, and although the record achieved a success of notoriety, the Pistols themselves were banned by many of the towns they tried to play concerts in.¹⁶⁰ Frankie Goes to Hollywood made a name for themselves when their first single, "Relax," was banned by the BBC.¹⁶¹ Several Police songs which were popular hits on U.S. radio were also banned by the BBC, "Invisible Sun," was banned because it dealt with Northern Ireland, while "Roxanne," was banned because it was about a prostitute.¹⁶²

¹⁵⁹ *Id.*

¹⁶⁰ *Psychotic Reactions and Carburetor Dung*, by Lester Bangs; *England's Dreaming: Anarchy, Sex Pistols, Punk Rock, and Beyond* by Jon Savage (New York: St. Martin's Press, 1992); *New York Times*, July 11, 1977, p. 2.

¹⁶¹ "Say It Again, Frankie," Joe Brown, *The Washington Post*, November 4, 1984, p. F1.

¹⁶² Fax to Gara LaMarche from Ben Penglase, January 3, 1992.

WHISTLEBLOWING IN THE NATIONAL HEALTH SERVICE

In 1990, Graham Pink, a National Health Service nurse, went public with his complaints about understaffing in the geriatric wards in which he worked. He did so only after a series of letters of complaint, beginning with his supervisor and ending with complaints to the Health Secretary and Prime Minister went unanswered. As a result of his whistleblowing, Pink lost his job. Although his case became a *cause celebre*, it was not unique, but symptomatic of a growing problem. National Health Trust hospitals have been incorporating so-called "gagging" clauses into their contracts, and reducing the ability of nurses, doctors, and other health workers to speak out in situations where conditions are inadequate.¹⁶³

In 1991, the Royal College of Nursing set up a confidential service, RCN Whistleblow, to help nurses report on low standards of care. Since that time it has received over one hundred calls.¹⁶⁴

In April 1992, Virginia Bottomley, Secretary of State for Health, urged nurses to speak out where they are concerned about poor standards of health service care. A report from the Royal College of Nursing indicates that many feel too intimidated by supervisors to do so. However, she said there was no need to introduce legislation to protect nurses who raised concerns. She declined to criticize confidentiality clauses. Christine Hancock, general secretary of the RCN said, "Gagging clauses are entirely inappropriate in a public service and should be withdrawn in every case."¹⁶⁵ Bottomley also was said to be looking at ways of guaranteeing physicians who act as hospital consultants a continued right to speak out without fear of being fired as more hospitals become NHS trusts. The British Medical Association has expressed its concern at the possibility that the NHS trusts, which have the right to set their own terms and conditions for staff, have been removing the paragraph which guarantees consultants' freedom of speech from the standard consultant contract.¹⁶⁶

However, several months later it was revealed that despite planned procedures for professional grievances, NHS staff will continue to risk dismissal for disclosing information to the public on what they believe to be poor standards of care. Virginia Bottomley told managers to provide "proper channels" for investigating complaints, but failed to ban the gagging clauses.¹⁶⁷

BRITISH BILL OF RIGHTS MOVEMENT

The British Constitution is an unwritten one, and Britain does not have a Bill of Rights. In recent years, the movement to institute a Bill of Rights and a written constitution has strengthened.

¹⁶³ "Whistleblowing: For Whom the Truth Hurts," Graham Pink, (Charter 88 Violations of Rights in Britain Series, #3), 1992.

¹⁶⁴ "Bottomley tells nurses to raise complaints," Jeremy Laurance, *The Times*, April 28, 1992.

¹⁶⁵ *Id.*

¹⁶⁶ "Bottomley ready to defend doctors' right to speak out," Nicholas Timmins, *The Independent*, April 27, 1992, p. 6.

¹⁶⁷ "Whistleblowers in NHS will still risk dismissal," Judy Jones, *The Independent*, June 12, 1992, p. 2.

Charter 88 is an organization which promotes the idea of a written constitution for the United Kingdom. Among its principles, the charter includes the following:

1. Enshrine, by means of a Bill of Rights, such civil liberties as the right to peaceful assembly, to freedom of association, to freedom from discrimination, to freedom from detention without trial, to trial by jury, to privacy and to freedom of expression.
2. Establish freedom of information and open government.

