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Press Freedom and Coverage in the U.S. and Kosovo: A Series of Comparisons and Recommendations

*Ben Holden**

ABSTRACT

The Republic of Kosovo was created from the southernmost section of the former Yugoslavia by American military intervention and subsequent worldwide humanitarian guidance between 1999 and 2008.¹ The resulting nation (which Russia, China, and others do not recognize)² was born with one of the most pro-speech and press-friendly constitutions in the world. This Article compares and contrasts four press freedoms in the U.S. and Kosovo: (1) censorship and liability for publication of “truthful” speech; (2) liability for media errors; (3) shield laws; and (4) transparency in courts and records. Where the law and social mores of Kosovo are silent, recommendations are made to adopt the actual or a modified version of the U.S. rule.³

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1. See G. Richard Jansen, *Albanians and Serbs in Kosovo: An Abbreviated History*, COLO. STATE UNIV. (Apr. 25, 1999), <http://lamar.colostate.edu/~grjan/kosovohistory.html> (last updated July 22, 2008).

2. *Countries That Have Recognized the Republic of Kosova*, KOS. MINISTRY OF FOREIGN AFF., <http://www.mfa-ks.net/?page=2,33> (last visited Nov. 25, 2014).

3. This Article is dedicated to the memory of Anthony Lewis, who died March 25, 2013. Lewis wrote about the atrocities in Kosovo, rather than its press freedoms and constitution-based legal system, which did not exist when he retired from the *New York Times* in 2001.

Overview

The tension between the press and the judicial branch of government is inevitable in a modern, free-press democracy. This is as true in the 238-year-old United States of America as it is in the six-and-a-half year-old Republic of Kosovo. The constitution may craft broad avenues of rights for the media, or the legislature may grant certain privileges. But it is the courts that are charged with the interpretation of these rights and privileges, leaving these two vital institutions – the press and the judiciary – mutually dependent upon one another. As famed American journalist Edward R. Murrow said: “What truly distinguishes a free society from all others is an independent judiciary and a free press.”⁴

So why did it take the United States Supreme Court over 165 years to expressly repudiate seditious libel,⁵ nearly 178 years to effectively bar prior restraints arising out of court coverage,⁶ and an additional four to find a First Amendment right to attend criminal trials?⁷ The clock is still ticking on the reporter shield law and the constitutional right to televise trials.⁸

By contrast, the Republic of Kosovo⁹ – founded in 2008,¹⁰ nine years after then-President Bill Clinton bombed strongman Slobodan Milosevic’s Ser-

4. Gary A. Hengstler, *Media Play Important Role in Awareness of Court Actions: The Media’s Role In Changing the Face of U.S. Courts*, IIP DIGITAL (May 2003), <http://iipdigital.usembassy.gov/st/english/article/2003/05/20030515122420nir.og0.4178212.html#axzz3LTEgPzfm>.

5. The Alien and Sedition Acts were passed by the U.S. Congress and signed by President John Adams on July 6 and July 14, 1798. *Adams Passes First of Alien and Sedition Acts*, HISTORY, <http://www.history.com/this-day-in-history/adams-passes-first-of-alien-and-sedition-acts> (last visited Nov. 25, 2014). In 1964, the U.S. Supreme Court expressly disfavored the Acts and repudiated the notion that one might be jailed merely for criticizing the government. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

6. *See Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

7. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion).

8. *See Branzburg v. Hayes*, 408 U.S. 665, 685, 703-05 (1972); *see also Chandler v. Florida*, 449 U.S. 560, 569 (1981) (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 610 (1978)).

9. Today, the former Yugoslavia geographically is made up of the nations of Slovenia, Macedonia, Croatia, Serbia, Montenegro, Kosovo, and Bosnia-Herzegovina. *See Timeline: Break-up of Yugoslavia*, BBC NEWS (May 22, 2006, 11:19 AM), <http://news.bbc.co.uk/2/hi/europe/4997380.stm>. Historically, Yugoslavia was comprised of six republics and two autonomous regions, including Kosovo. *See id.*

10. The United Nations on June 10, 1999, adopted UN Resolution 1244, calling for the establishment of a governing body in the region of Serbia occupied by 90% ethnic Albanians who were at war with the Serbian controlled government in Belgrade. *See WOLF THEISS RECHTSANWÄLTE GMBH, THE LEGAL GUIDE TO KOSOVO: CORPORATE-, TAX-, AND EMPLOYMENT LAW AND OTHER REGULATIONS 1-2* (2d ed.

bian Army out of its occupation of the Kosovo Province – has carved out an aggressive media landscape that is nearly as press-friendly as the nation that gave it birth. But Kosovo’s pro-media laws and procedures¹¹ work better in theory than in practice, according to a consensus of top Kosovo legal journalists and even a few candid judges. During the summer of 2013, the author was commissioned by an international nongovernmental organization (“INGO”) called the Organization for Security and Cooperation in Europe to work on a two-month project aimed at improving frayed relations between judges and journalists in Kosovo.¹² In meetings with journalists, judges, pub-

2009), available at http://www.wolftheiss.com/tl_files/wolftheiss/RegionalDesks/Kosovo/WT_Kosovo%20Guide.pdf; *The World Factbook*, U.S. CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (last updated June 19, 2014). Subsequently, the General Assembly of the Republic of Kosovo adopted its constitution in April 2008, and the document took effect in June of that year. WOLF THEISS RECHTSANWÄLTE GMBH, *supra*; see also *About the Constitutional Commission*, CONST. COMM’N OF THE REPUBLIC OF KOSOVO, <http://www.kushtetutakosoves.info/?cid=2,195> (last visited Nov. 25, 2014).

11. Kosovo’s initial legal structure – as well as its ongoing development and evolution – is a complex product of (1) its initial reliance on the United States for the military backing that brought the nation into being; (2) a series of substantial foreign investments from primarily Western nations and non-governmental agencies such as the United Nations Mission in Kosovo (“UNMIK”), the Organization for Cooperation and Security in Europe (“OSCE”), the United States Agency for International Foreign Development (“USAID”), and the European Rule of Law Mission in Kosovo (“EULEX”); and (3) internecine squabbles between the ousted power seat in Belgrade and the leadership in Kosovo’s Pristina capital on the one hand, and ethnic Serbs and ethnic Albanians on the other.

12. The author arrived in Kosovo on July 15, 2013, and departed the region August 17, 2013, having interviewed eighteen journalists, fifteen judges, six actual or prospective public information officers, many ordinary citizens, foreign INGO workers, and EULEX prosecutors and police. Interviewees included, but were not limited to, the following journalists, judges, and court public information officers: Vehbi Kajtazi, Legal Reporter, *Koha Ditore* (roughly translated as “Daily Times”); Fisnik Minci, Legal Reporter, *Koha Ditore*; Liridona Lluka-Gashi, Former President, Association of Professional Journalists of Kosovo; Bulrush Marina, Editor-in-Chief, *Bota Sot* (roughly translated as “The World Today”); Art Avid, Legal Journalist, *Kohavision*; Evliana Berani, Lawyer, Media Professor, and Editor-in-Chief, *Info Globi*; Mufail Limani, Director, *Radio-Television of Kosovo* (“RTK”) (Kosovo’s main state-funded television station; it was taken over by the Serbian army during the occupation, then returned to Albanian control following the American liberation; it remains largely state-funded and thus has the reputation among competing journalists as a government puppet); Arsim Lani, Television Editor and Journalist, *Klan Kosova*; Nenad Mladenovic, Editor, *RTV Puls*; Selviqe Bajrami, Print Journalist who has been covering the courts almost exclusively for more than eight years; Arben Ahmeti, Editor-in-Chief, *Tribuna Shqiptare*, Former Head of the Association of Professional Journalists of Kosovo, Former Journalist, *Koha Ditore*; Isak Vorgucic, Director, *Radio KIM, TV Centar*; Margarita Kadriu, Editor-in-Chief, *Kosova Sot* (self-proclaimed leading circulation newspaper in Kosovo; there are no audited figures in the nation’s newspaper business); Flutura Kusari, Legal Advisor, *Balkan Investigative Reporting*

lic information officers, government officials and international non-governmental agencies, a clear theme emerged: Kosovo wants to “do democracy the right way” and is desperately seeking answers. This Article is written in the spirit of legal exploration and scholarship, in the hope that some shred of its observations might move Kosovo judges toward a more enlightened view of the press, which might in turn generate more accurate and professional media coverage of the courts. Together, these virtuous

Network (“BIRN”) (a news outlet that to Americans would appear to be a cross between CBS Networks’ *60 Minutes* and the *National Enquirer*); Ardita Zejnullahu, Executive Director, Association of Broadcasters in Kosovo; all members of the five-person Independent Media Commission, which is the rough equivalent of the Federal Communications Commission in the United States; Arbër Jashari, Public Information Officer, Kosovo Court of Appeals; Besiana Gashi, Public Information Officer, Basic Court of Vushtrri; Selvane Bukleta, Public Information Officer, Basic Court of Peja; Albenora Bekteshi, Public Information Officer, Basic Court of Ferizaj; Lavdim Krasniqi, Executive Director, Kosovo Judicial Institute (the national equivalent of a government-run continuing legal education nonprofit); Enver Peci, President, Kosovo Judicial Counsel (agency that manages the nation’s court system); Fejzullah Hasani, President, Supreme Court of Kosovo; Salih Mekaj, President, District Court of Peja; Hamdi Ibrahim, President, Basic Court of Pristina; Bashkim Hyseni, President, Basic Court of Ferizaj; Zyhdi Haziri, President, Basic Court of Gjilan; Elmaze Syka, President, Basic Court of Peja; Vatun Durguti, President, Basic Court of Gjakova; Ymer Hoxha, President, Basic Court of Prizren; and Kada Bunjaku, President, Basic Court of Mitrovica.

