

Sub Judice and Free Speech: Balancing the Right to a Fair Trial Against Freedom of Expression in Israel

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I. INTRODUCTION

One of the foundations of the criminal justice system is the principle that a defendant's guilt may be decided only by those appointed by law to determine it,¹ and that decision should be based only on admissible evidence presented in court.² Another basic principle is that the legal system must take steps to ensure that any evidence before the court is reliable and reflective of factual reality.³

Media publications about an ongoing legal proceeding which report more than the events in court may undermine these two central principles. Media publication of testimonies not yet been heard by the court, such as stories from eyewitnesses who are not supposed to testify, or of other evidence which has not yet been presented (and may never be presented) in court, may influence the memories of future witnesses concerning events, making it less likely their witness testimony reflects reality.

Such publications are likely to influence the decision-making process of the judges as well, causing judges to likely determine a defendant's guilt based on "evidence" coming from the media.⁴ Thus, media publications may impinge on a defendant's presumption of innocence and his or her right to a fair trial, thereby endangering their freedom.⁵ Media publications can also impinge upon societal interests to maintain a fair and just criminal justice system.

However, these important interests must be balanced against other important principles and interests. The most important competing principle is freedom

1. See, e.g., European Convention of Human Rights, art. 6, Nov. 4, 1950 [hereinafter ECHR] [<https://perma.cc/78Q9-S7DM>]. See also U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.).

2. ADRIAN KEANE & PAUL MCKEOWN, THE MODERN LAW OF EVIDENCE 2 (10th ed. 2014); U.S. Const. amend. VI, Sanhedrin, 6b ("a judge may evaluate only what his eyes see.") [<https://perma.cc/TXZ6-SPHH>]. For an example under Israeli law, see *CrimA 21/72 Mordechai Zeiger v. State of Israel* 26 (1) PD 505 (1973), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www.nevo.co.il/psika_word/elyon/KF-1-505-L.pdf#xml=http://www.nevo.co.il/Handlers/Highlighter/PdfHighlighter.ashx?index=0&type=Main [perma.cc/6WSC-M4NV]; File No. 10563-06 CA (Jer.) Yaakov Neimi v. Elav Ofna Ltd. et al. (Mar. 8, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) [perma.cc/E2EJ-DWY5].

3. For an overview see Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985); Keane & McKeown, *supra* note 2, at 2-5.

4. See, e.g., Elizabeth F. Loftus, *Make-Believe Memories*, 58 AM. PSYCHOLOGIST 867, 867 (2003).

5. Nancy Mehrkens Steblay, Jasmina Besirevic, Solomon M. Fulero & Belia Jimenez-Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 L. & HUM. BEHAV. 219, 220 (1999).

of speech, which is the central basis of every democratic society,⁶ and therefore enjoys constitutional protection in most countries.⁷ A second principle is public trial, which guarantees that justice is conducted publicly.⁸

Limitations on media publications of ongoing legal proceeding has been a topic of interest in the Western world since the birth of modern journalism. Accordingly, all Western countries have some version of the sub judice rule. However, in the last few decades, as various forms of electronic media have increased the coverage of court proceedings, and as “objective journalism” has lost much of its luster and prestige, the chance of undue influence in criminal proceedings have increased. This raises the need to redraw the boundaries of legitimate media coverage of criminal proceedings.

Even though the need to strike a balance regarding the permissible news coverage of criminal proceedings is common to all Western systems of justice, the specific boundaries are bound to be influenced by local factors, which can obviously change over time: the local society and culture; the identity of the decision-makers in criminal cases (judges or jurors); the legal and constitutional environment; and the media’s local traditions.

For example, the Supreme Court of the United States found in the *Sheppard* case that the defendant had not received a fair trial for the murder of his wife due to the overwhelming wave of negative publicity the case received in the media.⁹ A “carnival atmosphere” accompanied the proceedings and prevented the defendant from receiving a fair trial, and therefore the Supreme Court held that he was entitled to a retrial.¹⁰ Nevertheless, the ruling noted that this was a “palliative” measure; reversing the conviction and ordering a new trial was only a temporary measure, as

6. See U.S. CONST. amend. I; see also ECHR art. 10.

7. See JOHN S. MILL, ON LIBERTY, 31 (2011); JAVIER CREMADES, DAS GRUNDRECHT DER MEINUNGSFREIHEIT IN DER SPANISCHEN CERFASSUNG, 173 (1994); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (stating “the best test of truth is the power of the thought to get itself accepted in the market.”); *R. v. Sec’y of State for the Home Dep’t Ex parte Simms* [2000] 2 A.C. 115 HL, 126.

8. ECHR, *supra* note 1, at art. 10; Courts Law (Consolidated Version), 5744-1984, 1123 LSI 198, § 68 (1984) (Isr.).

9. *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966).

10. *Id.* Recently, the Alabama Court of Criminal Appeals overturned the conviction and death sentence of Lam Luong for murdering his four children due to the prejudicial nature of local media coverage, ordering a retrial and change of venue. *Luong v. State*, 199 So. 3d 98 (2013). On March 14, 2014, the Alabama Supreme Court ruled 5-3 to reverse the Court of Criminal Appeals’ ruling. *Luong v. State*, 199 So. 3d 139 (2014). Similarly, see *Rideau v. Louisiana*, 373 U.S. 723 (1963).

a cure would require steps to prevent prejudice (sub judice publications) at the start, namely appropriate regulation to protect legal proceeding from invalid external influences.

But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.¹¹

Over the past few years, a relatively large number of cases have arisen in Israel, in which media publications have allegedly influenced criminal proceedings. The Supreme Court of Israel has issued a number of inconsistent decisions regarding such publications.

In this Article, we will study the sub judice prohibition, analyze the concern of undue influence of media publications in criminal cases in light of contemporary behavioral literature, discuss the various approaches found in contemporary Israeli case law, and propose a new and better model.

II. COMPARATIVE LAW AND POLICY CONSIDERATIONS

The sub judice rule aims to protect the defendants' rights for due process and a fair trial, while balancing them with other rights and interests such as freedom of speech and public trial. Its purpose is to prevent a defendant from being tried by the media rather than those who were ordained to do so, by forbidding the media from reporting anything that might influence an ongoing proceeding. As mentioned above, every democratic country has a version of the sub judice rule.

The sub judice prohibition protects a number of basic interests. The first is the defendants' constitutional right to a fair trial, and their constitutional right to a presumption of innocence, as their freedom should not be surrendered until they are found guilty by a court of law based upon admissible evidence. A second interest is the purity of the criminal proceeding. This interest is not only the interest of the defendant, but also the interest of the entire justice system and society as a whole—the interest that criminal proceedings cannot be influenced by external publications. This interest is compromised by publications to the benefit and detriment of the defendant.

11. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (emphasis added).

On the other hand, another basic right in a democratic society is freedom of speech.¹² Free speech is one of the most fundamental human rights and is essential for human self-fulfillment.¹³ Moreover, free speech furthers the marketplace of ideas and helps discover hidden facts.¹⁴ Free speech is an essential part of the democratic process, allowing the balance between stability and change in a democratic society.¹⁵ In Israel, free speech is applicable to every expression, even though it may be balanced against other values.¹⁶

There are substantial differences between different countries concerning the sub judice doctrine.¹⁷ The doctrine is influenced by the vigorousness of the defense given to free speech as well as by the meaning and significance

12. U.S. CONST. amend. I. As for the importance of free speech in Israel, see CA 409/13 Keshet Broadcasting v. Cooper 2 (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [https://perma.cc/5JF5-VT4A] for the ruling of Justice Hayut. Dep. Pres. Rivlin expands on this in CA 751/10 Ploni v. Dayan-Orbach, 61–66, 73–82 (Feb. 8, 2012) (unpublished). See also Mordechai Kremnitzer, Khalid Ghanayim & Boaz Shnoor, *Libel Law: De Lege Lata and De Lege Ferenda* (Jerusalem: Harry and Michael Sacher Institute, Hebrew University of Jerusalem 2005) at 61–64, 200–04.

13. FREDERICK F. SCHAUER, *FREE SPEECH: A THEORETICAL ENQUIRY* 47–72 (1982); ERIC BARENDT, *FREEDOM OF SPEECH* 14–20 (1985); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 6–25 (1989). In regard to Israeli case law, see HCJ 73/53 Kol Ha'am v. Minister of Interior 83(7) PD 871, 878 (1953) (Isr.); RUTH GAVISON, *HUMAN RIGHTS IN ISRAEL* 116 (1994); RE'EM SEGEV & M. KREMNITZER, *FREEDOM OF EXPRESSION AGAINST GOVERNMENTAL AUTHORITIES* 85–91 (2001); Guy Pessach, *Freedom of Speech and the Legal Foundations of the Press*, 31 HEBREW UNIV. L. REV.–MISHPATIM 895, 909–11 (2001).

14. JOHN MILTON, *COMPLETE PROSE WORKS OF JOHN MILTON* 492 (E. Sirluck ed. Vol. II 1959); *Abrams v. United States*, 250 U.S. 616, 630 (1919). Pessach, *supra* note 13, at 897–901.

15. BARENDT, *supra* note 13, at 18–20; Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 486 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497 (2011); DAVID A.J. RICHARDS, *FREE SPEECH AND THE POLITICS OF IDENTITY* 18–22 (1999). As for this justification in Israel, see Pessach *supra* note 13, at 901–08; CA 751/10, Ploni v. Dayan-Orbach 62 (Feb. 8, 2012) (Isr.) (unpublished); CrimA 214/89 State of Israel v. Ben-Moshe 22(2) PD 427, 435 (1968) (Isr.); Kremnitzer, Ghanayim & Shnoor, *supra* note 12, at 202.

16. CA 214/89 Avneri v. Shapira 43(3) PD 840, 857–59 (1989), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www.nevo.co.il/psika_word/elyon/padi-nb-3-840-l.pdf#xml=http://www.nevo.co.il/Handlers/Highlighter/PdfHighlighter.ashx?index=0&type=Main [https://perma.cc/LM66-T3DV].

