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REGINA v. SECRETARY OF STATE FOR THE HOME DEPARTMENT EX PARTE BRIND: UNCONVENTIONAL INTRUSIONS ON FREEDOM OF EXPRESSION*

"[Censorship] will be primely to the discouragement of all learning, and the stop of [t]ruth."¹

I. INTRODUCTION

The frequent denial of freedom of expression² in much of the world beyond Western Europe and North America has made protection of freedom of the media a significant characteristic of democratic societies.³ The United Kingdom, historically a pioneer in the realm of individual rights, has traditionally focused its efforts on expanding the protection of civil liberties.⁴ How-

* Thanks to Ms. Margaret Gale and Ms. Irene Romanelli, Esq.

1. J. MILTON, AREOPAGITICA 4 (Everymans ed. 1927).

2. The relatively modern concept of freedom of expression is a product of the post-World War II revival of natural rights. McGregor, *Freedom of Expression and Information: Conditions, Restrictions, and Limitations Deriving from the Requirements of Democracy*, 6 HUM. RTS. L.J. 384, 389 (1985) (report presented to the Sixth International Colloquy about the European Convention on Human Rights (Convention), held in 1985 at Seville, Spain) [hereinafter McGregor]. The brutal disregard of individual rights by certain European regimes earlier in this century prompted a reassessment of the prevailing utilitarian philosophy, which permitted the sacrifice of individual rights for the greater good of others. *Id.* The advent of The European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, Council of Europe, Europ. T.S. No.5, 213 U.N.T.S. 221 [hereinafter Human Rights Convention], meant that for the first time in history, treatment of citizens by a sovereign state was no longer a matter for the state's own exclusive determination, but a matter of legitimate concern for all other states and their inhabitants. See McGregor, *supra*, at 389. See *infra* notes 20-33 and accompanying text.

3. See McGregor, *supra* note 2, at 397.

4. See UNITED KINGDOM FOREIGN AND COMMONWEALTH OFFICE, HUMAN RIGHTS IN THE UNITED KINGDOM 1 (1988) [hereinafter HUMAN RIGHTS]. The Magna Carta of 1215 declared that no man should be punished except by the judgment of his peers and by the law of the land, and that to none should justice be denied. The Bill of Rights 1689, though concerned mainly with Parliament, outlawed royal authoritarianism, guaranteed free elections to Parliament and free speech within Parliament, prohibited cruel and unusual punishment, and guaranteed a host of other rights. E. WADE & G. PHILLIPS, CONSTITUTIONAL AND ADMINISTRATIVE LAW 13-15 (1985) [hereinafter E. WADE & G. PHILLIPS]. The United Kingdom is also bound by the *Universal Declaration of Human Rights*, G.A. Res. 217, U.N. Doc. A/1810 (1948), and the *International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), both of which protect freedom of expression.

ever, the United Kingdom's recent directive (directive, ban, or restrictions)⁵ aimed at restricting access by the media to certain extremist groups in Northern Ireland⁶ has seriously infringed upon the right to freedom of expression of both the British⁷ public and British media.⁸ The ban prohibits the direct appear-

5. See Secretary of State for the Home Dep't *ex parte* Brind, CO/1756/88, slip op. at 1 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). See also *infra* note 101.

6. Beginning in the sixteenth century, Protestant settlers from Great Britain infiltrated Ulster, a militantly Catholic province in Northern Ireland, so that a part of Ulster attained a Protestant majority. UNITED KINGDOM FOREIGN AND COMMONWEALTH OFFICE, NORTHERN IRELAND 1 (1988) [hereinafter NORTHERN IRELAND]. While the Protestants, or Unionists, favored union with Great Britain, the Catholic majority in Ireland developed a nationalist tradition and moved increasingly towards independence. *Id.*; W. HELLERSTEIN, R. MCKAY & P. SCHLAM, CRIMINAL JUSTICE AND HUMAN RIGHTS IN NORTHERN IRELAND, 43 REC. A. B. CITY N.Y. 110, 117 (1988) [hereinafter W. HELLERSTEIN, R. MCKAY & P. SCHLAM]. While the greater part of Ireland achieved full independence in 1949 as the Republic of Ireland, six counties in Ulster became Northern Ireland, a constituent of the United Kingdom. NORTHERN IRELAND, *supra*, at 2. In the United Kingdom House of Commons 17 of the 650 seats are allotted to Northern Ireland. Out of those 17 seats, 3 are held by the nationalist Social Democratic and Labor party. *Id.* at 15. In 1983 Provisional Sinn Fein candidate Gerry Adams won the seat for West Belfast, but he has not taken his seat. W. FLACKES, NORTHERN IRELAND: A POLITICAL DIRECTORY 1968-83, at 29 (1983) [hereinafter W. FLACKES]. Sinn Fein means "Ourselves Alone" in Gaelic, the native language of Ireland. W. HELLERSTEIN, R. MCKAY & P. SCHLAM, *supra*, at 119. The remaining 13 seats are presently held by Unionists. NORTHERN IRELAND, *supra*, at 15. Throughout this Comment, nationalist refers to the Catholic minority of Northern Ireland, while unionist refers to the Protestant majority in Northern Ireland. The population of Northern Ireland is divided: just under two-thirds is Protestant, while the remainder is Roman Catholic. The latter predominantly favors political union with Ireland. STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, THE PROTECTION OF HUMAN RIGHTS IN NORTHERN IRELAND, 1977, CMND. SER. 4, No. 7009, at 4. From 1969 to 1988 a total of 2,709 people, including 1,864 civilians, have died as a result of terrorism in Northern Ireland. NORTHERN IRELAND, *supra*, at 3. The British Government, meanwhile, has reacted with a series of domestic measures aimed at combatting terrorism. HUMAN RIGHTS, *supra* note 4, at 12.

7. In this Comment, the term "British" will refer to all parts of the United Kingdom, which includes England, Scotland, Wales, and Northern Ireland.

8. This Comment is limited to the analysis of freedom of expression with respect to the British media and public, and in no way examines the right to *political* expression. Free expression of ideas and information advocating or furthering terrorism is almost certain to trigger permissible restrictions on the freedom of expression. For an in-depth treatment of the use of media by terrorists, and the advantages terrorists gain thereby, see A. SCHMID & J. DE GRAAF, VIOLENCE AS COMMUNICATION: INSURGENT TERRORISM AND THE WESTERN NEWS MEDIA (1982) [hereinafter A. SCHMID & J. DE GRAAF]. Indeed, the European Commission on Human Rights (Commission) has already upheld interference with the right to freedom of expression based on the content of certain letters of an Irish Republican Army (IRA) sympathizer. See *X v. United Kingdom*, 3 Eur. Comm'n H.R. 62 (decisions & reports) (1976) (holding that conviction of applicant under the Incitement to Disaffection Act of 1934 was permissible since the letters in his possession encouraged British soldiers to turn their guns on superiors and offered them money to act illegally).

ance on television or radio of several extremist groups from Northern Ireland, and *any* spoken words that tend to advance their causes.⁹

Reporting the news from Northern Ireland has always been a difficult and unenviable task for the media.¹⁰ In *Regina v. Secretary of State for the Home Department ex parte Brind*,¹¹ the Queen's Bench divisional court (divisional court) upheld the British Government's restrictions against a challenge by a group of journalists on the ground that the Secretary of State for the Home Department had the proper power to issue the restrictions.¹² This Comment discusses that decision in light of freedom of expression as protected by article ten of the European Convention on Human Rights (Convention), to which the United Kingdom is a signatory.¹³ This Comment criticizes the

Similarly, in *Arrowsmith v. United Kingdom*, 19 Eur. Comm'n H.R. 5 (decisions & reports) (1980), a prosecution under the same act was upheld in the interest of preventing disorder within the army. *Id.* However, censorship of expression advocating terrorism is quite different from censorship of all expression by extremist groups. *See infra* notes 29-31 and accompanying text.

9. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, CO/1756/88, slip op. at 1 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file), 139 New L.J. 1229 (1989) (per Watkins, L.J., joined by Roch & Judge, J.J.), *aff'd on other grounds*, [1990] 2 W.L.R. 787 (C.A. 1989) (opinions per Donaldson, M.R., & Gibson & McCowan, L.J.J.), *aff'd sub nom.* *Brind v. Secretary of State for the Home Dep't*, [1991] 1 All E.R. 720 (H.L.). For the full text of the ban, see *infra* note 101.

10. CO/1756/88, slip op. at 6 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file); 138 PARL. DEB., H.C. (6th ser.) 894 (1988). *See also* Birt, *Gagging the Messenger*, *The Independent*, Nov. 21, 1988, at 21, col. 1 [hereinafter Birt] (recounting the difficulties encountered, and the responsibilities previously exercised, by journalists in Northern Ireland).

11. CO/1756/88, (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file), 139 New L.J. 1229 (1989) (per Watkins, L.J., joined by Roch & Judge, J.J.), *aff'd on other grounds*, [1990] 2 W.L.R. 787 (C.A. 1989) (opinions per Donaldson, M.R., & Gibson & McCowan, L.J.J.). In England, the high court of justice (Queen or King's Bench) is a court of the first instance. Appeals are taken to the court of appeal, and ultimately, to the House of Lords. Issues involving the European Convention on Human Rights may be further appealed to the European Court of Human Rights at Strasbourg, France (European Court). Additionally, opinions issued by British courts (where more than one judge sits) are frequently *seriatim*, so that decisions by such courts cannot be referred to strictly as majority opinions.

12. *See infra* note 109 and accompanying text.

13. Article 10 of the Convention states that:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties

decision as violative of the Convention since it does not permit restrictions on expression that impose a burden disproportionate to their anticipated benefit.¹⁴ Finally, this Comment concludes that the court's decision, deeming the restrictions permissible under the Convention, typifies the British judiciary's growing carelessness about the principles that should govern all limitations on freedom of expression and the judiciary's failure to defer to the specific interests that require restrictions.¹⁵

The United Kingdom has no bill of rights. Thus, British domestic law offers human rights little more than procedural protections that deny relief to aggrieved plaintiffs unless an otherwise legal decision verges on absurdity.¹⁶ This Comment concludes that while the Convention may not impose duties and confer rights upon individuals until it is incorporated into domestic law,¹⁷ the divisional court's standard of review is inconsistent with the United Kingdom's obligation under the Convention to insure that its domestic law provides adequate protection of freedom of expression.¹⁸ Consequently, upholding the restrictions is antagonistic to notions of a pluralistic, democratic society.¹⁹

II. FREEDOM OF EXPRESSION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. *Article Ten*

The substantive right to freedom of expression as set forth in article ten of the Convention²⁰ includes a group of distinct

as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Human Rights Convention, *supra* note 2, at art. 10.

14. See *infra* notes 20-33 and accompanying text.

15. JUSTICE: THE BRITISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, FREEDOM OF EXPRESSION AND THE LAW 1, 4, 7 (1990).

16. See *Regina v. Secretary of State for the Env't ex parte Nottinghamshire County Council*, [1986] 1 A.C. 240 (per Lord Scarman).

17. See Drzemczewski, *British Courts and the European Human Rights Convention: An Unsatisfactory Situation*, 1979 TOPICAL L. 38, 40 [hereinafter Drzemczewski].

18. See *infra* notes 20, 68 and accompanying text.

19. See *Regina v. Lemon*, 1979 A.C. 617, 665 (per Lord Scarman).

20. After World War II, a European Congress, made up of members of the International Committee of the Movements for European Unity, met at the Hague and, under

rights.²¹ The freedom to hold opinions is primarily an individual right.²² The freedom to receive and impart ideas and information extends to all forms of external expression.²³ Generally, article ten prohibits any censorship of the press, television, radio, or any other vehicle for the expression of ideas and informa-

the leadership of Winston Churchill, called for the foundation of the Council of Europe. P. VAN DLJK & G. VAN HOOT, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 1 (1984) [hereinafter P. VAN DLJK & G. VAN HOOT]; R. BEDDARD, *HUMAN RIGHTS IN EUROPE* 17, 28 (1980) [hereinafter R. BEDDARD]. The Statute of the Council of Europe was signed by 10 nations in London on May 5, 1949. R. BEDDARD, *supra*, at 18. The aim of the Council of Europe is "to achieve greater unity between its members . . . by agreements and common action . . . in the maintenance and further realization of human rights and fundamental freedoms." Statute of the Council of Europe, Ch. I, art. I (a & b), *reprinted in* A. ROBERTSON, *THE COUNCIL OF EUROPE* 257 (1961). The Statute of the Council of Europe created the Consultative Assembly, which then created a special commission to prepare the Convention. P. VAN DLJK & G. VAN HOOT, *supra*, at 1-2. The Consultative Assembly, now known as the Parliamentary Assembly (Assembly), is composed of parliamentarians of the member states. R. BEDDARD, *supra*, at 18. The Assembly has no powers of decision but makes recommendations to the Committee of Ministers. In turn, the Committee of Ministers, an executive organ, acts on the recommendations as it thinks proper. A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* 10-11 (1963). The Convention was signed in Rome on November 4, 1950 and entered into force on September 3, 1953. A. DRZEMCZEWSKI, *EUROPEAN CONVENTION IN DOMESTIC LAW* 1 (1983) [hereinafter A. DRZEMCZEWSKI]. The preamble of the Convention states that it is designed to take the first steps towards collective enforcement of certain rights set forth in the Universal Declaration of Human Rights. Human Rights Convention, *supra* note 2, preamble. The Convention establishes a Commission on Human Rights and a Court of Human Rights to ensure observance by parties to the Convention of the rights guaranteed therein. *Id.* at art. 19.

21. See Human Rights Convention, *supra* note 2, at art 10.

22. Tajima, *Protection of Freedom of Expression by the European Convention*, 2 HUM. RTS. J. 658, 663 (1969) [hereinafter Tajima]. The freedom to hold opinions does not include the right to incite particular conduct or to undermine rights guaranteed elsewhere in the Convention. Malinverni, *Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights*, 4 HUM. RTS. L.J. 443, 445 (1983) [hereinafter Malinverni].

