

University of Miami Law Review

Volume 56

Number 2 *Symposium on the Role of a Free
Press and Freedom of Expression in the
Development and Consolidation of
Democracies in Latin America*

Article 2

1-1-2002

The Role of a Free Press and Freedom of Expression in Developing Democracies

Irwin P. Stotzky

University of Miami School of Law, istotzky@law.miami.edu

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

Irwin P. Stotzky, *The Role of a Free Press and Freedom of Expression in Developing Democracies*, 56 U.
Miami L. Rev. 255 (2002)

Available at: <https://repository.law.miami.edu/umlr/vol56/iss2/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

SYMPOSIUM ON THE ROLE OF A FREE PRESS AND FREEDOM OF EXPRESSION IN THE DEVELOPMENT AND CONSOLIDATION OF DEMOCRACIES IN LATIN AMERICA

The Role of a Free Press and Freedom of Expression in Developing Democracies

IRWIN P. STOTZKY*

Democracy is an experiment in collective self-governance in which the sovereign power resides in the people as a whole and is exercised either directly by them (as in some small republics of antiquity) or by their representatives, usually officials elected by them. In modern societies, of course, elected officials generally exercise this power in the name of the people. That means, among other things, that the state must be responsive to the needs, desires, and interests of the people.

A real democracy means much more than the holding of periodic elections and representative government, however. Indeed, democracy often more vaguely denotes a social state in which all of the people have equal rights without hereditary or arbitrary differences of rank or privilege. The social and economic conditions that support a well-functioning democracy are extremely complex, but few formal institutional conditions are necessary to label a state as democratic. To put it another

* Professor of Law and Director, Center for the Study of Human Rights, University of Miami School of Law. © Copyright 2002. Irwin P. Stotzky. Jennifer Christianson deserves special recognition for her work in organizing the students to aid the speakers during the conference, for her excellent work in helping to edit the articles, and for her efficient research. Jennifer Sova also deserves special recognition for her excellent editing of the articles and for her efficient research. I am very grateful for the excellent research assistance by Ellen Ross.

way, there are thinner and thicker versions of democracy. These minimally required institutional structures include the popular election of government representatives by universal suffrage, in districts of approximately equal population for limited terms, to institutions that allow the representatives to govern effectively, and freedom of the press, expression, communication, and association. These institutional arrangements and conditions, however, require a multitude of ancillary rights. Any conclusions about what those rights may be, of course, are open to informed debate, a debate which must necessarily include an analysis of theoretical issues of the most complicated kind.

A slightly thicker version of democracy requires an environment of personal security for people to pursue their desires and their professions, to move about freely, and to explore new ideas and modes of living. Perhaps an even thicker version of democracy also means, among other things, the building of vibrant institutions of justice and law and the full blooming of civil society.¹ A truly vibrant democracy suggests an opportunity and an ability for the people to create and participate in a broad range of political parties, an engaged and highly competent and independent media, independent labor unions, and nongovernmental organizations, such as women's groups, all of which encourage political and social participation.

There is, of course, even more complexity to the concept.² Democ-

1. For an intriguing discussion of the relationship of civil society to democracy, see Stanley N. Katz, *Constitutionalism and Civil Society*, The Jefferson Lecture, University of California at Berkeley (Apr. 25, 2000) (unpublished manuscript on file with author).

2. In most, if not all nations that are moving from authoritarianism to democracy, there is a union between constitutionalism and democracy. This linkage forms a system of government generally referred to as "constitutional democracy." There are, however, tensions between the two concepts. These tensions arise when the expansion of democracy weakens constitutionalism, or when the strengthening of the constitutional ideal restrains the democratic process. In my opinion, the relationship between democracy and constitutionalism depends most importantly on the interpretation of constitutionalism. Even though the constitutional ideal has been quite successful, the ideal itself remains somewhat vague and mysterious. In general, almost all theorists agree that the term means some form of limited government, but the word has a range of meanings that vary in their conceptual thickness and lead to different interpretive schemes. Two contrasting views of constitutionalism demonstrate the point. The first, a truly Enlightenment account, is strongly based in Lockean individualism. This account leads to a highly formalistic view that relies principally on the structural features of constitutional documents. See, e.g., Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, & Steven C. Wheatley eds., 1993). The second tends to regard the constitutionalism of a particular society as a dynamic process, rooted in underlying, local social realities. See, e.g., H. W. O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, & Steven C. Wheatley eds., 1993). Despite the apparent incompatibility of these contrasting views, they tend to intersect analytically.

racy is not simply a descriptive concept whose institutions can clearly and easily be factually identified. It is largely a normative concept, which must necessarily be justified by moral theory. What democracy is cannot be separated from what it ought to be. The normative inquiry is inevitable and is clearly demonstrated by the conflicts and tensions within the distinctive institutions of democracy. As suggested above, a series of questions can be asked that raise the normative issue. For example, to raise only a few of a multitude of possible questions, can democracy be defined as simply a system of representation or is that system merely a substitute for direct participatory democracy that is made almost impossible by the size and complexity of modern societies? Is it the recognition of a bill of rights as the outer limit to majoritarian decisions enforced by the highest court in the land? Is democracy compatible with the absolute sovereignty of parliament? Are political parties necessary ingredients to a democracy?

This inevitable normative inquiry makes it impossible, without serious analysis of justificatory theories of democracy, to identify and adopt what can be termed appropriate democratic institutions. The wide range of institutions democracy suggests as valid will necessarily depend upon the validity of the particular theory used to justify it. Thus, in a sense, democracy is a social practice, consisting of regular conduct and predictable attitudes. These practices make up institutions that are oriented toward a certain value or goal. People cannot participate thoughtfully in the practice if they do not adopt an interpretive attitude,³ putting the conduct or attitude in line with certain goals or values. The practice can be made compatible with different goals or values—though not with any one that may be suggested—and so one must select the best justified one. Once this happens, the interpretation of the practice in relation to that value may simply result in a confirmation of the very value selected.

This is not to suggest, however, that all of democracy's characteristics are essential. Indeed, some are contingent and revocable. Nevertheless, one cannot begin to decide which institutional design is best for securing subjective or more importantly objective legitimacy and thus stability for democratic institutions, without articulating a well-developed theory that examines and explains the essential elements that make democracy so valuable.

There is, however, a serious problem with the worldwide democratic movement that has taken place in the past three decades. Many of those who are involved in this democratic revolution seem uninterested

3. Ronald Dworkin argues in favor of the idea that democracy must be normatively conceived by claiming that characterizing a certain practice necessarily requires one to have an interpretative attitude toward that very practice. RONALD DWORIN, *LAW'S EMPIRE* 66 (1986).

in engaging in any serious analysis of its validity. Indeed, the process of stabilizing and consolidating democracies has attracted many international, national, and local figures—lawyers, political actors, and common citizens. They clearly possess the necessary skills and dedication to make the dream of moving from authoritarian regimes to democratic ones a reality. At the same time, however, many of those who have become intimately involved in the transition and consolidation process approach the task in a very narrow manner. They are essentially concerned with stabilizing the democracy, but largely uninterested in justifying it. They simply assume it is the best political system and do not see the need for articulating its normative bases. This is a dangerous position to espouse because, as I have indicated, democracy itself is a normative concept and cannot be developed and preserved without analyzing the values that justify its institutions. The factors that make democracy the best political system are relevant in determining the best means for its preservation. It is clear that we simply cannot determine which institutions and which policies are essential, and which are not, in relation to democracy without a moral theory justifying the concept.