17. See *infra* IV. As for the viewpoint of Israeli jurisprudence, see CA 409/13 Keshet Broadcasting v. Cooper 4–8 (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [https://perma.cc/5JF5-VT4A], for Justice Solberg's ruling where Solberg notes three main approaches.

given to the presumption of innocence. The presumption of innocence in Continental law developed alongside the presumption of innocence in common law, but in each system, this principle has its own meaning, and the distinction affects the scope of permitted publications during legal proceedings.¹⁸

In common law, the presumption of innocence is only an evidentiary principle, placing upon the prosecution the obligation to prove guilt beyond a reasonable doubt. On the other hand, in the Continental system, the axiom that every person is innocent until proven guilty is a substantial presumption which precludes any sanction before conviction.¹⁹ *Inter alia*, it forbids any publications which indicate a person's guilt before they have been convicted.²⁰ The need to preserve the presumption of innocence of defendants requires limiting publications that concern the possibility a certain person has committed a crime. Therefore publications which allude to a certain person having committed a crime, including statements of a person suspected of having done so,²¹ must be limited by the need to protect the individual's presumption of innocence.²²

In American law, under the First Amendment, the press²³ is free to publish harsh statements about suspects and the processes of investigation and prosecution, even though such publications may impinge not only on the

18. For a historical survey, see Rinat Kitai, *The Importance of a Positive Presumption of Innocence, Its Role and Its Nature at Pre-Trial Stages* 3; *ALEI MISHPAT* 405, 408–13 (2003).

19. *Id.* at 433–35. In French jurisprudence in the last few decades of the twentieth century, reforms were instituted to strengthen and buttress the viewing of the presumption of innocence as an essential determination with significant ramifications. For a description of French legal reform, see Francois Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 *AM. J. COMP. L.* 107, 136–41 (2010).

20. For a description of the difference between the various legal systems and a call to adopt a broader definition, see Quintard-Morénas, *supra* note 19.

21. *Id.* at 138 n.289.

22. See *CODE DE PROCEDURE. PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE]* prelim. art. 3 (Fr.) (“Every person suspected or charged is presumed innocent until their guilt has been established. Infringements on their presumption of innocence are proscribed, compensated and punished in accordance with the law.”). Translation based on Quintard-Morénas, *supra* note 19, at n.292.

23. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). The prohibition on limiting freedom of speech of course relates to private individuals, not just the media. Nevertheless, courts often issue gag orders relating to a specific person, who is not a party to the proceedings, to prevent him or her from discussing matters relating to the proceedings, to avoid the danger of interference in the judicial procedure (and not in order to defend the dignity of the subjects of the publication). For a description of a case in which such an order is issued, as well as the argument that such orders are unconstitutional or at the very least must be highly restricted, see Michael D. Seplow & Paul L. Hoffman, *Punishing Pundits: People v. Dyleski and the Gag Order as Prior Restraint in High-Profile Cases*, 39 *LOY. L.A. L. REV.* 1197 (2006).

dignity of the accused, but on the legal proceedings and the defendant's right to a fair trial.²⁴

The United Kingdom's 1981 Contempt of Court Act proclaims that any media publication which significantly discusses pending legal proceedings to the extent that justice is endangered will be considered to have the intent of influencing a court proceeding and will incur criminal liability on the grounds of contempt of court.²⁵ A publication is considered to pose such a threat if it "creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced."²⁶ Section 4 states that "the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings" postpone such a publication "for such period as the court thinks necessary for that purpose."²⁷

At first, the court set a low threshold for applying this rule, so that only publications that pose minimal risks of severely influencing the legal proceedings are exempt from the application of the law,²⁸ whereas theoretical or distant risks would not incur liability.²⁹ However, later it was determined that the risk of jurors learning of the publication and the influence of the publication on the jurors must be determined both at the time of the publication and during trial.³⁰ In practice, this ruling severely limited the possibility of issuing gag orders and as a result, prosecution no longer sought them.³¹ This situation was criticized and in response, the Law Commission

24. As for the situation in the American legal system and criticism of it, see Mark J. Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167 (2006). Geragos discusses the serious influence of media reports on defendants' right to a fair trial when the press takes an interest. He suggests that the United States adopt the contempt laws of the United Kingdom, allowing suits to be brought against media for publications that impinge on defendants' rights. See also Gavin Phillipson, *Trial by Media: The Betrayal of the First Amendment's Purpose*, 71 L. & CONTEMP. PROB. 15–29 (2008); Stephen J. Krause, *Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial*, 76 B.U. L. REV. 537, 559–61 (1996).

25. Section 1 of the Act states that "'the strict liability rule' means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so." Contempt of Court Act 1981, c. 49, § 1 (U.K.).

26. *Id.* § 2.

27. Contempt of Court Act 1981, c. 49, § 4 (U.K.).

28. See *A-G v. English* [1983] 1 A.C. (HL) 116 at 141–42 (Eng.).

29. *A-G v. Guardian Newspapers Ltd. (No. 3)* [1992] 1 W.L.R. 874 (D.C.) at 881 (Eng.).

30. *A-G v. Mirror Group Newspapers Ltd.* [1997] 1 All E.R. 456 at 356 (Eng.).

31. Ian Cram & Nick Taylor, *The Law Commission's contempt proposals—getting the balance right?*, 6 CRIM. L. REV. 465, 471 (2013).

issued a consultation paper recommending strengthening the ability to indict individuals for publicizing a legal proceeding without changing the law.³² British courts sometimes issue non-disclosure orders in defamation suits and in suits claiming misuse of private information.³³ Such orders may include a ban on publicizing the slander itself, as well as ban on publicizing the existence of the slander suit or the request for a non-disclosure order (a super-injunction).³⁴

In Australia³⁵ and Canada,³⁶ the rules of sub judice are essentially the same as those in the United Kingdom, meaning a gag order will be issued to maintain the purity of a legal proceeding, if the balance of interests is in favor of the applicant.

In France and other Continental countries,³⁷ the possibility of publicizing events in criminal courts is restricted by the essential presumption of innocence.³⁸ This means that the press is forbidden from publishing any publication which might portray alleged perpetrators as guilty prior to conviction.³⁹

The European Court of Human Rights has also maintained in a number of cases that media publications which portray alleged perpetrators as guilty prior to conviction, whether published by independent media or by governmental authorities, are a violation of defendants' human rights.⁴⁰

32. LAW COMMISSION, CONTEMPT OF COURT: A CONSULTATION PAPER (2012), Consultation Paper No. 209 (U.K.), http://www.lawcom.gov.uk/app/uploads/2015/03/cp209_contempt_of_court.pdf [<http://perma.cc/4P7S-BZ7Z>]. A final recommendation regarding the relevant issues, has not yet been published.

33. Alastair Mullis & Richard Parkes, *Gatley on Libel and Slander* 974–78 (12th ed. 2013).

34. *Id.* at 970–71.

35. *John Fairfax and Sons Pty. Ltd. v. McRae*, (1955) 93 CLR 351 (Austl.); *Attorney Gen v. John Fairfax & Sons Ltd.* [1980] 1 NSWLR 362, 38 (Austl.).

36. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (Can.).

37. Giorgio Resta, *Trying Cases in the Media: A Comparative Overview*, 71 L. & CONTEMP. PROBS. 31, 41 (2008).

38. “Everyone has the right to the respect of the presumption of innocence. Where, before any sentence, a person is publicly shown as being guilty of facts under inquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for the injury suffered, may prescribe any measures, such as the insertion of a rectification or the publication of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expense of the individual or legal entity liable for that infringement.” CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9-1 (Fr.); Quintard-Morénas, *supra* note 19, at 140 n.313.

39. Quintard-Morénas, *supra* note 19, at 140–41.

40. *Allenet de Ribemont v. France*, 308 Eur. Ct. H.R. (ser. A), at 38 (1995); *Du Roy and Malaurie v. France*, 2000-X Eur. Ct. H.R. 34.

III. SUB JUDICE IN ISRAEL—LEGISLATIVE HISTORY AND LEGAL BACKGROUND

In Israel, the sub judice prohibition is found in Section 71(a) of the Courts Law, 5744-1984. The section was amended in 2002 to limit the scope of the offense to criminal proceedings and to add a mental element requirement.⁴¹ In its current iteration,⁴² the law states:

A person shall not publish anything concerning a criminal matter pending in court if the publication has the power to influence the course or outcome of the trial, with the intention of creating such an influence; and the anticipation of such an influence as almost certain, is equivalent to intent.

The 2002 amendment was the result of criticism that claimed the previous version excessively silenced freedom of speech and was utterly unnecessary to protect the proceedings of the court.⁴³

One concern about the sub judice prohibition is that media publication might influence judges' decision-making. However, Israeli legislation and case law tend to assume that inadmissible evidence, including media publications, presented to judges has a possible negligible effect on them. Thus, the Evidence Ordinance sets out that the fact that a court is exposed to inadmissible evidence does not disqualify it from adjudicating the case, but it allows disqualifying the verdict if the judge was influenced by the invalid evidence to the extent of ruling in accordance with it.⁴⁴

Case law interpreted this provision narrowly, stating that usually a professional judge can disassociate himself from the influence of invalid evidence. Therefore, the judge's exposure to invalid evidence does not affect the conclusions he reaches, and naturally such exposure should not

41. Courts Law (amended), 5762-2002, § 41(a) (2002) (Isr.).

42. Before the amendment, the relevant portion read: "A person shall not publish anything concerning a matter pending in any court if the publication is intended to influence the course or outcome of the trial." Courts Law (Consolidated Version), 5744-1984, § 71(a), 38 LSI 271 (1983-1984) (as amended) (Isr.).

43. See Ze'ev Segal, *Lifting the Prohibition to Publish on Grounds of Sub-Judice: A Proposal for an Alternative Arrangement*, 1984 BAR-ILAN L. STUD. 105 (1984).