23. Bullinger, *Freedom of Expression and Information: An Essential Element of Democracy*, 6 HUM RTS. L.J. 338, 340 (1985) [hereinafter Bullinger] (report presented to the Sixth International Colloquy about the European Convention on Human Rights, held in 1985 at Seville, Spain). This right includes freedom to disseminate information and ideas by access to mass media and by personal means. "Freedom of expression is guaranteed regardless of its content." *Id.* at 347. The freedom to impart information concerns mainly the content of the information, not the means by which it is imparted. P. VAN DLJK & G. VAN HOOT, *supra* note 20, at 311. The right to obtain information concerns the active pursuit of such knowledge as is necessary for independent opinion formation. In contrast, the right to receive information freely concerns the right to gain passively such knowledge as is necessary for independent opinion formation. *Council of Europe, PROCEEDINGS OF THE FOURTH INTERNATIONAL COLLOQUY ABOUT THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 123 (1976) [hereinafter COLLOQUY]. Finally, the right to receive information assumes that someone is willing to impart that information. Leander v. Sweden, 116 Eur. Ct. H.R. (ser. A) at 29 (1987).

tion.²⁴ Article ten also guarantees the right of the public to be properly informed.²⁵ These rights are guaranteed against any interference by public authority, whether legislative, administrative, or judicial.²⁶

The first inquiry under article ten is whether the right of free expression has been violated.²⁷ If a violation is found, the next issue is whether the restriction is permissible. Freedom of expression may be restricted pursuant to the conditions listed in section two of article ten.²⁸ These include restrictions in the interest of public safety, for the prevention of disorder²⁹ or crime,³⁰ and for the protection of the rights of others.³¹ These

24. See F. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 151 (1975). Justice Black expressed a similar view with respect to the First Amendment when he stated that:

[i]deas and beliefs are today chiefly disseminated to the masses of people through the press, radio, [and] moving pictures The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition.

Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting). The general language of article 10 is understood to include all technical means of communication. Bullinger, *supra* note 23, at 349. The Commission recently held that freedom of expression includes the freedom to impart information and ideas "also by means of radio broadcasts." Radio X v. Switzerland, 37 Eur. Comm'n H.R. 236, 239 (decisions & reports) (1984). Television and radio program data are generally included in the information aspect of article 10, rather than as opinions or ideas. Z. NEDJATI, *HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION* 181 (1980).

25. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 40-41 (1979).

26. See Tajima, *supra* note 22, at 665; *STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, THE PROTECTION OF HUMAN RIGHTS IN NORTHERN IRELAND*, 1977, CMND. SER. 4, No. 7009, at 69.

27. See P. VAN DLJK & G. VAN HOOT, *supra* note 20, at 428.

28. See Human Rights Convention, *supra* note 2, at art. 10, § 2; see also *supra* note 13.

29. In one of the leading cases interpreting the phrase "in the interests of public safety, for the prevention of disorder," the Commission held that a narrowly tailored ban on public demonstrations in a busy thoroughfare in the town of Moutier, Switzerland was justifiable for the prevention of breach of the peace and serious clashes between demonstrators. *Rassemblement Jurassien & Unité Jurassienne v. Switzerland*, 17 Eur. Comm'n H.R. 93 (decisions & reports) (1980).

30. With respect to the phrase "for the prevention of crime," the Commission has also held that article 8 of the Convention, which guarantees the right to respect for family and private life, was not violated by compilation by the Vienna police of an extensive file on the unsuccessful applicant's private life. While there was no finding of any secret surveillance by the security police, the Commission stressed that the sole use of data in a criminal proceeding against the applicant is justified and necessary in a democratic society for the prevention of crime. *X v. Austria*, 16 Eur. Comm'n H.R. 145 (decisions & reports) (1979). See also Baader, Meins, Meinhof & Grundman v. Federal Republic of Germany, 2 Eur. Comm'n H.R. 58 (decisions & reports) (1975) (holding that restrictions on correspondence, visitation and access to literature imposed upon imprisoned or de-

exceptions must be narrowly interpreted since it is the right to free expression that is guaranteed by the Convention, not the exceptions.³² In sum, any restrictions on freedom of expression must not only be prescribed by law, but must also be necessary in a democratic society and justified by one of the exceptions described in section two of article ten.³³

B. Interpretation of Freedom of Expression by the European Court

In interpreting the Convention, it is the obligation of the various judicial bodies that handle complaints³⁴ to develop a common European standard of constitutional principles to realize the aims and ideals of the Council of Europe.³⁵ The provisions of the Convention thus become part of a new law for all signatory states, rooted in a foundation of legal conceptions shared by those states.³⁶

The requirement in article ten that a restriction on freedom

tained terrorists were necessary for the prevention of crime or disorder).

31. Human Rights Convention, *supra* note 2, at art. 10, § 2; *see also supra* note 13. The phrases "public safety" and "prevention of disorder" are said to refer to the security or order dealt with by police regulations or criminal law. Schwartz, *Broadcasting and the EEC Treaty*, 11 EUR. L. REV. 7, 53 (1986) [hereinafter Schwartz]. Recently, the House of Lords interpreted the phrase "prevention of crime" in a broad general sense, rejecting the notion that it addressed itself to particular identifiable future crime. *In re An Inquiry Under the Company Securities (Insider Dealing) Act 1985*, [1988] 1 A.C. 660, 704-05 (1987) (per Lord Griffiths). Many cases before the Commission have upheld restrictions on freedom of expression where the views of *individuals* directly advocated illegal acts or extremist ideas such as neonazism or fascism. *See, e.g., X v. Austria*, 42 Eur. Comm'n H.R. 105 (1973) (prosecution of an alleged terrorist for having approved illegal acts in an interview in the press upheld as a valid interference with freedom of expression in the interests of national security, public safety, and the prevention of disorder or crime); *X v. Austria*, 1963 Y.B. EUR. CONV. ON HUM. RTS. 424 (Eur. Comm'n on Hum. Rts.) (no violation of article 10 since applicant's conviction under a valid law proscribing Nazi organizations was necessary for the protection of public safety, national security, and the rights and freedoms of others).

32. *Malinverni*, *supra* note 22, at 452; *Engel v. Netherlands*, 22 Eur. Ct. H.R. (ser. A) at 21 (1976).

33. Muchlinski, *The Freedom of Speech and the European Human Rights Convention: The Sunday Times Case*, 1979 TOPICAL L. 1, 2 [hereinafter Muchlinski].

34. Judicial bodies that handle applications at Strasbourg alleging violation of the Convention are the Commission, the European Court, and the Committee of Ministers. *See supra* note 20.

35. Muchlinski, *supra* note 33, at 3. *See Austria v. Italy*, 1961 Y.B. EUR. CONV. ON HUM. RTS. 116, 138 (Eur. Comm'n on Hum. Rts.). *See also supra* note 20 and *infra* notes 53-63 and accompanying text.

36. *See Muchlinski*, *supra* note 33, at 3; Human Rights Convention, *supra* note 2, preamble.

of expression be prescribed by law is intended to prevent vagueness and arbitrariness.³⁷ Additionally, the requirement that a restriction be "necessary" reflects a need for objective necessity, while the words "in a democratic society" involve the protection of general constitutional values.³⁸ However, in article ten adjudication, the crucial issue has shifted from whether a restraint on speech is objectively necessary to whether it is necessary to prevent destruction of the values protected by the Convention.³⁹

In the seminal article ten case, *Handyside v. United Kingdom*,⁴⁰ the European Court of Human Rights at Strasbourg (European Court) rejected the applicant's claim that his obscenity conviction violated article ten.⁴¹ United Kingdom authorities had fined the applicant under an obscenity act for publication of "The Little Red Schoolbook," despite the book's publication in Denmark without any such difficulties.⁴² The European Court established that a respondent state has the burden of showing that a restriction is proportionate to a legitimate aim pursued; this implies that the measure must be addressed toward a pressing social need.⁴³ The reasons given by the state to justify the restriction must also be relevant and sufficient under section two of article ten.⁴⁴ Further, where there is a vital public interest in

37. In *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979), the European Court explained that the phrase "prescribed by law" had two basic requirements. First, a law must be adequately accessible, so that a citizen may know the legal rules applicable to a given case. Second, a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. *Id.* at 31.

38. *Muchlinski*, *supra* note 33, at 2. The European Court has established that the adjective "necessary" is synonymous neither with "indispensable" nor with the looser test of "reasonable" or "desirable." *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 35-36; *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22.

39. *Muchlinski*, *supra* note 33, at 6. However, a tendency emerged early in the Commission to defer to a government's finding that a restriction was necessary as long as there were reasonable grounds for such a finding, so that possibly too wide an area of discretion was given to governments in nonemergency situations. *Id.* at 7. In *X v. Austria*, 1960 Y.B. EUR. CONV. ON HUM. RTS. 310 (Eur. Comm'n on Hum. Rts.), the Commission hardly mentioned the facts and circumstances of the case in deciding that the restriction was acceptable simply because domestic law authorized it. The Commission did not show that "in the circumstances of the case, the particular application of the law was justifiable." *Muchlinski*, *supra* note 33, at 7-8.

40. 24 Eur. Ct. H.R. (ser. A) (1976).

41. *Id.*

42. *Id.*

43. *Id.* at 22-24. This proportionality test is derived from article 10's requirement that a restriction be "necessary in a democratic society." Compare *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23, with Human Rights Convention, *supra* note 2, at art. 10.

44. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 22-24.

communication of the restricted matter, a state needs to show that free expression would necessarily have the adverse consequences alleged.⁴⁵

In the historic *Sunday Times v. United Kingdom*⁴⁶ judgment, the European Court applied these principles and held in favor of free speech. The European Court reviewed the validity of an injunction against the Sunday Times that halted publication of articles about children affected by the drug thalidomide.⁴⁷ The injunction was allegedly necessary to protect pending litigation on the thalidomide children. The House of Lords found the injunction obligatory under the common law of contempt.⁴⁸ The European Court held that the decision of the House of Lords violated article ten.⁴⁹

The limits of a state's ability to abridge freedom of expression were substantially elaborated upon in both *Handyside* and *Sunday Times*. Since it is the responsibility of signatory states to secure for their citizens the freedoms enumerated in the Convention, the court allows those states a margin of appreciation in determining whether or not a pressing social need exists.⁵⁰ However, since this domestic margin of appreciation "goes hand in hand with a [E]uropean supervision,"⁵¹ this doctrine does not grant unlimited deference to the findings of domestic authorities. Where a restriction depends on a more shifting and subjective goal, the margin of appreciation accorded to national authority is greater. In *Handyside*, the European Court found that no uniform European conception of morals existed; thus, the findings of the British tribunal in that case could not be disturbed.⁵² However, in *Sunday Times*, the House of Lords deci-

45. McGregor, *supra* note 2, at 395. Other tests employed by the court include more scrutiny according to a restriction's breadth and consideration of the practice of other states parties to the Convention. *Id.* The best example of "a vital public interest" is the articles on the drug thalidomide and its effects on children in the United Kingdom, enjoined by the House of Lords in *Attorney Gen. v. Times Newspapers, Ltd.*, 1974 A.C. 273 (1973). See *infra* notes 46-48 and accompanying text.

46. 30 Eur. Ct. H.R. (ser. A) (1979).

47. *Id.*

48. *Attorney Gen. v. Times Newspapers, Ltd.*, 1974 A.C. 273 (1973).

49. *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) (1979).

50. *Id.* at 36; *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 22-23. The margin of appreciation doctrine means that some initial deference will be granted to a national authority's determination that a restriction is necessary in a democratic society.

51. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23; McGregor, *supra* note 2, at 394.

52. P. VAN DIJK & G. VAN HOOT, *supra* note 20, at 435. On the other hand, where a restriction is aimed at a goal that is more objective in nature, the measure of deference granted to a state is much lower. *Handyside*, 24 Eur. Ct. H.R. (ser. A) at 23; *Sunday*

sion that an injunction was necessary in a democratic society did not survive intensified scrutiny. Clearly, the scope of review exercised by the European Court in determining the necessity of a restriction goes beyond whether a state has acted reasonably, carefully, and in good faith.⁵³

The scope of review exercised by the European Court in *Sunday Times* indicates that the Court is moving away from its emphasis on objective necessity with respect to the exceptions in article ten.⁵⁴ The failure to consider the content of the values to be protected under the Convention jeopardized the possibility of ascertaining a common European standard of protection by which the Convention should operate.⁵⁵ The European Court considered the facts and circumstances in *Sunday Times* in more detail than in *Handyside*. By articulating the values article ten seeks to protect and applying these values to the facts, the European Commission on Human Rights (Commission) and the European Court reaffirmed their obligation both to develop a European standard of review, and to focus on the values the Convention seeks to protect.⁵⁶

C. The Council of Europe and Freedom of Expression

The Council of Europe⁵⁷ has demonstrated a strong commitment to protecting freedom of expression. The Consultative Assembly has declared that "the independence of the press and other mass media from control by the state should be established by law."⁵⁸ This declaration points to the duty of authori-

Times, 30 Eur. Ct. H.R. (ser. A) at 35-36.

53. See *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 36.

54. See Muchlinski, *supra* note 33, at 10-14. See also *supra* notes 34-39 and accompanying text. Previously, the Commission had tended to accept any executive action that had the effect of protecting rights threatened by an exercise of freedom of expression, irrespective of whether the democratic values embodied in the Convention were secured. *Id.* at 9. See, e.g., *X & German Ass'n of Z v. Federal Republic of Germany*, 1963 Y.B. EUR. CONV. ON HUM. RTS. 204 (Eur. Comm'n on Hum. Rts.) (obscenity conviction of newspaper distributor for selling nonpornographic magazines which might negatively influence adolescents upheld as within the state's margin of discretion). In that case, the "in a democratic society" element was completely ignored. Muchlinski, *supra* note 33, at 9.