At the end of the summer, the author sat for an hour-long courts-and-media debriefing with the United States Deputy Chief of Mission, Kelly Degnan. Degnan, functionally the deputy U.S. Ambassador to Kosovo, requested the initial meeting based on her keen interest in courts-and-media issues in the Republic of Kosovo. She said she believes the relationship between the courts and the press is one of the key elements to the ongoing viability of the young nation. Interview with Kelly Degnan, Deputy Chief of Mission, U.S. Embassy, in Pristina, Kosovo, (Aug. 13, 2013). On Saturday, November 30, 2013, the author was the chair of a panel on courts and media held as part of Kosovo’s Annual National Judicial Conference, attended by virtually every ranking working judge in the country, or about 200 jurists. Jill B. Stockton, *UNR Professor’s Work Strengthens Kosovo’s Judiciary*, NEV. MEDIA ALLIANCE (Dec. 20, 2013), <http://nevadamediaalliance.org/2013/12/20/unr-professors-work-strengthens-kosovo-judiciary/>. For three days on December 2, 3, and 4, 2013, as a consultant to the U.S. State Department, the author and public information officer-consultant Ron Keefover conducted training sessions for public information officers regarding managing the press in Kosovo. *See id.* These sessions were held at the Kosovo Judicial Institute, the main training body for judges in Kosovo. *See id.* Finally, on December 4, 2013, Keefover and the author met briefly with U.S. Ambassador to Kosovo Tracey Ann Jacobson at the U.S. Embassy in Pristina, the nation’s capital. *See id.* The “in-country” work was followed by a month of interviews, email conversations, note-sharing and follow-up aimed at producing the *Basic Legal Handbook for Journalists in Kosovo* (Kosovo Journalists Association 2014), scheduled for distribution in Albanian, Serbian and Turkish under a grant from the Organization for Security & Cooperation in Europe (“OSCE”) in early 2015. *See id.*

impulses might move a new nation incrementally toward a more perfect – and press-friendly – democratic union.¹³

This Article engages a limited number of areas of free-speech/open access inquiry. In fact, it raises just four questions for comparison and contrast between the 223-year-old Constitution and Bill of Rights of the United States of America and the six-and-a-half year-old Constitution of the Republic of Kosovo. The issues examined are: 1) penalties for truthful reporting; 2) media mistakes; 3) shield laws; and 4) transparency. Because Kosovo law does not observe the concept of precedent, the law of the nation is determined by a detailed Constitution and the discretion of judges.¹⁴ Its criminal and civil¹⁵ codes sometimes resort to related, influential European courts, which have spawned some of the relevant principles of Kosovo law. In determining “what the law is” in this new nation, this Article relies occasionally upon interviews with working judges, journalists, government

13. As of January 1, 2013, the Law on Courts instituted a series of changes to the judiciary in Kosovo, which included revision of the court structure. REPUBLIC OF KOS., IMPLEMENTATION PLAN FOR THE NEW LAW ON CTS. 3 (2011), *available at* http://kgjk-ks.org/repository/docs/Plani-i-Implementimit-te-Ligjit-per-Gjykata_Anglisht_416041.pdf. The Kosovo court system now contains seven Basic Courts, a Court of Appeals, and a Supreme Court. USAID NGA POPULLI AMERIKAN OD AMERICKOG NARODA & KOS. JUDICIAL COUNCIL, KOSOVO COURT STRUCTURE, *available at* http://kgjk-ks.org/repository/docs/KOSOVO-COURT-STRUCTURE_547880.pdf. The seven Basic Courts have jurisdiction over the regions of: Pristina, Ferizaj, Gjilan, Peja, Gjakova, Prizren and Mitrovica. *Id.* The Basic Courts have various departments, including a General Department and a Serious Crimes Department. *Id.* Basic Courts are the courts of first instance or “trial courts” where criminal proceedings are conducted. *Id.* The Criminal Procedure Code is the rulebook for the criminal court system, including jurisdiction and procedure (what are the proper procedural steps in a criminal prosecution). *See generally* JON SMIBERT, U.S. DEP’T OF JUSTICE, GUIDE TO THE CRIMINAL PROCEDURE CODE OF KOSOVO AND CRIMINAL PROCEDURE CODE OF KOSOVO 3 (2013), *available at* http://www.kgjk-ks.org/repository/docs/Udhezuesi-dhe-kodi-i-procedures_anglisht_225215.pdf. The main participants to a criminal case in Kosovo are the Judge (or three-Judge Panel), the State Prosecutor, the Defendant, Defense Counsel, the Injured Party and the Victim Advocate. *Id.* at 3, 9. The Police have a large role at the investigative stage, but are not parties to the actual criminal case. *See id.* at 3-4.

Also, constitutional interpretation in Kosovo is a tricky matter. There is a constitutional court, but it has questionable authority because only “nations” can have constitutions and Russia and China (both OSCE members) do not recognize Kosovo. *See Home*, CONST. CT. OF KOS., <http://gjk-ks.org/?cid=2,1> (last visited Nov. 25, 2014); *U.S., European Powers Recognize Kosovo*, NBC NEWS (Feb. 18, 2008, 6:26 PM), http://www.nbcnews.com/id/23219277/ns/world_news-europe/t/us-europ-ean-powers-recognize-kosovo/#.VDbrQst0zIV.

14. *See* WOLF THEISS, *supra* note 10, at 2.

15. The Civil Procedure Code in Kosovo is known as the “Law on Contested Procedure.” *See generally* On Contested Procedure, Law No. 03/L-006 (2008) (Kos.), *available at* http://www.kuvendikosoves.org/common/docs/ligjet/2008_03-L006_en.pdf.

officials, the U.S. State Department and Kosovo-based INGO policymakers conducted by the author in the summer and early fall of 2013.

Beyond Sedition in America and Criminal Libel in Kosovo

John Adams was well known as a thin-skinned politician who bristled at criticism of his governance as well as criticism of him personally.¹⁶ Thus, in the years leading up to 1798, Adams became convinced that the only way to quell the criticism was to meet it head on – to essentially outlaw the criticism and jail his critics.¹⁷ His leadership in passage of the Sedition Act was so roundly criticized and repudiated by history, that his successor, Thomas Jefferson, freed those citizens jailed under the Act and repaid their fines by Act of Congress.¹⁸

Despite never being successfully challenged in a U.S. court, jurists and scholars universally view the law as an abomination.¹⁹ In fact, the United States Supreme Court rejected the validity of the Act in the context of another case involving censorship of material that had the effect of criticizing government.²⁰ The Pentagon Papers Court reflects the view that the Act, because it places penalties upon accurate or “truthful” speech, was inconsistent with freedom of the press and, therefore, the First Amendment to the U.S Constitution.²¹

In Kosovo, the young nation’s moral speech equivalent of the Sedition Act was the existence of, and criminal prosecution for, crimes against “honor.”²² These crimes included the law against “insult” and criminal

16. See, e.g., DAVID McCULLOUGH, JOHN ADAMS 269 (2001).

17. See *id.* at 504-07.

18. *Id.* at 577.

19. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 73 (2004) (discussing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

20. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (analyzing and reflecting upon the historical significance of the Sedition Act) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter ‘which no one now doubts.’ Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: ‘I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.’ The invalidity of the Act has also been assumed by Justices of this Court.” (citations omitted)).

21. *Id.* at 273-76.

22. See, e.g., Criminal Code of the Republic Kosovo, Code No. 04/L-082, arts. 37 (repealed 2012), 296, 341 (2012), available at www.legislationline.org/documents/id/17770.

defamation.²³ Close cousins of seditious libel, Kosovo levied criminal penalties for these “honor crimes” until the end of 2012.²⁴ The eradication of these laws was a cause for great self-congratulation among Kosovars, who revere America and Americans, and who (at least in the legal community) understood that criminal penalties for words were not an American mode of legal redress.²⁵

But prosecution for leaking the name of a confidential witness is universally believed to be good policy among prosecutors and court public information officials in Kosovo; even some journalists take the view that the consequences of such a leak are so grave as to justify criminal action.²⁶

Background on Kosovo Court Challenges

Because there is no concept of binding precedent in Kosovo, every case stands on its own.²⁷ Further, because government corruption – actual and perceived – is a major issue in the nation, many reporters and editors interviewed for this Article say they believe a significant percentage of judges in Kosovo are corrupt.²⁸ They report the news through this lens. On the other hand, many judges interviewed for this piece say they believe most journalists who cover the courts lack the background and training to do a competent job of reporting on the judiciary.²⁹ The two sides certainly seem to be speaking different languages.³⁰

23. *See id.* arts. 159, 198. Some journalists and other Kosovars, including government officials, believe some of the strong sentiment regarding honor may be a vestige of the centuries-old unwritten Albanian law known as the “Kanun,” a set of traditional Albanian laws that held, for example, that if a welcomed stranger were killed in the home of another, the host was honor bound to seek equal revenge on the perpetrator. *See* interviews cited *supra* note 12; Dan Bilefsky, *In Albanian Feuds, Isolation Engulfs Families*, N.Y. TIMES (July 10, 2008), http://www.nytimes.com/2008/07/10/world/europe/10feuds.html?pagewanted=all&_r=0. Prosecutors in Kosovo said sometimes law enforcement and even civil resolution of disputes is impeded by the deep-seated cultural norms left by the Kanun. *See* interviews cited *supra* note 12.

24. *See, e.g.*, Law No. 04/L-129 (Kos.) (repealing Criminal Code of the Republic of Kosovo art. 37), available at www.legislationline.org/documents/id/17770.

25. *See* interviews cited *supra* note 12. Note that the reporters, judges and public information officers shared stories and impressions of the judiciary generally on the condition that they not be individually identified, although they were willing to be noted as among those persons who spoke with the consultant to the Organization for Security & Cooperation in Europe for purposes of improving relations between judges and journalists in Kosovo. *See* interviews cited *supra* note 12.

26. *See* interviews cited *supra* note 12.

27. *See supra* note 14 and accompanying text.

28. *See* interviews cited *supra* note 12.

29. *See* interviews cited *supra* note 12.