44. "When evidence which is not admissible as proof of a criminal charge has been admitted by error or inadvertence, such evidence shall not be used in proof of the charge nor shall any judgment be based thereon; *nevertheless, the fact that such evidence has been heard by the court shall not invalidate the judgment* unless, in the opinion of the court, the accused would not have been convicted if such evidence had not been given or there was no other sufficient evidence to support conviction apart from that evidence." Evidence Ordinance [New Version], 5731-1971, ¶ 56, 2 LSI 198 (1968-72) (Isr.) (emphasis added).

invalidate the verdict.⁴⁵ Moreover, case law determined that even if a judge may be exposed to invalid evidence, once told to ignore it, a judge should be able to do so.⁴⁶ Similarly, the judges' professionalism and expertise hypothesis led the courts to rule that exposure to invalid evidence does not justify disqualifying a judge, except in the most extreme circumstances.⁴⁷

Another relevant issue is that Israeli case law tends not to grant restraining orders against media publications for the tort of libel.⁴⁸ In practice, the rulings of the Supreme Court do not allow restraining orders even in cases where the subject is not a classic public figure or if there are serious doubts concerning the publication's truth.⁴⁹

Therefore, in the next chapter, we will review some Israeli cases concerning massive media coverage of both public and nonpublic figures and the possible influences on the outcomes of the cases.

45. In *Abitbol v. State of Israel*, the court ruled that in order to invalidate a verdict given after the judge was exposed to invalid evidence, the appeal must show that there is no valid evidence to support the verdict, or the court of appeals must be convinced that the judge ruled as they did only because of the invalid evidence. DNP 199/94 *Abitbol v. State of Israel* 51(2) PD 1 (1996) (Isr.). The case notes that only in rare circumstances may it be determined that invalid evidence has in fact influenced the court. *Id.*

46. *Id.* at 14–16. This verdict does not dovetail with other research literature. See Chanan Goldschmidt & Yaakov Schul, *Difficulties in disregarding information – psychology and law*, MISHPAT VE-ASAKIM 67, 81–82 (2010) (Isr.) (contrasting the *Abitbol* ruling with other research literature).

47. See, e.g., CrimA. 08/990 *Margi v. Dahan* (May 25, 2008) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\08\900\009\n02&fileName=08009900_n02.txt&type=4 [<https://perma.cc/ZW3J-DYZ5>]. Paragraph 10 of the opinion specifically addresses a judge's exposure to invalid evidence and holds the judge in the instant case could remain impartial and professional. *Id.* YIGAL MARZEL, *LAWS OF DISQUALIFYING A JUDGE* 299 (2006) (Isr.). For a survey of the different views about this verdict, see CrimA 6752/97 *Pridan v. State of Israel* 51(5) PD 329, 333–35 (1997), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/97/520/067/A01/97067520.a01.pdf> [<https://perma.cc/BY9V-Q6GW>], where President Barak mentions several views without deciding among them. One view is that of President Agranat: “The very fact that the judge honestly believes that he can free himself from the preconceived notion under discussion is not compelling in the question of his disqualification from hearing the retrial, if only because that preconceived notion is likely to influence him, even subconsciously.” B.S. 48/75 *Yedid v. State of Israel* 29(2) PD 375, 383 (1975), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Another view is that of President Shamgar, who maintains: “The judge has the presumption of being able to ignore inadmissible evidence presented to him, but this is insufficient in a case such as this, because the appearance of propriety is no less important to us.” CrimA 593/83 *Werkstahl v. State of Israel* 37(4) PD 614, 616 (1983), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

48. CA 10771/04 *Reshet Media v. Ettinger* 59(3) PD 308 (2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/04/710/107/N01/04107710.n01.pdf> [<https://perma.cc/5GMS-SLXW>].

49. *Id.*

IV. SUB JUDICE IN ISRAELI CASE LAW

As mentioned above, lately there has been ongoing debate in Israeli case law about the influence of media reports on the justice system. This chapter will present the different cases where the question has been raised and the courts' resulting verdicts.

A. *The Cooper Case*⁵⁰

In 2010, one of Israeli television's most prominent investigative news programs, *Uvda*, reported the story of Shimon Cooper.⁵¹ According to *Uvda*, Cooper married a few times, and each time, his wife died under mysterious circumstances.⁵² In November 2012, Cooper was indicted for murdering his wife.⁵³ During trial, on January 14, 2013, *Uvda* scheduled an additional report to air.⁵⁴ This report was to include interviews with prosecution witnesses who had not yet testified at trial.⁵⁵

Before airing the episode, *Uvda* sought Cooper's response to the allegations made in its report. Cooper, who was in custody at the time, petitioned to the district court for both an interlocutory and a permanent injunction to prevent the broadcast of the program, claiming that it violated the sub judice prohibition.⁵⁶ Cooper's petition had a number of procedural flaws: Cooper

50. CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [<https://perma.cc/5JF5-VT4A>]. The description of the facts is from sections 2–3 of President Grunis's ruling.

51. *Id.*

52. *Id.*

53. *Id.* In fact, later, Cooper was indicted for the murder of another wife. *Id.* Cooper was ultimately convicted for both murders. File No. 47934-11-12 DC (Central) State of Israel v. Cooper (June 28, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-12-11-47934-44.htm [<https://perma.cc/DFH6-Z4K4>].

54. *See* CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [<https://perma.cc/5JF5-VT4A>].

55. CC (TA) 19664-01-13 Cooper v. Keshet Broadcasting, (Jan. 14, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www-nevo-co-il.mgs-clb.macam.ac.il/psika_html/mechozi/ME-13-01-19664-33.htm [<https://perma.cc/F4RT-YFCT>]. The court explains in paragraphs 8 and 9 of the opinion that *Uvda* planned to air interviews that included interviews with Cooper's past mistresses and anesthesiologist Dr. Maria Zakutzky. *Id.*

56. CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/>

did not provide an affidavit to support the petition nor propose a bond to compensate the defendants.⁵⁷ Keshet Broadcasting, the producers of the program, opposed the petition on procedural and substantive grounds.⁵⁸ However, Keshet Broadcasting, too, did not file an opposing affidavit.⁵⁹ The State of Israel supported Cooper's position.⁶⁰

At the hearing, the parties agreed the court should address only the petition for a permanent injunction.⁶¹ The court, Senior Judge Gideon Ginat presiding, issued a permanent injunction forbidding the defendants from broadcasting the show.⁶² This ruling was appealed.⁶³

The Supreme Court ruled unanimously that the procedural flaws in Cooper's petition justified rejection.⁶⁴ Nevertheless, all justices addressed the substantive issue, and these obiter dicta opinions showed the great ideological rifts between them.⁶⁵

On one side, Justice Hayut asserted that a restraining order against a publication is censorship, impinging on the constitutional right to free speech.⁶⁶ As such, it is restricted by the limitations on any abrogation of constitutional rights and a restraining order may be granted only when "there is a near-certainty of substantial risk to the integrity of the criminal-justice process."⁶⁷ Without this high level of probability, no restraining order against publication may be granted, even if it is reasonable or near-certain that the publication will have a substantial influence on the outcome of the criminal proceeding.⁶⁸

004/s05/13004090.s05.pdf [https://perma.cc/5JF5-VT4A]. Cooper did not base his claim on the anticipated damage to his reputation. It is feasible that he did not base his claim on the Defamation Law, 5724-1965, 19 LSI 254 (1964-65) (Isr.), because he foresaw that *Uvda* would claim that the publication is true, which would result in a trial that *Uvda* may have won or because existing case law practically abolished the possibility of receiving a temporary restraining order under Defamation Law. See CA 10771/04 Reshet Media v. Ettinger, 59(3) PD 308 (2004), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/04/710/107/N01/04107710.n01.pdf> [https://perma.cc/5GMS-SLXW].

57. CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [https://perma.cc/5JF5-VT4A].

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

This is true even if the publisher fulfills all the other conditions of Section 71 and the publication is likely to be a criminal offense.⁶⁹

Chief Justice Grunis did not spell out his position regarding the balance between the two conflicting values, but claimed that as a general rule, punishing forbidden speech (as sub judice) is better than the prior restraint of such speech.⁷⁰ However, he did state (while Justice Solberg demurred),⁷¹ that it is doubtful a civil court has the authority to issue an injunction to prevent the future commission of a criminal offense based on the petition of the projected victim.⁷² This is a problematic opinion since civil courts may issue a quia timet injunction—a temporary order to restrain wrongful acts which are threatened or imminent but have not yet commenced. Issuing a quia timet injunction is subject to some requirements,⁷³ and it seems they applied in *Copper*. If the court has the authority to prevent a future civil

69. *Id.* Justice Hayut notes there were previous publications that related to Cooper, making it doubtful whether the further publication by *Uvda* would be significant. *Id.* These matters raise a problem related to the reality of our time, in which there will almost inevitably be some prior publication in the virtual domain, so a gag order for traditional media alone is of doubtful effectiveness. This is a difficult problem, but its resolution is beyond our scope and requires comprehensive analysis to wrestle with the problem and solve it. For a proposal to deal with the problem in England, see THE LAW COMMISSION, CONTEMPT OF COURT (1): JUROR MISCONDUCT AND INTERNET PUBLICATIONS (2013), HC 860, at 7–61 (U.K.), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274266/0860.pdf [<https://perma.cc/UP88-GWXX>].

70. CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [<https://perma.cc/5JF5-VT4A>].

71. *Id.*

72. *Id.*

73. In seeking a quia timet injunction, “the prosecutor must prove ‘real damage that is almost certain to occur.’” See CA 468/81 Trust Co. Ltd. v. Orbit Medicenters Ltd., 35(4) PD 736, 736 (1981) (Isr.), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www.nevo.co.il/psika_word/elyon/PADI-LD-4-736-L.pdf#xml=http://www.nevo.co.il/Handlers/Highlighter/PdfHighlighter.ashx?index=0&type=Main [<http://perma.cc/357D-QUX5>]; HCJ 1921/94 Soker v. Comm. for Residential and Indus. Const., 48(4) PD 237, 262 (1994), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <https://www.nevo.co.il/search/Highlighter.aspx?verdictid=248138> [<http://perma.cc/P7JB-EWT3>]. In the *Cooper* case, as explained above, if witnesses see interviews of other prosecution witnesses on the *Uvda* program, it would almost inevitably influence their perception of reality and corrupt their testimony. Perhaps it would not lead to a wrongful conviction, but it would definitely corrupt the criminal trial (perhaps even making the sentence more severe), which is true damage. Moreover, even if in the *Cooper* case the criteria for a quia timet injunction were not met, this does not mean that the court does not have the authority to issue such an injunction, but that even though it essentially has the authority to do so, in these circumstances the conditions do not exist.

wrong, why would it not have the authority to prevent an imminent criminal act?⁷⁴ The logic of the quia timet injunction is to allow people to defend themselves ahead of time from a future injury caused by unlawful action,⁷⁵ and it is essentially a prophylactic measure.⁷⁶ This logic applies equally whether the injury will result from a wrongful act or from a criminal act.