55. Muchlinski, *supra* note 33, at 10.

56. See Muchlinski, *supra* note 33, at 13-14, 21, 23.

57. See *supra* note 20.

58. *Draft of Resolution 428*, Eur. Consult. Ass., 18th Sess., Doc. No. 2687 (1970); COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 908-09 (1979) (declaration on mass communication media and human rights) (resolution 428).

ties to make available certain information so that mass communication media can fulfill their duty to give complete information on public affairs.⁵⁹ More important, the 1982 declaration of Freedom of Expression and Information adopted by the Committee of Ministers seeks, among other things, "the absence of censorship or any arbitrary controls or restraints on participants in the information process, on media content, or . . . on the dissemination of information."⁶⁰

It is only in the last decade that Europeans have focused their attention on issues related to broadcasting. The European Community (EC) published a green paper in 1984 which explored the subject extensively.⁶¹ However, the Council of Europe may be a more appropriate forum in which to develop policy and law in European broadcasting as the green paper did not receive a favorable response from all EC members.⁶² Furthermore, the Council of Europe is better equipped to take into account shared cultural features, languages, and interests of many European states that are not EC members.⁶³

The importance of broadcasting, and all media, to freedom of expression is demonstrated by the changing role of governments in guaranteeing the rights provided in the Convention. Today, governments must not only protect fundamental rights from infringement, but also must take positive action to ensure the existence of media able and prepared to supply information to the public.⁶⁴

59. *Id.*

60. COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 206-07 (1987). See also McGregor, *supra* note 2, at 394 (discussing the declaration). Although no declaration may bind a state as a matter of law, declarations are incontrovertible as policy statements and examples of the objectives of the Council of Europe. See *supra* note 20.

61. See Television without Frontiers — Green Paper on the Establishment of a Common Market for Broadcasting, Especially by Satellite and Cable, Commission of the European Communities, COM (84) 300 final, June 14, 1984. A green paper is an extensive report that examines a given topic.

62. Springer, *Mass Media Unlimited: A Challenge to the Council of Europe*, FORUM xxii-xxiii (1986) (Council of Europe quarterly)[hereinafter Springer]. See also European Convention on Transfrontier Television, 28 I.L.M. 857 (1989) (reaffirming principles of the free flow of information and ideas, the independence of broadcasters, the importance of broadcasting for the development of culture and the free formation of opinions, and the safeguarding of pluralism and equality of opportunity among all political parties) (provisional edition).

63. Springer, *supra* note 62, at xxii.

64. COLLOQUY, *supra* note 23, at 122-23. This transformation of the duty of public power is concerned with the view that public authority is obliged to take positive action

D. *The United Kingdom and the Convention*

The United Kingdom ratified the Convention in 1951.⁶⁵ In January 1966 the United Kingdom recognized both the right of an individual plaintiff to apply to the Commission for relief under the Convention, and the compulsory jurisdiction of the European Court.⁶⁶ The Convention does not legally oblige signatory states to incorporate its provisions into domestic law.⁶⁷ However, signatories are obliged to secure for anyone within their jurisdiction the rights set forth therein.⁶⁸ In ratifying the Convention, the British executive assumed correctly that the Convention did not require it to incorporate its provisions directly into internal law, and that at the time of ratification, in the opinion of the government, British law adequately reflected the Convention's requirements.⁶⁹ However, the issue of whether British domestic law conforms to the Convention must be constantly re-examined. This can be attributed to the general terms in which the rights granted by the Convention are expressed,

in securing human rights. *Id.* See also Bullinger, *supra* note 23, at 382 (affirmative action is imposed on member states under article 10).

65. Mann, *Britain's Bill of Rights*, 94 L.Q. REV. 512, 517 (1978) [hereinafter Mann].

66. Simmonds, *The United Kingdom and the European Convention on Human Rights*, 15 INT'L & COMP. L.Q. 539 (1966); 1966 Gr. Brit. T.S. No. 8 (Cmd. 2894). The advent of the Convention in a nation that has no written constitution defining the rights and liberties of its citizens meant that, for the first time, a comprehensive guarantee of human rights would be applied throughout the United Kingdom as a whole. See generally HUMAN RIGHTS, *supra* note 4, at 20. The United Kingdom's declaration accepting the right to individual petition was made in accordance with article 25 of the Convention, which sets forth the procedures for accepting that right. Human Rights Convention, *supra* note 2, at art. 25. Prior to this, the United Kingdom could only be brought to the European Court by a complaint filed by another state. Applications at Strasbourg are handled first by the Commission. The Commission may examine an application if all domestic remedies have been exhausted, and within six months of the date when a final decision was taken. *Id.* at art. 26. If the application is declared admissible, a friendly settlement is attempted, through either the Committee of Ministers or the Commission. If there is no friendly settlement, the case is referred to the European Court. *Council of Europe, What is the Council of Europe Doing to Protect Human Rights?* 29 (1977).

67. A. DRZEMCZEWSKI, *supra* note 20, at 55.

68. Human Rights Convention, *supra* note 2, at art. 1.

69. HOUSE OF LORDS, REPORT OF THE SELECT COMMITTEE ON A BILL OF RIGHTS 27 (1978) [hereinafter BILL OF RIGHTS]; A. DRZEMCZEWSKI, *supra* note 20, at 178. It thus appeared that the Convention, having been complied with as far as the government was concerned, would present no further developments in terms of the rights which it guaranteed. However, the fear that a future government might wish to curtail freedoms previously enjoyed made the Convention's guarantees more than mere words on paper. This in turn was the chief value of the Convention to the ordinary citizen. See Shawcross, *United Kingdom Practice on the European Convention on Human Rights*, 1965 BELGIAN REV. INT'L L. 297, 300.

and the evolutionary way in which they are interpreted.⁷⁰

While the Crown (the executive branch) has historically had the power to enter into international treaty obligations,⁷¹ British law dictates that such treaties cannot take effect in domestic law unless Parliament passes an enabling act.⁷² As a result, because Parliament has not incorporated the Convention, it has no effect in British domestic law.⁷³ Thus, the decisions of the European Court are not legally binding on domestic courts. They are, however, highly persuasive and do bind the United Kingdom on an international plane.⁷⁴

The United Kingdom's acceptance of the private right of ac-

70. HOUSE OF LORDS, MINUTES OF EVIDENCE TAKEN BEFORE THE SELECT COMMITTEE ON A BILL OF RIGHTS 37 (1978) [hereinafter MINUTES OF EVIDENCE].

71. 1 W. BLACKSTONE, COMMENTARIES *257; E. WADE & G. PHILLIPS, *supra* note 4, at 320.

72. The Parlement Belge, 4 P.D. 129 (1879); Walker v. Baird, 1892 A.C. 491 (P.C.) (Nfld.); Attorney Gen. for Canada v. Attorney Gen. for Ontario, 1937 A.C. 326 (P.C.) (Can.); Duffy, *English Law and the European Convention on Human Rights*, 29 INT'L & COMP. L.Q. 585, 585 (1980) [hereinafter Duffy]. The absence of a bill of rights in the United Kingdom has prompted many proposals that Parliament legislatively incorporate the Convention into domestic law. The controversy surrounding a legislatively enacted bill of rights revolves around the problem of entrenchment, namely, that any subsequent Parliament can undo the actions of its predecessors. MINUTES OF EVIDENCE, *supra* note 70, at 105, 162-63, 197. See generally Lester, *Fundamental Rights: The United Kingdom Isolated?*, 1984 PUB. L. 46, 46-49 [hereinafter Lester, *Fundamental Rights*] (discussing the dogma of Parliamentary sovereignty). Thus, the durability of a bill of rights (whether based on the Convention or not) would be enveloped in uncertainty. At present, British constitutional rights are derived from constitutional conventions, court decisions, and acts of Parliament. Since Parliament may at any time overrule any other constitutional authority, the government of the day, if ensured a clear majority in the House of Commons, has virtually unchecked authority. Andrews, *The European Jurisprudence on Human Rights*, 43 MD. L. REV. 463, 482 (1984).

73. Duffy, *supra* note 72, at 615. Among Council of Europe member states that have not incorporated the Convention into their domestic law, the United Kingdom is the only one in which there is no written constitution guaranteeing some or all of the rights protected by the Convention. MINUTES OF EVIDENCE, *supra* note 70, at 116. One of the strongest arguments against incorporation of the Convention is that it would politicize the role of the judiciary. While prompted by concerns for separation of powers, this argument does not address the need for protection of human rights in society. Kerridge, *Incorporation of the European Convention on Human Rights into United Kingdom Domestic Law*, in THE EFFECT ON ENGLISH DOMESTIC LAW OF MEMBERSHIP IN THE EUROPEAN COMMUNITIES AND RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 247, 260-63 (1983) [hereinafter Kerridge]. Kerridge concludes that British judges are in politics whether they like it or not, and proposes a separate constitutional court (as in the Federal Constitutional Court of West Germany) to deal preliminarily with constitutional questions, thus disposing of controversial issues before they reach the ordinary courts. *Id.* at 261-62.

74. Human Rights Convention, *supra* note 2, at art. 53; A. DRZEMCEWSKI, *supra* note 20, at 316.

tion naturally resulted in an increased role for the Convention in domestic law. Although the Convention has been cited in courts throughout the United Kingdom,⁷⁵ the Convention's erratic history has clouded its certainty as a guide to judicial decisionmaking. Thus, some British judges gladly turn to the Convention, while others refuse to do so.⁷⁶ The Convention's present position as a strictly international obligation in British law is unlikely to change without the necessary enabling legislation by Parliament.⁷⁷

The first reliance on the Convention in a British decision was in 1974.⁷⁸ The Convention's present status in English do-

75. Notably, some of these decisions demonstrate a judicial sensitivity to protecting human rights so that the United Kingdom's obligations under the Convention are not underemphasized. Compare *Regina v. Deery*, 1977 N.Ir. 164 (Crim. App.) (holding that the Convention is a strong guide in construing ambiguous or unclear domestic legislation) and *Regina v. McCormick*, 1977 N.Ir. 105 (Belfast City Comm'n) (finding, after a careful examination of the Strasbourg case law on the relevant provisions of the Convention, that the statutory provision in question had incorporated the Convention's guidelines into domestic law) with *Kaur v. Lord Advocate*, [1980] 3 Common Mkt. L.R. 79 (Scot. Sess., outer house) (rejecting plaintiff's claims outright on ground that the Convention is not part of Scottish law, and also rejecting the limited recourse to the Convention allowed in English law). The *McCormick* case is an object lesson on how the Convention's case law can be used by domestic courts to clarify an ambiguity in British law. Duffy, *supra* note 72, at 589.

76. See Lester, *The United Kingdom and the International Covenants*, 2 HUM. RTS. REV. 58, 64 (1977) (quoting Lord Scarman's Hamlyn Lectures) [hereinafter Lester, *The United Kingdom*]. See also Warbrick, *European Convention on Human Rights and English Law*, 130 New L.J. 852 (1980) ("there is a danger that the Convention will be used as a convenient peg on which to hang a judicial inclination, the very arbitrariness of the decisions being used by opponents of the Convention to underline their more wide-ranging objections to it").

77. Lester, *The United Kingdom*, *supra* note 76, at 63. The second of three readings before the House of Lords of a bill proposing incorporation of the Convention into British law was approved of by a vote of 56 to 30. Kerridge, *supra* note 73, at 249. The bill later failed. Although the United Kingdom has chosen not to incorporate the Convention, the House of Lords Committee on incorporation unanimously concluded that if a bill of rights were to be adopted, it would be through direct incorporation of the Convention. See Lester, *Fundamental Rights*, *supra* note 72, at 62; BILL OF RIGHTS, *supra* note 69, at 20. However, to say that incorporating the Convention into domestic law would invade Parliamentary sovereignty begs the question by what logic the Convention was ratified in the first place. Kerridge, *supra* note 73, at 251. Those who advocate that there is no need to incorporate because British law already complies fully with the Convention support an unsound argument. There could be no possible harm from incorporation if the United Kingdom were already complying with the Convention. *Id.* at 253-54.

78. See *Regina v. Miah*, [1974] 1 All E.R. 1110 (C.A.), *aff'd sub nom.* *Waddington v. Miah*, [1974] 1 W.L.R. 683 (H.L.) (referring to presumption against certain criminal legislation as a result of the Convention). The effect of the Convention as an instrument in statutory interpretation has undergone many changes. Lord Denning, in a series of decisions, suggested first that legislation which did not conform to the Convention might have to be held *per se* invalid. *Birdi v. Secretary of State for Home Affairs*, 119 Sol. J.

mestic courts allows for its usage in resolving statutory ambiguity and uncertainty in the law.⁷⁹ In 1980 the court of appeal held that even the Home Secretary himself was not obliged, in exercising his statutory powers, to take into account the provisions of the Convention.⁸⁰

E. Freedom of Expression and the British Media

The United Kingdom is unusual in that it has no written constitution. Rather, freedom of speech, expression, and the press are often referred to as "residual rights."⁸¹ Domestic law takes these rights for granted; what is left is a residual liberty to impart information and ideas if they are not restricted by law.⁸²

332, 61 I.L.R. 250 (C.A. 1975). He then remarked, in *dicta*, that his previous statements should be cut back. However, he added that those who administer and apply the law ought to have regard to the Convention in carrying out their duties. *Regina v. Secretary of State for the Home Dep't ex parte Bhajan Singh*, 1976 Q.B. 198, 207 (C.A.). In *Regina v. Chief Immigration Officer, Heathrow Airport ex parte Salamat Bibi*, [1976] 1 W.L.R. 979 (C.A.), Lord Denning revoked his earlier suggestion that officials should specifically take the Convention into account when administering rules made by Parliament or a Minister, since Parliament, or the Minister, would already have done so. *Id.* at 984-85.

79. *Id.* See also Duffy, *supra* note 72, at 587. Additionally, the Convention could be introduced into domestic law via the common law. The principle that customary international law forms part of the law of the land in the United Kingdom allows a unique exception to the rule that unincorporated treaties are not part of domestic law. As a result, portions of the Convention could effectively be incorporated into the common law if adopted by usage or judicial decision. The Convention could also enter the common law as an obligation of public policy. However, these options have not historically been relied on very much. See *id.* at 605-07, 612; Drzemczewski, *supra* note 17, at 40, 46. One British author has concluded, in "a depressing glance at English judges' reactions to human rights claims," that "the common law seems as obdurate as an old ass in its resistance to change through the influence of human rights." Feldman, *Influences on Judicial Reasoning*, in *THE EFFECT ON ENGLISH DOMESTIC LAW OF MEMBERSHIP IN THE EUROPEAN COMMUNITIES AND RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 27 (1983).

80. *Fernandes v. Secretary of State for the Home Dep't*, 1981 Imm. A.R. 1, 78 I.L.R. 37 (C.A. 1980).