30. *Kosova Sot* (roughly translated, “Kosovo Today”) publisher Margarita Kadriu told the author of this Article openly that she believes “several specific judges

Much of the law of the new Republic of Kosovo is imbedded in the nation's Constitution, and there is heavy reliance on international and European courts for guidance.³¹ Because for many years the nation's legal system was run by the United Nations (and its "major case" criminal system still contains parallel courts run by the European Union Rule of Law Mission in Kosovo, or EULEX), the nation has a little-developed history of jurisprudence and tradition in a Western legal sense.³² But below the level of war crimes, government corruption, and major murder cases, ordinary judges handle the cases.³³ So judges, whom the press does not trust, have great discretion over everyday cases. And the press, whom the judges do not trust, have little guidance or training in covering the courts.³⁴ In fact, many of the nation's judges are widely perceived by the press to be corrupt and there have been a number of high-profile corruption cases involving various public officials.³⁵

Perhaps most challenging, however, is the concept of precedent and the manner in which judges instruct court reporters to create the written record in cases. Essentially, there is no precedent; the judge decides the law and there is one court of appeal. As to the written record, judges have little physical space and often work in cramped quarters.³⁶ Some trials are held in judges' offices.³⁷ The courtroom in Metrovica, which was essentially commandeered by Serbian nationalists during the post-emancipation Serbian-Albanian conflict, was, throughout 2013 and part of 2014, illegally held by those persons. During this period the court in Metrovica sat instead at Vushtrri, to the south. Approximately fifteen judges, clerks and other court personnel shared a space that is about the size of an average conference room in an American law firm.³⁸

in Kosovo are corrupt." Interview with Margarita Kadriu, Editor-in-Chief, Kosova Sot, in Pristina, Kos. (Aug. 1, 2013). She added that she had reported this to the U.S. Embassy in Kosovo and that her reporters had in their possession a secretly recorded iPhone audio of a judge demonstrating a blatant willingness to abuse power. *Id.* This example is given not for its truth, but to demonstrate the extreme lack of trust between judges and journalists in Kosovo.

31. See interviews cited *supra* note 12.

32. See *generally Factsheet*, EUR. UNION RULE OF L. MISSION KOS., <http://eulex-kosovo.eu/images/press/strengthening-NEW.jpg> (last visited Nov. 25, 2014).

33. See USAID & KOS. JUDICIAL COUNCIL, *supra* note 13.

34. See interviews cited *supra* note 12.

35. UNITED NATIONS OFFICE ON DRUGS & CRIME, CORRUPTION IN KOSOVO: BRIBERY AS EXPERIENCED BY THE POPULATION 17-18 (2011), available at http://www.unodc.org/documents/data-and-analysis/statistics/corruption/CORRUPTION_KOSOVO_Population.pdf.

36. See interviews cited *supra* note 12.

37. See interviews cited *supra* note 12.

38. See interviews cited *supra* note 12.

I. CENSORSHIP AND LIABILITY FOR DISCLOSURE OF “CONFIDENTIAL” MATERIAL

A. *Censorship and Disclosure Sanctions for “Truthful” Publications: A Comparison of U.S. Case Law and Kosovo Law*

1. Censorship

a. *The United States and Censorship*

Liability for truthful,³⁹ non-commercial speech in America has evolved. Historically, speakers and critics of government labored under a speech-chilling protection standard which allowed injunctions and no-fault liability for seditious⁴⁰ and group libel,⁴¹ as well as subsequent punishment for anti-government speech that implied the vague and overbroad “clear and present danger.”⁴² Currently, speech is protected from prosecution for inciting violence unless it incites imminent lawless action where such action is likely to occur.⁴³ Speech is protected from censorship except in the most limited cases of national security.⁴⁴ The American concept of libel – a false and reputationally damaging statement communicated to a third party – requires, by definition, proof of falsity.⁴⁵ Since 1964, civil liability for libel of public-

39. In this Article, “truthful” speech means factual assertions or opinions not alleged to contain material factual errors. See LIVINGSTON RUTHERFORD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS 57-58, 69-70 (1904) (discussing Zenger’s famous defense by Andrew Hamilton, who made the still-used argument that truth should be a defense to libel); see also Sedition Act of 1918, Pub. L. 65-150, 40 Stat. 553 (repealed 1920); Espionage Act of 1917, 18 U.S.C. §§ 792-99 (2012); *Railway President Held as Seditious: William Edenborn, Naturalized German, Accused of Disloyal Speech in Louisiana*, N.Y. TIMES, April 29, 1918, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9D04E0D81F3FE433A2575AC2A9629C946996D6CF>. Edenborn’s speech said, in pertinent part, that Germany would not attack the U.S. and that “America can look to other countries for any possible attacks in the future. Recently a certain Prime Minister stated ‘our nation is mistress of the sea, has been mistress of the sea, and always will be mistress of the sea.’” *Id.* These words, in the view of the U.S. Justice Department “breathe[d] the arrogant spirit of Prussianism” into America and the words amounted to “seditious treason.” *Id.*

40. See Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1800); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264-65, 292 (1964); *Beauharnais v. Illinois*, 343 U.S. 250, 258 (1952); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347(1974).

41. *Beauharnais*, 343 U.S. at 258.

42. See *Gitlow v. New York*, 268 U.S. 652, 671 (1925); *Abrams v. United States*, 250 U.S. 616, 624(1919); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

43. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

44. See *infra* notes 50-55 and accompanying text.

45. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48, 56-57 (1988) (holding that the statements regarding television preacher Jerry Falwell allegedly having

figure plaintiffs in America requires that the plaintiff prove the defendant knew the defamatory statements were false or that he or she was reckless in failing to determine the truth of the statements.⁴⁶ Libel claims involving non-public figure plaintiffs need only prove that the defendant was at least negligent.⁴⁷ The first potential area of “truthful speech” media liability involves censorship, a subject that has filled legal and journalistic tomes for centuries.⁴⁸ Fortunately, in Kosovo, the nation’s anti-censorship protection is written right into the Constitution, and the judges seem to follow the law in this area, according to numerous interviews with people close to and within the court system.⁴⁹

The two leading American cases on censorship are *Near v. Minnesota*⁵⁰ and *New York Times v. U.S.*,⁵¹ the so-called “Pentagon Papers Case.” Because *Near* is essentially incorporated into the Pentagon Papers case, the discussion and analysis here will be confined to *New York Times*. In *New York Times*, the U.S. government tried to censor or enjoin publication of a classified Vietnam War study by the *New York Times* and the *Washington Post*, two leading American newspapers.⁵² The U.S. Supreme Court, the highest court in the land, said the Government failed to meet the burden of proof needed to justify censoring the material.⁵³ The framework for the case was handed down in *Near*, a case involving a state law banning, or – in slang language – gagging, “malicious, scandalous and derogatory newspaper[s]” or other

sex with his mother in an outhouse were an obvious parody not to be taken seriously, which could therefore not be proven “true” for purposes of the *New York Times Co. v. Sullivan* “actual malice” standard, which the Court looked to – rather than standard intentional infliction of emotional distress concepts – to decide the case under the First Amendment); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (holding that a successful false light tort claim must meet the standard of *New York Times Co. v. Sullivan* “actual malice,” that is, that the defendant knew the statements were false, or was reckless in failing to verify their truth); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (limiting and narrowing the tort of public disclosure of private facts to give the press greater First Amendment protection).

46. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

47. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-49 (1974) (holding that the *New York Times* “actual malice” standard of knowing falsity or reckless disregard does not apply to non-public figures, but that the First Amendment compels a minimum standard of at least negligence for liability and actual malice for punitive damages).

48. See, e.g., Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014); Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970); Thomas B. Leary & J. Roger Noall, Note, *Entertainment: Public Pressures and the Law: Official and Unofficial Control of the Content and Distribution of Motion Pictures and Magazines*, 71 HARV. L. REV. 326 (1957).

49. See interviews cited *supra* note 12.

50. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

51. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

52. *Id.* at 714.

53. *Id.*

publications.⁵⁴ The *Near* Court made clear that in the United States, censor-censorship is only allowable where the government can meet a heavy burden of proving that it is protecting national security, such as blocking publication of ship transport dates or troop locations in wartime.⁵⁵

b. Kosovo and Censorship

On the issue of censorship, the nation of Kosovo got off on the right foot. The Constitution of the country has an anti-censorship provision written right into its plain language.⁵⁶ Therefore, though journalists there have many complaints about judges' rulings and behavior, express censorship does not appear to be among them.⁵⁷

Article 42 of the Constitution is captioned "Freedom of Media."⁵⁸ Subpart 2 of Article 42 reads: "Censorship is forbidden. No one shall prevent the dissemination of information or ideas through media, except if it is necessary to prevent encouragement or provocation of violence and hostility on grounds of race, nationality, ethnicity or religion."⁵⁹

The exception language in Article 42.2 obviously contemplates scenarios that would justify censorship, particularly a fresh eruption of Serb nationalist violence – or oppression of the Serb minority by the Albanian majority. From interviews with judges, journalists, and public information officers, it appears clear that the primary exception to Article 42 is a violence/national security exception of the sort that the U.S. has incorporated as an exception to the First Amendment by way of such cases as *Brandenburg v. Ohio* and *New York Times v. U.S.*⁶⁰ Thus, as long as the peace and power-sharing arrangement between Serbs and Albanians holds, and as long as the semi-autonomous northern areas in Metrovica are brought under control, it appears censorship will remain less of a problem than it was in the U.S. in a similar state of its infancy. Therefore, the nation of Kosovo needs no assistance from U.S. law on the matter of statutory protection of the press against censorship.

When interpreting and implementing Article 42, however, the analysis of *Near* and *New York Times v. U.S.* seems to provide needed guidance in a judicial paradigm that does not subscribe to the notion of precedent. For a judge on a case-by-case basis to decide whether to censor the press based on

54. *Near*, 283 U.S. at 703.

55. *Id.* at 716.

56. CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II, art. 42, available at <http://kryeministri-ks.net/zck/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

57. See interviews cited *supra* note 12.

58. CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II, art. 42, available at <http://kryeministri-ks.net/zck/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

59. *Id.* at art. 42.2.

60. See *supra* notes 43, 51-53 and accompanying text.

“provocation of violence and hostility on grounds of race, nationality, ethnicity or religion” allows too much discretion and cries out for a clear rule of law.⁶¹ Otherwise, the result in these very important cases will turn on which judge sits on the case – and where cross-ethnic issues and parties are part of the case, this could lead to the perception of biased decisions that erode public trust in the judiciary.