Fortunately, there exists a plethora of writings on the concept of democracy. Political philosophers, political scientists, and constitutional lawyers, among others, have for many years attempted to articulate convincing conceptions of this system of government. Moreover, the wave of democratization that swept over Latin America in the 1980s and Eastern Europe and parts of the Caribbean in the 1990s, has revived the study of these theories and conceptions. Hunger for a convincing set of reasons for creating and perpetuating democracies has prompted the academy to respond with new writings and reviews of older works on the subject.⁴ Discussion, analysis, and debate about these theories are crucial for creating the conditions and justifying the institutional reforms, on both a macro and micro level, that may help turn the prom-

4. There has been renewed interest in authors such as Joseph Schumpeter, who, by contrasting an elitist conception of democracy with the classical one, has given various explanations for the United States political system. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1976). In a similar way, Robert Dahl gives explanatory prominence to the conception of democracy as a "poliarchy" over the populist and Madisonian models of democracy. ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956). In another view, Anthony Downs describes an economic theory. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957). As opposed to these, which I will generally label "pluralist" views, scholars such as Crawford B. MacPherson argue for a model of participatory democracy. CRAWFORD B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* (1977). In this camp, Jürgen Habermas defends a democratic system that takes as its model a process of ideal communication. JÜRGEN HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (1979). In a slightly different guise, Bruce Ackerman seeks to put forth a unique outlook, which he labels "dualist," placing it in opposition to two other views of democracy that he terms "monist" and "fundamentalist." BRUCE ACKERMAN, *WE THE PEOPLE* (1991).

ise of a democracy into a reality. The September 11, 2001 bombing of the World Trade Center and the subsequent legal and political response in the United States and in other nations world-wide, in the "war against terrorism," has made it even more urgent and prudent to analyze what democracy means, even in a well-established and mature one.

Justificatory conceptions of democracy in the marketplace of philosophical ideas consist of two prominent families: those conceptions which justify democracy regardless of how it transforms people's interests and preferences, and those which depend on the transformation itself to assign value to democracy. The first category of theories starts from the assumption that the value of democracy is not tied to the transformation of people's self-centered interests or preferences nor tied to discouraging the association of people into different groups and corporations in order to further their self-interested goals in the political sphere. That value lies instead in providing mechanisms in which the pursuance of the extant preferences and interests of individuals and their group affiliations work for the common good. For example, proponents of these views mean to protect people's liberties by creating mechanisms to insure that these groups do not monopolize power. Examples of this first family of theories include, among others, utilitarianism,⁵ and its variant, classical economic analysis,⁶ elitism,⁷ pluralism,⁸ and consensualism.⁹ Proponents of these theories do not view democracy as transformative of interests and preferences, but simply accept these interests and preferences and leave them undisturbed, as found.

In general, this family of theories is defective because it disregards the difference between personal and impersonal preferences, treating the latter in a way that is only appropriate for the former. Personal preferences endorse things that enhance the life or the well-being of the agent. They can be the object of actions which aim at their aggregate satisfaction, without determining their respective validity. Preferences for states

5. Utilitarianism evaluates actions and institutions according to their consequences for a certain intrinsic good. There are several varieties of utilitarianism according to the nature of that intrinsic good. In light of the fact that pleasure cannot exhaust the whole good, the most favored modern view of utilitarianism identifies the good in relation to the satisfaction of preferences and the subjective interests of people, whatever their content. For an idealistic view that identifies the good with respect for certain rights, see Thomas Scanlon, *Rights, Goals, and Fairness, in PUBLIC AND PRIVATE MORALITY* (S. Hampshire ed., 1978).

6. See, e.g., ANTHONY DOWNS, *AN ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

7. See, e.g., Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* (H. A. Gerth & C. Wright Mills trans., 1958); JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1976).

8. See, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); ROBERT A. DAHL, *DEMOCRACY, LIBERTY, AND EQUALITY* (1986); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989).

9. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

of affairs which are supposedly valuable from an impersonal point of view—such as equality of opportunity and the abolition of institutions of slavery—are not deemed to be satisfied in an aggregative way. They are adopted or rejected as the basis for action only after their validity is determined. Democratic theories that oppose the marketplace rely on contesting and determining the validity of impersonal preferences.

The second family of justificatory theories assigns value to democracy based on a processing of preferences. It relies on the power of democracy to transform people's original self-interested preferences into more altruistic and impartial ones. These conceptions do not separate politics from morality. Instead, proponents of these views acknowledge that politics involves moral inclinations, moral judgments, and moral responsibilities. This family of theories includes, among others, popular sovereignty,¹⁰ perfectionist theories,¹¹ and dialogic approaches.¹²

These two families of justificatory theories can be classified as pure. They either consider all preferences of people to be outside the political sphere or subject all these preferences to possible transformation through the process of democracy. I would be remiss, however, without mentioning a third vision of democracy. There are mixed views that appear to distinguish conditions under which the preferences of people are either left to themselves or subject to transformation. For example, while the Federalists adopted a pluralist conception about the neutralization of factions through the division of powers and representation, it also relied on the merits of civic virtue and dialogue in relation to the representatives themselves. Thus, to this Madisonian Federalist conception, dialogue was an essential, even perhaps the essential aspect of representative government. The Federalists assumed, however, that it would be unrealistic and even pernicious to rely on the entire community's political involvement in a dialogic way.¹³

The view I endorse, which is a subset of the second family of justifications and can perhaps more accurately be classified as a mixed view, relies on the power of democracy to transform people's selfish preferences and assumes that the mechanism for turning these preferences into less partial ones is that of collective deliberation. Thus, democracy may transform individuals' selfish preferences into less partial ones through dialogue. I depart from this subset of established views of democracy,

10. See, e.g., Jean-Jacques Rousseau, *The Social Contract*, in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU* (Sir Earnest Barker ed., 1962).

11. See, e.g., John Stuart Mill, *Considerations on Representative Government*, in *THREE ESSAYS ON LIBERTY; REPRESENTATIVE GOVERNMENT; THE SUBJECTION OF WOMEN* (1975).

12. See, e.g., Bruce Ackerman, *Why Dialogue*, 86 J. OF PHIL. 5 (1989).

13. See, e.g., Cass Sunstein, *Interest Groups in American Public Life*, 38 STAN. L. REV. 29 (1985).

however, by adding that the consensus achieved through collective deliberation has value in itself because it provides reasons for believing that the solution endorsed by that consensus agrees with what is prescribed by valid moral principles which, in turn, provide us with autonomous reasons to act. The deliberative conception of democracy which I defend asserts that when democracy is seen as a process of collective deliberation and majoritarian decision-making, there is an intrinsic relationship between democratic politics, the law that results from it, and morality.

As the voluminous literature about these theories suggest, however, a major, if not the major value underlying almost every conception of democratic theory, is human dignity. By their very nature, people are worthy of respect and must therefore enjoy a large degree of autonomy. Moreover, this status is principally attainable in the modern world by the people being able to share in the governance of their society. Autonomy consists of the exercise of self-governing capacities, such as the capacities of understanding, imagining, reasoning, valuing, and desiring. Free persons have, and are recognized as having, such capacities. In a political order dedicated to securing the conditions of free deliberation for its members, those members can legitimately expect of that order that it not only permit, but also actively encourage, the exercise of autonomy. Further, to claim autonomy for oneself is to recognize the reciprocal and equally legitimate claims for autonomy by others. Thus, a vibrant democracy requires an ongoing order of mutually assured and encouraged autonomy in which political, social, and economic decisions are based on the considered judgments of the members of the community who are seen and treated as free and equal persons. The expressions of self-governing capacities must operate both within the formal institutions of government and in the affairs of daily life. Finally, the democratic order must stably satisfy the conditions of equal freedom and autonomy that give it definition.