Charter 88 believes that it has made a great deal of progress in public education with regard to constitutional rights. The Liberal Democrats have long supported a Bill of Rights. The Labor party, which historically has not done so, has come around to supporting a Bill of Rights as well. Even the Conservative party, which believes Britain's traditional unwritten constitution is working well enough, instituted the open government initiatives.

Charter 88 is particularly proud of the impact it made with its Democracy Days program, where, one week before the 1992 General Election forums were set up all over the country where voters could come and ask questions directly of their local candidates. Despite the Conservative victory, according to Charter 88 officials, the movement is growing, due to public frustration with the political process in Britain. The initial charter now has over 30,000 signatories.¹⁶⁸

Liberty, the National Council for Civil Liberties, also supports the institution of a Bill of Rights. Liberty has been developing a document known as "A People's Charter," which is its draft of such a Bill. Among its relevant provisions are Article 6, The Right to a Fair and Public Trial or Hearing; Article 8, The Right to Personal Privacy; Article 9, The Right to Freedom of Conscience; Article 10, the Right to Freedom of Information and Expression; and Article 11, the Right to Organize and Demonstrate.

Article 10 reads as follows:

1. Everyone shall have the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers either orally, in writing or in print, in the form of art, or through any media of their choice subject only to such limits as are prescribed by law, strictly necessary and demonstrably justified in a democratic society for the protection of individuals from imminent physical harm or to prevent incitement to racial hatred, and for the protection of the rights and freedoms of others as laid down in this Bill.
2. Everyone shall have the right of access to official information held by public authorities subject only to such limits as are prescribed by law, strictly necessary and demonstrably justified in a democratic society for:
 - (a) the protection of the rights and freedoms of others as laid down in this Bill.

¹⁶⁸ Conversation with Caroline Ellis, Charter 88, November 19, 1992.

(b) the protection of the public safety to the extent that is strictly necessary in exceptional circumstances. Nothing in this clause shall prohibit access to public information which it is in the public interest to acquire.

3. This Article shall not prevent the state from requiring the licensing of broadcasting, television or cinema enterprises.

The People's Charter is still in draft form, but will be released in revised final form in May of 1993. Officials with Liberty are also positive about the future of a British Bill of Rights, since both Labor and the Liberal Democrats are now committed to the concept.¹⁶⁹

RECOMMENDATIONS

Helsinki Watch and the Fund for Free Expression call upon the British government to take a series of steps to restore rights of freedom of expression that have been eroded in recent years. While we endorse no specific structural reform, such as the adoption of a Bill of Rights or the incorporation into British law of the European Convention on Human Rights, we strongly encourage the British government to enact a scheme of permanent protection for individual liberties, including freedom of expression. We also call upon the government to:

(1) Repeal the Official Secrets Act -- or, at a minimum, reform it to provide for a defense that the disclosure at issue serves the public interest or has been previously published elsewhere -- and adopt a freedom of information law;

(2) Bar the use of injunctions against the press for publishing material obtained in breach of confidence;

(3) Revise the defamation laws to provide a higher burden of proof for plaintiffs -- particularly those who are public officials or well known public figures -- and stronger defenses for those sued, such as the fact that publication serves the public interest;

(4) Balance the rising concern for increased privacy protection with strengthened guarantees of freedom of the press;

(5) Revise the Public Order Act to recognize an affirmative right of peaceable assembly and limit police and local authority power over assemblies and demonstrations to the imposition of impartially applied time, place and manner restrictions;

(6) Reform the broadcasting statute to insulate the British Broadcasting Corporation and independent television and radio from government interference with program content, and rescind the "broadcasting ban" on interviews with representatives of Sinn Fein Northern Ireland;

¹⁶⁹ Conversation with Andrew Puddephatt, General Secretary, Liberty, November 19, 1992.

(7) Abolish the power of local government authorities to ban films in cinemas, and abolish the powers of the British Board of Film Classification to ban or require cuts in videocassettes;

(8) Cease using the Prevention of Terrorist Act to force investigative journalists to reveal protected sources, and reform the act to end the proscription of organizations;

(9) Resist attempts to use the obscenity laws to regulate a wide variety of forms of artistic expression, and repeal the blasphemy law;

(10) Protect the rights of National Health Service employees who "blow the whistle" on inadequate health care conditions, and ban "gagging" clauses in their contracts.

* * *

This newsletter is a publication of the Fund for Free Expression and Helsinki Watch. It was researched and written by Catherine Siemann, a New York attorney.