2. Liability for Publication of Stolen Material

a. *Bartnicki v. Vopper: Innocently Publishing Stolen Material Is Protected by the First Amendment*

The second potential area of “truthful speech” media liability involves the question of whether stolen material published by the press is (or should be) protected by the First Amendment. In *Bartnicki v. Vopper*, a pair of union representatives (one of whom was Bartnicki) had their cell phone conversation illegally intercepted and recorded during a heated collective bargaining dispute.⁶² A radio personality, Vopper, played the tape on his radio show in connection with a news story on the settlement.⁶³ Bartnicki sued, claiming that Vopper knew or should have known the broadcast was the product of an illegally taped conversation.⁶⁴ Bartnicki and another union leader sued for money damages under federal wiretapping laws, which prohibit intercepting cell phone calls and disclosure of material obtained by illegal interception.⁶⁵ Vopper claimed the First Amendment protected him because he had no knowledge or participation in the theft and because its contents were a matter of public concern.⁶⁶ The U.S. Supreme Court agreed, reasoning that the wiretapping statutes violated the First Amendment to the extent used to suppress information from a party who obtains it innocently or legally.⁶⁷

b. *Kosovo and Liability for Innocent Publication of Stolen Material*

Honor and duty have outsize meaning in Kosovo. The culture is, by American standards, laced with formalism and overly solicitous salutations and greetings. Perhaps an attendant to this formalism is the seemingly absolute rejection of dishonor in polite society. However, there appears to be an even greater disconnect between press values and those of ordinary

61. See CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II, art. 42, available at <http://kryeministri-ks.net/zck/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

62. *Bartnicki v. Vopper*, 532 U.S. 514, 514 (2001).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 516, 520.

67. *Id.* at 527-28.

citizens in Kosovo than in the U.S., where the gap appears sizeable. Thus, in interviews with reporters and editors at the two leading news organizations in Kosovo, the social or moral prohibition against communicating material dangerous to “national security” or even the names of confidential witnesses, was simply absent. Judges, court personnel, and Albanian members of international non-governmental organizations, on the other hand, felt adamantly that such disclosures were irresponsible and a breach of the public’s trust.⁶⁸ However, based on numerous interviews with judges and journalists in Kosovo, it must be concluded that civil protection for printing stolen material where the journalists played no part in the theft will not be protected. And so, while the rule of *Bartnicki* may be a best practice, it is likely not the rule that will be followed in Kosovo.

3. Liability for Inadvertently Disclosed Confidential Material

a. *Florida Star v. B.J.F.: Inadvertently Disclosed Confidential Material Is Protected by the First Amendment*

The third potential area of “truthful speech” media liability involves whether inadvertently disclosed “confidential” material gives rise to press liability when voluntarily handed over by the government. Both the facts and holding of the *Florida Star v. B.J.F.* case are straightforward. B.J.F., a rape victim in Florida, had her name inadvertently left on written materials made available to the press by the police.⁶⁹ The *Florida Star* published B.J.F.’s full name, in violation of a state law that made publication of a rape victim’s name a crime.⁷⁰ The U.S. Supreme Court held that this state law provision violated the First Amendment.⁷¹ The general rule regarding publication of public records handed to the press by the government appears to be that the press is virtually insulated from liability.

b. *Kosovo and Liability for Inadvertently Disclosed Confidential Material*

Crimes like rape, sex trafficking, and child molestation, while officially covered by the criminal code, seem as likely to be managed quietly by the

68. See interviews cited *supra* note 12. It is ironic that a legal standard very close to the *Bartnicki* rule is imbedded in the Kosovo shield law. Law on the Protection of Journalism Sources, Law No. 04/L-137, art. 8 (2013) (Kos.), available at <http://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20the%20protection%20of%20the%20journalism%20sources.pdf> (“Journalists and other media professionals cannot be criminally prosecuted in the event that they take or use documents which are secured illegally by third parties, when they are exercising the right to remain silent about their sources of information.”).

69. Fla. Star v. B.J.F., 491 U.S. 524, 526-27 (1989).

70. *Id.* at 526.

71. *Id.*

families involved in Kosovo. And although the Kanun⁷² is not often cited as the basis, the social and cultural mores that underpin the practical solutions to disputes seem highly informed by the Kanun. The social stigma that attaches to the aforementioned crimes is great and thus a system that protected the media for publishing, for example, the name of a rape victim shared inadvertently by police, would create a sense of outrage among ordinary citizens. Therefore the rule of *Florida Star* – protection for accurate publication of government records, even when they contain embarrassing facts about innocent victims – would not work in Kosovo. More likely, the opposite rule would attach and be enforced by Kosovo judges, given that no constitutional or statutory provision exists which directly controls such a fact pattern. In fact, because of the cultural backdrop of the Kanun, some Kosovar judges seem quite comfortable with a strict liability standard for harm caused by speech perceived to be “honor” violations.⁷³

4. Liability for Media Wrongdoing

a. Chaquita Banana v. Gannett: *Settlement in Case of Media Wrongdoing*

The fourth and final potential area of “truthful speech” media liability involves the news organization’s exposure to libel, or perhaps even criminal prosecution, where the press participates in the theft. The *Cincinnati Enquirer*, owned by the Gannett Co. Inc., paid \$10 million and ran a “Page One” apology in 1998 for three days rather than go to court over a phone-hacking scandal in which the newspaper’s reporters participated in the theft of more than 2,000 voicemail messages from the international fruit shipping giant.⁷⁴

72. As noted *supra*, the Kanun is a centuries-old unwritten Albanian “law” or set of social, legal and societal guiding principles. See discussion *supra* note 23. Often Albanians resort to self-help rather than use of the legal system to resolve disputes. See interviews cited *supra* note 12.

73. See interviews cited *supra* note 12.

74. Alicia C. Shepard, *Bitter Fruit: How the Cincinnati Enquirer’s Hard-Hitting Investigation of Chiquita Brands International Unraveled*, AM. JOURNALISM REV., Sept. 1998, available at <http://ajrarchive.org/article.asp?rel=ajrlisasept98a.html>; see also Bruce W. Sanford, *Mortification: Chiquita Lesson: Libel Isn’t Weapon of Choice: First Amendment Law Enters a New Season as Litigants Use Common Law Claims and Torts to Protest Stories They Don’t Like – and Newsgatherers Disavow Their Own Stories*, AM. SOC’Y OF NEWS EDITORS, <http://files.asne.org/kiosk/editor/98.sept/sanford1.htm> (last updated Oct. 15, 1998, 3:35 PM) (noting that “[j]udges, it should come as no surprise, harbor the same deepening contempt for the news media that is abroad in the land”).

b. Kosovo and Media Participation in Theft of News Material

The “rule” of *Chiquita Banana*, while not actually litigated, would likely never be adopted by news organizations such as the *Balkan Investigative Reporting Network* and the *Kosovo Sot* newspaper, the two broadest-reaching print and online news outlets in Kosovo. These news outlets are aggressive and have open contempt for many judges. On the other hand, for organizations such as *Radio Television of Kosov*, the state-sponsored broadcast network, or *Koha Ditore*, the most Western newspaper, the *Chiquita* approach of repudiating theft (and subsequent financial responsibility to avoid litigation) may make sense.

The way media participation in theft of “newsworthy” material would play out, assuming the material were labeled an “official secret,” would be through the criminal law, rather than by exercise of a judge’s contempt power, as might occur in an American court. The Kosovo Law on Witness Protection, Law No. 04/L-015, reads as follows: “Main provisions for protection of data and records: The Committee, Directorate, governmental authorities, organizations, services as well as persons shall treat all documents and data regarding the implementation of the witness protection program as *official secret*.”⁷⁵

Jon Smibert, a lawyer and senior legal analyst with the U.S. State Department in Kosovo, says as a practical matter that the confidential witness law in Kosovo works like this:

There’s a history to the “confidential witness” disclosure and also to the idea of judicial contempt power. In many ways, judicial contempt is never asserted here, although there are some basis to do so in the new CPC [criminal procedure code] and criminal code. (Criminal Contempt under the new Criminal Code is not well understood, and is currently the subject of a squabble between the Supreme Court and the Chief State Prosecutor.[.]) The Supreme Court said that everyone who failed to follow any legal court order (including a massive number of property decisions) should be prosecuted. This would literally be tens of thousands of people. The Prosecutor has said that this would be overreaching and has refused to do so, and we suggested that doing so would violate the European Convention on Human Rights (Protocol 4, Article 1 prohibits depriving one of liberty mere[ly] for failing to fulfil[l] a contractual obligation.)

Thus, the only power is really in the Criminal Code’s prohibition against disclosing “official secrets.” Under the [C]riminal [C]ode before 2013, there was a vague criminal offen[s]e if someone disclosed an “official secret” – a category that was never well defined.

75. Law on Witness Protection, Law No. 04/L-015, ch. VIII, art. 30 (2011) (Kos.) (emphasis added), available at http://www.md-ks.org/repository/docs/law_on_witness_protection.pdf.

There had been attempts in 2007 [to] prosecute people (usually court staff or even judges) for disclosing the names of witnesses or other information from the court files, but it was generally held that “official secret” did not include sealed files in the court. This changed . . . in 2011 with the Witness Protection Law. Further, in the new Criminal Code, Article 433 describes “official secret” as “information or documents proclaimed by law, other provisions, or by a decision by the competent authority issued on the basis of law to be an official secret and whose disclosure has caused or might cause detrimental consequences.” It then excludes two categories: any information of a grave violation of human rights or that may create a danger to the constitutional order of Kosovo, or any information or documents intended to conceal the perpetrator of a criminal offen[s]e for which punishment is greater than [five] years.