In exercising the sovereign prerogative of self-governance in modern society, the people necessarily depend upon certain institutions for information about the positions of politicians competing for office and to evaluate government policies. Today, the organized press, particularly the broadcast media, is the major institution that performs this informative and evaluative function. To perform these democratic functions, the press must be protected both from the state and from private threats. Stated otherwise, the press certainly needs a degree of autonomy from the state, but also needs help from it. Although most proponents of free speech would deny or indeed even find certain aspects of this view dangerous, even deplorable, the state can be both a friend and

an enemy of the press. This is particularly so in developing democracies.

The view that real freedom of speech may mean that the state has to interfere to liberate and equalize speech opportunities rests on a particular justification of that freedom. It is premised on a democratic theory of free speech which emphasizes social, rather than individualistic values.¹⁴ The freedom the state should be called upon to foster is a public freedom. Under this theory, free speech is intended to broaden the terms of discussion as a way of enabling the people to become aware of the issues before them and of the most compelling arguments on all sides.

14. The alternative view sees freedom of speech as the necessary context of any meaningful concept of liberty, not in an instrumental sense, but in a constitutive sense that a society of silenced but "otherwise free" persons is unthinkable outside a religious retreat. Freedom of speech is seen as a constitutive part of personal autonomy and as a basis for self-expression and self-fulfillment. This view, of course, makes its appeal to the individualistic ethos of modern society that is inherent in modern popular and political culture.

Another model of free speech and the most common theory of it in United States jurisprudence—the "marketplace of ideas" paradigm—offers little more than an instrumental role for the first amendment. Proponents of this model claim that truth (*with a capital T*) or the most illuminating perspective or solution can be discovered through the process of debate, free from any kind of governmental interference. The model has strong historical support. The classic statement of this model was articulated first by John Milton. *See* John Milton, *Areopagitica*, in *AREOPAGITICA AND OTHER PROSE WRITINGS BY JOHN MILTON* (W. Haller ed., 1927). *E.g.*, even "bad books . . . to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate. . . . [A]ll opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest." *Id.* at 19-20. More graphically:

And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?

Id. at 59. John Stuart Mill later reiterated this theme, see John Stuart Mill, *On Liberty*, in *SELECTED WRITINGS OF JOHN STUART MILL* 135-36 (M. Cowling ed., 1968):

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Justice Holmes gave judicial support for this view of the first amendment in his famous dissent in *Abrams v. United States*:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting). The United States Supreme Court continues to rely primarily on the "marketplace of ideas" paradigm in determining what speech is protected under the first amendment. *See, e.g.*, Justice Brennan's opinion in *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 & n.13, 279 n.19 (1964).

In theory, this will allow all citizens to pursue their ends fully, freely, and perhaps even to make the morally correct decisions.

Democracy, as a system in which the majoritarian opinion is validly binding insofar as all of the people concerned have participated in both the discussion and in a collective decision, is the natural substitute for the mechanism of informal discussion and unanimous consensus. This system allows for the adoption of new decisions at particular times. If this does not occur, the status quo will prevail, even if favored solely by a minority. Majority rule, of course, is not the functional equivalent of impartiality: the majority may be openly biased against a minority. Nevertheless, when all the people concerned freely and equally participate in the process of deliberation and decision, democracy preserves some of the epistemic value inherent in the process of informal discussion and unanimous consensus. Democracy, based upon this process, includes a dynamic of collective action and tends toward the adoption of impartial solutions.

This does not mean that democratic solutions are always the morally correct ones; it only means that they are generally more likely to be right than solutions adopted by any other procedure. To put it another way, the democratic method of collective decision-making is more reliable than the procedure of isolated individual reflection in reaching morally correct solutions to intersubjective moral issues. For example, dictators have acted on the basis of their own reflections on intersubjective moral matters, and have had power to enforce their decisions. The results of this process have, of course, been disastrous. In addition, however wise and well-meaning an individual may be, it is unlikely that he could represent the real interests of others better than they could by directly participating in the process of discussion and decision.

The epistemic value of democracy varies with the degree to which its underlying conditions are satisfied. Those conditions depend upon the openness of the debate, and the degree to which people equally participate in and support the final decision. There is, of course, a threshold at the lowest degree of satisfaction of those conditions beyond which the epistemic value of the process is so feeble that it begins to be surpassed by the value of the process of individual reflection.

Reliable and objective information about the relevant issues is a critical factor in the validity of such a democratic process justified in the manner I have suggested. Indeed, in my view, democracy is a system that allows the people to choose the form of life they wish to live. It presupposes that this choice is made against a background of public debate that is, to use the phrase Justice Brennan made famous, "uninhib-

ited, robust, and wide-open.”¹⁵ Freedom of speech and freedom of the press thus play a very crucial role in a democracy. Such freedom is “the matrix, the indispensable condition of nearly every other form of freedom”¹⁶ and indeed of the democratic process itself.

In order to perform its democratic functions, the press certainly needs to be autonomous from the state in several ways. One of the major forms of autonomy is economic. The print media (newspapers) and the broadcast media (radio and television) must be privately owned. If the press is economically dependent on the state, the information available to the people could be limited to the state’s views and state officials would be able to hire or fire journalists or broadcasters who did not report the news in line with the state’s views and replace them with their own people who would necessarily follow the “party line.”

A second and related form of independence from the state is legal. Legislation must be enacted, and judicial doctrines must be developed, to limit the state’s capacity to silence government critics through criminal or civil actions.¹⁷ Seditious libel cannot exist as a valid legal doctrine in a democracy. The press and other government critics cannot be prosecuted for libeling the state. In addition, defamation actions by public officials for criticisms leveled against performance of their public duties must be severally restricted. Even these minimal requirements are not easy to develop. Indeed, in the United States, where freedom of speech is said to reign supreme, the Supreme Court did not officially declare the crime of seditious libel to be unconstitutional nor severely limit defamation actions by public officials against critics of their public

15. *New York Times Co. v. Sullivan*, 371 U.S. 254, 270 (1964).

16. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). There are several senses in which this is true. First, this freedom is clearly essential to self-government, through which real freedom is defined, realized, and secured. Second, it is vital to publicize, and hence root out, violations of other rights against the majority. If a society does not allow a vigorous and real freedom of speech and press, the government could simply silence those whose rights it invaded. Finally, such freedom is the necessary context for any meaningful concept of liberty.

17. The media, of course, may not only be informative, competent, and responsible, it may also be irresponsible, sometimes even quite dangerous. In Rwanda, for example, three Rwandan news media executives are on trial on charges of genocide and incitement to genocide through their use of radio broadcasts and newspapers. The defendants are accused of using their media outlets to spread ethnic hatred, demonize the Tutsi, and then persuading people to kill the Tutsi and moderate Hutu. Marlise Simons, *Trial Centers on Role of Press During Rwanda Massacre*, N.Y. TIMES, Mar. 3, 2002, at 3A. Their trial is examining the issue of the role of the news media in the massacre of more than 800,000 people in Rwanda in 1994. The case is the first of its kind since 1946 when a Nazi publisher of an anti-Semitic weekly (*Der Stürmer*) appeared before the Nuremberg tribunal. At that time, of course, the charge of genocide did not yet exist. Nevertheless, the Nazi publisher was sentenced to death.