Helsinki Watch was established in 1978 to monitor domestic and international compliance with the human rights provisions of the 1975 Helsinki Accords. The Chair is Jonathan Fanton; Vice Chair, Alice Henkin; Executive Director, Jeri Laber; Deputy Director, Lois Whitman; Staff Counsel, Holly Cartner; Research Associates, Erika Dailey, Rachel Denber and Ivana Nizich; Associates, Pamela Cox, Christina Derry and Aleksandr Petrov. The members are M. Bernard Aidinoff, Roland Algrant, Kenneth Anderson, Hans A. Bethe, Charles Biblowit, Martin Blumenthal, Gladys Chang-Brazil, Roberta Cohen, Lori Damrosch, Istvan Deak, Adrian W. DeWind, E.L. Doctorow, Fr. Robert Drinan, Stanley Engelstein, Frances Tarlton Farenthold, Alan R. Finberg, Bernard D. Fischman, Marvin E. Frankel, Ellen Futter, Willard Gaylin, John Glusman, Victor Gotbaum, Hanna Gray, Jack Greenberg, John Gutfreund, Rita E. Hauser, John Hersey, Elizabeth Holtzman, Lawrence Hughes, Susan Jacoby, Robert James, Anne M. Johnson, Russell Karp, Rhoda Karpatkin, Stephen L. Kass, Bentley Kassal, Marina Pinto Kaufman, Joanne Landy, Margaret A. Lang, Norman Lear, Leon Levy, Leon Lipson, Wendy Luers, Elizabeth J. McCormack, Theodor Meron, Arthur Miller, Toni Morrison, Daniel Nathans, Matthew Nimetz, Eleanor Holmes Norton, John B. Oakes, Jane Olson, Yuri Orlov, Bruce Rabb, Stuart Robinowitz, Felix G. Rohatyn, Donna E. Shalala, Stanley K. Sheinbaum, Jerome J. Shestack, Sanford Solender, George Soros, Susan Weber Soros, Michael Sovern, Svetlana Stone, Rose Styron, Jay Topkis, Liv Ullman, Gregory Wallance, Rosalind Whitehead, Jerome R. Wiesner, Roger Wilkins, Theodore Zang, Jr.

The Fund for Free Expression was created in 1975 to monitor and combat censorship around the world and in the United States. The Chair is Roland Algrant; Vice Chairs, Aryeh Neier and Robert Wedgeworth; Executive Director, Gara LaMarche; Leonard Sandler Fellow, Mary Lynne Wertwas; Associate, Lydia Lobenthal. The members are Alice Arlen, Robert L. Bernstein, Tom A. Bernstein, Hortense Calisher, Geoffrey Cowan, Dorothy Cullman, Patricia Derian, Adrian DeWind, Irene Diamond, E.L. Doctorow, Norman Dorsen, Alan Finberg, Francis FitzGerald, Jack Greenberg, Vartan Gregorian, S. Miller Harris, Alice H. Henkin, Pam Hill, Joseph Hofheimer, Lawrence Hughes, Ellen Hume, Anne M. Johnson, Mark Kaplan, Stephen Kass, William Koshland, Judith F. Krug, Jeri Laber, Anthony Lewis, William Loverd, Wendy Luers, John Macrae, III, Michael Massing, Nancy Meiselas, Arthur Miller, The Rt. Rev. Paul Moore, Jr., Toni Morrison, Peter Osnos, Bruce Rabb, Geoffrey Cobb Ryan, John G. Ryden, Steven R. Shapiro, Jerome Shestack, Nadine Strossen, Rose Styron, Hector Timerman, John Updike, Luisa Valenzuela, Nicholas A. Veliotis, Kurt Vonnegut, Jr., Gregory Wallance and Roger Wilkins.

Helsinki Watch and the Fund are divisions of Human Rights Watch, which also includes Africa Watch, Americas Watch, Asia Watch, Helsinki Watch, Middle East Watch, and special projects on Prisoners' Rights and Women's Rights. The Chair is Robert L. Bernstein and the Vice Chair is Adrian W. DeWind. Aryeh Neier is Executive Director; Kenneth Roth, Deputy Director; Holly J. Burkhalter, Washington Director; Gara LaMarche, Associate Director; Susan Osnos, Press Director.