The 2011 Law on Witness Protection (04/L-015) makes all documents and the work of the Witness Protection committee an official secret, as well as the documents to implement witness protection. It then refers to the criminal offen[s]e for disclosure of official secrets in the [C]riminal [C]ode. This was meant to clarify that the predecessor to the Criminal Code and the new Code both covered disclosure of a person who has been entered into witness protection.⁷⁶

The bottom line from Smibert is: 1) the judicial contempt power in Kosovo (which on its face appears applicable to journalists for printing the names of confidential witnesses) is greatly misunderstood and the subject of a courts versus prosecutors dispute; and 2) the 2011 Law on Witness Protection, and by extension, the identities of confidential witnesses, are official secrets and disclosure of these names – often the names of witnesses in war crimes trials – subjects journalists to criminal liability.

c. Possible Conflict Between Confidential Witness Statute and Shield Law in Kosovo

Kosovo’s Reporter Shield Law, Law No. 04/L-138 Article 9, is discussed at length below. It appears clear and unequivocal on its face, protecting reporters who refuse to reveal their sources. But what if that source is a government employee who is revealing the name of a “confidential witness”? In a case similar to *Florida Star*, wherein the government actually *provided* the material for the forbidden publication,⁷⁷ what then? Although this issue has not been litigated to a written decision, it appears, based on interviews with Kosovar judges, prosecutors and journalists, that a Kosovo judge would enforce the confidential witness

76. E-mail from Jon Smibert, Resident Legal Advisor, U.S. Dep’t of Justice, to author (Apr. 16, 2014, 04:23 EDT) (on file with author).

77. *Fla. Star v. B.J.F.*, 491 U.S. 524, 527 (1989).

provision against the media and might in fact attempt to compel disclosure through the Criminal Code.⁷⁸

B. Kosovo Statutory Law Governing Disclosure Sanctions for “Truthful” Publications

1. Confidential Witness Disclosure

In Kosovo, a nation that did not exist until 2008, there are remnants of the war of independence and, with it, old blood rivalries and feuds. Many of the soldiers from the Kosovo Liberation Army became politicians after emancipation, attempting to perfect the imperfect alchemy of war hero (or war criminal) to civil politician.⁷⁹ It is considered a serious crime in Kosovo for the press to disclose the name of a confidential witness.⁸⁰ Many prosecutors believe reporters should be prosecuted and jailed for this offense.⁸¹

2. The Case of Commander Zogaj

One recent example of the dangers of protected witness disclosure in Kosovo involved former Kosovo Liberation Army Commander Agim Zogaj, who kept a meticulous diary of alleged war crimes and eventually agreed to testify against some of his former comrades under a witness protection arrangement with the EULEX law enforcement agency in Kosovo.⁸² Zogaj, shortly before the trial, was found dead in Germany, hanging from a tree.⁸³ All charges against the accused were ultimately dismissed when the diary was found inadmissible.⁸⁴

78. See interviews cited *supra* note 12.

79. Colleen Sullivan, *Kosovo Liberation Army (KLA)*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/322751/Kosovo-Liberation-Army-KLA> (last updated Mar. 28, 2014).

80. See *supra* note 75 and accompanying text.

81. See interviews cited *supra* note 12.

82. Matthew Brunwasser, *Death of War Crimes Witness Casts Cloud on Kosovo*, N.Y. TIMES (Oct. 6, 2011), http://www.nytimes.com/2011/10/07/world/europe/death-of-war-crimes-witness-casts-cloud-on-kosovo.html?_r=0.

83. *Id.*

84. *Former Kosovo Rebel Leader Fatmir Limaj Faces Retrial*, BBC NEWS (Nov. 20, 2012), <http://www.bbc.com/news/world-europe-20418824>; *Kosovo Court Acquits Ex-Rebel KLA Leader and Aides*, BBC NEWS (May 2, 2012), <http://www.bbc.com/news/world-europe-17926150>. Kosovo alleged war crimes during the Serb-Albanian ethnic conflict that underlay the struggle between the former Yugoslavia and Kosovo throughout much of the 1990s. Brunwasser, *supra* note 82. KLA Commander Agim Zogaj’s diary, and his planned testimony, became key elements of a scheduled war crimes trial of Serbian revolutionary turned politician Fatmir Limaj. *Id.* By 2011, long after the war, Limaj had become a leading political figure within the ruling party

II. PRESS LIABILITY FOR ERRORS, PRINTED FALSEHOODS, AND BROKEN PROMISES

A. Public Figures

1. United States: Press Wins Unless You Knew It Was Wrong or You Were Reckless

Under the First Amendment to the U.S. Constitution, a mistake made in a defamation case involving a public figure or public official plaintiff – written libel or oral slander – cannot give rise to press liability unless the reporter knew that the statement was false when she made it, or recklessly failed to confirm its truth.⁸⁵

2. Compare Kosovo

This concept is known as the *New York Times v. Sullivan* “Actual Malice” Rule. This rule is the best-practice rule of law for a nation seeking to encourage government transparency and protection of an aggressive press. Therefore, the rule should be adopted in Kosovo and incorporated into its developing legal system. With the repeal of honor code provisions, eradicating libel as a criminal charge as of 2013, the developing law of libel would be best served by a standard that encourages investigative reporting and transparency, while still allowing redress for public figures where reporters behave recklessly or worse. Public confidence in the judiciary in Kosovo trails faith in institutions such as the police and general government bureaucrats.⁸⁶

B. Non-Public Figures

1. United States: Press Wins Unless You Were at Least Negligent

Rather than follow the rule of “actual malice” from *New York Times v. Sullivan*, the U.S. Supreme Court, in 1974 in *Gertz v. Robert Welch, Inc.*, modified the defamation rules under the First Amendment to allow recovery

in Kosovo. *Id.* But shortly before Limaj’s war crimes trial, Zogaj, who was a protected witness, was found hanging from a tree in Germany, where he was awaiting travel back to Kosovo to testify. *Id.* Limaj and others were set free when the diary was ruled inadmissible without Zogaj’s testimony. See *Former Kosovo Rebel Leader Fatmir Limaj Faces Retrial*, *supra*.

85. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

86. Shpresa Mulliqi, Nat’l Prof’l Awareness Officer, Org. for Sec. & Co-operation in Eur., Presentation at The Vushtri Conference and Annual Kos. Police Training (July 17, 2013).

of *actual damages* by a non public figure plaintiff where the defendant was merely negligent.⁸⁷

2. Compare Kosovo

Adoption of such a rule in Kosovo would not violate the nation's regulatory scheme and would be culturally consistent with the notion that regular Kosovars deserve more protection of their privacy and have an implicit right to be left alone. Implementation of the *Gertz's* "at least negligence" standard for private citizens would not apply to public figures and therefore would not prevent Kosovo journalists from continuing to aggressively report alleged corruption among public officials.

C. *Matters of Public Concern*

1. United States: No Punitive Damages Unless Actual Malice

When a non-public figure plaintiff sues over an issue that is a matter of public concern, the U.S. Supreme Court has held that *punitive damages* against the press or other protected speaker under the First Amendment are only recoverable where the plaintiff can prove knowing falsity of the statement or reckless disregard for the truth – the *New York Times* "actual malice standard."⁸⁸ That is, while First Amendment application allows a private person to recover actual damages upon proof of mere negligence, forcing a defendant to pay punitive damages requires the defendant to have published the false statement with knowledge of its falsity, or with reckless disregard for the truth. The rationale here is that while a private person deserves greater protection than public figures, there is another, competing public policy at play where the private person was wronged in connection with a public debate about an issue of great importance to the larger community. If the statement libeling a private person is not of public concern, U.S. courts may apply a negligence standard for punitive damages.⁸⁹

2. Compare Kosovo

The dual rules of *Sullivan* and *Gertz* would function well in Kosovo and allow citizens who are aggrieved in completely private defamation disputes – private persons, matters not of public concern – to be awarded punitive damages based on mere media sloppiness where there are mistakes made in stories that are about, in essence, a subject that is "nobody's business."

87. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 323-24 (1974).

88. *Id.* at 324, 349.

89. *Id.* at 350.

D. Right of Subject to Retraction/Correction

1. United States: No Right to Forced Corrections

So-called “right of reply” statutes were once common in America. Pat Tornillo was a candidate for the state legislature in Florida in the 1980s and he became the subject of two unflattering editorials in the *Miami Herald* newspaper.⁹⁰ He sued to have his replies to these articles printed by the *Herald*, invoking a state law that gave political candidates the statutory right to reply to criticisms published in private (non-government) newspapers.⁹¹ The U.S. Supreme Court eventually took the case, *Miami Herald Publishing Company v. Tornillo*, and held that such “right of reply” statutes violate the U.S. Constitution.⁹² The rationale was that imposition of a right to reply on a non-government entity was an improper incursion into the editor’s function at a private news organization and a penalty for the newspaper based on its content choices.⁹³

2. Compare Kosovo

The nation of Kosovo at this stage of its development has not only embraced a rule quite opposite the holding of *Miami Herald* – but the rule is part of the nation’s Constitution.⁹⁴ Under Article 42.3 of the Kosovo Constitution, a citizen has the right to correct false information in the press. The section reads: “Everyone has the right to correct untrue, incomplete and inaccurate published information, if it violates her/his rights and interests in accordance with the law.”⁹⁵

The functional enforcement of Article 42.3’s forced-correction provision⁹⁶ is in the hands of the Kosovo Press Council, a voluntary

90. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 243 (1974).

91. *Id.* at 243-44.

92. *Id.* at 244, 258.

93. *Id.* at 258.

94. CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II, art. 42.3, available at <http://kryeministri-ks.net/zck/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

95. *Id.* Note that the Kosovo Press Council Statute, adopted May 11, 2010, was adopted in furtherance of Article 42.3, giving the authority to the Press Council to hear public complaints against news organizations, “to order a print media to print its adjudications on a place indicated” – functionally to enforce the constitutional right to corrections, and to fine news organizations for various misdeeds, including serious reporting errors. KOS. PRESS COUNCIL, KOSOVO PRESS COUNCIL STATUTE 4-5 (2010), available at http://www.presscouncil-ks.org/repository/docs/Statute_PCK_English_FINAL.pdf.