The trial is expected to set international standards for the limits of free speech. It will certainly raise the issue of whether journalists should exercise self-restraint or even self-censorship during these moments of severe crises.

performance until 1964.¹⁸

Another form of independence, one that requires positive state action, not inaction, is the physical integrity of government critics. Reporters and publishers must be protected from assassinations and other forms of physical violence, such as torture, and coercion. Unfortunately, violence against government critics, particularly the press, has often occurred and continues to be a serious problem in developing democracies. The problem is even more complicated. Much of the violence propagated against government critics is state sponsored, either openly or covertly. If the state is involved in these crimes, of course, state officials will certainly not protect those who criticize their activities. Nevertheless, pressure from the United States and its allies, the international community, including international organizations such as the United Nations, and regional bodies, such as the Organization of American States, and international human rights institutions, pushing for the strict enforcement of international human rights laws and agreements, may be helpful in reducing the violence and in deterring future threats.

One other serious problem with the democratic role of the press is also economic. It is the impact that private aggregations of power have on the people's freedom, which is potentially disastrous for a democracy. While it is important for nations striving for democracy to have a privately owned communications industry, that industry is necessarily constrained by its own economic structure. The media owners are essentially involved in a commercial venture and, of course, seek to maximize their profits. Their decisions on what news to report and how to report it are almost exclusively determined by their wish to make a profit. This need to maximize profits may cause the press not to report in detail the news that should be reported to further democratic goals because airing those reports will harm the economic interests of the press. It may also cause the press not to criticize vigorously and effectively government officials or their public actions, the positions and actions of candidates for office, or private corporative interests, for fear of losing profits. For example, particular government policies may increase the profits of the press but may have other bad side effects for the majority of citizens or for particular groups of citizens. Thus, the state may sometimes be called upon to counteract the impact that private aggregations of power have on the freedom so necessary for a viable democracy to flourish.

18. *New York Times Co. v. Sullivan*, 371 U.S. 254 (1964). See also Harry Kalven, Jr., *The New York Times Case: A Note On The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191 (1964).

In some instances, instrumentalities of the state will try to stifle free and open debate. In other cases, however, the state may have to act to further public debate where private interests are stifling speech and thus interfering with the creation and maintenance of a democracy. The state may have to allocate public resources—pass out microphones—to those whose voices and views would not otherwise be heard in the public square. This may even entail silencing the voices of some in order to hear the voices of others. There may be no other way to get the relevant information to the people. Can a democratic theory of free speech and press help nations succeed in their quests for democratization?

A large gap looms between our moral and philosophical justifications for democracy and our prescriptions for addressing the inadequacies of the process for creating and perpetuating such a system on a daily basis. This law review issue brings together academics and advocates, lawyers, theorists, reporters, and policy analysts to address some of the most pressing issues of free speech and press facing the contemporary international democracy movement. The contributors to this issue gathered in January 2001 at the University of Miami School of Law in a conference organized by the Center for the Study of Human Rights,¹⁹ an organization dedicated to promoting more sophisticated understandings of the theoretical, philosophical, and moral issues raised by our commitment to international human rights, including the system of democratic governance.

Two panels were convened to discuss some of these questions. The morning panel, moderated by Professor Stephen J. Schnably, included: Santiago A. Canton, Special Rapporteur for Freedom of Expression of the Organization of American States; Jairo E. Lanao, counsel for the Inter-American Press Association; Alejandra Matus, an exiled Chilean journalist and author; and Silvio Waisbord, a professor of journalism and mass media at Rutgers University.

The afternoon session focused on Haiti, a nation striving to create a democracy. The premier of *The Agronomist*, a superb documentary film by the academy award winning director, Jonathan Demme, depicting the life of the Haitian Journalist, Jean Dominique, who was assassinated in April 2000, highlighted the afternoon session. The afternoon panel, moderated by Professor Irwin P. Stotzky, included Michele Montas-Dominique, a prominent broadcast journalist in Haiti, and the widow of

19. Founded in 1997 at the University of Miami School of Law, the Center for the Study of Human Rights focuses on increasing knowledge and understanding of international human rights issues, bringing theoretical insights to the study and practice of human rights, assisting public and private human rights organizations throughout the world in addressing the increasingly complex developments in the field, and equipping succeeding generations of lawyers and other professionals with the skills needed to play vital roles in the world community.

Jean Dominique, Jean Jean-Pierre, a Haitian-American journalist; and Ira Kurzban, general counsel in the United States for Haiti's only two democratically elected governments in the nation's almost 200 year history, the Aristide and Preval administrations.

The opening essay, by Santiago A. Canton, the Special Rapporteur for Freedom of Expression of the Organization of American States, is an example of the importance of regional bodies and international covenants on the promotion of rights, including freedom of expression, in developing democracies. Mr. Canton's essay describes the creation, mandate, operation, and effect of his Office. It brings into focus the complexities of protecting and encouraging democracy through the rights of freedom of expression.

At the Second Summit of the Americas, held in 1998 in Chile, the Heads of State and Governments of the Hemisphere recognized the significance of freedom of expression in the unprecedented movement toward democracy that has taken place in the past several decades. In response, the Inter-American Commission on Human Rights created the office of the Special Rapporteur for Freedom of Expression, an independent office with its own budget. As Mr. Canton explains, the main objective of the Office is "to reinforce and protect the observance, respect, and development of freedom of expression in the Americas."²⁰ This mandate is particularly important because of the significance of freedom of expression in helping to build and strengthen democracy and in protecting other rights of the people.

The Rapporteur's duties include the yearly preparation of a general report. The purpose of the report is to judge the circumstances that confront freedom of expression in the hemisphere and to identify the barriers to its full enjoyment. The Rapporteur must also prepare specific reports by subject matter. Such reports include analyses of the strength and vitality of freedom of expression in particular countries, and an analysis of general themes in freedom of expression that may be applicable to many nations. The Rapporteur has the responsibility of collecting all the information needed for the reports, which requires on-site visits and meetings with the relevant parties in those nations, including government officials, representatives of the media and other non-governmental organizations, and other interested actors.²¹ The Rapporteur has one other important mandate: he must organize activities for the promotion of human rights, such as presenting papers at conferences; instructing

20. Santiago A. Canton, *The Role of the OAS Special Rapporteur for Freedom of Expression in Promoting Democracy in the Americas*, 56 U. MIAMI L. REV. 307, 310 (2001).

21. *See id.*

civil servants, professionals, and students on the Commission's work; and preparing educational materials.

Another function of the Rapporteur is to present information to the Commission on urgent situations that call for precautionary or provisional measures to protect journalists and other social commentators at risk of harm. These actions are taken at the request of member states. Finally, the Rapporteur provides information on individual cases concerned with freedom of expression that are presented to the Commission. He also participates in settlement procedures that are undertaken by the Commission in these cases.

The Office has issued several annual reports, each concentrating on different aspects of freedom of expression. The 1998 Report focuses on Cuba and Peru, two of the countries where the right of freedom of expression has been most seriously threatened. In this report, Mr. Canton discusses the principal methods of coercion, including murder, criminal contempt laws, and compulsory membership laws. He emphasizes the increasing number of threats and assassinations against journalists and implores the Organization of American States member states to create a system of accountability and effective investigation.²²

The 1999 Report concentrates on the internal legislation of member states. It distinguishes three categories of restrictions and threats to freedom of expression—states without that freedom, states where freedom of expression is severely limited, and other problems of freedom of expression in other countries. It also establishes a foundation of basic legal principles necessary to protect freedom of expression, such as the principles against prior restraint, contempt, and libel and slander laws. Finally, the report asks member states to bring domestic laws and practices regarding freedom of expression in line with international legal standards.²³

The 2000 Report is somewhat upbeat. It stresses the progress in the hemisphere in respecting freedom of expression and information. Many states have requested recommendations from this Office and expressed their intentions to increase protection for freedom of expression. Unfortunately as the report notes, many of these reforms have not yet been implemented. On the more negative side, the report reaffirms the Rapporteur's concern over assassinations of journalists and other violations

22. See Annual Report of the Inter-American Commission on Human Rights, 1998, Vol. III, Report of the Special Rapporteur for Freedom of Expression, Inter-Am. H.R.C., OEA/Sev.L0V/II.102, doc. 6 rev. (1999).