81. E. WADE & G. PHILLIPS, *supra* note 4, at 502; see 502 PARL. DEB., H.L. (6th ser.) 687 (1988).

82. E. WADE & G. PHILLIPS, *supra* note 4, at 501-02; JUSTICE: THE BRITISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, FREEDOM OF EXPRESSION AND THE LAW 6 (1990). Civil and criminal restraints on these freedoms include the laws of defamation, libel, obscenity and sedition, and copyright laws. E. WADE & G. PHILLIPS, *supra* note 4, at 501-26. One of the oldest and most respected recognitions of freedom of speech was made in *Bonnard v. Perryman*, [1891] 2 Ch. 269 (C.A.), where Lord Chief Justice Coleridge stated that "[t]he right of free speech is one which it is for the public interest that individuals should possess . . . and exercise without impediment, so long as no wrongful act is done . . ." *Id.* at 284. Even earlier, in a seminal declaration of free expression under the common law, Lord Mansfield stated that "[t]he liberty of the press consists in printing without any previous licen[s]e, subject to the consequence of the law." *Rex v.*

However, Lord Kilbrandon has referred to what he regards, at least since the Convention was ratified, as the existence of a constitutional right to free speech.⁸³

Broadcasting in the United Kingdom is generally divided between the statutorily created Independent Broadcasting Authority (IBA) and the government owned British Broadcasting Corporation (BBC). Although networks are supposed to determine their program content independently, the IBA and BBC must satisfy themselves, so far as possible, that nothing is included in their programming that "offends against good taste or decency, is likely to encourage or incite to crime or to lead to disorder, or to be offensive to public feeling."⁸⁴ If the IBA or BBC is in breach of its duties, the remedy is an injunction or suit against them.⁸⁵ Courts, however, are extremely reluctant to act as censors of these bodies.⁸⁶

Broadcasting guidelines for BBC coverage of Northern Ireland prior to 1988 involved a complex hierarchy of editorial clearances before programs could be transmitted.⁸⁷ However, there was no advance prohibition on who or what groups could be interviewed, or when they could be interviewed.⁸⁸ The IBA, on the other hand, was regulated by regular, confidential meetings between its chairman, the Secretary of State for Northern Ireland, and the Chief Constable of the Royal Ulster Constabulary, the Northern Irish police force.⁸⁹ Even in the absence of

Dean of St. Asaph, 100 E.R. 657, 661 (K.B. 1784).

83. *Cassel v. Broome*, 1972 A.C. 1027, 1133 (discussing punitive damages with respect to commercial publication). Similarly, in *Regina v. Wells Street Stipendiary Magistrate ex parte Deakin*, 1980 A.C. 477 (1979), Lord Diplock criticized the law of defamatory libel as out of tune with the United Kingdom's international obligations, and referred unambiguously to freedom of expression as guaranteed by the Convention. *Id.* at 482-83.

84. Broadcasting Act, 1981, ch. 68, § 4. The British Broadcasting Corporation (BBC) is regulated by similar language under its Charter, License, and Agreement. *See infra* note 102.

85. E. WADE & G. PHILLIPS, *supra* note 4, at 524-26.

86. E. WADE & G. PHILLIPS, *supra* note 4, at 526.

87. *See* A. SCHMID & J. DE GRAAF, *supra* note 8, at 158-62. The managing director of the BBC for Northern Ireland, the Controller Northern Ireland, and the News Editor Northern Ireland had to be consulted as part of the "referral up" system in place previously. *Id.* at 160. Additionally, no interview with an IRA member was permissible without being first cleared by the editor of news and current affairs. *Id.*

88. A. SCHMID & J. DE GRAAF, *supra* note 8, at 160.

89. A. SCHMID & J. DE GRAAF, *supra* note 8, at 159. It should be noted that the government conceded that its decision to censor the BBC and Independent Broadcasting Authority (IBA) "should not be taken as implying that the government considered that the broadcasting authorities had failed in the past to observe their duties in relation to

formal censorship, governmental pressure on major networks resulted in a good deal of self-censorship throughout the 1970s.⁹⁰

F. Principles of British Administrative Law

Judicial review of administrative action in British law is governed in part by the *Wednesbury*⁹¹ standard. *Wednesbury* review scrutinizes administrative action to determine whether a minister has followed the statutory objective, and whether the minister has refrained from taking into account irrelevant considerations.⁹² Once those questions are answered in favor of the minister, a decision may only be reversed if a court finds that the minister has come to a conclusion so unreasonable that no reasonable authority could ever have come to it.⁹³

The *Wednesbury* standard applies to administrative decisions made by the executive branch.⁹⁴ Under the *Wednesbury*

the contents of broadcasts." *Regina v. Secretary of State for the Home Dep't ex parte Brind*, [1990] 2 W.L.R. 787, 795 (C.A. 1989) (per Donaldson, M.R.) (quoting affidavit of Under-Secretary C.L. Scoble).

90. A. SCHMID & J. DE GRAAF, *supra* note 8, at 159-61. The excessive influence of the government in media coverage in Northern Ireland compels the conclusion that as long as the BBC and IBA are "too responsible and responsive to the government, and not enough to the Irish reality and the British public," media coverage in Northern Ireland will be incomplete, and the public and the direct victims of terrorism will suffer as a result. *Id.* at 162. Instead of government ordered guidelines, or guidelines designed by the media, Schmid and de Graaf propose a democratically elected, impartial media council to decide on censorship guidelines, restoring censorship to the public, in whose interest the news is disseminated in the first place. *Id.* at 172-74.

91. *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (1947) (per Greene, M.R.) (C.A.). In *Council of Civil Service Unions v. Minister for Civil Service*, 1985 A.C. 374 (1984), Lord Diplock stated that administrative actions could also be reviewed if they were illegal, that is, if the decisionmaker did not understand correctly the law that regulated his decisionmaking power, or give effect to it. Review was also available if there existed a "procedural impropriety" in a decision. Further, Lord Diplock expressly left open the possibility of introducing proportionality review into British domestic law. *Id.* at 410. *See supra* note 44 and accompanying text. *See also infra* notes 92-99 and accompanying text.

92. *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (1947) (C.A.).

93. *Id.* For a detailed examination of the flaws and shortcomings of *Wednesbury* review where fundamental human rights are concerned, see Jowell & Lester, *Beyond "Wednesbury": Substantive Principles of Administrative Law*, 1984 PUB. L. 368 [hereinafter Jowell & Lester]. The authors make effective arguments that it is possible to develop independent principles allowing substantive review so as to strengthen the protection of fundamental rights against the misuse of official discretion, without violation of separation of powers. *Id.* at 368-69. The authors also give several examples of substantive review in British cases, lurking beneath "*Wednesbury's* ample cloak." *Id.* at 371-72.

94. *Regina v. Secretary of State for the Env't ex parte Nottinghamshire County Council*, [1986] 1 A.C. 240 (1985) (per Lord Scarman).

standard, British courts can reverse political judgments made by the executive branch only if they are "perverse or absurd."⁹⁵ Ostensibly, this standard of review makes no allowance for substantive review of a decision. Judges are therefore extremely reluctant to articulate principled justifications for intervention in administrative decisions.⁹⁶ The most important limitation on judicial review of administrative action in the United Kingdom is that "it is a *supervisory* and not an *appellate* jurisdiction."⁹⁷ The British judiciary, concerned with maintaining separation of powers and stemming the prolific use of judicial review of administrative decisions, has reacted by intentionally limiting administrative review to abuses of that power.⁹⁸

III. *REGINA V. SECRETARY OF STATE FOR THE HOME DEPARTMENT EX PARTE BRIND*

A. *Facts*

The British Parliament has passed a variety of emergency legislation in attempting to deal with the difficult situation in Northern Ireland.⁹⁹ On October 19, 1988, in response to renewed terrorist activity by extremists in Northern Ireland, Douglas Hurd, then Secretary of State for the Home Department, issued

95. *Id.* at 248.

96. Jowell & Lester, *supra* note 93, at 371-72.

97. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, [1990] 2 W.L.R. 787, 802 (C.A. 1989) (per Donaldson, M.R.) (emphasis in original).

98. See *Puhlhofer v. Hillingdon London Borough Council*, [1986] 1 A.C. 484, 502 (per Lord Brightman).

99. The Northern Ireland (Emergency Provisions) Act 1978, enacted to protect the public against terrorism, enables security forces to search, question and arrest people suspected of being involved in terrorism, and empowers the Secretary of State to proscribe terrorist organizations. Northern Ireland (Emergency Provisions) Act, 1978, ch. 5; NORTHERN IRELAND, *supra* note 6, at 11. The Northern Ireland (Emergency Provisions) Act also significantly broadens the Royal Ulster Constabulary's power of arrest when emergency conditions exist. W. HELLERSTEIN, R. MCKAY & R. SCHLAM, *supra* note 6, at 129. The Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA), applicable throughout the United Kingdom, permits warrantless arrests of persons the police reasonably suspect are involved in terrorist activities. Such suspects may be held 48 hours or more "with the approval of the Home Secretary or the Secretary of State for Northern Ireland for up to a further five days." Prevention of Terrorism (Temporary Provisions) Act, 1984, ch. 8; NORTHERN IRELAND, *supra* note 6, at 12. The PTA also allows for the exclusion of suspected terrorists from the United Kingdom at the discretion of the Home Secretary. W. HELLERSTEIN, R. MCKAY & R. SCHLAM, *supra* note 6, at 125. The procedures under which these exclusions are made "are, prima facie, a breach of natural justice and the due process provisions of article [6] of the Convention." ARTICLE 19: THE INTERNATIONAL CENTRE ON CENSORSHIP, NO COMMENT: CENSORSHIP, SECRECY AND THE IRISH TROUBLES 16 (1989) [hereinafter No COMMENT].

a set of restrictions to the BBC and IBA.¹⁰⁰ The restrictions required them to stop broadcasting direct statements of certain extremist groups.¹⁰¹ The remainder of the restrictions (the sup-

100. Secretary of State for the Home Dep't *ex parte* Brind, CO/1756/88, slip op. at 1 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). On Remembrance Sunday of 1987, an IRA bomb exploded at Enniskillen, Northern Ireland, killing 11 civilians. In August 1988 a bus bomb attack in Ballygawley, Northern Ireland killed eight soldiers. These incidents were major factors in prompting the restrictions. See NORTHERN IRELAND, *supra* note 6, at 3; 500 PARL. DEB., H.L. (6th ser.) 1144 (1988); 138 PARL. DEB., H.C. (6th ser.) 896 (1988); The Guardian, Oct. 20, 1988, at 1, col. 1. On October 26, 1989, after a shakeup in the British cabinet, Home Secretary Hurd was appointed Foreign Secretary by Prime Minister Margaret Thatcher. N.Y. Times, Oct. 27, 1989, at A1, col. 2.

101. The Independent, Oct. 20, 1988, at 1, col. 1. The restrictions were served by notice upon the BBC and IBA, pursuant to section 29(3) of the 1981 Broadcasting Act (Broadcasting Act), with respect to the latter, and clause 13(4) of the Charter, License, and Agreement of 1981, with respect to the former. *Brind*, CO/1756/88, slip op. at 1-2 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). Throughout this Comment, the provisions and duties specified in the Broadcasting Act will be used to refer also to the Charter, License, and Agreement, since they are effectively identical.

The Broadcasting Act provides in part that "the Secretary of State may at any time by notice in writing require the [IBA] to refrain from broadcasting any matter . . . specified in the notice." Broadcasting Act, 1981, ch. 68, § 29.

The restrictions issued by the Home Secretary provide in part that:

1. [The BBC and IBA are required] to refrain at all times from sending any broadcast matter which consists of or includes any words spoken . . . by a person who appears or is heard on the programme [sic] . . . where (a) the person speaking the words represents or purports to represent [any organization proscribed in the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978, Sinn Féin, Republican Sinn Féin, or the Ulster Defence Association,] or (b) the words support or solicit or invite support for such an organization, [except for] any matter specified in paragraph 3 below

3. [The matter referred to] above is any words spoken (a) in the course of proceedings in Parliament, or (b) by or in support of a candidate at a parliamentary, European Parliamentary or local election pending that election.

Brind, CO/1756/88, slip op. at 1 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

The Northern Ireland (Emergency Provisions) Act applies to the IRA, Cumann na mBan, Fianna na h-Eireann, the Red Hand Commandos, Saor Eire, the Ulster Freedom Fighters, the Ulster Volunteer Force, and the Irish National Liberation Army (INLA). Northern Ireland (Emergency Provisions) Act, 1978, ch. 5, § 21, sched. 2.

The IRA includes both the Official IRA and its radical and more violent wing, the Provisional IRA, or "Provo." Cumann na mBan is the women's section of the IRA, whose members have been utilized by the Provisional IRA in its campaign of terrorism, and whose members have even placed bombs. W. FLACKES, *supra* note 6, at 74. Fianna na h-Eireann is the youth wing of the Provisional IRA, whose services have also been utilized in carrying bombs, moving weapons, and acting as decoys. *Id.* at 95. The Red Hand Commandos are a unionist paramilitary group, launched in 1972 and associated with the Ulster Volunteer Force. *Id.* at 200. Saor Eire is a left wing nationalist group regarded by security forces in Northern Ireland as a minor element in the violence. *Id.* at 208. The Ulster Freedom Fighters are a Protestant paramilitary group that split from the Ulster Defence Association in 1973. They have taken credit for some of the most critical assassi-

port clause) also banned the direct broadcast of words that supported, solicited, or invited support for such extremists.¹⁰² The Home Secretary had not previously availed himself of this power under the 1981 Broadcasting Act (Broadcasting Act).¹⁰³ Furthermore, no previous use of the power under antecedent statutes had ever involved such a sweeping and drastic restraint.¹⁰⁴ The restrictions produced cries of outrage by civil libertarians,¹⁰⁵ cre-

nations of nationalist sympathizers. *Id.* at 233-34. The Ulster Volunteer Force is another Protestant paramilitary force. It once declared that its intention was to mercilessly kill IRA men. *Id.* at 242-43. The INLA is the quantitatively insignificant military wing of the Irish Republican Socialist Party. It is dedicated to bombing and violence. *Id.* at 121-22.

While section 1 of the PTA bans the IRA and the INLA, this section does not apply in Northern Ireland, since it would otherwise overlap with the Northern Ireland Act, which already bans them. W. HELLERSTEIN, R. MCKAY & R. SCHLAM, *supra* note 6, at 128.