Moreover, in most cases, committing a crime is also considered as a breach of statutory duty, which is a civil tort.⁷⁷ In the *Cooper* case, violating Section 71 of the Criminal Code gave Cooper the right to sue in torts (so long as damage can be proven). Even accepting Grunis's view that a civil plaintiff cannot obtain an injunction in order to prevent criminal behavior, if Cooper were to note in his petition his fear of the defendants committing a tort of breach of statutory duty, the court would have the authority to issue a restraining order banning such behavior.⁷⁸ In such circumstances, negating the court's authority because a petitioner relied on his concern of imminent violation of criminal law and failed to mention that this criminal violation is also a civil tort would seem to be meticulous formalism.

Justice Solberg arrived at a different balance between freedom of speech and the right to a fair trial. In his view, one must strike a delicate balance between them.⁷⁹ Therefore, in order to protect the right to a fair trial, courts

74. To be precise, a restraining order against an alleged offender is not the opening of a criminal proceeding against a future offender, but only the victim's attempt to prevent the commission of a criminal offense (which may never be committed). Similarly, in issuing a restraining order, at the petition of a future victim, there is no determination that the designated offender would indeed be found guilty if they in fact acted on their intentions, but only the desire to protect the designated victim from a future behavior that would likely endanger them.

75. See CA 214/89 Avneri v. Shapira, 43(3) PD 840, 851 (1989), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www.nevo.co.il/psika_word/elyon/padi-nb-3-840-1.pdf#xml=http://www.nevo.co.il/Handlers/Highlighter/PdfHighlighter.ashx?index=0&type=Main [<https://perma.cc/LM66-T3DV>].

76. CA 407/54 Bayit Meshutaf 3 v. Lampert, 10 PD 1104, 1107 (1956) (Isr.).

77. The tort of breach of statutory duty in Israel differs from the corresponding violations in England and the United States. This Article does not have the scope to delve into this, but it is sufficient to note that most criminal breaches of statute which injure another person sustain the tort as long as the offense is designed to protect that person (and not as part of protecting individuals in general in the country). See, e.g., CA 245/81 Sultan v. Sultan, 38(3) PD 169, 176–79 (1984) (Isr.).

78. CA 241/89 Avneri v. Shapira, 43(3) PD 840, 854–55 (1989), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www.nevo.co.il/psika_word/elyon/padi-nb-3-840-1.pdf#xml=http://www.nevo.co.il/Handlers/Highlighter/PdfHighlighter.ashx?index=0&type=Main [<https://perma.cc/LM66-T3DV>]; HCJ 1921/94 Soker v. Comm. for Residential and Indus. Const., 48(4) PD 237, 262 (1994), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <https://www.nevo.co.il/search/Highlighter.aspx?verdictid=248138> [<http://perma.cc/P7JB-EWT3>].

79. CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [<https://perma.cc/5JF5-VT4A>]. In paragraph 2 of Justice Solberg's

should issue restraining orders against any publication which impinges on the possibility of reaching a fair and just verdict.⁸⁰ Justice Solberg stressed that the American approach, which prohibits restraint of speech, is unique and was not adopted by any other legal system; all other systems create a balance which allows the court to issue restraining orders in certain instances.⁸¹

B. *The Olmert Case*

Chief Justice Grunis also presided in the case of former Prime Minister Ehud Olmert,⁸² who was tried for bribery. In the *Olmert* case, Chief Justice Grunis granted the petition of Olmert's attorneys to ban the publication of audio recordings of Shula Zaken (Olmert's personal assistant),⁸³ a petition which was based on the sub judice prohibition.⁸⁴

This would seem to contradict Grunis's position in *Cooper*, in which he stated that even in a case of violation of the sub judice prohibition, the

opinion, Justice Solberg prioritizes the need to balance the freedom of expression and the public's right to know with the procedures and integrity of the court system. *Id.*

80. CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [<https://perma.cc/5JF5-VT4A>].

81. *Id.* §§ 3–7.

82. CrimA 8080/12 State of Israel v. Ehud Olmert (June 1, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (order prohibiting publication of cassettes), <http://elyon1.court.gov.il/files/14/800/080/x02/14080800.x02.pdf>; CrimA 8080/12 State of Israel v. Ehud Olmert (June 2, 2014) (Isr.) (order clarifying that the gag order issued for eight cassettes will remain in effect until the date of publication), <http://elyon1.court.gov.il/files/12/800/080/s17/12080800.s17.pdf>; CrimA 8080/12 State of Israel v. Ehud Olmert (June 17, 2014) (Isr.) (order clarifying that the ban on the publication of eight recordings is currently in effect), <http://elyon1.court.gov.il/files/12/800/080/s18/12080800.s18.pdf>.

83. Shula Zaken was Ehud Olmert's bureau chief, and she was prosecuted alongside him. At a certain point, she turned the state's witness against him and in this context turned over recordings of her conversations with Olmert to the prosecution. See Toi Staff, *Former PM Olmert to report to Prison Monday Morning*, THE TIMES OF ISRAEL (Feb. 15, 2016), <http://www.timesofisrael.com/former-pm-olmert-to-report-to-prison-monday-morning/> [<https://perma.cc/C73H-EALL>].

84. Olmert's attorneys wrote in their petition: "Due to the great media interest in publishing and broadcasting the tapes of Olmert and Zaken's conversations, there exists a near-certain probability—in truth, it is an absolute certainty—that once the gag order expires this coming Sunday, the tapes will be the lead story of every evening news program on radio and television, immediately being disseminated to the public via every other type of media. In this situation, the certain publication of the tapes in the media will force the court to release them, and will compel it, gun to its head, to become aware of their content, severely undermining Olmert's right to a fair trial."

tool of ex-post-facto enforcement or punishment is preferable to the preventive measure of using gag orders.

Grunis's ruling in *Olmert*, which banned the publication of the Zaken tapes, supports our views. Moreover, in our opinion, there are three main distinctions between the *Cooper* case and the *Olmert* case, which leads to the conclusion that there were much stronger grounds for a restraining order in the *Cooper* case than in the *Olmert* case.

1. In the *Olmert* case, the concern was that the judges might be potentially influenced, while in the *Cooper* case, the concern was that witnesses, who are not professional judges, and therefore do not enjoy the assumption of judicial professionalism, might be unduly influenced. In the *Sheftel* case,⁸⁵ it was determined that the more a publication focuses on influencing witnesses, distinct from influencing the court itself (namely the professional judges), the greater the concern the publication may influence the legal proceeding or its results. Therefore, we would have expected the court in the *Cooper* case to ban the publication.
2. In the *Olmert* case, the publication was about to be made during the appellate hearing, unlike the *Cooper* case, in which the publication was made during the trial itself. When the publication is made during an appeal (in which neither witnesses nor evidentiary claims are presented), the risk of impermissible influence on the appellate court is much lower.⁸⁶ Indeed, recently the Beer-Sheva Regional Court (dealing with administrative matters) accepted the petition of convicted murderer Daniel Maoz to be interviewed by the media, even though his appeal is still pending.⁸⁷ The court stated:

Though, as stated, a concern may exist, but we must take into consideration that this proceeding is not one in which witnesses will be heard or evidence presented, but rather an appeal. We are dealing with a theoretical question, whether the very existence of the interview creates a substantial and near-certain danger of impinging upon the legal proceeding which will take place regarding the petitioner's matter, which is an appeal to the Supreme

85. H CJ 223/88 Sheftel v. Attorney General, 43(4) PD 356, 363–64 (1989) (Isr.).

86. Re'em Segev, *Sub Judge: Freedom of Expression in Matters Under Adjudication*, ISRAEL DEMOCRACY INSTITUTE 28–30 (2001) [hereinafter Segev]; see also New Directives of the Attorney General, 3(2), 3, <http://www.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/41102.pdf>. (“Even when the influence is directed at the court itself, one must distinguish between the trial court and the appellate court; if it is an appellate court, the concern of influencing it shrinks.”).

87. Prisoner Petition File No. 30999-09-13 (Be'er Sheva), Daniel Maoz v. IPS, § 6 (Dec. 9, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www.nevo.co.il/psika_html/minhali/MM-13-09-30999-950.htm (emphasis added).

Court. Without a substantial evidentiary framework to support this, the answer to this question must be negative.⁸⁸

3. The public interest in the legal proceedings against Olmert, a former prime minister of the State of Israel, is much greater than the interest in the proceeding against Cooper. Olmert's criminal trial gripped the public, not only because of the narrow legal question—whether the defendant was guilty or not guilty, and if guilty, what sentence would be appropriate—but because of aspects extending far beyond the individual verdict.⁸⁹

In this context, we should also cite Justice Jubran's opinion in the *Katsav* case, which we will discuss shortly:

The higher the status of the defendant, and the greater the severity of the alleged crime, naturally the public interest in the case will be broader, and the media coverage will be more extensive.

...

The appellant served in a public office of the first rank: President of the State of Israel. He was the number-one citizen of our country. *Due to his status and office, he should have clearly understood that he was under the media spotlight and the spotlight of the nation as a whole. His notoriety as the president of the state proved to be a double-edged sword for him, which pushed the publication of the matter far beyond that of a normal report.*⁹⁰

C. *The Katsav Case*

Another instance where the influence of the media arose was in the legal proceedings against Moshe Katsav, former President and Minister, who was convicted of rape. In the *Katsav* case, Justice Salim Jubran related to sub judice while discussing the claims by Katsav's defense attorneys concerning his prejudgment in the media.

Indeed, it is utterly inappropriate to relocate a legal proceeding to the domain of the media. This is likely to impinge on the purity of the judicial process and its image . . . In this case, the media involvement has crossed every boundary, and we should certainly be distressed by this. We hope that such a severe wrong committed by the media . . . will vanish from the earth and never return. The scope, frequency and

88. *Id.*

89. *See* New Directives of the Attorney General 4(1), 3, <http://www.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/41102.pdf>.