23. See Annual Report of the Inter-American Commission on Human Rights 1999, Vol. III, Report of the office of the Special Rapporteur for Freedom of Expression, Inter-Am. H.R.C., OEA/Ser. 4V/II.106, doc. 3 rev. (2000).

of freedom of expression, and the judiciary's role in silencing critics of public officials by upholding criminal libel and slander laws.

Finally, the 2000 Report discusses the Declaration of Principles of Freedom of Expression, which the Office promulgated and the Commission approved in October 2000. The Declaration is meant to assist the Commission and the Inter-American Court of Human Rights with the interpretation of the American Declaration and American Convention, and to guide the development of jurisprudence. It consists of thirteen principles, including the right of access to information held by the state, the duty of states to provide information, the prohibition against prior censorship (restraint), the rejection of prior conditions on the dissemination of information (such as veracity, timeliness, or impartiality), the duty of the state to prevent and punish severe physical and coercive violations of freedom of expression, such as assassination, kidnapping, intimidation, and threats directed at journalists, the rejection of contempt ("*desacato*") laws, and the elimination of monopolies or oligopolies in the ownership and control of the communications industry.²⁴

The Rapporteur has participated in two on-site visits with the Commission—to Peru and to Paraguay—that resulted in state-specific reports. He has also taken many other trips, independently of the Commission, at the request of specific governments. These trips have directly led to improving the legal conditions, by repealing certain laws or passing legislation, that allow freedom of expression to flourish in those nations.²⁵ The Special Rapporteur's Office is of special importance to human rights proponents because of the legal and moral power it offers to force nations to protect the process of free expression—the entire communicative process—and thus democracy itself.

The fact that there is a Special Rapporteur's Office and reporters, academics, and other actors who successfully engage in human rights activities in these nations that are undergoing a democratic transition, is an important step in the human rights movement itself. This advancement did not appear out of thin air. Rather, it stems from the historical underpinnings of the concept of human rights.

Indeed, the human rights movement is based on two fundamental principles that give intellectual and substantive content to human rights as an enduring concept.²⁶ The first principal is that the will of the most powerful people and groups is not, and can never be, the final and valid

24. See Annual Report of the Inter-American Commission on Human Rights 2000, Vol. III, Report of the office of the Special Rapporteur for Freedom of Expression, Inter-Am. H.R.C., OEA/Ser.L/V/II.111, doc. 20 rev. (2001).

25. See *id.*

26. ENCYCLOPEDIA OF HUMAN RIGHTS 529 (Edward Lawson ed., 2d ed. 1996) (quoting Declaration of the Rights of Man and of the Citizen (France 1789)).

justification for actions that affect the vital interests of individuals. The second is that the mere fact of being human is sufficient in and of itself to allow claims for particular goods that are basic for living an autonomous and dignified life. These principles are the bedrock upon which human rights expanded.

The mechanism for expansion and acceptance of human rights has been the affirmation of these principles through the constitutions of almost all nation-states and through international norms, such as the Universal Declaration of Human Rights²⁷ enacted by the United Nations in 1948, including the subsequent covenants about civil, political, economic, social, and cultural rights.²⁸ This was just a start, however. The constitutional and international human rights movements did not prevent unprecedented genocides, massacres, persecutions, and other unspeakable horrors of the past century. Nevertheless, these terrible facts should not obscure the slow, if insecure progress, that has taken place in the world since World War II. For example, increasingly more nations adhere to the rule of law, large-scale slavery has almost disappeared from the face of the earth, international tribunals have been established to protect human rights, and people all around the world are increasingly alert to preventing atrocities, even beyond their own borders. Unfortunately, even with all of these advancements, it is not possible to evade the question of why these manifestations of progress are not more substantial, widespread, and faster developing, or why there are lapses and renewed acts of massive human rights violations.

I believe that one of the major factors that weakens the movement to promote human rights is the perception that, once legally recognized, these rights are forever secured. While legal recognition is important because it makes it possible to alleviate or even stop certain kinds of rights violations carried out by the state, it is not enough. It is insufficient because those who have a monopoly on power and the tools for repression often employ the state machinery to violate human rights in the name of the state.

Recognizing this limitation, action in the field concentrates increasingly on the establishment of international covenants that define rights

27. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR 3d Sess., art. 1, U.N. Doc. A/810 (1948), available at <http://www.un.org/overview/rights.html>.

28. See International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

and institute external sanctions for their violations, as well as regional courts and other monitoring devices, such as the Office of Special Rapporteur. This is a decisive step. It makes human rights relatively independent from the internal circumstances of each country. Nevertheless, these mechanisms do have severe limits. Ideological divergence among governing powers in different nations leads to the acceptance of only a limited set of undisputed rights. Different notions of sovereignty restrict international obligations, including outside intervention in aid of the investigation and punishment of human rights violations and in the implementation of structural reforms to stop their future occurrence. In addition, even if legal obligations exist in a particular nation, powerful corporative groups may simply disregard those legal rights in pursuit of their own self-interested goals.

Other strategies in addition to legal recognition of human rights are certainly necessary.²⁹ One possible strategy is to create certain types of governmental structures and policies to increase popular participation in public life and thus help to foster a moral consciousness in the citizenry—a belief in the transcendent value of human rights and a commitment to fight against any actions that violate them. This should act as a catalyst for the creation of institutions that will promote respect for human dignity. Freedom of expression is essential to this process. The Special Rapporteur's position is, in my view, extremely helpful as a moral force in this battle. The integrity and courage of the individual reporters and other non-governmental organizations in fighting for freedom of speech and helping to check government violations of human rights is another crucial factor in this battle.

To varying degrees, many countries in Latin America and in the Caribbean have a relatively open and diverse press which often leads to dynamic and acrimonious public debate, but journalists in these nations frequently face serious physical reprisals from state officials because of their reporting. In other nations, such as Chile, however, the journalists and opposition figures do not generally face physical risks, but public debate is a far cry from "being uninhibited, robust, and wide-open."³⁰ In point of fact, such debate is often muted, limited, and timorous. Since the return to democracy in Chile,³¹ violations of freedom of expression are directly traceable to laws that fail to protect essential democratic values and hamper the vigorous discussion that democracy demands, not necessarily to repressive actions by the executive branch of government.

29. This is not, of course, to say that legal recognition is not a very significant aspect of the international human rights movement.

30. *New York Times Co. v. Sullivan*, 371 U.S. 254, 270 (1964).

31. Pinochet stepped down from power in Chile in 1990.

Chile has traditionally been a society with an overenthusiastic respect for the formalities of the "written" law. This is also true for most other civil law countries in Latin America. The jurisprudential tradition is to view the judge's role in the most formal terms. His job is to apply the law in its most literal sense. The judiciary is, therefore, extremely reluctant to interpret laws in the light of underlying concerns, such as the preservation of democratic values and international human rights principles.