Sinn Fein, or Provisional Sinn Fein, the political counterpart of the Provisional IRA, is a fully legalized party in the United Kingdom, despite its dedication to British withdrawal from Northern Ireland. W. FLACKES, *supra* note 6, at 196-97. Republican Sinn Fein, or Official Sinn Fein, is a fervently marxist political party, which emerged after a split within Sinn Fein in 1970. The trend of Republican Sinn Fein is to renounce paramilitarism, as a result of which its proscription was removed by the British government in 1973. *Id.* at 256. The Ulster Defense Association (UDA), the largest Protestant paramilitary organization, though never yet proscribed, has been associated with the Ulster Freedom Fighters and has spawned the Ulster Loyalist Democratic Party. *Id.* at 229-33.

The restrictions avoid a head-on conflict with the case law of the Commission by allowing a relaxation of the restrictions during election periods. In *X & Ass'n of Z v. United Kingdom*, 1971 Y.B. EUR. CONV. ON HUM. RTS. 538 (Eur. Comm'n on Hum. Rts.), the Commission remarked, in *dicta*, that a denial to a political party (such as Sinn Fein) of access to broadcasting during election time would raise an issue under article 10. *Id.* at 546. However, extant restrictions in the Republic of Ireland would stand in clear violation of this *dictum*. See *infra* note 121.

102. *Brind*, CO/1756/88, slip op. at 1 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

103. See *supra* note 101.

104. No COMMENT, *supra* note 99, at 24-25. See *infra* note 156. It should be noted that "the near absolutist American judicial opposition to prior restraint has not been matched in Europe." Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 554 (1988). But see *Attorney General v. B.B.C.*, 1981 A.C. 303, 362 (1980) (per Lord Scarman) ("the prior restraint of publication though occasionally necessary in serious cases is a drastic interference with freedom of speech and should only be ordered where there is [a] . . . 'pressing social need'").

105. See, e.g., *Nightline: Censorship, Suspension of Rights in England* (ABC television broadcast, Oct. 21, 1988) (transcript on file in the *Brooklyn Journal of International Law* library) [hereinafter *Nightline*], where Kevin Boyle, former Chairman of article 19, which observes the safeguard of freedom of expression as guaranteed under article 19 of the Universal Declaration of Human Rights, stated that "[l]iberty is ill in [Britain], and we really have no doctor to go to, we do not have, as in your case, a Supreme Court where we can challenge [the constitutionality of] what a government does." *Id.* at 2. At the same time, the right to silence to avoid self-incrimination, one of the oldest of individual rights, has also been curtailed considerably by the Thatcher government. *Id.* at 2,

ated mass confusion for BBC and IBA broadcasters,¹⁰⁶ and prompted court challenges in both Northern Ireland¹⁰⁷ and Great Britain.¹⁰⁸

On February 22, 1989, six journalists and an employee of the National Union of Journalists¹⁰⁹ brought suit challenging the restrictions of the Home Secretary as *ultra vires* and void.¹¹⁰ The remedy sought by the plaintiffs was an order of certiorari.¹¹¹

The plaintiffs contended that the Home Secretary had ex-

5-7. It has been suggested that these extreme remedies, at the expense of civil liberty, deal excessively with the symptoms of terrorism and not with the roots. *Boston Globe*, Oct. 24, 1988, at 1, col. 1.

106. See Birt, *supra* note 10, at 21.

107. The restrictions were challenged in the Northern Ireland high court by Belfast broadcasting journalists Christopher Moore and David Lynas on the ground they violated the 1973 Northern Ireland Constitution Act, which states that "discrimination against anyone on the grounds of politics or religion is unlawful." Hunter, *Broadcast Ban Court Actions*, 138 NEW L.J. 925 (1988); Piette, *Legal Challenges to the Broadcasting Ban*, 18 INDEX ON CENSORSHIP 7 (Feb. 1989). Additionally, a suit filed in Belfast by Sinn Féin Councillor Mitchell McLaughlin foundered when he was denied legal aid. NO COMMENT, *SUPRA* note 99, at 95. The court of appeal reversed this determination one year later and ordered that legal aid be provided and the case set for argument in the high court. Press Association Newsfile, Apr. 27, 1990 (NEXIS).

108. On January 17, 1989, the divisional court (Watkins & Mann, L.J.J., & McCowan, J.), "with some hesitation," granted leave to challenge the legality of the restrictions. *Daily Telegraph*, Jan. 18, 1989, at 3, col. 5.

109. The six journalists were Donald Malcolm Brind, a BBC producer; Fred Albert Emery, a television journalist; Alexander Graham, a television producer and editor; Victoria Leonard, an LBC producer; Scarlett McGwire, joint NUM president and broadcaster; and John Richard Pilger, a television and radio presenter. The other plaintiff was Thomas Edward Nash, assistant to the NUJ general secretary. See also *The Times* (London), May 27, 1989, at 4, col. 1; *Brind*, CO/1756/88, slip op. at 3-4 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

110. *Brind*, CO/1756/88, slip op. at 5 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). The doctrine of *ultra vires*, perhaps the central principle of British administrative law, is based on the proposition that a public authority may not act outside, or in excess of, its powers. H. WADE, *ADMINISTRATIVE LAW* 40-41 (1977). The doctrine of *ultra vires* has unique constitutional and judicial importance because British judges have no right to interfere with an administrative decision unless it contravenes the will of Parliament as expressed in the statute conferring the power. *Id.* at 42. As a result, the *ultra vires* doctrine has become a procrustean bed into which British judges have subsumed instances of inconsistency with a statute, failure by a minister to follow expressly prescribed procedure, irregular delegation and breach of jurisdictional conditions, unreasonableness, irrelevant considerations, improper motives, and breach of natural justice. *Id.* at 43.

111. *Brind*, CO/1756/88, slip op. at 5 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). In British law, the prerogative remedy of certiorari brings up to the high court an administrative decision so that it may be investigated. If the decision is *ultra vires*, it is quashed and declared completely or partially invalid by the court. H. WADE, *ADMINISTRATIVE LAW* 546-47, 550-51 (1982). In cases involving certiorari, the Crown is the nominal plaintiff but is expressed to act on behalf of the applicant. *Id.* at 547.

ceeded the scope of his powers under the Broadcasting Act.¹¹² They also contended that the restrictions were disproportionate to the mischief the Home Secretary was seeking to avoid (the direct broadcast of extremist groups).¹¹³ Finally, the plaintiffs charged that the Home Secretary's decision was unreasonable under the *Wednesbury* standard.¹¹⁴ The plaintiffs argued that there were no clear standards for deciding whether potential broadcast material fell within the restrictions. They also complained that the restrictions interfered with the broadcasters' editorial control and the ability of the public to freely receive information.¹¹⁵

Responding to plaintiffs' contentions, the government argued that four matters had prompted it to take action against terrorism.¹¹⁶ First, the government noted the offense caused to viewers and listeners by the appearance of apologists for terrorism, particularly after a terrorist outrage.¹¹⁷ Second, the government cited the undeserved publicity given to terrorists by media coverage.¹¹⁸ Third, the government contended that such appearances tended to increase the standing of terrorists and create the false impression that support for terrorism itself is a legitimate political opinion.¹¹⁹ Fourth, the government claimed that broadcast statements were intended to have, and sometimes did have, the effect of intimidating some of those at whom they were directed.¹²⁰

112. *Brind*, CO/1756/88, slip op. at 8 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). See *supra* notes 95-96 and accompanying text. See *infra* note 125.

113. *Brind*, CO/1756/88, slip op. at 9 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). The plaintiffs also contended that the restrictions were unlawful in that they conflicted with the duties of the BBC and the IBA to report current affairs fully and impartially. *Id.*

114. *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (1947) (C.A.). See *supra* notes 91-92 and accompanying text.

115. *Brind*, CO/1756/88, slip op. at 4 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

116. CO/1756/88, slip op. at 18 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file); [1990] 2 W.L.R. 787, 793-94 (C.A. 1989) (per Donaldson, M.R.); *id.* at 809 (per McCowan, L.J.).

117. CO/1756/88, slip op. at 19 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file); [1990] 2 W.L.R. 787, 794 (C.A. 1989) (per Donaldson, M.R.); *id.* at 809 (per McCowan, L.J.) (quoting affidavit of Under-secretary C.L. Scoble).

118. [1990] 2 W.L.R. at 794 (per Donaldson, M.R.).

119. *Id.*

120. [1990] 2 W.L.R. 787, 794-95 (C.A. 1989) (per Donaldson, M.R.); *id.* at 809 (per McCowan, L.J.); see CO/1756/88, slip op. at 19 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

B. The Divisional Court

The court refused to consider the plaintiffs' claim regarding the proportionality of the restrictions. The court noted that any disproportion of the restrictions to "the mischief to be avoided" or "benefit to be obtained" had no bearing on the lawfulness of the decision.¹²¹ To apply such a standard would result in courts substituting their own decisions for that of the minister, which would violate British separation-of-powers principles.¹²² The court held that this claim should be resolved by asking whether any reasonable minister, properly directing himself as to the law, would have made such a decision.¹²³ The court proceeded to analyze whether the Home Secretary exceeded the limitations on his power imposed by both domestic law¹²⁴ and the Convention.¹²⁵ The court then stated that the Convention and Euro-

121. CO/1756/88, slip op. at 10 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). The court also noted the existence of more severe restrictions in the Republic of Ireland and attached significance to the approval of the restrictions by Parliament. *Id.* at 6, 10. A notice issued under the Irish Broadcasting Authority Act, which governs the transmissions of Radio Telefis Eireann (the broadcasting entity in the Republic of Ireland), prohibits broadcasting of "an interview, or report of an interview with a spokesman . . . for any one or more of the following organizations." No COMMENT, *supra* note 99, at 34; see Broadcasting Authority Act, No.37, § 16 (Ir. 1976) (amending Broadcasting Authority Act, No.10, § 31 (Ir. 1960)) (emphasis added). See *infra* notes 225-26 and accompanying text. In August 1989 the NUJ and Federated Workers' Union of Ireland launched a challenge to the Irish broadcasting ban in the Commission. The applicants alleged violations of article 10 (freedom of expression), article 14 (discrimination), article 6 (right to effective remedies) and Protocol 1, article 3 (freedom of expression in connection with elections) of the Convention. No COMMENT, *supra* note 99, at 95. A challenge of the British restrictions is expected to be filed in the Commission upon exhaustion of domestic remedies, after which the challenge may be consolidated with the Irish proceedings. See *id.* at 94; de Smith, *Broadcasting and Northern Ireland: Constitutional Issues?*, 139 New L.J. 1240, 1241 (1989).

122. *Brind*, CO/1756/88, slip op. at 10 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

123. *Id.* at 9-10.

124. The Home Secretary (or any Minister), in exercising his statutory powers, must identify correctly the policy and objectives of an act, and then take account of them. *Brind*, CO/1756/88, slip op. at 11 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file) (citing *Padfield v. Minister of Agriculture, Fisheries & Food*, 1968 A.C. 997). In delimiting the apparently unlimited censorship powers accorded to the Home Secretary by the Broadcasting Act, the court relied on a statement by Lord Diplock in *Garland v. British Rail* for the proposition that "[in construing] United Kingdom statutes . . . the words of a statute passed after [a convention] has been signed and dealing with the subject matter of the international obligation[s] of the United Kingdom, are to be construed, [if possible], as intended to carry out the obligation, and to be consistent with it." *Id.* at 14 (citing [1983] 2 A.C. 751). Thus, the court justified article 10 of the Convention as a limitation on the Home Secretary's power.

125. *Brind*, CO/1756/88, slip op. at 10-15 (Q.B. Div'l Ct., May 26, 1989) (LEXIS,

pean Court case law should be considered in cases where United Kingdom law is not firmly settled.¹²⁶ The court compared the limitations in section two of article ten of the Convention to the duties imposed on the BBC and IBA by the Broadcasting Act and found them substantially the same. However, the court found a difference in that the Broadcasting Act's reference to "matter[s] likely to be offensive to the public feeling"¹²⁷ was a significant departure from the provisions of article ten of the Convention,¹²⁸ which permits narrowly drawn restrictions in the "general" interests of public welfare.¹²⁹

The court's standard of review with respect to the Home Secretary's decisions obliged it to first inquire into the reasons for the decisions.¹³⁰ In examining these reasons, the court stated it would "consider whether there existed a pressing social need for the directions."¹³¹ Based upon the affidavits of the government and the debates in Parliament,¹³² the court found that

Enggen library, cases file). All parties stipulated that there were limitations on the Home Secretary's discretion, regardless of the plain language of section 29(3) of the Broadcasting Act. The court justified its failure to address the journalists' argument that a minister must exercise his powers in accordance with freedom of expression as protected by the common law by finding that the Convention was not incorporated into the common law, and that the restrictions were not in violation of the Convention. *Cf. id.* at 13, 19 ("fact that the common law may be identical to . . . [a]rticle 10 does not assist [plaintiffs]").

126. *Brind*, CO/1756/88, slip op. at 14-15 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). The court followed *Attorney General v. B.B.C.*, 1981 A.C. 303 (1980), where Lord Fraser noted that "[United Kingdom] courts . . . should have regard to the provisions of the Convention . . . and to the decisions of the [European] Court . . . in cases . . . where our domestic law is not firmly settled." *Id.* at 352.

127. Broadcasting Act, 1981, ch. 68, § 4(1)(a). *See supra* note 84 and accompanying text.

128. *Brind*, CO/1756/88, slip op. at 17 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). *See supra* notes 20-32 and accompanying text.

129. *See* Human Rights Convention, *supra* note 2, at art. 10, § 2. *See supra* notes 28-32 and accompanying text.

130. *See Brind*, CO/1756/88, slip op. at 17 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

131. *Id.* at 18. However, the court warned that it would in no way decide for itself whether a pressing social need in fact existed. *Id.* This apparent contradiction can be attributed to the court's reluctance to pass any sort of political judgment on the expedience of the restrictions. *Id.* at 7, 10, 18.