90. CrimA 3372/11 *Katsav v. State of Israel*, §§ 393, 394 (Nov. 10, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/11/720/033/c34/11033720.c34.htm>.

power of the reports may likely be perceived as transferring the legal proceeding to the domain of the media.

...

It appears that the sub judice principle, according to which it is prohibited to publish anything about a pending criminal matter with the intent to influence the judicial process or its results, was violated in the case of the appellant. Even as the trial went on, the media published many reports, day in and day out. In this context, we should cite Justice E. E. Levy's ruling (Plonit, Sec. 65): "A man may discover in the morning that he is guilty and in the evening that he is innocent, depending on that day's commentator, reporter and editor."⁹¹

D. Other Cases

Aside from these three central cases, there were a number of additional cases in the past few years which have been subject to broad and sensationalistic media coverage ("public lynching"), creating the impression that criminal cases are adjudicated not in the court but in the media. For example, the case in which Capt. R. was initially convicted, and later exonerated,⁹² from "confirming the kill" in the death of Iman Darweesh Al Hams⁹³ the case of former Justice Minister Haim Ramon,⁹⁴ convicted of forcibly kissing a female soldier known as H.,⁹⁵ the fatal car accident, involving a famous attorney Dr. Avigdor Klagsbald;⁹⁶ the murder of Tair Rada, a

91. See *id.* at 394.

92. On November 15, 2005, the Military Court of the Southern Command exonerated the accused on all counts for the death of Iman Darweesh Al Hams. Gabriel Motroc, *Israeli Captain Acquitted on All Charges After Shooting Palestinian Girl 17 Times*, AUSTRALIAN NAT. REV. (Nov. 23, 2015).

93. *We killed her. I confirmed the kill too*, NANA NEWS (Nov. 22, 2005), <http://news.nana10.co.il/Article/?ArticleID=159463> [<https://perma.cc/32MS-Y8YR>]; Chanan Greenberg, *The officer 'confirmed the kill' and shot the girl point-blank*, YNET (Oct. 8, 2004), <http://www.ynet.co.il/articles/0,7340,L-2987078,00.html> [<https://perma.cc/C7RS-4J7L>]; Eitan Rabin, *The soldier testified: 'Captain R. riddled the girl with bullets point-blank'*, NRG MAARIV (Feb. 24, 2005), <http://www.nrg.co.il/online/1/ART/875/125.html> [<https://perma.cc/LGC2-GU5Q>].

94. CrimA 5461/06 State of Israel v. Ramon (Mar. 29, 2007) (Isr.).

95. Gil Salomon, *H. Testifies: This is How Ramon Harassed Me*, NRG MAARIV (Oct. 17, 2006), <http://www.nrg.co.il/online/1/ART1/492/575.html> [<https://perma.cc/2J2S-N6NZ>]; Tali Zinn and Miri Hasson, *Relations of Authority: The Big Problem*, YNET (July 25, 2006), <http://www.ynet.co.il/articles/0,7340,L-3281164,00.html> [<https://perma.cc/TZ3D-3592>].

96. CrimA 71933/06 Klagsbald v. State of Israel (Feb. 8, 2007) (Isr.). See generally *Attorney Klagsbald Drank Wine Before the Accident*, WALLA NEWS (Apr. 17, 2006), <http://news.walla.co.il/item/892275> [<https://perma.cc/Q5M7-HZF5>]; Vered Lovitz, *Klagsbald Found Guilty in Causing Death by Negligence; Family: 'He Was Drunk'*, YNET (July 6, 2006), <http://www.ynet.co.il/articles/0,7340,L-3271899,00.html> [<https://perma.cc/BK9Z-WN8Y>]; Hadas Shefer, *Perhaps Klagsbald Was Just Changing Songs on the Radio*, NRG MAARIV (July 7, 2006), <http://www.nrg.co.il/online/1/ART1/445/798.html> [<http://perma.cc/JDQ9-A7V8>].

schoolgirl, and the subsequent conviction of Roman Zadorov;⁹⁷ the case of Daniel Maoz, convicted of murdering his parents;⁹⁸ the Holy Land affair, a corruption case in which Olmert was one of the defendants and the investigative news program Kolbotek published an exposé on state's witness Shmuel Dachner (S.D.), seemingly done to undermine his credibility;⁹⁹ the case of the popular singer Eyal Golan, who was accused of sex crimes against minors and subsequently convicted of tax offenses while his father was convicted of soliciting prostitutes;¹⁰⁰ et cetera.

In some of the cases, such as those of Capt. R., Eyal Golan and Emmanuel Rosen, the extensive public reverberations of the allegations, ended in a whimper. Although many media organizations joined the condemnatory

97. CrimA 7939/10 Zadorov v. State of Israel (Dec. 23, 2015) (Isr.). The petition for a retrial was denied. Yuval Lidor, *Suspect in Tair's Murder Confesses: I Have Assaulted in the Past*, NRG MAARIV (Dec. 20, 2006), <http://www.nrg.co.il/online/1/ART1/520/397.html> [https://perma.cc/MVJ6-ZTS4]; Ahiya Raved, *Evidence Against Zadorov Published: 'A Conviction is Likely'*, YNET (Jan. 15, 2007), <http://www.ynet.co.il/articles/0,7340,L-3352495,00.html> [https://perma.cc/6EE9-9ZG3]; Eli Levy, *Zadorov Washed the Blood Off the Knife and Went Back to Work*, NRG MAARIV (Jan. 17, 2007), <http://www.nrg.co.il/online/1/ART1/532/164.html> [http://perma.cc/W6UD-AVXZ]; Yuval Lidor & Oshrat Nagar, *Zadorov confesses to Tair's murder a second time*, NRG MAARIV (Feb. 26, 2007), <http://www.nrg.co.il/online/1/ART1/548/909.html> [https://perma.cc/CPY5-KPD2]; Sharon Rofe-Ofir, *Zadorov learned from the Internet how to slit a throat*, YNET (June 17, 2007), <http://www.ynet.co.il/articles/0,7340,L-3413974,00.html> [https://perma.cc/ZF4P-NYXC].

98. See generally File No. 54877-09-11 (Jer.) State of Israel v. Maoz (July 1, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Gilad Grossman, *Allegation: Entangled in gambling debts, he killed his parents for the inheritance*, WALLA NEWS (Sept. 21, 2011), <http://news.walla.co.il/item/1862400> [https://perma.cc/JTS4-6WNG]; Yair Altman, *He killed his parents: 'He lost all the wedding money in poker games.'* YNET (Sept. 21, 2011), <http://www.ynet.co.il/articles/0,7340,L-4124866,00.html> [https://perma.cc/VZ4G-H56U]; Gilad Grossman, *Daniel Maoz's sister testifies against him: 'I thought he was involved in the murder right away.'* WALLA NEWS (Mar. 7, 2012), <http://news.walla.co.il/item/2514653> [https://perma.cc/TT8Z-NV7F].

99. See *The face of the state witness*, RESHET, <http://reshet.tv/item/news/kolbotek/season-14/episodes/video-00209703/> [https://perma.cc/YAX9-Z65K].

100. See generally Eli Senior & Gilad Morag, *Allegation against Eyal Golan: Sex with Minors at a Party*, YNET (Nov. 20, 2013), <http://www.ynet.co.il/articles/0,7340,L-4455922,00.html> [https://perma.cc/2DAK-KQDJ]; Matan Hetzroni & Azri Amram, *Golan: 'I slept with a lot of women, I have no idea who among them was a minor.'* CHANNEL 2 NEWS (Nov. 20, 2013), <http://www.mako.co.il/news-law/crime/Article-f75c0a6f9f57241004.htm> [http://perma.cc/GT7P-7AJB]; Guy Peleg, *Eyal Golan's statements to police revealed*, CHANNEL 2 NEWS (Jan. 23, 2014), <http://www.mako.co.il/news-law/crime/Article-9e0046b4f00c341004.htm>; *Golan investigation transcripts revealed*, WALLA NEWS (Jan. 24, 2014), <http://news.walla.co.il/item/2714845> [https://perma.cc/8RCG-PEFF].

chorus, either the case was closed due to insufficient evidence or the defendant was cleared of all charges.

On the other hand, at least in the *Zadorov* case, in which Roman Zadorov was convicted of murdering young Tair Rada, the media leaned towards exonerating the defendant, and the extensive media coverage may have actually produced a retrial (at the conclusion of which Zadorov was once again convicted).¹⁰¹ This result is problematic. If the Supreme Court was actually influenced to allow Zadorov a retrial by the extensive media coverage and not by the new evidence presented by the defense, then Zadorov was in fact tried by the media. Just as a person whose exoneration is justified by the evidence should be found innocent regardless of the media's position concerning the case, a person whose conviction is justified by the evidence should be found guilty regardless of the media's position of the case.¹⁰²

As the above cases demonstrate, even though the courts acknowledged the media's possible effect on the trial's outcome (to the extent of granting a retrial in the *Zadorov* case), they still declared that they personally were immune to such effects and therefore the integrity of the cases were not breached. But, this raises the question: can judges really neutralize the influence of these publications while making a judicial decision?

101. CrimA 7939/10 Zadorov v. State of Israel (Dec. 23, 2015) (Isr.). In addition to this case, there is also the Amos Barnes affair in Israel. He was convicted of murder, and after he was freed, the media played a pivotal role in the decision to retry him. Baruch Kra, *State Retracts 27-year-old Murder Charge Against Amos Baranes in Rachel Heller Case*, HAARETZ (Sept. 13, 2002), <http://www.haaretz.com/state-retracts-27-year-old-murder-charge-against-amos-baranes-in-rachel-heller-case-1.34267> [https://perma.cc/5HWX-ZE7Y]. However, the state decided not to retry him, which meant exoneration. *Id.* Similarly, Dominique Strauss-Kahn's case was another instance in which the media helped to expose the truth by raising doubts as to the reliability of the complainant. Yuval Karniel, *Who Needs the Sub Judice Rule? Israel as a Test Case in the Relationship between Law and Media*, 6 J. MEDIA L. 96, 116 (2014). Ultimately, the prosecution moved to dismiss the indictment. *Id.*

102. In this context, we must note that Karniel is of the opinion that even though media involvement might theoretically violate the sub judice prohibition, in fact it forces the justice system to follow the dictates of the law and act accordingly. Karniel, *supra* note 101, at 117. In his view, the media was responsible for revealing the truth (and convicting the guilty) in the Katsav affair. *Id.* at 112. Former President of Israel Katsav thought that only an exoneration in court could change public opinion, in whose eyes he was already guilty and in fact a serial sex offender, and according to Karniel this is why Katsav rejected the plea bargain he was offered. *Id.* The media was not satisfied with the plea bargain as an end to the affair. *Id.* Katsav's fatal error was his violent appearance on television, which lay bare the naked truth. *Id.* at 113. Instead of quieting the media firestorm, Katsav only inflamed it further. *Id.* Additional complainants decided to step forward and expose more acts (while serving as Minister of Tourism). *Id.* Karniel believes that the saturated media coverage caused Katsav to turn down the plea bargain. *Id.* Katsav believed that the media lynching committed against him would always leave him with the public image of a serial sex offender. *Id.* at 113–14. His only option to restore his image was to gamble on exoneration at the end of a full trial, a gamble which had a profound impact on his freedom. *Id.* at 114.