96. This is true as to print publications; electronic media regulation in Kosovo is governed by the constitutionally created and sanctioned Independent Media Commission, which appears to have less well-developed processes for television and radio-

association of private print media in Kosovo, who have drafted and agreed to the “Kosovo Press Council Statute.”⁹⁷ The Kosovo Press Council has the authority to levy fines on the press for improper behavior, such as disclosure of confidential witness names or libel, and has the authority to force the member newspapers “to print its adjudications on a place indicated by” the Council.⁹⁸ Such a paradigm is anathema to the First Amendment to the U.S. Constitution and the cases limiting government control of the press.⁹⁹

This constitutional and administrative right of Kosovars has further been incorporated into the libel statute.¹⁰⁰ It is the view of the author that the

self-implementation of the Article 42.3 forced-correction provisions. *See generally About the IMC*, INDEP. MEDIA COMM’N, <http://www.kpm-ks.org/?faq=141&gjuha=3> (last visited Nov. 25, 2014) (explaining the role of the Independent Media Commission and its authority under Kosovo’s constitution and laws); Law on the Independent Media Commission, Law No. 04/L-044 (2012) (Kos.), *available at* <http://www.kpm-ks.org/materiale/dokument/1335250709.2603.pdf> (establishing the powers of the Independent Media Commission).

97. *See* KOS. PRESS COUNCIL, *supra* note 95.

98. *Id.* at 5.

99. *See* U.S. CONST. amend. I; *e.g.*, *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

100. Article 13 of the Kosovo Law Against Defamation and Insult is the mirror opposite of the holding in the *Miami Herald* case. *See supra* notes 90-93 and accompanying text. Its provisions essentially give an aggrieved party the statutory (on top of Section 42’s constitutional) right to a forced correction and in-publication rebuttal space. The law provides:

Article 13

Right of reply

13.1. Any person, irrespective of citizenship or residence, mentioned in a newspaper, a periodical, a radio and television broadcast, or in any other medium of a periodical nature, regarding whom or which facts have been made accessible to the public which the person claims to be inaccurate, may exercise the right of reply in order to correct the facts concerning that person.

13.2. At the request of the complainant, the medium in question shall be obliged to make public the reply which the complainant has submitted.

13.3. By way of exception, the publication of the reply may be refused or edited by the medium in the following cases:

- a) if the request for publication of the reply is not addressed to the medium within seven (7) days from the day on which the complainant became aware of the publication;
- b) if the length of the reply exceeds what is necessary to correct the information containing the facts claimed to be inaccurate;
- c) if the reply is not limited to a correction of the facts challenged;
- d) if it constitutes a punishable offence;
- e) if it is considered contrary to legally protected interests of a third party;
- f) if the individual concerned cannot show the existence of a legitimate interest.

13.4. Publication of the reply shall be without undue delay and shall be given the same prominence as was given to the information containing the facts claimed to be inaccurate.

legislators of Kosovo have considered this issue and – consistent with their current societal and cultural mores – find the newspaper to be a sort of public utility, which ordinary people should be able to access as a matter of right when they are wronged by the press.

E. Broken Promise Liability

1. United States: Right of Action Under *Cohen*

The fifth potential area of “truthful speech” media liability involves whether a reporter can be held liable for breaking a promise of confidentiality to a news source. In *Cohen v. Cowles Media Company*, Lori Sturdevant, a reporter at the *Minneapolis Star Tribune*, received news material from public relations executive Dan Cohen, which was damaging to a political opponent.¹⁰¹ She promised him anonymity in exchange for the material.¹⁰² Over Sturdevant’s objection, editor Joel Kramer decided that the better story involved Cohen, and (without Sturdevant’s byline) published a news article about “dirty tricks” – the sharing of politically damaging information about an opponent on the eve of an election.¹⁰³ The story was published, and Cohen lost his job and was essentially professionally ruined as a result of the news article.¹⁰⁴ Cohen sued for breach of contract, and the U.S. Supreme Court agreed that a broken promise by a news organization to a source supports an action for money damages on the theory of promissory estoppel.¹⁰⁵ The trial included dramatic testimony by Cohen, who broke down on the witness stand, and by Sturdevant, who disagreed fundamentally with her editors’ decision to break her promise to Cohen and who had removed her byline from the story in protest.¹⁰⁶

2. Compare Kosovo

The nation of Kosovo has no statutory or constitutional corollary to the *Cohen* rule. Research and interviews with judges and journalists revealed no similar cases either. With no legal foundation upon which to build, one can

Civil Law Against Defamation and Insult, Law No. 02/L-65, ch. V, art. 13 (2006) (Kos.), available at http://www.assembly-kosova.org/common/docs/ligjet/2006_02-L65_en.pdf.

101. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665-66 (1991).

102. *Id.* at 665.

103. *See id.* at 665-66.

104. *Id.* at 666.

105. *Id.* at 665.

106. As a University of California-Berkeley (Boalt Hall) law student, the author worked as a summer associate at the Faegre & Benson law firm during the summers of 1987 and 1988. In that capacity, he played a very minor role as a researcher and law clerk working on the case with Faegre & Benson partner Jim Fitzmaurice, the main trial lawyer defending Cowles Media.

only speculate as to whether the *Cohen* fact pattern presents a wrong for which a remedy is required and lacking in Kosovo. The answer, in the author's opinion, is no. In fact, it might be argued that the "Right of Reply" from Article 42 of the Constitution and Article 13 of the Kosovo Code (along with the major print media's power to levy fines) provides sufficient redress, so long as the defendant is a member of the press or has the same means of publication at the time of the litigation as existed when the plaintiff was wronged. That is, if the "Right of Reply" statute puts the plaintiff back in the same position as before the wrong, wouldn't he then be "doubly" compensated for his wrong if he is able to recover money damages in addition to a forced right of reply in the same medium on the same terms as the offending communication?

As if in answer to what might be perceived as an anti-media imbalance in this area, enter Kosovo, Article 6.2 of the current Civil Law Against Defamation and Insult. That statute provides:

In defamation and insult actions involving statements on matters of public concern, the defendant shall carry the burden of proving that he/she acted responsibly in publishing the impugned statements. A finding by the court that the defendant acted responsibly in publishing the impugned statements, unless the defendant knew that the impugned statement was false or acted in reckless disregard of its veracity, shall absolve the defendant of any liability.¹⁰⁷

From the statute it seems that after a reporter meets his burden of proof that he "acted responsibly," he is insulated from libel liability.¹⁰⁸

This provision seems problematic for at least two reasons. First, there is the matter of undue discretion in the hands of the trial judge. What is "responsible" behavior and how will it be adjudicated in a nation that is so new, with judges who are so roundly anti-media? And second, the burden shift seems to be bad public policy. The statute already writes in the requirement that the matter be of "public concern," which gives the trial judge an opportunity to protect a plaintiff who is merely the victim of press meddling. Thus, a reporter who makes an error, in order to avail himself of this protection, must first show that the communication was a matter of public concern (the statute is silent as to who has the burden here, but because the reporter has the general burden, he likely has the public concern burden as well) *and then* he must show that he acted responsibly.

As constructed, this statute appears unlikely to give much protection to aggressive journalists in a new nation who make honest mistakes about matters of public concern. A better framework would be to shift the burden to the plaintiff, both as to the public concern question and the responsibility

107. Civil Law Against Defamation and Insult, Law No. 02/L-65, ch. IV, art. 6.2 (2006) (Kos.), available at http://www.assembly-kosova.org/common/docs/ligjet/2006_02-L65_en.pdf.

108. *Id.*

issue. Such a change would bring this law into line with the centuries-long learning of U.S. courts without stripping private Kosovo plaintiffs of their opportunity to seek redress for media overreaching.¹⁰⁹

III. SHIELD LAWS

A. *United States: No Shield Law Under the First Amendment*

The Shield Law debate – whether there is immunity from contempt of court or similar prosecution for failing to reveal an anonymous news source – has raged in America for centuries.¹¹⁰ The U.S. Supreme Court in *Branzburg v. Hayes* held that there is no reporter’s shield law implied by the First Amendment, but, of course, the case left open the opportunity for states to pass such laws and forty of fifty American states have done so.¹¹¹ As recently as 2013, the United States Senate considered a bill to allow reporters protection for sources that provide information to journalists on the condition of anonymity.¹¹² News gatherers have long considered such protections vital to a free flow of information in a democracy, particularly where the subject of those stories is government misbehavior.¹¹³

B. *Kosovo Shield Law: Lesson for America*

In the case of the reporter shield law question, U.S. courts could learn from the young nation of Kosovo, which, by statute, decrees: “Journalists and other media professionals cannot be criminally prosecuted in the event that

109. See discussion *supra* note 100 (discussing Article 13 – Right of Reply).

110. See generally *Branzburg v. Hayes*, 408 U.S. 665, 686-91, 697-98 (1972) (finding that no such “virtually impenetrable constitutional shield” necessarily exists and describing the history of the “newsman’s privilege”).

111. See *Number of States with Shield Law Climbs to 40*, REP.’S COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/number-states-shield-law-climbs> (last visited Nov. 25, 2014).

112. See Rem Rieder, *Media Shield Law Moves Forward*, USA TODAY (Sept. 12, 2013, 9:56 PM), <http://www.usatoday.com/story/money/business/2013/09/12/senate-judiciary-committee-approves-media-shield-bill/2807045/> (describing the latest developments regarding the Free Flow of Information Act).

113. See, e.g., *Branzburg*, 408 U.S. at 679-82; see also *Chandler v. Florida*, 449 U.S. 560, 573-75 (1981) (holding that there is not a “constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances”); Tim Cushing, *Sen. Feinstein During ‘Shield’ Law Debate: ‘Real’ Journalists Draw Salaries*, TECHDIRT (Aug. 8, 2013, 3:58 PM), <https://www.techdirt.com/articles/20130807/13153224102/sen-feinstein-during-shield-law-debate-real-journalists-draw-salaries.shtml> (noting the problematic issue around the definition of what a “journalist” is). The problematic issues involving the definition of a “journalist” may be one of the main factors holding up passage of a potential shield law at the federal level.

they take or use documents which are secured illegally by third parties, when they are exercising the right to remain silent about their sources of information.”¹¹⁴

The Kosovo Shield Law further provides: “In case of a breach of professional secrecy defined in the Criminal Code of the Republic of Kosovo, journalists and other media professionals cannot be criminally prosecuted under the charge of collaborating in crime when they are exercising their right to keep silent about their sources.”¹¹⁵

The rationales for a shield law are many: encouragement of government whistleblowers, protection against retaliation from government, protection for private observers of senior management misbehavior, and general protection of the privacy of people who do not wish to become inadvertent public figures by thrusting themselves into the middle of a controversy.