Several major areas of legislation in these Latin American nations are particularly harmful to an open society that honors freedom of expression. In Chile, there are two areas of legislation that are extremely harmful to a free society. The first deals with laws that restrict political criticism of public officials and their policies by prohibiting expressions that are considered offensive to senior officials in public positions (state institutions).³² The second area concerns a series of laws and statutes that strictly limit the public's right of access to government controlled information far more strictly than the right of freedom of expression demands.³³ Both Alejandra Matus, an heroic journalist, and Jairo E. Lanao, a lawyer for the Inter-American Press Agency, discuss these kinds of laws and their deleterious effects on democracy.

Ms. Matus, an investigative Chilean journalist, spent six years investigating the Chilean judicial system. This investigative work resulted in a book, entitled *The Black Book of Chilean Justice*, which was published in April 1999. The book traces the history of the Chilean High Court from its origins through 1999, and concludes that there has never been a truly independent judiciary in Chile. Rather, Ms. Matus found that the Chilean judicial system is inundated with corruption and incompetence, which clearly benefited the military dictatorship of Pinochet.

On April 14, 1999, less than twenty-four hours after the public presentation of Ms. Matus's book, the judiciary ordered the police to confiscate the first edition of her book.³⁴ The Chilean government filed charges against her under Chile's National Security Law,³⁵ a class of laws generally referred to as *desacato* laws, which are common in many Latin American countries. These laws are a specific class of legislation that criminalizes any expressions which offend, insult, or threaten a public functionary in the performance of his duties. In Chile, contempt

32. See JAIRO LANAO, FREEDOM OF THE PRESS AND THE LAW 167 (1999).

33. *Id.* at 184.

34. Law on State Security, No. 12,977, art. 16 (Chile).

35. Law on State Security, No. 12,977, art. 6(b) Chile).

of authority provisions exist in the Criminal Code,³⁶ in the State Security Law,³⁷ and in the Code of Military Justice.³⁸ The underlying logic of these laws is based on the view that people are required to respect those in authority simply because they hold positions of power. Such a view is, of course, antithetical to democracy because it defines the ordinary person as a mere subject rather than as a real, autonomous citizen. It also violates one of the fundamental principles underlying the concept of human rights because it suggests that the powerful have the absolute right and authority to determine important issues that affect the vital interests of the people without the people's participation in the decision making process and without their consent.

The Chilean government formally charged Ms. Matus under the contempt of authority provisions in the State Security Law, which potentially criminalizes criticism of a congressperson, a high court justice, or the chief of police, among other state dignitaries. Under Article 6(b)³⁹ of the law, it is an offense against public order to insult the President of the Republic, Ministers of State, Senators, or Deputies, or members of the Higher Courts of Justice, the Comptroller General of the Republic, Commanders-in-Chief of the Armed Forces or the Director General of the National Police, whether or not the defamation, libel, or calumny is committed with respect to the exercise of official functions of the offended party.

The *desacato* laws are even more insidious and destructive to free speech than it may first appear. Contempt of authority offenses are dealt with by application of special norms which reduce due process guarantees and rights of defense and also carry higher penalties than other types of similar laws. For example, the maximum penalty under Article 6(b)⁴⁰ is five years in prison while the maximum penalty for libel or calumny is only three years in prison. In addition, under this law, investigative procedures are telescoped and thus allow significantly less time for defense than the crime of libel in the Criminal Code. The law also allows a judge to order immediate seizure of all of the materials containing abuse of publicity condemned by this law.⁴¹

36. The provisions in the Criminal code that protect the president, government ministers, members of Congress, and the judiciary from libelous attacks have rarely been used. CÓDIGO PENAL art. 263-64 (Chile).

37. Law on State Security, No. 12,977, art 6(b) (Chile).

38. CÓDIGO PENAL MILITAR art. 284 (Chile) (threats, offenses, or insults to armed forces); *id.* at art. 276 (relating to the crime of sedition).

39. Law on State Security, No. 12,927, art. 6(b) (Chile).

40. *Id.*

41. Article 16(b) states in pertinent part:

If a crime against the Security of the State were to be committed using the press, radio or television, the competent court may suspend the publication of up to ten

The charges against Ms. Matus caused her to flee Chile and eventually claim and be granted political asylum in the United States.⁴² Ms. Matus represents the best in journalism – a woman who stood up for truth and accountability and is a living example of a model citizen in a democracy. Because of her principled stand against authoritarianism, and international pressure, the Chilean government has repealed Article 6(b).⁴³

In addition to these *desacato* laws, which are obviously extremely harmful to creating an environment conducive to the exercise of free speech and press, there are many others laws in Latin American countries that harm the public debate necessary to a well-functioning democracy. Mr. Lanao's article surveys these nations and the complex of laws that hinder freedom of expression. In point of fact, Mr. Lanao's article is a summary of an extraordinary study that he compiled of laws in Latin America that adversely affect the rights of a free press and freedom of speech and expression. The study resulted from a hemispheric conference that the Inter American Press Association held at Chapultepec Castle in Mexico City in March, 1994. The Conference, which brought together 135 leading politicians, writers, academics, constitutional lawyers, editors, and private citizens from the Western Hemisphere, resulted in a document—known as the Declaration of Chapultepec—announcing ten significant principles necessary for a free press to perform its democratic mission. The Declaration includes the following intriguing principles:

1. No people or society can be free without freedom of expression and of the press. The exercise of this freedom is not something authorities grant, it is an inalienable right of the people.

editions of the guilty newspaper or magazine and for up to ten days the broadcasting of programs of the transgressing radio station or television channel. Without prejudice of this decision, in aggravated cases, the court may order the immediate confiscation of any edition in which the abuse in advertising is expressly manifested. The court shall exercise similar powers with respect to any other edition ostensibly issued for the purpose of replacing the one being sanctioned.

Law on State Security, No. 12,927, No. 16 (Chile).

42. See Alejandra Matus, *The Black Book of Chilean Justice*, 56 U. MIAMI L. REV. 329 (2001).

43. On April 10, 2001, the Chilean Senate approved a new Press Law that repeals portions of the National Security Law that affect Ms. Matus. The new Press Law repeals Article 6(b) of the State Security Law (the law Matus was prosecuted under). The new law also repeals Article 16, which allowed judges to confiscate any material that is used to commit a "crime against the Security of the State." Under the new Press Laws, journalists will be able to keep their sources secret, courts will no longer be allowed to gag the media from reporting criminal cases, and all prosecutions of press offenses will be handled by civilian instead of by military courts. The law did not repeal Article 30 of the State Security Law, which requires judges to confiscate any material that "might have been used" to commit any crime against state security. Law on State Security, No. 12,927, art. 30 (Chile).

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.
3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector. No journalist may be forced to reveal his or her sources of information.
4. Freedom of expression and of the press are severely limited by murder, terrorism, kidnapping, intimidation, the unjust imprisonment of journalists, the destruction of facilities, violence of any kind and impunity for perpetrators. Such acts must be investigated promptly and punished harshly.
5. Prior censorship, restrictions on the circulation of the media or dissemination of their reports, arbitrary management of information, the imposition of obstacles to the free flow of news, and restrictions on the activities and movements of journalists directly contradict freedom of the press.
6. The media and journalists should neither be discriminated against nor favored because of what they write or say.
7. Tariff and exchange policies, licenses for the importation of paper or news-gathering equipment, the assigning of radio and television frequencies and the granting or withdrawal of government advertising may not be used to reward or punish the media or individual journalists.
8. The membership of journalists in guilds, their affiliation to professional and trade associations and the affiliation of the media with business groups must be strictly voluntary.
9. The credibility of the press is linked to its commitment to truth, to the pursuit of accuracy, fairness and objectivity and to the clear distinction between news and advertising. The attainment of these goals and the respect for ethical and professional values may not be imposed. These are the exclusive responsibility of journalists and the media. In a free society, it is public opinion that rewards or punishes.
10. No news medium nor journalist may be punished for publishing the truth or criticizing or denouncing the government.⁴⁴

Mr. Lanao's compilation of laws flags authoritarian remnants in the legislation of twenty-four countries that honor these principles. The study includes interviews with media experts in all of these countries. This was the first study ever made that compiles information on all of the laws affecting freedom of speech and press in the Western Hemisphere. Mr. Lanao's article is written against the backdrop of these ten principles. His paper convincingly demonstrates the adverse affect of these

44. LANAQ, *supra* note 32, at 528-29.

laws to these principles and thus to the development and consolidation of democracy.