V. JUDICIAL PSYCHOLOGY AND PROFESSIONAL ADJUDICATION

The doctrine of sub judice protects the purity of the criminal justice system. The doctrine aims to prevent external media publications from influencing the determination of a defendant's guilt. The Israeli legislature assumes that media publications can influence a legal proceeding.¹⁰³ In the past, some have doubted this assumption,¹⁰⁴ but broad empirical literature unquestionably supports the proposition that exposure to post-factum publications can alter the memory of past events.¹⁰⁵ From the 1970s to the present day, hundreds, perhaps thousands,¹⁰⁶ of studies have unequivocally established that exposing individuals to information about a past event can influence their memories, without them being aware of it.¹⁰⁷ For example, studies focusing on jurors have found that the more exposure a given case receives in the media, the higher the chance that the jurors will prejudge the case and thus become tainted by bias.¹⁰⁸

103. See Segal, *supra* note 43, at 112.

104. See *id.* at 143–51.

105. See C.A. Morgan III et al., *Misinformation can influence memory for recently experienced, highly stressful events*, 36(1) INT'L J. L. PSYCHIATRY 7 (2013); Elizabeth F. Loftus, D. G. Miller & H. J. Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. EXP. PSYCHOL. HUM. LEARN. 19 (1978).

106. See Elizabeth F. Loftus, *Searching for the Neurobiology of the Misinformation Effect*, 12 LEARN. MEM. 1, 1 (2005).

107. For a survey of the expansive empirical literature showing how external information substantially influences the memories of eyewitnesses, see, e.g., Elizabeth F. Loftus, *Planting misinformation in the human mind: A 30-year investigation of the malleability of memory*, 12 LEARN. MEM. 361 (2005); Steblay, *supra* note 5. In particular, see C.A. Morgan, *supra* note 105, which show that even memories of traumatic events in the past can be altered subconsciously by being exposed to later information about the event. This research is relevant especially to the testimony of victims or witnesses testifying about traumatic events. Similarly, see Loftus, *supra* note 105. They prove that the more time that passes between the actual event and the exposure to erroneous information, the higher the chances that the person will remember the erroneous information as correct information. In most cases, a lot of time passes between the event's occurrence, the legal proceeding and the publication of stories about it in the media, and thus the chances grow that the witnesses will err. For a study that analyzes the neurological basis of false memory, see Yoko Okado & Craig E.L. Stark, *Neural activity during encoding predicts false memories created by misinformation*, 12 LEARN. MEM. 3 (2005).

108. See, e.g., Edmond Costantini & Joel King, *The Partial Juror: Correlates and Causes of Prejudgment*, 15 L. & SOC'Y REV. 9, 36 (1981); Krause, *supra* note 24; Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VANDERBILT L. REV. 143, 189 (2011). For a cognitive analysis of the way irrelevant information influences both judges and jurors in various circumstances, see Goldschmidt & Schul, *supra* note 46.

The media's influence upon legal proceedings may occur in one of two ways. First, witnesses' memories may be created or changed,¹⁰⁹ without the witnesses' awareness of this alteration;¹¹⁰ second, judges and other decision-makers' opinions may be influenced and shaped by these media reports. Not only are these effects very difficult to neutralize,¹¹¹ but people are seldom aware of them.¹¹² For example, if during an interview a witness reveals the content of her testimony and the interview is subsequently published, this may influence other witnesses' memory and their recollection.¹¹³ Moreover, if the presiding judge is exposed to this publication, it may influence his or her perception of the event and affect the way he or she evaluates future admissible evidence.

As mentioned above, extensive empirical literature proves that every bit of information a person is exposed to subconsciously influences every other piece of information exposed to, naturally changing the comprehensive interpretation of the event.¹¹⁴

However, most Israeli case law holds that judges are immune to the external influence of inadmissible evidence. Judges argue that professional judges, like themselves and unlike amateur jurors, have the capacity to set aside the influence of media reports.¹¹⁵ Jurists raise this argument, believing judges

109. Elizabeth F. Loftus, *The malleability of human memory*, 67 AM. SCIENTIST 312, 313 (1979); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 55, 60 (1979); Elizabeth F. Loftus, *Imagining the past*, 14 THE PSYCHOLOGIST 584, 586–87 (2001).

110. Maryanne Garry, Charles G. Manning, Elizabeth F. Loftus & Steven J. Sherman, *Imagination inflation: Imagining a childhood event inflates confidence that it occurred*, 3 PSYCHONOMIC BULL. & REV. 208, 209 (1996); Elizabeth F. Loftus & Jacqueline E. Pickrell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720, 723–24 (1995); Giuliana Mazzoni & Amina Memon, *Imagination can create false autobiographical memories*, 14 PSYCHOL. SCI. 186, 188 (2003).

111. Hedy Red Dexter, Brian L. Cutler & Gary Moran, *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity*, 22 J. OF APPLIED SOC. PSYCHOL. 819, 829–30 (1992).

112. Gary Moran & Brian L. Cutler, *The prejudicial impact of pretrial publicity*, 21 J. OF APPLIED SOC. PSYCHOL. 345, 362–63 (1991).

113. Cf. Criminal Procedure Law, 1982-5742, ¶ 172 (amended) (Isr.) (which forbids a witness from being present when another witness testifies).

114. See, e.g., CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [<https://perma.cc/5JF5-VT4A>]; CA 214/89 Avneri v. Shapira 43(3) PD 840, 851 (1989), Nevo Legal Database (by subscription, in Hebrew) (Isr.), https://www.nevo.co.il/psika_word/elyon/padi-nb-3-840-1.pdf#xml=http://www.nevo.co.il/Handlers/Highlighter/PdfHighlighter.ashx?index=0&type=Main [<https://perma.cc/LM66-T3DV>]; CA 407/54 Bayit Meshutaf 3 v. Lampert, 10 PD 1104, 1107 (1956) (Isr.). See also Helen M. Paterson & Richard I. Kemp, *Comparing Methods of Encountering Post-event Information: The Power of Co-witness Suggestion*, 20 APPL. COGNIT. PSYCHOL. 1083, 1083 (2006).

115. Segal, *supra* note 43, at 143–48 and the references cited therein.

have the ability to overcome the influence of media reports due to their “legal education and [. . .] by way of their judicial service.”¹¹⁶

This argument is problematic and lacks empirical evidence. Research on psychological biases of judges demonstrates that judges are generally unsuccessful in neutralizing the influence of outside media reports.¹¹⁷ Moreover, research has demonstrated the effects of exposure to media reports on human memory in many varied segments of the population.¹¹⁸ Empirical research shows that exposure to misleading data leads to errors, at varying levels, among all people,¹¹⁹ regardless of the fact that such influence is forbidden.¹²⁰ Therefore, the burden of empirically proving that judges can

116. *Id.* at 146.

117. *See, e.g.*, Birte Englich, Thomas Mussweiler & Fritz Strack, *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188 (2006); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Jeffrey J. Rachlinski, L.H. Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); Goldschmidt & Goldschmidt & Schul, *supra* note 46, at 86–89.

118. *See* Loftus, *Planting misinformation*, *supra* note 107, at 362–63.

119. *See, e.g.* CA 409/13 Keshet Broadcasting v. Cooper (Apr. 11, 2013) (unpublished), Nevo Legal Database (by subscription, in Hebrew) (Isr.), <http://elyon1.court.gov.il/files/13/090/004/s05/13004090.s05.pdf> [<https://perma.cc/5JF5-VT4A>]. For a survey of studies showing that even the memories of infants and non-human biological species may be influenced by later erroneous information, see Loftus, *Planting misinformation*, *supra* note 107, at 362–63. In addition to the abovementioned, it is worth noting that there are factors that make the judges relatively susceptible to the possibility of being influenced by exposure to later erroneous information. For example, as time passes between the true and erroneous information, the odds increase that the person will be confused between true and erroneous information, and the erroneous information may be remembered as true. Phillip A. Higham, *Believing details known to have been suggested*, 89 BRIT. J. PSYCHOL. 265, 265 (1998). First, in most circumstances (particularly in major cases), judges write their opinions long after the information has been publicized in the media, and thus the chances that media reports will influence their memory increase. Second, in Israel, most judges are in their sixties or seventies. Age is significant on this issue because memory begins to fade when someone gets older; thus an older judge is more likely to falsely “remember” erroneous information and believe it as accurate. *See* Mara E. Karpel, William J. Hoyer & Michael P. Toggia, *Accuracy and Qualities of Real and Suggested Memories: Nonspecific Age Differences*, 56 J. GERONTOL. PSYCHOL. SCI. 103, 103, 107–08 (2001). For the similarities among judges and other people, in the context of Israel, see Issi Rosen-Zvi, *Are Judges Human? The Construction of the Image of the Professional Judge in Light of Judicial Disqualification Rules*, 8 MISHPAT UMIMSHAL 49, 82–84 (2005), and the many references cited therein.

120. The odds of being misled by erroneous information may be reduced if the individual is warned *before* being exposed to the information that it may be misleading. *See* Edith

neutralize the subconscious effects of exposure to media reports on their decision, and that it is not simply the whim of jurists to see their colleagues as superior and beyond reproach, lies upon those who embrace this claim. Barring any empirical evidence showing significant distinction between judges and jurors, it is exceedingly problematic to rely on this claim.