132. Parliamentary approval of the restrictions is not required, and the Parliamentary debates produced no actual legislation. *Cf.* Broadcasting Act, 1981, ch. 68 *passim* (no Parliamentary approval required for actions of the Home Secretary). Rather, Parliament approved the restrictions under the assumption that the Home Secretary's actions were lawful, a matter that only the judiciary may determine. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, [1990] 2 W.L.R. 787, 796 (C.A. 1989) (per Donaldson, M.R.).

there existed prima facie evidence that the restrictions were introduced in the interests of public safety, for the prevention of disorder or crime, and for the protection of the rights of others.¹³³ Any burdens and difficulties in implementing the restrictions, and any international ramifications emanating from the restrictions, were held by the court to have been duly considered by the Home Secretary and Parliament.¹³⁴ As a result, the Home Secretary's decision could not "be said to be perverse or absurd."¹³⁵ Thus, the court refused to find the Home Secretary's decision unreasonable.¹³⁶

Finally, the court considered whether the restrictions themselves, rather than the decisions to issue them, were unreasonable according to the *Wednesbury* standard. The court rejected all claims as to overbreadth and refused to accept that any difficulties engendered by the restrictions could not be overcome. Consequently, the court refused to find the restrictions unreasonable.¹³⁷

C. *The Court of Appeal*

The court of appeal unanimously affirmed the divisional court.¹³⁸ Lord Donaldson held that the issue of whether British common and statutory law were inconsistent with the United Kingdom's obligations under the Convention was a matter for the European Court and not for British courts. Lord Donaldson

133. *Brind*, CO/1756/88, slip op. at 19 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). The court found that the government's contentions regarding intimidatory statements by the extremists were wrong as a matter of fact, but declined to make a decision on the government's first ground, namely that offense had been caused to viewers and listeners by the appearance of the apologists for terrorism, particularly after a terrorist outbreak. *Id.* The court might very well have declared the latter contention wrong as a matter of law since such a restriction would not fall within section 2 of article 10. See Human Rights Convention, *supra* note 2, at art. 10, § 2.

134. *Brind*, CO/1756/88, slip op. at 21-22 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

135. *Id.* at 22.

136. *Id.* at 19-20. As for the arguments that the restrictions conflicted with the journalists' duties under the Broadcasting Act, and prevented them from reporting current affairs impartially, the court held that the journalists were required by the Broadcasting Act to report events with due impartiality, which meant that complete impartiality was not required. *Id.* at 20-21.

137. *Id.* at 22-23.

138. *Brind* [1990] 2 W.L.R. 787, 796 (C.A. 1989) (opinions per Donaldson, M.R., & Gibson & McCowan, L.J.J.). The disposition in the court of appeal is included for the benefit of the reader, but the analysis in this Comment focuses mostly on the decision in the divisional court, and not the subsequent appeal.

stated that the duty of the British courts is to decide disputes under British domestic law as it is and not as it would be if full effect were given to the Convention.¹³⁹ Two judges explicitly rejected the divisional court's holding that article ten of the Convention acted as an express limitation on the Home Secretary's power.¹⁴⁰

Lord Donaldson found no ambiguity in the terms of the Broadcasting Act. Thus, under British law, the terms of the Convention were irrelevant to the Home Secretary's actions.¹⁴¹ With respect to the principle of proportionality as a ground of administrative review, Lord Donaldson held that the proportionality of a restriction to the legitimate aim pursued should be considered as a facet of an administrative action's irrationality. The court held that while proportionality should be considered as a factor when applying *Wednesbury's* unreasonableness test,¹⁴² proportionality should not be a separate ground for seeking judicial review. The court maintained that such an independent ground would easily lead to courts substituting their view of what was appropriate for that of the minister.¹⁴³ Under *Wednesbury*, the Master of the Rolls did not find the Home Secretary's actions as "falling outside the wide spectrum of ra-

139. *Id.* at 798 (per Donaldson, M.R.). Lord Justice Gibson agreed on this point, and added that British courts could not "decide whether an act of the minister, which is lawfully within the power given by Parliament [in the Broadcasting Act], is a breach of the obligation of the United Kingdom under the Convention." *Id.* at 805-06.

140. *Id.* at 798-99 (per Donaldson, M.R.); *id.* at 808-09 (per McCowan, L.J.).

141. *Id.* at 798. See *supra* note 78. The plaintiffs added, as an additional argument on appeal, that the Home Secretary's censorship powers under section 29(3) of the Broadcasting Act must have been directed at a goal for which the Broadcasting Act otherwise provided no remedy. Thus, the journalists' duties under section 4 to assure that nothing in programming is likely to encourage or incite to crime or to lead to disorder and to report with due impartiality cannot have been covered by section 29(3). *Brind*, [1990] 2 W.L.R. at 799-800 (C.A. 1989) (per Donaldson, M.R.) & 808-09 (per McCowan, L.J.). See *supra* note 84. Lord Donaldson found no evidence that Parliament intended the Broadcasting Act to be interpreted as the plaintiffs argued. Two judges rejected the argument on the grounds that the restrictions merely required the broadcasters to do what they "were plainly not prepared to do" pursuant to their section 4 obligations. *Brind*, [1990] 2 W.L.R. at 787, 808 (C.A. 1989) (per McCowan, L.J.). However, this reasoning assumes precisely what the court refused to consider, namely that the restrictions were necessary in the interests of national security, for the prevention of disorder or crime, and for the protection of the rights of others. Cf. *id.* at 797-99, 805-09 (article 10 has no bearing on the Home Secretary's actions).

142. *Id.* at 802. Lord Justice McCowan agreed on this point, having considered the proportionality inquiry to fall under the rubric of "reasonableness." *Id.* at 809.

143. *Id.* at 802.

tional conclusions."¹⁴⁴

IV. THE RESTRICTIONS AND THE CONVENTION

During the debate on the restrictions in the House of Lords, one member expressed his desire that the restrictions be examined by a court of law (at Strasbourg if necessary), and that the status of freedom of expression as a fundamental right in the United Kingdom be established once and for all.¹⁴⁵ While decisions of the European Court are not binding in British domestic law, the law of that court is the only way to test the compatibility of the restrictions with the Convention.¹⁴⁶ The restrictions, therefore, merit consideration in light of the case law of the European Court.

A. *The European Court's Case Law*

The first test prescribed under article ten is whether a violation of freedom of expression has occurred.¹⁴⁷ The restrictions not only impede broadcasters from imparting specific news and information, but also burden them with a restriction that is exceedingly difficult to comprehend or implement.¹⁴⁸ Specifically, broadcasters have practically no way of knowing in advance whether a statement will "support or solicit or invite support" for the named organizations.¹⁴⁹ Thus, in many instances, broadcasters must either prerecord and expurgate everything said that might fall within the support clause or exercise extensive self-censorship by avoiding such broadcasts altogether.¹⁵⁰ Additionally, the restrictions impede the British public's right to receive information and ideas about vital and current events.¹⁵¹

144. *Id.* at 803. Similarly, Lord Justice McCowan was unable to find that the Home Secretary's political judgment, that the appearance of terrorists on programs increases their standing and lends them political legitimacy, was one that no reasonable Home Secretary could hold. *Id.* at 810.

145. 502 PARL. DEB., H.L. (6th ser.) 687-88 (1988) (statement of Lord Bonham-Carter).

146. *See supra* notes 66-74 and accompanying text.

147. *See* Human Rights Convention, *supra* note 2, at art. 10, § 1. *See supra* notes 20-32 and accompanying text.

148. *See* Birt, *supra* note 10, at 21.

149. No COMMENT, *supra* note 99, at 31.

150. No COMMENT, *supra* note 99, at 31.

151. *Cf.* Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser.A) at 40-41 (1979) (public has a right to be properly informed). While the ability of television broadcasters to use voice-over techniques to broadcast material otherwise affected by the ban appears to mitigate the severity of the ban, that option, by definition, is only partially available

Article ten also requires that a restriction on freedom of expression be prescribed by law.¹⁵² The clarity of the terms of section 29(3) of the Broadcasting Act, although seriously disputed by the plaintiffs in *Brind*, relate to the question of whether the Convention is applicable under domestic law, not whether the restrictions conform to article ten per se.¹⁵³ The absolute sovereignty of Parliament in British law dictates that neither the BBC and IBA, nor the journalists, can legitimately contest a statute that has been duly enacted.¹⁵⁴ Furthermore, the licensing clause of article ten, which endorses the lawful regulation of broadcasting, virtually creates a presumption in favor of broadcasting legislation.¹⁵⁵ The restrictions are thus prescribed by law.¹⁵⁶ Notwithstanding this, it is in the subsequent provisions

to radio broadcasters. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, CO/1756/88, slip op. at 2 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). Under the ban, a voice-over allows a television broadcaster to transmit the actual words spoken if the television image is frozen, or to overdub the extremist's words while transmitting the actual visual image of the extremist. *Id.* A radio announcer may only report words spoken by a banned extremist. Moreover, the government position that voice-over techniques "might be against the spirit of the ban," endorses self-censorship by broadcasters. See *The Guardian*, Oct. 20, 1988, at 1, col. 3. The reality of the ban is thus editorial control exercised by governmental edict, and not by journalists.

The court of appeal marvelled at how little the restrictions obstructed the "the oxygen of publicity" to the banned extremists. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, [1990] 2 W.L.R. 787, 803 (C.A. 1989) (per Donaldson, M.R.). The argument that the restrictions interfered with communication of ideas and information was met by the assertion that the networks could continue indirectly to report what an extremist had said. *Id.* at 810 (per McCowan, L.J.). However, it is difficult to see how restrictions which resulted in the banning of the song "Streets of Sorrow" by the musical group *The Pogues* can be regarded as lenient. The IBA claimed that the song, which expresses sympathy for the Birmingham Six, "indicate[s] a general disagreement with the way the government responds to, and the courts deal with, the terrorist threat." Neither *The Pogues* nor the Six have expressed support for any of the banned groups." No COMMENT, *supra* note 99, at 65.

152. Human Rights Convention, *supra* note 2, at art. 10, § 2. See *supra* note 37 and accompanying text.

153. The divisional court found that section 29(3) was unusually wide in its terms and that the Broadcasting Act conferred upon the Home Secretary a power of censorship that was neither limited in scope nor subject to the control of Parliament. *Brind*, CO/1756/88, slip op. at 8 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). In the court of appeal, Lord Donaldson found that "the words of section 29(3) should . . . be given their natural meaning[, so that] the power is quite clearly all-embracing." *Brind*, [1990] 2 W.L.R. 787, 800 (C.A. 1989) (per Donaldson, M.R.). In a separate opinion affirming the judgment of the divisional court, Lord Justice McCowan agreed that the language of section 29(3) was clear and unlimited with respect to article 10. *Id.* at 806-09. See *supra* note 79 and accompanying text.

154. See *supra* note 72.

155. See Human Rights Convention, *supra* note 2, at art. 10, § 1.

156. However, the Home Secretary's unprecedented use of his censorship powers

of article ten that the directives violate the right of free expression.¹⁵⁷

The plaintiffs in *Brind* correctly contended that the Home Secretary could only exercise his powers in breach of article ten if a pressing social need existed.¹⁵⁸ Under the European Court's case law, the government would have to show that a pressing social need for the restrictions actually existed.¹⁵⁹ In contrast, the *Brind* court's test consisted of whether the Home Secretary could reasonably have concluded that a pressing social need for the restrictions was present.¹⁶⁰ The *Brind* court refused to address the European Court's approach.

The next test prescribed by article ten is that a restriction be justified by one of the reasons stated therein.¹⁶¹ The court in *Brind* stated that there was prima facie evidence supporting the Home Secretary's conclusions that the restrictions were necessary "in the interests of . . . public safety, the prevention of disorder or crime, for the protection . . . of the rights of others."¹⁶² The main argument offered by the Home Secretary with respect

under section 29(3) of the Broadcasting Act creates a serious issue as to the ability of the journalists, and the BBC and IBA, to regulate their conduct under the Broadcasting Act. 502 PARL. DEB., H.L. (6th ser.) 705-06 (1988). Under antecedent statutes, the Home Secretary had used these powers only four times previously, and only one of those directives is still in force. *Id.* at 706. Two of the previous directives were issued in 1927, and two were issued in 1955. The only directive still in force requires the BBC not to broadcast its own opinion on current affairs or on matters of public policy. *Id.* One prior directive required the BBC not to broadcast matters of religious, political or industrial controversy. Another directive required the BBC to refrain from broadcasting statements or discussions on matters during the fortnight before they were debated in Parliament. The other directive required the BBC to refrain from broadcasting controversial political party broadcasts, other than those arranged in agreement with the leading political parties. *Id.*

157. The divisional court expressly held that the Home Secretary had a duty to exercise his powers in conformity with the right to freedom of expression under the Convention. *See Brind*, CO/1756/88, slip op. at 14 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file). Indeed, it would be contrary to the basic principle of applying statutory limits to statutory powers to assume that the Convention is always irrelevant when determining questions of ultra vires; it must be considered if a statute impliedly so requires. *See Duffy*, *supra* note 72, at 598. Duffy suggests that legal justification might sometimes be found for greater use of the Convention by United Kingdom Courts involved in statutory interpretation or judicial review of administrative action. *Id.* at 599.

158. *Brind*, CO/1756/88, slip op. at 8-9 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

159. *See supra* notes 43-52 and accompanying text.

160. *See Brind*, CO/1756/88, slip op. at 19-20 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

161. Human Rights Convention, *supra* note 2, at art. 10, § 2.

162. *Brind*, CO/1756/88, slip op. at 19 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

to such contentions was that "the terrorists themselves draw sustenance and support from having access to radio and television."¹⁶³ However, the Parliamentary debates shed little light on the extent to which public safety and the prevention of disorder or crime would merit such an intrusion on freedom of expression.¹⁶⁴

The Parliamentary debates concentrated primarily on other grounds advanced by the Home Secretary in support of the restrictions,¹⁶⁵ specifically the widespread offense caused to viewers throughout the United Kingdom, particularly after a terrorist outrage.¹⁶⁶ The *Brind* court refrained from examining whether evidence regarding the latter grounds existed,¹⁶⁷ thereby avoiding the necessity of adjudging the "significant difference" between article ten of the Convention and the Broadcasting Act.¹⁶⁸ The court might have been justified in finding that the Home Secretary's determination that direct appearances by terrorists on television and radio offend public sensibilities was reasonable, but this finding would not permit restriction on freedom of expression under article ten.¹⁶⁹ Such a finding would bring both *Brind* and the Broadcasting Act into further conflict with the Convention, since article ten does not allow restrictions on free expression which protect the public from audiovisual offense.¹⁷⁰

163. 138 PARL. DEB., H.C. (6th ser.) 893-94 (1988) (statement of Home Secretary Hurd).