This exhaustive study led Mr. Lanao to several conclusions that hold across the board for all of these nations. For example, Mr. Lanao concludes that criminal libel laws and their close relative, the insult laws, are most frequently employed to attack the press. Moreover, he indicts every nation in the hemisphere and all branches of government. No government institution is spared from criticism. Every branch of government in these nations is implicated in some form and degree in suppressing freedom of speech. To put it another way, the legislative, executive, and judicial branches both enact these limitations and apply them. Thus, journalists and publishers can be charged with a crime and sent to jail for publishing information that is inaccurate or for attacking the honor or reputation of a person, even in his public life. Moreover, truth is not a defense to most of these charges.

Another obstacle to a free press is the requirement that journalists obtain prior authorization to work, such as obtaining degrees or holding membership in a designated organization. And most of these nations restrict or forbid the publication of electoral information on the eve of or during elections. In addition, right to reply laws, the creation of special courts to try illegal acts committed through the news media, and laws restricting access to government controlled information, such as the absolute secrecy of criminal court records, impinge on freedom of speech and press and directly harm the development of a democracy.

To counter some of these problems, Mr. Lanao suggests a series of legal reforms, such as the creation of routine defenses, standards of conduct, and guidelines for judicial review of issues touching the freedoms of speech and press. He further suggests that each nation develop a set of rules regarding evidentiary burdens of persuasion and production guidelines for estimating awards for any harm done to one's reputation, and other intangible harms. Mr. Lanao suggests other, more drastic legal reforms, such as eliminating insult law provisions that shield government officials from criticism, decriminalizing libel, and developing civil law remedies for certain violations, such as the right to privacy, that are now criminal in nature. Moreover, many of his suggestions include using United States Supreme Court legal doctrines as a guiding, but not definitive model. Finally, Mr. Lanao suggests that judges and lawyers must be educated over a period of time in the importance of these overriding principles to free speech and in the technical aspects of the necessary legal doctrines that will ensure their protection.

Mr. Lanao's work is a fine example of such an educational initiative. Through the efforts of Mr. Lanao and other dedicated lawyers and

journalists, and non-governmental organizations, the Declaration has now been signed by every leading head of state of the Western Hemisphere nations, and it has become a barometer to measure the extent of true freedom of the press in each of these countries.

Silivo Waisbord's piece is the final article of the morning session. It is an excellent analysis of the role of investigative journalism and the challenges faced by investigative journalists in Latin America. Professor Waisbord distinguishes investigative journalism from other types of reporting by claiming it publicizes information about wrong doing that affects the public interest. Employing the "Fourth Estate" model, he argues that the main value of this journalistic method to democratic governance is its contribution to increasing political accountability, one of the most serious weaknesses in Latin American democracies.

For example, the publication of news about political and economic wrongdoing may potentially trigger congressional and judicial investigations. In addition, investigative journalism contributes to accountability by monitoring the functioning of democratic institutions and by examining how well these institutions actually fulfill their constitutional mandates. The press sustains accountability by continuing coverage in specific cases of wrongdoing which keep certain public issues in the public consciousness. Indeed, press reports have led to resignations of individuals involved in illegal acts. Investigative journalism contributes to the nurturing of an informed citizenry by exposing information that is not publicly available and by raising and addressing issues that need public consideration.

According to Professor Waisbord, there is a serious problem with the "Fourth Estate" model as an accurate description of investigative journalism in Latin America. The "Fourth Estate" model is based on a view of an independent press that keeps government at a distance. The reality that underlies investigative journalism, however, is that it is part of a complex, larger network of relationships between news organizations and government officials. This is not all. Political and economic issues further complicate the relationships and the role of investigative journalism. As stated above, the media is constrained by its economic structure. Its success depends on maximizing profits, which may cause the media not to publish publicly important information. Yet, according to Professor Waisbord, investigative journalism can well survive without the press being wholly committed to scrutinizing government action.

Professor Waisbord lists and analyzes the legal, political, and economic constraints, both external and internal, that limit press independence and the promise of investigative journalism. For example, external constraints, such as the absence of public access laws that allow

open and effective access to government records and public information, the absence of laws granting journalists the right to professional secrecy regarding their sources, the right to reply laws, gag laws, insult and defamation laws, contempt laws, and the failure to have independent judiciaries all remain key obstacles to a truly independent press that meets its "Fourth Estate" obligations. External political restraints that harm investigative journalism include government bullying of news organizations that report wrongdoing, intimidation and punishment of those journalists and media organizations that practice investigative journalism, violence against those journalists, an authoritarianism in thought and deed, and ineffective investigation and prosecution of the perpetrators of these crimes. The external economic constraints include the advertising revenues dolled out by governments and private corporations. For example, by depending on private advertisers alone, news organizations may be able to report on government illegalities but not on issues that affect the private advertisers.

The internal constraints on investigative journalism are reflected in the ambiguous and uncertain commitment by the press organizations to investigative journalism. This is reflected in the scarcity of resources allocated to investigative journalism and in the constant editorial pressures on journalists to produce stories inexpensively and quickly. Thus, reporters have to battle against sources, legal constraints, editors, and executives who refuse to assign human and monetary resources for investigation and analysis of important public issues. The lack of newsroom autonomy by reporters because of the fear of irate publishers and board members leads to self-censorship. Besides a fear of losing their jobs, some reporters are corrupt, and accept bribes to kill stories. All of these problems corrupt the process of investigative journalism.

Even more harmful to the nurturing that news organizations need to practice successfully investigative journalism are the formations of media monopolies and oligopolies. The problem is even more insidious. The close ties between media owners and government officials compound the problem and lead to even more constraints upon investigative journalism.

After a thorough discussion of these problems, Professor Waisbord reiterates his claim that investigative journalism is an important element for improving the quality of Latin American democracies. He then lays out a prescription for creating and maintaining the conditions necessary for the consolidation of a vibrant investigative journalism. According to Professor Waisbord, many areas need attention, including the development of legal mechanisms that effectively facilitate public access to official information as well as other laws that protect citizens and give them

the necessary tools to monitor government activities, a truly independent judiciary, and the use of new technologies to facilitate access to public records, to compile records, and to allow a diversity of sources and databases. Thus, Professor Waisbord recommends the development of programs to promote public access laws and to discuss the possibilities of expanding the public availability of new technologies, to support the online activities of non-government organizations (which can act as sources of information), and to strengthen journalistic online communities.

Finally, to accomplish these lofty goals, Professor Waisbord argues that journalism training is in need of change. He suggests that journalism education must include familiarity with press laws and how these laws affect reporting, computer assisted reporting techniques, and an emphasis on the ethical issues, including those affecting privacy, accountability, accuracy, responsibility, and moral decency. He also suggests that this education must include an encouragement to expand the investigative journalism agenda from government wrongdoing to include such issues as private corporate and environmental wrongdoing, and that reporters must be trained in the technicalities of these and other possible fields of reporting that affect the broader society.