Moreover, judges themselves have expressed the view that they are not better than their fellow human beings and are equally susceptible to influential information. For example, former Justice (later President of the Supreme Court) Aharon Barak stated in the *Azoulay* case that *even professional judges are mere flesh-and-blood human beings* likely to be influenced by the nature of the (biased) coverage in the press:

The judge, despite her ethics and propriety, despite the spine and fundamental principles which shape her judgment, *remains, at the end of the day, a human being. This is both her strength and her weakness. This is the reality, and it must be observed with eyes wide open. Therefore, we must recognize the reasonable possibility that a professional judge may be influenced.*¹²¹

President of the Israeli Press Council and former Supreme Court Justice, Dalia Dorner, shares this view that the media has a subconscious influence on a judge's reasoning:

*I am confident that a judge has courage and fortitude, but the subconscious influence of the media on judges nevertheless gets under the judges' skin. Therefore the press must limit themselves of their own volition.*¹²²

We give the final word to American Judge Richard Posner (Seventh Circuit Court of Appeals) who eloquently describes in his book the issue of influencing judges:

Through self-awareness and discipline, a judge can learn not to allow his sympathies or antipathies to influence his judicial votes—unduly. But the qualification in “unduly” needs to be emphasized. *Many judges would say that nothing “outside the law,”* in the narrow sense that confines the word to the texts of formal legal documents, *influences their judicial votes at all. Some of them are speaking for*

Greene, M.S. Flynn & E.F. Loftus, *Inducing Resistance to Misleading Information*, 21 J. VERBAL LEARN. VERBAL BEHAV. 207, 208 (1982). Therefore, in situations in which the judge is aware of exposure to evidence that may be inadmissible (e.g., confidential evidence or late evidence), the odds of being influenced by invalid evidence is relatively small in practice. However, the odds are high that a judge may be exposed to media reports (television, internet, newspapers, etc.) characterized by Section 71 of the Courts Law at least in part, before the judge realize the information relates to a pending case, and thus the judge cannot prepare themselves ahead of time, but only ex post facto. Cf. CA. 844/06 Zvi Bialostotsky v. Bank of Jerusalem, 6 (Nov. 26, 2007), Nevo Legal Database (by subscription, in Hebrew) (Isr.). Since this warning is not effective, the chance of being misled increases.

121. CA 3203/91Azoulay v. Azoulay, Nevo Legal Database (by subscription, in Hebrew) (Isr.).

122. Ruti Avraham, *How Does the Media Influence Judges?*, ARUTZ SHEVA (Israel National News) (Dec. 25, 2006, 2:06 PM), <http://www.inn.co.il/News/News.aspx/157695>.

*public consumption, and know better. Those who are speaking sincerely are fooling themselves.*¹²³

VI. EVALUATING ISRAELI RULINGS

Our criminal system is designed so the police investigates; the district or state attorney prosecutes; and the judges decide cases after the defendant has had his day in court represented by a defense attorney who seeks to protect the defendant's rights during the process. This process is quite different than investigative journalism.

Investigative journalism is a troubling phenomenon. The reporter is the investigator, the judge, the jury, and the executioner, and the verdict is carried out publicly. Is the media performing its role responsibly? Or has the desire for high ratings motivated the press to conduct a drumhead court-martial, making it so that the public finds the accused guilty, even though the matter is still pending before the court? Is not every person, even one suspected of a crime, entitled on the basis of human dignity to present their case before the court, and only there? This concern becomes even more acute in a case, such as *Cooper*, where the prosecutor (the State of Israel) and the prosecuted (Shimon Cooper) share the common view: broadcasting interviews with key prosecution witnesses in an investigative news program is likely to influence justice.

Our criticism of Israeli case law in this Article is based on the principle of "criminal decision-making strategy."¹²⁴ The principle of this view establishes that every critical juncture of a criminal trial, and even beyond it, both at the legislative and the judicial level must take into account the possibility that decisions will increase the risk of convicting the innocent. The criminal decision-making strategy must be a guiding principle for shaping both laws and judicial decisions.

123. RICHARD A. POSNER, REFLECTIONS ON JUDGING 130 (2013).

124. Doron Menashe, *Judicial Discretion in Fact-Finding, Freedom of Proof, and Professionalism of the Courts*, 43 HAPRAKLIT: ISR. B. L. REV. 83, 90–91, 114, 122–26 (1993) (Isr.); Doron Menashe, *The Ideal of Finding Truth and the Principle of Minimizing False Convictions: An Analysis of a Complex Relations*, 1 KIRYAT MISHPAT 307, 307–11 (2001) (Isr.); see generally DORON MENASHE, THE LOGIC OF ADMISSIBILITY OF EVIDENCE (The Magnes Press & the University of Haifa Press, 2009) (Isr.); ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 172–77 (2005). But see LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY ON LEGAL EPISTEMOLOGY 36–38, 215–16 (2006). For analysis of the different approaches of Stein and Laudan, see Ronald J. Allen, *Laudan, Stein, and the Limits of Theorizing About Juridical Proof*, 29 L. & PHIL. 195, 195–230 (2010) (book review).

Therefore, once such a risk-increasing junction has been identified, the legislature and judges have the obligation to reduce the risk of wrongful conviction even by limiting free speech if necessary. Although the social value of allowing publication is very high, the attorney general will generally not dismiss an indictment and exonerate an offender in order to allow the publication. If the publication cannot justify the social cost incurred by exonerating a defendant who may be guilty, it surely cannot justify the far heavier and more undesirable social cost of possibly convicting an innocent person.

Moreover, courts must consider the jurisprudential aspect involved in the risk of a wrongful conviction as part of the larger principle of protecting the innocent, which is based on the universal idea of presumption of innocence. The presumption of innocence recognizes the human tendency to prejudge; however, the guilt or innocence of the accused should be determined only by judicial discretion (ignoring any media coverage which may produce a premature verdict). In our view, judicial discretion also requires the court to actively assume that every criminal defendant is presumed innocent. Therefore, judicial discretion requires reducing the risks of wrongful conviction (without precluding the possibility of finding the defendant guilty; the defendant has a presumption of innocence, not sweeping immunity preventing conviction in a criminal case).

The principle of protecting the innocent may also be achieved by logically broadening the standard of proof in criminal law, in such a way to create broad margins of protection against wrongful conviction. According to this approach, the limitation of the “beyond a reasonable doubt” standard, applied only to determining the guilt or innocence of the defendant, is likely to preclude the application of the values undergirding this standard. It is evident that applying the standard narrowly may turn out to be “too little” or “too late” in terms of protecting the innocent from the risk of false conviction that criminal proceedings and the various procedural and evidential rules are liable to create.

Therefore, in our view, courts must first and foremost take into account *the risk of wrongfully convicting the innocent* when interpreting the criminal norm stipulated in Section 71 of the Courts Act. The purpose of Section 71 is to protect the *independence, self-sufficiency and freedom* of the judicial branch from all external influence or prejudice. The protection that this criminal standard provides to the judicial proceeding includes protection against invalid influence or negative bias that could cause the court to convict defendants who would otherwise have been exonerated. *Preventing wrongful conviction* is the central aim of the sub judge rule, which the court must certainly make its guiding light.

In our view, whenever there is a genuine concern of potential influence upon witnesses at trial, as in the *Cooper* case, there is no convincing counter-

argument and publication should be banned. Even if one accepts the claim that judicial professionalism suffices to ignore the “background noise” and the judicial proceeding can continue without becoming “contaminated” (an assertion that we do not accept), the situation is completely different when it comes to influencing witnesses.

Exposing witnesses to information which might influence their memories and decision-making, cannot be disregarded as they are not bound by judicial professionalism. In other words, even if a professional judge may justify the non-restraint of sub judice publications, this theory does not appease the concern of impermissible influence on witnesses, who are “the weak link” in the chain of determining facts in judicial proceedings.¹²⁵ Publicizing essential facts during the preliminary stage of a criminal proceeding (before the trial begins) may dissuade witnesses from testifying at all. It could also “refresh” their memories of the events, so that their testimony is not based on what they personally saw or heard, but rather on what was planted in their heads. This may impact the determination of verifiable facts at trial, thereby damaging the entire judicial proceeding.

Based on the “criminal decision-making strategy” viewpoint and the fear of wrongfully convicting the innocent, the most fitting test for sub judice violations should be the *reasonable possibility test*. This test is not predicated on cardinal probability, but rather on a comparative one. For that sake that it is enough that there exists a scenario in which the publication having an impermissible influence on the trial outcome and such scenario is more probable or at least not less probable than the other scenarios

This test refers to the possible sequence of events based on human judgment, as opposed to a pure speculation or general hypotheses, which are in principle both irrefutable, that the defendant would be convicted due to the publication having an impermissible influence on the presiding judge or the witnesses that are to testify at trial. Whenever such a possibility exists, there is reason to prevent the publication, regardless of any connection to the expression under discussion.

If publication is essential, the prosecution can proceed with publication if it exonerates the defendant. If the prosecution does not do so and is prepared to give up the right to freedom of speech (e.g. choose to pass on the publication

125. Segal, *supra* note 43, at 143–48; *see also* CrimA 126/62 Disenchik v. Attorney General, 17 PD 169, 175, 181–82 (1963) (Isr.), https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\62\260\001\Z01&fileName=62001260_Z01.txt&type=4 [<https://perma.cc/7VCU-F8JJ>].

or broadcast), then the criminal prosecution admits it would rather avoid exonerating an offender over exercising the right to freedom of speech. However, if freedom of speech does not justify the cost of exonerating an offender, how could it possibly justify the price of wrongfully convicting the innocent?

Moreover, supporting the reasonable-possibility test is crucial, at least in cases in which there is a possibility of influencing witnesses. The risk of such influence is what motivated Justice Yoel Sussman in the *Disenchik* case,¹²⁶ the first case to enforce the sub judice violation in Israel. In *Disenchik*, a murder case, the defense attorney pled “not guilty” to the judge’s question before the defendant could plead for himself. The next day, the Maariv newspaper published an article reporting that the defendant had confessed to the reporter before the trial, but this confession was not binding. The magistrate’s court exonerated the defendants (the reporter and his editor), but the district court accepted the state’s appeal and convicted them for sub judice. The Supreme Court affirmed.