One of the main rationales argued by opponents of shield laws is that nobody knows who the media really are and that certain types of speakers should be given less protection than working journalists. The best reply to this argument comes from a time when the U.S. was even younger than the nation of Kosovo: Publius,¹¹⁶ an anonymous speaker who helped build the rationale for passage of our Constitution, would have been denied shield law protection as a non-journalist.¹¹⁷ And the same would be true for Thomas Paine, who wrote *Common Sense* anonymously.¹¹⁸

IV. TRANSPARENCY AND ACCESS TO THE COURTS

A. Open Courts

1. United States: Open Courts

The U.S. Supreme Court held in *Richmond Newspapers, Inc. v. Virginia* that the press and the public have the right under the First Amendment to

114. Law on the Protection of Journalism Sources, Law No. 04/L-137, art. 8 (2013) (Kos.), available at <http://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20the%20protection%20of%20the%20journalism%20sources.pdf>.

115. *Id.* art. 9.

116. Publius was actually a pseudonym used by John Jay, James Madison, and Alexander Hamilton in their eighty-five anonymous constitutional policy papers written in the early years of America’s independence. See *The Federalist by Alexander Hamilton, James Madison, and John Jay*, SAGAMORE INST. (Aug. 29, 2013), <http://www.sagamoreinstitute.org/library-article/the-federalist-by-alexander-hamilton-james-madison-and-john-jay>; see also THE FEDERALIST Nos. 1-85 (John Jay, James Madison & Alexander Hamilton).

117. See Cushing, *supra* note 113.

118. There were many anonymous reprints of the *Common Sense* pamphlet before Paine became widely known as the author of these influential, revolutionary essays. See *Common Sense*, THOMAS PAINE SOCIETY, <http://www.thomaspainesociety.org/#!/common-sense/clbks> (last visited Nov. 25, 2014).

attend criminal trials.¹¹⁹ The Court, however, left the door open to some limitations, such as when other overriding interests outweigh the public policy value of open courtrooms.¹²⁰ This open door has, as a practical matter, justified closed military and terrorism trials.¹²¹ Subsequent American case law has found a similar right to attend most civil trials.¹²²

2. Kosovo: Open Courts – An Express Constitutional Right in Kosovo

The law requiring open trials in Kosovo is embedded in the nation's Constitution. Article 31, Right to Fair and Impartial Trial, provides that:

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.
2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.
3. Trials shall be open to the public except in limited circumstances in which the court determines that in the interest of justice the public or the media should be excluded because their presence would endanger public order, national security, the interests of minors or the privacy of parties in the process in accordance with law.¹²³

Further, trials in Kosovo are presumed open¹²⁴ to the press and to the public under Article 22 of the Kosovo Constitution, which incorporates by reference Article 14 of the International Covenant on Civil and Political

119. 448 U.S. 555, 580 (1980).

120. *Id.* at 580-81.

121. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 357 (codified as amended in scattered sections 8, 12, 15, 18, 20, 31, 42, 47, 49, 50 U.S.C.).

122. *See, e.g.*, *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (citations omitted) (finding that the public and the press have a right to civil trials and discussing history of debate on the topic).

123. CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II, art. 31, available at <http://kryeministri-ks.net/zck/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

124. *See* On Contested Procedure, Law No. 03/L-006, ch. XXIV, art. 444 (2008) (Kos.), available at http://www.kuvendikosoves.org/common/docs/ligjet/2008_03-L006_en.pdf. Members of the media should know that, under Article 446, closed hearings allow entry to only parties, their legal representatives and intermediaries, authorized official persons, scientists. *Id.* art. 446. Under Article 447.2, “[t]here is no special appeal regarding . . . the closed door hearing.” *Id.* art. 447.2.

Rights (“ICCP”¹²⁵). There are, however, exceptions to the presumption of openness.¹²⁶

a. Civil Trials Open in Kosovo

Further reinforcing the constitutional provision, Article 444 of the Code on Contested Procedure (a.k.a. Civil Procedure) provides that the main hearing is open to the public, which, of course, means by inference that it is open to the media.¹²⁷ In order to close a courtroom to the press and the media, the court must state a “justifiable excuse” under Article 445.¹²⁸ The issue of whether to close a courtroom is settled in a pre-trial hearing pursuant to Article 448.¹²⁹ Permissible excuses for a judge’s decision to close a courtroom include: “a) an official secret should be kept or when it comes to the public order; b) if there are mentioned trade secrets, inventions, whose publications will cause interference in the interests protected by law; c) private details from the parties[’], or other [involved persons’, lives] are mentioned.”¹³⁰

Under Article 446 of the Code on Contested Procedure, closed hearings allow entry only to parties, their legal representatives and intermediaries,

125. CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II, art. 22(3), available at <http://kryeministri-ks.net/zck/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>. ECHR Article 6.1 also provides that everyone in Kosovo is “entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” European Convention on Human Rights, § I, art. 6.1, Nov. 4, 1950, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

126. In addition to these exceptions, International Covenant on Civil and Political Rights Article 14 (incorporated by reference into the Kosovo Constitution) provides that “[t]he press and the public may be excluded from all or part of a trial for reasons of morals, public order . . . or national security . . . or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14 (Dec. 16, 1966), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. The statute goes on to say that “any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.” *Id.*

127. See On Contested Procedure, Law No. 03/L-006, ch. XXIV, art. 444 (2008) (Kos.), available at http://www.kuvendikosoves.org/common/docs/ligjet/2008_03-L006_en.pdf.

128. *Id.* at art. 445.

129. *Id.* at art. 448.

130. *Id.* at art. 445.

“authorized official persons,” and scientists.¹³¹ Under Article 447.2, “[t]here is no special appeal regarding . . . the closed door hearing.”¹³²

This is one of the recurrent problems under the Kosovo regulatory scheme: appeals are not as a matter of right. So even if the Constitution and/or Code are press-friendly, where no right of appeal exists, a judge who is anti-media or ill-informed can quite easily thwart the will of lawmakers and the best interests of the people to enjoy a transparent window into their system of justice.

b. Criminal Trials Open in Kosovo

Criminal trials in Kosovo are also presumed open to the media and the public.¹³³ The public and press can only be excluded for one or more of six specific reasons under Article 294. These reasons include: “1.1. protecting official secrets; 1.2. maintaining the confidentiality of information which would be jeopardized by a public hearing; 1.3. maintaining law and order; 1.4. protecting the personal or family life of the accused, the injured party or of other participants in the proceedings; 1.5. protecting the interests of children; or 1.6. protecting injured parties, cooperative witnesses and [other witnesses covered by the Code].”¹³⁴

Further, criminal trials in Kosovo are required to have a written record of the proceedings under Article 315.¹³⁵ Therefore, while the written opinions of the *Richmond Newspapers* and *Nebraska Press* cases may give guidance to Kosovo judges as to when they should make exceptions, the law of Kosovo on its face appears to fully contemplate open trials and to abhor both locked courtrooms and gag orders on the press.

c. Practical Impediments to Open Courts in Kosovo

Sometimes a judge will order a courtroom closed outright.¹³⁶ But sometimes there are practical impediments to open trials, which do not involve legal rulings. For example, the European human rights community (whose tenets are incorporated into the Kosovo Constitution) recognizes that (1) “lack of publicity of hearings,” (2) “inaccessible venue[s],” (3) “insufficient courtroom space,” or (4) the application of “unreasonable

131. *Id.* at art. 446.1.

132. *Id.* at art. 447.2.

133. Criminal Procedure Code, Code No. 04/L-123, ch. XIX, art. 293 (2012) (Kos.), available at www.legislationline.org/documents/id/17771.

134. *Id.* at art. 294.

135. *Id.* at art. 315.

136. *See id.* at art. 301.

conditions of entry into the courtroom” can all have the same effect as a closed courtroom.¹³⁷

In Kosovo, hearings are sometimes held in small judges’ offices.¹³⁸ And while this may be a temporary necessity, in order to comply with internationally accepted human rights standards on fair trials, the place of a hearing must be easily accessible to the public.¹³⁹

B. Open Records

1. United States: Open Records

In the United States, federal courts, individual state courts and the U.S. Freedom of Information Act provide for open court records.¹⁴⁰

2. Compare Kosovo

Article 41 of the Kosovo Constitution, Right of Access to Public Documents, provides that:

1. Every person enjoys the right of access to public documents.
2. Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification.¹⁴¹

In addition, Articles 41 and 42 (the anti-censorship provision) of the Kosovo Constitution address the rights of the public and, by inference, the rights of journalists, to obtain public documents, including court files.¹⁴² There are many exceptions to the availability of records, primarily: (1)

137. OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS, ORG. FOR SEC. & CO-OPERATION IN EUR., HANDBOOK FOR MONITORING ADMINISTRATIVE JUSTICE 48-49 (2013), available at <http://www.osce.org/odihr/105271?download=true>.

138. 4 AM. BAR. ASSOC., JUDICIAL REFORM INDEX FOR KOSOVO 78 (2010), available at http://apps.americanbar.org/rol/publications/kosovo_jri_vol_iv_12_2010_en.pdf.

139. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 14 (Dec. 16, 1966), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

140. See 5 U.S.C. § 552 (2012).

141. CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II, art. 41, available at <http://kryeministri-ks.net/zck/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

142. *Id.* at arts. 41-42.

privacy, (2) trade secrets, and (3) security classification. Decisions on when documents are not publicly available are in the hands of the trial judge.¹⁴³

However, nowhere in the Kosovo legal landscape is the gap between theory and execution greater than in the realm of public records. Although public court records must be maintained under Article 315 of the Kosovo Code, and made available to parties under Article 41 of the Constitution, working journalists in Kosovo say it simply does not happen. Longtime journalist Selvije Bajrami, who has covered the courts for many years and currently serves as the court reporter for the *Zeri Gazette*, said in an interview that the way most journalists obtain copies of criminal filings is “by going for coffee with the defense lawyer.”¹⁴⁴

C. Gag Orders

1. United States: (Virtually) No Gag Orders on the Press

In *Nebraska Press v. Stuart*, a judge ordered members of the media not to publish truthful information they had gathered from a grisly murder involving six members of a single family.¹⁴⁵ Both the defense lawyers and the prosecution asked the judge to enter a press gag order, which essentially censored the press.¹⁴⁶ The U.S. Supreme Court ultimately found, that while there may be limited circumstances justifying such orders, they are antithetical to the presumption of openness and transparency that undergird the First Amendment.¹⁴⁷ Thus, after *Nebraska Press* – and based on subsequent case law, virtually every other case not involving juveniles or national security – the press has both the right to cover the trial under *Richmond Newspapers*, and the right to print whatever it sees fit under *Nebraska Press*.¹⁴⁸

2. Kosovo: (Theoretically) No Gag Orders

Gag orders appear to be covered by Article 42.2 of the Kosovo Constitution, discussed above.¹⁴⁹ That section bans censorship except in limited cases, several of which are similar to the U.S. exceptions for national

143. See Criminal Procedure Code, Code No. 04/L-123, ch. IX, art. 114 (2012) (Kos.), available at www.legislationline.org/documents/id/17771.

144. Interview with Selvije Bajrami, Journalist, *Zeri Gazette*, in Pristina, Kosovo (Dec. 3, 2013).

145. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 542 (1976).

146. *Id.*

147. See *id.* at 561-62.

148. See *id.*; see also *supra* notes 119-122 and accompanying text.

149. See CONSTITUTION OF THE REPUBLIC OF KOSOVO June 15, 2008, ch. II, art. 41.2, available at <http://kryeministri-ks.net/zck/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

security and terrorism.¹⁵⁰ But as a practical matter, interviews and research revealed no cases of Kosovo judges affirmatively ordering journalists not to report material gleaned from open-courtroom reporting. Instead, it appears, judges in the new nation are far more likely than American judges to exercise their authority under the various exceptions, such as the Article 445 civil “justifiable excuse” provision in the Civil Code and the Article 294 exceptions in the Criminal Code.¹⁵¹ No written record of some of these closures exists, according to journalists.¹⁵² The practical impact of these courtroom closures results in the functional equivalent of a gag order. And the unfettered discretion of judges, coupled with the lack of consistent appellate rights, reduces this otherwise laudatory free-speech provision to a hollow promise.

D. Cameras in the Courtroom

1. United States: Federal Courts Mostly Closed to Cameras; States Have Discretion

One of the main free-press notions most lacking in the U.S. courts is the right of the press to record and/or televise trials. In broad strokes, the law of cameras in America is bifurcated: cameras are banned in most all federal courts, and states can make up their own minds on criminal trials. Further, it is the state government that determines the law of video access to its criminal courts – not the prosecutor, nor the defendant, nor both in concert.¹⁵³

Still, the overwhelming majority of American states have opted for at least limited video coverage.¹⁵⁴ Authority for this discretion flows from *Chandler v. Florida*, a state law case in which the Supreme Court held that a criminal defendant has no Sixth Amendment claim when her trial is televised against her will.¹⁵⁵ The clock is still ticking on the question of cameras in federal courtrooms, including the U.S. Supreme Court, where they remain banned.¹⁵⁶

150. *See id.*

151. *See* interviews cited *supra* note 12.

152. *See* interviews cited *supra* note 12.

153. *Chandler v. Florida*, 449 U.S. 560, 570-74, 582-83(1981).

154. *See* Kathy Kirby & Kat Scott, *Cameras in the Court: A State-by-State Guide*, RADIO TELEVISION DIGITAL NEWS ASS’N (Sept. 7, 2014, 9:50 AM), http://rtdna.org/article/cameras_in_the_court_a_state_by_state_guide_updated (last visited Feb. 1, 2015).

155. *Chandler*, 449 U.S. at 583.

156. *See* Christina Locke Faubel, *Cameras in the Courtroom 2.0: How Technology Is Changing the Way Journalists Cover the Courts*, REYNOLDS CTS. & MEDIA L.J., Fall 2013/Winter 2014, at 3, 9, available at <http://issuu.com/njcmag/docs/13-rnldslj-vol3-iss1/6>.

2. Kosovo: Statutory Right Under Article 301.3

The infant nation Kosovo, with the aid of the international community, was created with mandated transparency as to cameras, among other press-friendly policies.¹⁵⁷ Compare this with the U.S. view, captured by the oft-quoted story by longtime Supreme Court reporter Tony Mauro that former U.S. Supreme Court Justice Souter declared that America's high court would allow cameras "over my dead body."¹⁵⁸ Kosovo takes the extreme opposite position. Article 301.3 of the Kosovo Code makes all criminal trials in Kosovo subject to audio and video recording by the media unless the judge, in a written, reasoned decision, rules that such recording shall not be allowed.¹⁵⁹ Journalists who are denied access to courtrooms for recording purposes should review any administrative guidelines that have been published by the designated media committee of the Kosovo Supreme Court. Such regulations, which may be amended from time to time, generally follow the exceptions listed in Article 294.¹⁶⁰

Postscript

Anthony Lewis, two-time winner of the Pulitzer Prize, was both a critic and a champion of independent judiciaries and the free press.¹⁶¹ He cared passionately about each of the four over-arching concepts discussed here – 1) penalties for truthful reporting; 2) media mistakes; 3) shield laws; and 4) transparency. But he was not an apologist for the press, and particularly toward the end of his years came down "against" the media on such issues as shield laws and the extent to which the "Actual Malice" Rule ought to apply to non-government officials.¹⁶²

But Lewis was unwavering on his stance regarding the media's responsibility to uncover and speak out against injustice. No better example can be found than his passionate June 22, 1999, column in support of U.S.

157. See *supra* notes 123-135 and accompanying text.

158. Tony Mauro, *Congress Focuses on Cameras at the High Court*, DAILY REP. (Apr. 4, 2006), <http://www.dailyreportonline.com/id=1202552585997/Congress-focuses-on-cameras-at-the-high-court?slreturn=20140912140839>.

159. Criminal Procedure Code, Code No. 04/L-123, ch. XIX, art. 301.3 (2012) (Kos.), available at www.legislationline.org/documents/id/17771.

160. See *id.* at art. 294.

161. Scott Malone, *Update 2 – NY Times Legal Trailblazer Anthony Lewis Dead at 85*, REUTERS (Mar. 25, 2013, 6:48 PM), <http://www.reuters.com/article/2013/03/25/usa-people-anthonylewis-idUSL2N0CH1J820130325>.

162. See Scott Horton, *Six Questions for Anthony Lewis, Author of Gideon's Trumpet and Freedom for the Thought We Hate*, HARPER'S MAG. (Feb. 20, 2008, 4:54 AM), <http://harpers.org/blog/2008/02/six-questions-for-anthony-lewis-author-of-gideons-trumpet-and-freedom-for-the-thought-we-hate/>.

military involvement in Kosovo.¹⁶³ Lewis could not have known then that America's aid, which he so fervently supported, would not just end the tyranny and genocide of Milosevic, but that it would also set in motion a chain of events that would create Kosovo in June 2008, the world's newest democracy, borne replete with a free press and an independent judiciary. Lewis wrote:

There can be no doubt, now, about the scale of Serbian atrocities in Kosovo. Western reporters and war-crimes investigators have begun to confirm what Kosovar Albanian refugees described.

NATO officers estimate that at least 10,000 ethnic Albanians were murdered; the figure could be much higher. Families were burned alive in their homes, children killed in front of their mothers.

The details are so terrible that, in our safe lives, we are inclined to turn away – to stop reading, to change the channel. But we must know what happened. For what the Serbs did in Kosovo confronts us again with the question of the human capacity for evil.¹⁶⁴

Were he still alive to see the full flower of Kosovo's press and its democracy, Tony Lewis would surely waive off any connection between his words and America's leadership following the Clinton Administration's ten-week bombing campaign¹⁶⁵ that led to the expulsion of strongman Slobodan Milosevic.¹⁶⁶ Based on his writings, it is clear that he believed the press was not always right.¹⁶⁷ But a fair reading of his work also supports the conclu-

163. Anthony Lewis, *Abroad at Home; The Question of Evil*, N.Y. TIMES (June 22, 1999), <http://www.nytimes.com/1999/06/22/opinion/abroad-at-home-the-question-of-evil.html>.

164. *Id.*

165. Technically it was a North Atlantic Treaty Organization, or NATO, effort. *A Kosovo Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html> (last visited Nov. 25, 2014). But the U.S. led the bombing and virtually all ordinary Kosovars credit America generally and Clinton in particular with helping them obtain their emancipation. *Id.* In fact, a multi-story statue of a smiling and waving Bill Clinton is displayed prominently in a public square along one of Pristina, Kosovo's busiest streets. *Kosovo Unveils Clinton's Statue*, BBC NEWS (Nov. 1, 2009), <http://news.bbc.co.uk/2/hi/8336789.stm>. Former U.S. Senator and First Lady Hillary Clinton noted in her 2014 book *Hard Choices* (2014 Simon and Schuster) not just the statue, but the presence of a ladies-wear shop called "Hillary" across the same public square. HILLARY RODHAM CLINTON, *HARD CHOICES* 222 (2014).

166. John B. Allcock, Slobodan Milošević, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/383076/Slobodan-Milosevic> (last visited Nov. 25, 2014).

167. Adam Liptak, *Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85*, N.Y. TIMES, Mar. 25, 2013, at A1, available at <http://www.nytimes>

sion that Lewis believed judicial transparency coupled with press accountability created a nation's best chance for enduring democracy.

[.com/2013/03/26/us/anthony-lewis-pulitzer-prize-winning-columnist-dies-at-85.html?pagewanted=all](https://scholarship.law.missouri.edu/mlr/vol79/iss4/7).