164. See 139 PARL. DEB., H.C. (6th ser.) 1102 (1988) (statement of MP MacLennan) and 502 PARL. DEB., H.L. (6th ser.) 684 (1988) (statement of Lord Bonham-Carter).

165. See, e.g., 139 PARL. DEB., H.C. (6th ser.) 1102 (1988) (allegation that the terrorists draw sustenance from their television appearances mentioned, but not discussed) (statement of MP MacLennan); 139 PARL. DEB., H.C. (6th ser.) 1109 (1988) (appearances on television by terrorists actually hurt them, for example, by subjecting them to rigorous journalistic techniques which humiliate them) (statement of MP Mallon); 502 PARL. DEB., H.L. (6th ser.) 685-86 (1988) (allegation that the terrorists draw sustenance from their access to television countered by the assertion that a mere eight minutes of air time was occupied by terrorist appearances during the last year) (statement of Lord Bonham-Carter); 502 PARL. DEB., H.L. (6th ser.) 711-13 (1988) ("precious little evidence" that the terrorists draw sustenance from direct access to radio and television) (statement of Lord Prys-Davies).

166. 138 PARL. DEB., H.C. (6th ser.) 893-94 (1988) (statement of Home Secretary Hurd).

167. *Brind*, CO/1756/88, slip op. at 19 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Eng-gen library, cases file).

168. *Id.* at 17.

169. See *supra* notes 127-29 and accompanying text.

170. Cf. Human Rights Convention, *supra* note 2, at art. 10, § 2 (offensiveness to public feeling not a permissible restriction on freedom of expression).

The mere fact that Parliament approved of the Home Secretary's restrictions should not have played such an important role in the *Brind* court's finding that the restrictions were necessary for the prevention of disorder or crime.¹⁷¹ If the Parliamentary debates had clearly addressed the type of danger that would occur in the absence of the ban, or if the breadth of the restrictions with respect to their ends somehow had been justified, then the debates might be entitled to greater weight. Instead, the court articulated little reason why the discussions constituted *prima facie* evidence of the reasonableness of the Home Secretary's decision to issue the restrictions.¹⁷²

The government's alleged compliance with the Convention in designing the restrictions should consist of more than mere statements to that effect before Parliament.¹⁷³ An actual demonstration of discussion and understanding of the values implicit in article ten is the least that should be required to show compliance with the Convention. Instead, possible violation of the Convention was mentioned only once in the House of Commons¹⁷⁴ and twice before the House of Lords.¹⁷⁵ The *Brind* court cannot rely on the "many and strong views expressed in Parliament" to support the Home Secretary's conclusion that a pressing social need for the restrictions existed, since Parliament examined the restrictions with regard to neither the Convention nor the spirit of article ten.

B. Proportionality

The restrictions are not proportionate to the legitimate aim pursued. The restrictions are overbroad because they direct

171. *But cf.* Warbrick, *The European Convention on Human Rights and the Prevention of Terrorism*, 32 INT'L & COMP. L.Q. 82, 116-18 (1983) (suggesting that most counter-terrorist measures employed by a state will fall within the state's margin of appreciation, and that demands for control of terrorism in the context of media communications are on the rise) [hereinafter Warbrick]. *See supra* note 89.

172. *Brind*, CO/1756/88, slip op. at 19-20 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

173. *See* 138 PARL. DEB., H.C. (6th ser.) 896 (1988) (statement of Home Secretary Hurd).

174. 139 PARL. DEB., H.C. (6th ser.) 1101 (1988) (statement of MP MacLennan) (speaker does not question the compatibility of the restrictions with the Convention, but seeks political, as opposed to legal, justifications for the restrictions).

175. 502 PARL. DEB., H.L. (6th ser.) 687 (1988) (statement of Lord Bonham-Carter) (freedom of expression a fundamental right under the Convention but not clearly so under British law); 502 PARL. DEB., H.L. (6th ser.) 712 (1988) (statement of Lord Prys-Davies) (expressing doubt that the restrictions conform to article 10).

themselves in part to broadcasting that has nothing to do with Northern Ireland.¹⁷⁶ In fact, when asked in the House of Commons whether the restrictions applied to appropriate words spoken by a person with no demonstrable connection to the banned extremists, the Home Secretary replied that such persons would not be allowed to broadcast under the support clause.¹⁷⁷ The Home Secretary has thus introduced a dangerous weapon that could be applied to a much wider variety of broadcasting than may be indicated on the face of the restrictions. Another problem is that the restrictions deter direct broadcast interviews of innocent persons.¹⁷⁸ Thus, many persons could be prevented from airing their views due to a remote nexus with a banned group.¹⁷⁹ Additionally, the excessive side effects of the ban, and their irrelevance to the Home Secretary's purposes in issuing the restrictions, illustrate the disproportionality of the restrictions to the legitimate aim pursued.

The *Brind* court's refusal to consider the proportionality of the restrictions to the ends they seek to achieve disregards any excessive effects the restrictions might have.¹⁸⁰ For example, historical documentary footage of members of listed organizations, such as Ireland's liberator Eamon de Valera, may no longer be broadcast.¹⁸¹ Audience participation programs have also been drastically affected by the restrictions. These programs are prevented from reflecting the full range of opinion on Irish issues and must be produced in a fashion that allows immediate censorship of any dialogue in violation of the ban.¹⁸² Additionally,

176. 138 PARL. DEB., H.C. (6th ser.) 902 (1988) (statement of Home Secretary Hurd).

177. 138 PARL. DEB., H.C. (6th ser.) 902 (1988) (statement of Home Secretary Hurd). See paragraph (b) of the Home Secretary's restrictions *supra* note 101.

178. Thus, for example, the radio interview of Errol Smalley, who personally had no connection with any banned organization, was cancelled because his nephew was convicted of a pub bombing. *Fear of Ban Halts Radio Interview on Pub Bombs*, *The Independent*, Nov. 11, 1988 (copy on file in the *Brooklyn Journal of International Law* library). See *supra* note 101.

179. See *Nightline*, *supra* note 105, at 4.

180. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, CO/1756/88, slip op. at 10 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

181. See Birt, *supra* note 10, at 21; 139 PARL. DEB., H.C. (6th ser.) 1103 (1988) (statement of MP MacLennan). The restrictions also negatively affect relationships among the media and Northern Irish communities: the trust of the local community in Derry, won by BBC's Radio Foyle as a result of its competent service, has thus been jeopardized by the restrictions. Birt, *supra* note 10, at 21.

182. *TV ban on Sinn Fein "already breached,"* *The Independent*, Oct. 1988, at 2, cols. 1-2 (copy on file in the *Brooklyn Journal of International Law* library).

radio and television broadcasters who are forced to act as self censors will often err on the side of caution; thus, there is a constant danger of incomplete reporting of events in Northern Ireland.¹⁸³

Alternatively, the Home Secretary could have designed a series of restrictions that would have protected free expression and allowed as little censorship as possible.¹⁸⁴ A more narrowly drawn directive would increase the margin of appreciation afforded to the restrictions under the European Court's case law.¹⁸⁵ For example, the Home Secretary could have limited the scope of the ban to proscribed organizations, so that the restrictions would not affect legal parties such as Sinn Fein.¹⁸⁶ Moreover, a more precise definition of broadcasting that directly advances terrorist propaganda could have been drafted to lessen the substantial self-censorship that has occurred. This would provide news and information to the British public and the world that does not reach them under the present restrictions.

C. *Objectives of the Council of Europe*

The Home Secretary issued the directives with little regard for the objectives of the Council of Europe.¹⁸⁷ The objectives of the Council of Europe,¹⁸⁸ especially the Committee of Ministers' declaration on Freedom of Expression and Information,¹⁸⁹ illustrate the incompatibility of the restrictions with the Convention. Specifically, these objectives demand the independence of media from control and the absence of censorship by the State.¹⁹⁰ Furthermore, the unique position of the Council of Europe as an

183. No COMMENT, *supra* note 99, at 31, 51-53, 59-65. One of the most embarrassing indications of the confusion surrounding the restrictions was evidenced by a statement of the Minister of State on national television that the BBC and IBA should telephone the Home Office for clearance on any program on Northern Ireland. 139 PARL. DEB., H.C. (6th ser.) 1086 (1988). One program cleared by the lawyers of a particular channel was later prohibited by lawyers of the IBA. 139 PARL. DEB., H.C. (6th ser.) 1140 (1988).

184. Cf. Warbrick, *supra* note 171, at 99-100 (European Court, in considering the necessity of a restriction, will consider "the possibility of alternative measures to achieve the protection of the interest affected and provision of controls upon the means actually chosen" by a state).

185. See *supra* notes 50-51 and accompanying text.

186. See Northern Ireland (Emergency Provisions) Act 1978.

187. Cf. 138 PARL. DEB., H.C. (6th ser.) 893-94 (1988) (statement of Home Secretary Hurd) (brief conclusory statement that the restrictions conform to the Convention).

188. See *supra* notes 57-64 and accompanying text.

189. See *supra* note 60 and accompanying text.

190. See *supra* notes 57-64 and accompanying text.

appropriate forum for development of European media policy would possess little credibility if it became known as an organization that fosters censorship.¹⁹¹

The idea of freedom of expression as a prerequisite of a democratic society, endorsed by the Parliamentary Assembly, the European Court, and the Committee of Ministers,¹⁹² is also incompatible with the exercise of censorship. Since the European Court would construe the restrictions in article ten narrowly, the Home Secretary's restrictions would be under a heightened standard of review, and would accordingly stand a lesser chance of being upheld at Strasbourg.¹⁹³

V. THE BRITISH JUDICIARY AND THE WEDNESBURY PRINCIPLE

As a signatory, the United Kingdom undertook to secure the rights guaranteed by the Convention to its inhabitants. The plaintiffs in *Brind* could not have relied directly on article ten as a basis for their cause of action since the United Kingdom has not incorporated the Convention into domestic law. However, since nations that have not incorporated the Convention must ensure that their law is in conformity with the Convention, persons should have a remedy under domestic law.¹⁹⁴

Although the Convention has not been incorporated into national law, the Convention does have some constitutional significance in British law. The word of Parliament is no longer final, and the fact that an individual can seek judicial review of United Kingdom laws beyond the national court hierarchy is of

191. The European Community (EC) is another appropriate forum for the development of a uniform European media policy. Many aspects of freedom of expression with respect to broadcasting are encompassed by EC law. Cf. Schwartz, *supra* note 31 (discussing broadcasting as regulated under EC law and article 10 of the Convention). The Parliament of the EC has requested the Commission of the EC to "press for an agreement between the [m]ember [s]tates . . . under the terms of which . . . [the Convention] . . . would be considered . . . as [an] integral par[t] of the Treaties establishing the Communities." 20 O.J. EUR. COMM. (No. C299) 26 (1977). Furthermore, a joint declaration issued by the official branches of the EC pledged that all member states, as signatories of the Convention, stress the prime importance they attach to the protection of fundamental rights, and that they would, in pursuit of the aims of the EC, continue to respect those rights. 20 O.J. EUR. COMM. (No. C103) 1 (1977); 1977 Y.B. EUR. CONV. ON HUM. RTS. 832 (joint declaration). Despite these forceful considerations, fundamental rights can only be invoked if the matter in question comes within EC law. Duffy, *supra* note 72, at 614.

192. Bullinger, *supra* note 23, at 342. See *supra* notes 20 and 33 and accompanying text.

193. See *supra* notes 34-56 and accompanying text.

194. Human Rights Convention, *supra* note 2, at art. 1.

great constitutional importance.¹⁹⁵ Although Parliament has not incorporated the Convention into domestic law, it is bound by a negative obligation *not* to pass any legislation in contravention of the Convention.¹⁹⁶ Despite the absence of a genuine bill of rights, a *de facto* bill of rights is being imposed by the European Court upon the United Kingdom with a breadth and intensity alien to British law.¹⁹⁷ Nevertheless, the status of the Convention in British domestic law allows British judges to callously treat fundamental rights that have not been appealed to the European Court, thus exposing the basic flaw in the United Kingdom's treatment of the Convention.¹⁹⁸ The Convention's Framers did not intend to place sole responsibility for the protection of the Convention's guarantees upon the European Court. Rather, it was intended that national remedies be instituted to secure those guarantees in domestic law.¹⁹⁹

Since there is no bill of rights in the United Kingdom, the boundaries of the constitutional right to free speech, if such a right exists at all, must therefore be based on existing common law principles and the Convention. The Convention arguably represents an expansion of common law protections of "residual" freedom of expression.²⁰⁰ Thus, if the law of the United Kingdom clearly reflects the requirements of the Convention, reference to the European Court's case law becomes superfluous. Otherwise, recourse to the European Court's case law is necessary to determine whether a provision in the Convention has been violated.

195. Gilmour, *The Sovereignty of Parliament and the European Commission of Human Rights*, 1968 PUB. L. 62, 71.

196. *Id.* at 72-73. Indeed, "the existence of international obligations [such as the Convention] place . . . a considerable limitation upon the notion of the sovereignty of Parliament and to a large extent highlight its lack of rapport with modern conditions." *Id.*

197. Mann, *supra* note 65, at 524.

198. See *supra* notes 65-80 and accompanying text.

199. Lester, *Why British Judges Bow to Strasbourg*, New Society, July 29, 1982, at 178, col. 3; see Human Rights Convention, *supra* note 2, at art. 1. This is illustrated by the fact that signatories of the Convention are not obligated to recognize the jurisdiction of the European Court.

200. Cf. Sunday Times v. United Kingdom, 30 Eur. Ct. H.R. (ser. A) (1979) (judgment of the House of Lords technically reversed due to inadequate protection of freedom of expression); Regina v. Wells Street Stipendiary Magistrate *ex parte* Deakin, 1980 A.C. 477 (1979) (per Lord Diplock) (British law of defamation, which stands article 10 on its head, an intractable subject in need of radical reform). See *supra* notes 81-90 and accompanying text.