The main justification for the conviction was that the publication would likely influence witnesses’ testimonies at trial because the evidence would be eyewitness identification. On the one hand, publishing the defendant’s confession was likely to strengthen the confidence of the eyewitness that the defendant was the one who shot the victim. However, on the other hand, an eyewitness who would have testified on the defendant’s behalf would likely be dissuaded from testifying after reading in the newspaper that the defendant had already confessed to committing the charged offense. Additionally, in the *Cooper* case, publishing a series of interviews with central witnesses before testimony had been heard in court, was likely to influence the other witnesses’ memories (even if unconsciously), as that their testimony would mold to become closer to the versions presented on television.

In the *Disenchik* case, Justice Sussman ruled that the publication of the confession made to the reporter would likely influence the witnesses who were supposed to testify at trial.

However, Judge Sussman avoided ruling on whether the article had the potential of influencing the judges. Justice Sussman was ready to assume for the benefit of the appellants that an Israeli court—as it is composed of professional judges, unlike the Anglo-American system, in which non-professional jurors determine the facts—is not as susceptible to external influences. Additionally, professional judges can ignore news reports, just as they ignore inadmissible evidence that they may sometimes come across. However, Judge Sussman expressed reservations, noting that even professional

126. CrimA 126/62 *Disenchik v. Attorney General*, 17 PD 169 (1963) (Isr.), https://supreme.decisions.court.gov.il/Home/Download?path=EnglishVerdicts\62\260\001\Z01&fileName=62001260_Z01.txt&type=4 [<https://perma.cc/7VCU-F8JJ>].

judges may be susceptible to external influences (mainly when it comes to weighing evidence), as even the court itself is not an “automatic” judging mechanism.¹²⁷

In contrast, Justice Zvi Berenzon, with whom Justice Moshe Landau concurred, stressed the danger of influencing judges. When such a report is published, it necessarily penetrates the consciousness of every reader, even if that reader is a professional judge presiding over the case, it still forms a belief of whether the defendant is guilty. Even professional judges are only flesh and blood, and they are likely to be unduly influenced, even if only subconsciously. Therefore, such a publication may cause the verdict to be based, in part, on forbidden external influences rather than on legitimate evidence.¹²⁸

The concern of impermissible influence on trial witnesses also arose in the *Haim Ramon* case, which dealt with a former justice minister convicted of forcibly kissing a female soldier. The court held:

We cannot conclude this trial without relating to the media. In our view, every red line has been crossed in this case, sub judice dragged to depths never seen previously. The content of testimonies was published by the media before the witnesses had testified, and thus we learned, in a number of cases, that the testimony was contaminated. The prohibition against publishing the complainant’s testimony was brazenly violated by a word-by-word report of the confrontation, which was an integral part of the testimony. Evidence from the case, including photographs, were publicly disseminated, before the court could rule. The various media made perverse use of polygraph tests for the final three defense witnesses, in an attempt to create in the public the feeling that the trial was taking place in the media and not in the courthouse. Our feeling was that attempts were made, sometimes through hidden messages and sometimes openly, to pervert justice. We disregarded this. We judges have only the dictate of our conscience, and that alone is what directs us.¹²⁹

We cannot conclude this chapter without noting the research of Professor Daniel Kahneman, Nobel Prize winner in Economics, regarding cognitive biases and judicial verdicts.¹³⁰ Kahneman’s research supports the general conclusion that judges are in fact flesh and blood, sensitive to external

127. *Id.* at 175.

128. *Id.* at 183–88.

129. CrimA 5461/06 State of Israel v. Ramon (Jan. 31, 2007), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (news coverage influences murder case).

130. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974); *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman et al. eds., Cambridge Univ. Press 1982); KAHNEMAN DANIEL, THINKING FAST AND SLOW, (Farber et al. eds., 2011).

influence more than they think or are aware (or are ready to admit).¹³¹ According to Kahneman, the danger of influence increases among those who consider themselves professional judges, unsusceptible to external influence. Supreme effort is required to evince doubt and sweep away a fact which one wishes to ignore. Those who believe that no such effort is necessary are those most likely to be influenced by such a fact.

VII. A NEW MODEL

In this Article, we reviewed the sub judice rule, its history, and the problems judges face when deciding whether, and to what extent, to grant a gag order. We examined several models that could mitigate external influences; yet in our view, none offers a satisfactory and enforceable solution.

Determining what attitude to adopt with regard to investigative journalism concerning criminal cases requires balancing between two competing values. On the one hand, modern democratic society has an interest in investigative journalism regarding criminal matters that exposes the oversights of the police, prosecution, and courts. Such journalism is an essential part of democracy. On the other hand, media articles related to pending criminal cases raise serious fears of perverting criminal justice, either because the media reports subconsciously prejudice the judges, or because they influence witnesses' memories and testimonies.

This problem has troubled many legal systems in the past few decades. An ocean separates the views of the United Kingdom and the United States. The U.K. stresses the danger of undermining justice, and is prepared, for the sake of purity of the judicial process, to restrain the media significantly, while the U.S. believes free speech is more highly valued as a basic freedom, even if it increases the danger of "trial by media." Either way, no one disputes the media's major influence over public opinion and (indirectly) the courts as well.

Israeli jurisprudence forbids publishing anything that tends to influence a criminal proceeding. However, this legislation is not implemented in practice and thus remains a dead letter. In turn, the current state of affairs does not protect criminal proceedings as the legislature intended. Nevertheless, sub judice remains an important tool in reducing the risk of wrongful convictions. The recent calls to strike down Section 71 of the Courts Law¹³²

131. Hemi Bin-Nun, Cognitive biases and judicial decisions: systematic thinking and intuition in the judge's work, 5 SHA'AREI MISHPAT 177, 179–80 (5770-2010).

132. Israeli Supreme Court Justice Esther Hayut stressed at a conference on the theme of "Litigation, Media and Practicality" that sub judice should perhaps be discarded due to its becoming a "dead letter." Yuval Yoaz, *Hayut: 'The sub judice prohibition has become a dead letter; we should consider eliminating it,'* GLOBES (July 8, 2013, 2:33 PM), www.globes.co.il/news/article.aspx?did=1000860316 [<https://perma.cc/E7BL-GQUW>]

are without merit, and they demonstrate indifference to the danger of wrongful convictions. Moreover, abolishing the doctrine of sub judice may invalidate a vital, essential tool that allows courts to deal with the troubling phenomenon of a trial by media.

In order to prevent wrongful convictions, we must prevent the prejudices of sub judice publications from taking place in the first place, and craft appropriate regulation that would better protect the judicial proceeding from forbidden external influences. Once the Attorney General applies the sub judice prohibition effectively and consistently, the media will educate itself about the dangers of sub judice publication, and the difficulties of enforcement will naturally be lessened. Indeed, enforcing this law and maintaining the purity of the criminal law process is not simple. However, lack of enforcement of the sub judice rule in the criminal sphere, in and of itself, does not compel the conclusion that the doctrine should be removed from the Israeli corpus of law; instead, it may simply call for greater enforcement.

The only issue that must be addressed is the proper balance between freedom of speech and the need to guarantee *that the defendant's fate will be decided within the walls of the courthouse and nowhere else*. Therefore, in our view, Judge Ginat was correct in the holding of the *Cooper* case:

The appropriate place to determine the defendant's guilt is only in the criminal courthouse. Creating another forum in which some of the evidence will be presented, in a dramatic, attractive fashion impinges, without a doubt, on the capacity of the defendant and on the capacity of the prosecutor to present the issues in a full way, pursuant to the rules of evidence in a criminal court.¹³³

However, given the need to protect freedom of expression and the desire to create a clear rule, we suggest a new type of sub judice rule. We suggest shifting away from the probability test (deciding the probability and extent of a publication's effect on a criminal proceeding), and instead focus on the content of a publication.

Today, the central question that must be decided in prosecuting sub judice is whether it is near-certainty or reasonable possibility that the press will

("Must we arraign every day? Must we renew the enforcement? There really is nothing to restore, since enforcement never existed. We always approached enforcement on tiptoe. I am not confident that we must keep this criminal standard. I have my thoughts about this matter, and we need to reconsider it.")

133. CA 409/13Cooper v. Keshet Broadcasting Ltd. 1, 8–9 (Apr. 1, 2013) Nevo Legal Database (by subscription, in Hebrew) (Isr.), <https://www.law.co.il/media/computer-law/keshet1.pdf> [<https://perma.cc/5Z6S-PDEY>].

have a hard time deciding in advance how the prosecution and the court will view the intended publication. Therefore, in our view, it may be beneficial to approach this topic differently by utilizing another judicial test, one which analyzes the content of the publication without determining the probability of its effect on the pending criminal proceeding.

We suggest adopting a new, revolutionary restricted model that prohibits two kinds of publications determined to arouse real concern regarding witness testimony as well as likelihood of judicial error (even if the judge is a professional one): (A) publications of admissible or inadmissible evidence related to the offense before it has been presented in court;¹³⁴ and (B) publications of interviews with litigants or witnesses scheduled to testify at trial.¹³⁵

We believe that by converting the general prohibition to a defined prohibition of specific publications, chances of enforcing this rule will increase, thus preventing the current situation, in which the existing criminal prohibition rule is not enforced and the accused are at risk of wrongful convictions. The chance of maintaining a criminal prohibition, in its confined form, will prevent trial-by-media and guarantee the interest of the accused without impinging unnecessarily on freedom of expression or freedom of the press.

134. *See* Guidelines of the Attorney General (Guidelines for Plaintiffs on the Prosecution of the Sub Judge Offense), 5762-2002, Directive No. 51.051, A(3) 2 (Isr.) (“Publishing evidence inadmissible in court.”).

135. *See* Historical Guidelines of the Attorney General Criminal Law (Instructions to Plaintiffs Regarding the Prosecution of Sub Judge), 5752-1992, Directive No. 51.051, 2(3) (repealed 2003) (Isr.) [<https://perma.cc/X9B9-LEWR>] (“Publishing an interview with litigants or witnesses supposed to testify at trial, or publishing the accounts of these individuals, not including publishing in good faith something which was stated or which occurred in a public session of the court.”).