The *Brind* court relied on *Attorney General v. B.B.C.*,²⁰¹ which stated that the Convention and decisions of the European Court should be considered in cases where domestic law is not firmly settled.²⁰² However, the *Brind* court failed to conform fully to these considerations. Although the *Brind* court interpreted the restrictions in light of article ten, no attempt was made to refer to the case law of the European Court.²⁰³ This would have clarified the relationship of the restrictions to article ten by showing what sorts of limitations on freedom of expression are permissible under the Convention. Since none of the prior directives served upon the BBC and IBA resembled the restrictions at issue in *Brind*, domestic law can hardly be said to be "firmly settled."²⁰⁴ Rather, the *Brind* court was faced with a sweeping prior restraint without precedent in the area of freedom of expression.²⁰⁵ Furthermore, British courts often cite the European Court in freedom of expression cases.²⁰⁶ The House of Lords has intimated that with respect to article ten, the principle of proportionality has already been adopted in areas of expression other than broadcasting.²⁰⁷ Thus, the only logical expla-

201. 1981 A.C. 303 (1980).

202. *Id.* at 352.

203. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, CO/1756/88, slip op. at 19 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

204. *See supra* note 101 and accompanying text.

205. *See supra* note 156 and accompanying text.

206. In *Attorney Gen. v. Associated Newspapers Group*, [1989] 1 W.L.R. 322 (Q.B. 1988), where an application for contempt of court against a newspaper was denied, the court cited *X v. United Kingdom*, 41 Eur. Ct. H.R. (ser. A) (1981), in support of the position that mental health review tribunals were not courts within the provisions of the contempt of court act. In *Attorney Gen. v. Guardian Newspapers, Ltd.* (No.2), 1990 A.C. 109 (Ch. 1988), an interlocutory injunction against a newspaper enjoining publication of a former secret serviceman's memoirs was dissolved by the trial judge, who cited *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) 11 (1986), in confirming the need for a pressing social need in order to justify a restriction. Even in *Attorney Gen. v. B.B.C.*, the *Sunday Times* case was cited by Lord Scarman. 1981 A.C. 303, 354, 362 (1980). *See supra* note 75 and accompanying text.

207. *Colman v. General Medical Council*, CO/1411/87 (Q.B., Nov. 25, 1988) (LEXIS, Enggen library, cases file) (per Auld, J.). The fact that the substantive right to freedom of expression as contained in article 10 was "selectively" subsumed into British domestic law by all three courts in the *Spycatcher* cases indicates that British courts could conceivably subsume similar rights with respect to the media, though this is not likely absent a mandate from the European Court. *See Attorney Gen. v. Guardian Newspapers, Ltd.* (No.2), 1990 A.C. 109, 273 (1988) (per Lord Griffiths), *id.* at 283-84 (1988) (per Lord Goff); *id.* at 178-79 (C.A. 1988) (per Donaldson, M.R.), *id.* at 203 (C.A. 1988) (per Dillon, L.J.), *id.* at 218-20 (C.A. 1988) (per Bingham, L.J.); *id.* at 156-59 (Ch. 1987) (per Scott, J.) (denying an injunction regarding publication of information obtained in confidence). More recently, in a decision handed down by the House of Lords shortly after *Brind*,

nation for the *Brind* court ignoring the European Court's case law is that it would be essentially at odds with the *Brind* court's application of British administrative law.²⁰⁸

The framework of the British judiciary is ill suited to the protection of human rights from administrative discretion. *Wednesbury* review²⁰⁹ has been criticized as preventing review except in cases where an official has behaved absurdly, or taken leave of his senses.²¹⁰ The *Wednesbury* standard protects an otherwise legal administrative action unless it is so unreasonable that no reasonable authority could ever have come to it.²¹¹ The adoption of substantive review²¹² where fundamental rights such as freedom of expression are concerned, as well as the adoption of a proportionality standard to review the scope of an administrative decision, are changes that are necessary in British law.²¹³ Without these changes, the essence of rights guaranteed by the Convention will be radically reduced.²¹⁴ By considering whether

Lord Templeman indicated that had the government made the proper allegations, then application of the proportionality test with regard to *freedom of expression* would have been appropriate. Lord Advocate v. The Scotsman, [1989] 3 W.L.R. 358, 368 (H.L.).

208. See *supra* notes 121-23 and accompanying text.

209. See *supra* notes 91-98 and accompanying text.

210. Jowell & Lester, *supra* note 93, at 372 (citing Regina v. Secretary of State for the Env't *ex parte* Nottinghamshire County Council, [1986] 1 A.C. 240 (per Lord Scarman)).

211. See *supra* notes 91-98 and accompanying text.

212. Note that, unlike substantive review, *Wednesbury* review is concerned not with decisions, but with the decision-making process. Substantive review is concerned with the substance of administrative decisions. Jowell & Lester, *supra* note 93, at 369. Examples of substantively infirm decisions include irrational or arbitrary decisions, decisions which unjustifiably violate fundamental rights and freedoms, and decisions which are tainted with fraud and bad faith, and which unjustifiably depart from usual administrative practice. *Id.* at 374.

213. Jowell & Lester, *supra* note 93, at 374-76. British courts are already bound to give effect to the principle of proportionality in cases involving directly effective EC law. *Id.* at 376. Thus, proportionality review is not as alien to British law as would seem, and British courts cannot avoid the proportionality principle on the grounds that it has no common law precedent. Cf. Council of Civil Service Unions v. Minister for Civil Service, 1985 A.C. 374 (1984) (leaving open the possibility of introducing proportionality review into the common law). But cf. Colman v. General Medical Council, CO/1411/87 (Q.B., Nov. 25, 1988) (LEXIS, Enggen library, cases file) (per Auld, J.) (flatly refusing to "import the [obsolete and discredited] . . . European concept of proportionality into the common law"). The *Colman* court found that proportionality was best considered as a subset of reasonableness, considered implicitly in determining whether a decision is "irrational." *Id.* This seems to be the prevalent opinion among British legal authorities. See Jowell & Lester, *supra* note 93, at 369-72.

214. Strict scrutiny, a technique employed in United States constitutional law where a challenged governmental action affects fundamental rights, has no equivalent in the United Kingdom, perhaps because there is no Bill of Rights to scrutinize. Cf. L. TRIBE,

a pressing social need for the directives existed, the divisional court adopted a test prescribed by the Convention, to wit, whether the restrictions were necessary in a democratic society.²¹⁵ However, the *Brind* court refused to modify present principles of British administrative law, and consequently applied a standard of review to the restrictions that was more lenient than would be permissible under the Convention. Notwithstanding the narrow scope of the *Wednesbury* standard, the *Brind* court unequivocally adhered to that standard and refused to find the Home Secretary's decision to be one to which no reasonable Home Secretary could ever have come.²¹⁶

Since the *Brind* court concluded that the Home Secretary acted within the bounds of article ten, the court necessarily found that he must have taken into account its provisions, which coincide with his duties under the Broadcasting Act. The court's reasoning is flawed. By not applying the European Court's test, the court could hardly have reached any conclusion *other* than that the Home Secretary acted reasonably in the *Wednesbury* sense. Furthermore, by not applying the European Court's test, the conclusion that the Home Secretary's actions were lawful under the Convention has no basis. Given the obligations placed by the Convention on both the judiciary and the executive branch, it is simply inconsistent that the Convention should be a source in interpreting legislation but not judicial review of administrative action.²¹⁷

Nonetheless, the divisional court's finding that the limitations in article ten of the Convention acted as a restriction on the Home Secretary's power seems to carve out an exception to the court of appeal's holding in *Fernandes v. Secretary of State for the Home Department*,²¹⁸ which held that the Home Secretary was not under any legal obligation to take into account the provisions of the Convention.²¹⁹ This sort of judicial inconsis-

AMERICAN CONSTITUTIONAL LAW 1451 (2d ed. 1988) ("strict scrutiny acknowledges that other political choices [that] burde[n] fundamental rights . . . must be subjected to close analysis in order to preserve substantive values of equality and liberty").

215. Human Rights Convention, *supra* note 2, at art. 10, § 2.

216. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, CO/1756/88, slip op. at 19-20 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

217. Jowell & Lester, *supra* note 93, at 380.

218. 1981 Imm. A.R. 1, 78 I.L.R. 37 (C.A. 1980).

219. *Id.* In *Brind*, The court of appeal rejected the divisional court's reasoning and held that the Home Secretary was under no obligation to consider the Convention. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, [1990] 2 W.L.R. 787, 798-

tency is a reflection of the Convention's precarious position in domestic law and illustrates the need to incorporate it into domestic law.

The *Brind* court found it useful to compare the duties of the IBA and BBC to the exceptions in section two of article ten.²²⁰ The comparison may seem wise in that many of the duties of the BBC and IBA coincide with restrictions in article ten. By allowing the government to dictate the terms of broadcasting in the United Kingdom, the *Brind* court glossed over the right to free expression of which the broadcasters were subsequently deprived. "However, it should be for the broadcaster and journalist to decide, subject to the ordinary law, who may be interviewed on television, or radio."²²¹ Indeed, a recent report by one of the most respected legal organizations in the United Kingdom concluded that "the fundamental rule should be that the free expression of ideas and information is only to be restricted for the most pressing of reasons, and that restrictions must only be those that are necessary for those reasons."²²²

The court, the government, and Parliament also placed considerable importance on the fact that the restrictions merely brought the United Kingdom into line with extant restrictions in the Republic of Ireland.²²³ This is a mistake. While the Convention is not a part of the domestic law of Ireland,²²⁴ a presumption that Irish law is in conformity with the Convention nonetheless exists.²²⁵ While the broadcasting ban in Ireland covers the same parties as the British ban, it has been suggested that the legislation containing the restrictions is in conflict with the Irish Constitution.²²⁶ Furthermore, although the Irish Supreme

99 (C.A. 1989) (per Donaldson, M.R.); *id.* at 808-09 (per Mc Cowan, L.J.).

220. *Brind*, CO/1756/88, slip op. at 15-17 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

221. No COMMENT, *supra* note 99, at 102.

222. JUSTICE: THE BRITISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS, FREEDOM OF EXPRESSION AND THE LAW 5 (1990) (emphasis deleted).

223. *Brind*, CO/1756/88, slip op. at 5-6 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file); 138 PARL. DEB., H.C., (6th ser.) 896 (1988) (statement of Home Secretary Hurd).

224. J. CASEY, CONSTITUTIONAL LAW IN IRELAND 172 (1987) [hereinafter J. CASEY].

225. *State v. Walsh*, 1981 I.R. 412, 440 (per Henchy, J.) (Ir.S.C.).

226. J. CASEY, *supra* note 224, at 443. Under a ministerial order made pursuant to the Irish Broadcasting Authority Act, *see supra* note 121, any organization banned under Northern Ireland law is also banned from broadcasting in Ireland. This means that an Irish minister has sub-delegated his power to the Secretary of State for Northern Ireland in that the latter is empowered to decide who may be interviewed on Irish broadcasts. *Id.* This may conflict with the Irish Constitution. *See* IRELAND CONST. art. XV, § 2, cl. 1

Court has upheld the restrictions,²²⁷ they were not challenged by journalists, but by a banned Sinn Fein representative, and no reference was made to either freedom of expression or the Convention.²²⁸ The similarity to the Irish restrictions thus hardly justifies the introduction of restrictions in the United Kingdom.

VI. CONCLUSION

In *Regina v. Home Secretary ex parte Brind*,²²⁹ the divisional court and court of appeal remained true to principles of British administrative law, which do not take into account the proportionality of an administrative action to the "mischief it seeks to avoid."²³⁰ In so doing, the divisional court took into consideration the limitations imposed by article ten of the Convention on the journalists' freedom of expression, but refused to apply the case law of the European Court, since neither the Convention nor its case law has been incorporated into domestic law.

As long as British courts are unwilling to apply the European Court's standards of review and case law, the common objectives of the Council of Europe, and the protection of free expression that the Convention seeks to enforce will have no palpable meaning to the ordinary citizen. To bring about the necessary changes, British courts must either expand the dimensions of *Wednesbury* review, or adopt the "proportionality" review utilized by both the European Court and the Court of Justice of the European Communities. The Home Secretary's order

("[t]he sole and exclusive power of making laws for the state is hereby vested in the [Parliament]: no other legislative authority has power to make laws for the [s]tate").

227. *State (Lynch) v. Cooney & Attorney Gen.*, 1982 I.R. 337 (Ir. S.C.).

228. *See id. passim*. Furthermore, to suggest that the restrictions place the United Kingdom on a par with the Irish Republic is preposterous since electoral support for all of the extremists there amounts to 2%, whereas 35% of the nationalist community in Northern Ireland supports Sinn Fein. It is thus not only a legalized political party, but one which receives "mass support." 139 PARL. DEB., H.C. (6th ser.) 1110-11, 1123-24, 1139 (1988). There were also, at the time of the debates in Parliament, about 60 elected Sinn Fein councillors in local government in Northern Ireland. 502 PARL. DEB., H.L. (6th ser.) 712 (1988). At the same time, it was claimed that the restrictions affected Sinn Fein much more than they affected the UDA, since the UDA had not used the media to a great extent, nor does the UDA have the electoral support that Sinn Fein has. *War against the IRA*, *The Independent*, Oct. 20, 1988, at 8, col. 6. *See supra* note 101.

229. *Regina v. Secretary of State for the Home Dep't ex parte Brind*, CO/1756/88, slip op. at 1 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file), 139 New L.J. 1229 (1989).

230. *Cf. Brind*, CO/1756/88, slip op. at 9-10 (Q.B. Div'l Ct., May 26, 1989) (LEXIS, Enggen library, cases file).

is an unprecedented prior restraint, and is deeply repugnant to principles of democracy. Although Freedom of the press was not at issue in *Brind*, a minimum standard should be applied in adjudicating all media restrictions, including those affecting the press, television, and radio. Adoption of the European Court's analysis of article ten would ensure that "freedom of expression in the press and in broadcasting [w]ould not be unwarrantably fettered."²³¹

In order to achieve these changes, the British Parliament must incorporate the Convention into domestic law. In the absence of such legislation, the constitutional guarantees provided by the Convention will receive inadequate protection under British domestic law, and the European Court will continue to find the United Kingdom to have violated the Convention.²³²

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231. *Attorney Gen. v. B.B.C.*, [1979] 3 W.L.R. 312, 324 (per Denning, M.R.) (C.A.), *aff'd*, 1981 A.C. 303 (1980).

232. It is no coincidence that the leading case law of the European Court has involved petitions against the United Kingdom. In fact, the United Kingdom has been brought to the European Court on 31 occasions since 1950, and has been found to violate the Convention more than any other signatory. *Human Rights Ruling*, 85 LAW SOC'Y GAZETTE, Dec. 7, 1988, at 5.