While the morning session of the conference and the first set of papers discuss and analyze the speech and press issues that are ubiquitous in the political life of the Western Hemispheric nations, the afternoon session and second set of papers concentrate on one particular Caribbean nation—Haiti—and with good reason. Simply put, Haiti is a unique case in the international movement from dictatorship to democracy. It is an extreme example of the problems facing nations undergoing a democratic transition. As such, it presents, to an uncomfortably extreme degree, most of the problems facing these countries. Among many other issues, it raises serious questions about the role of the international community in this democratic drama, and more importantly for the purposes of this symposium, demonstrates the significance of free speech and a free press to the establishment and development of a democracy.

The story of Haiti is, at one level, uncomplicated. In 1990, a vast majority of the Haitian people—67.8 percent⁴⁵—elected Jean-Bertrand

45. Aristide actually received a substantially higher percentage of the vote. Many of the ballots in his favor, however, had to be discounted because voters failed to mark them properly. This was due to the high illiteracy rate among the electorate. In point of fact, virtually every one of the ballots that had to be discounted were votes for Aristide. Interview with Cathy Maternowska, in Miami, Fla. (Nov. 8, 1993) (Maternowska, an anthropologist who lived in Haiti from 1985 to 1993, worked extensively with the poor of Haiti and was an observer of the 1990 election).

Aristide President, in the first democratic election to take place in Haiti in its nearly 200 year history as an independent state. Equally impressive was the election process.⁴⁶ It represented the culmination of an extraordinary international effort to launch Haiti on the path of democracy. Both the Organization of American States and the United Nations played major roles in helping Haitian officials assure the dignity of the election process.

Within months after his installation as President, Aristide was overthrown in a military coup and forced into exile, first in Venezuela and then in Washington. The Organization of American States and the United Nations immediately condemned the coup, speaking out forcefully against the *de facto* regime and in support of the democratically elected Aristide government. It also responded by freezing the assets of Haiti and imposing an embargo on the country. After several years of failed efforts to coax the *de facto* government to negotiate with Aristide for his return, and ostensibly because of serious human rights abuses resulting in the murders of several thousand people and the economic chaos created and then exacerbated by the embargo, the international community resorted to force. The international community also responded with several other unprecedented actions. Indeed, between 1990 and 1997, the United Nations engaged in an unusually broad range of activities in support of democracy in Haiti, including election-monitoring, United Nations Security Council-mandated sanctions, two peacekeeping operations, a naval blockade, and United Nations Security Council-authorized use of force against the *de facto* regime.

The international community's response to the military coup which ousted Aristide is unique in at least three respects. In July 1994, the United Nations Security Council, for the first time in its history, gave approval for a forcible intervention in a Member State to change its government – to restore its democratically elected government. This clearly differed from other situations in which the Organization of American

46. In addition to the smooth functioning of the election process itself, voter turnout was an astounding seventy five percent, despite formidable logistical challenges. The dirt roads and mountain paths of rural Haiti, where over seventy-five percent of the population lives, made the distribution of election materials treacherous and uncertain. The high illiteracy rate among Haitians compounded the already difficult challenges of registering and voting. Despite these difficulties, approximately 3.2 million Haitians registered to vote and more than 2.4 million voted on election day. Moreover, despite these logistical problems, virtually all observers who monitored the voting, both international and domestic, attested that the elections were free and fair and that the voters experienced no threats, intimidation, or harassment. There have been two other democratically elected presidential administrations since 1990. On December 23, 1996, René Préval was elected President. For the first time in nearly 200 years of Haitian independence, one democratically elected president peacefully yielded power to another. In November 2000, the people of Haiti overwhelmingly voted to return Aristide to the presidency in another free and fair election.

States and United Nations had been involved, such as Nicaragua and El Salvador. Unlike those cases, the stated goals of the military intervention were neither to support democratic processes as a means of national reconciliation nor to uphold the integrity of the electoral process as a means of securing the fragile peace accords. Instead, the primary and publicly proclaimed goal was simply and solely the restoration of democratic governance. Stated otherwise, the overriding purpose of intervention was to replace an illegitimate regime (the *de facto* military government) with the legitimate regime (the democratically elected and internationally sanctioned Aristide government). Indeed, for the first time in the history of the Americas, a democratically elected president was returned to his country because of pressure from the international community and displaced the very same dictators who overthrew him.⁴⁷

This was also the first time that the United States sought Security Council authorization for the use of force within the Western Hemisphere. This is, of course, a sharp contrast from the unilateral interventions by the United States in Latin America during the twentieth century, the most recent examples being Grenada (1983) and Panama (1989). Despite the fact that the Clinton Administration viewed the crisis in Haiti with a growing urgency because of the increasingly large refugee migration from Haiti to the shores of Florida between 1991 and 1994, the United States did not take unilateral military action. Rather, the United States used multilateral channels to resolve the crisis. While the use of multilateral avenues was less "efficient" than would have been unilateral methods, the Clinton Administration correctly understood that multilateral action offered important advantages, both domestically and internationally.

The Haiti case is unique in one other respect: this was the first test of the June 1991 Organization of American States Santiago Declaration on the protection of democracy.⁴⁸ Indeed, this case suggests a growing consensus among Organization of American States Member States and internationally that the Western Hemisphere should develop into a democratic zone free from military dictatorship.⁴⁹ Moreover, the Haiti case has been used as a precedent for the Organization of American States in

47. This may also be the first time this has ever occurred in modern times in any nation.

48. See The Santiago Commitment to Democracy and the Renewal of The Inter-American System, Organization of American States General Assembly, 3d Plen. Sess. (adopted June 4, 1991), at 1, O.A.S. Doc. OEA/Ser. P/XXI.O.2 (1991) [hereinafter *The Santiago Commitment*]; Representative Democracy, Organization of American States General Assembly, 5th Plen. Sess. (adopted June 5, 1991), AG/RES. 1080 (XXI-0/91), O.A.S. Doc. OEA/Ser. P/XXI. 02 (1991).

49. No strong multilateral or regional efforts have been made to institute democracy in Cuba. While still formally a member of the Organization of American States, Cuba was suspended from the organization in 1962.

its efforts to react to threats to democracy in Peru (1992), Guatemala (1993), and Paraguay (1996).

The international effort continues. The attempt to help Haiti create the necessary infrastructure for democracy to develop—economically, politically, and socially—however, has not been as successful as the original military intervention. Unfortunately, the results of the outside world's intervention in Haiti may well prove unsuccessful and impermanent in a way that Graham Greene⁵⁰ would have well understood. Nevertheless, the questions that the Haiti case raises are surprisingly numerous and important. For example, is democracy so widely accepted as an international norm, at least in the Western Hemisphere, that the international community has a right, indeed even a duty, to restore it when it is forcibly overthrown by military coup and whose *de facto* government has committed gross human rights violations, trampled on the rights of the people, and caused massive refugee flows? If so, what particular bodies can legitimately (and legally) exercise such a right of intervention? Can an outside military intervention and then a peacekeeping mission create the conditions for democracy to develop and help to secure it?

Central to the resolution of these questions are the internal politics of Haiti and how the almost intractable political, social, and economic problems play out. While each nation has its own peculiar history, culture, and methods of dealing with its problems, Haiti's experience nevertheless exemplifies the transition and consolidation process. Indeed, there are several significant features of the consolidation of democracies that have taken place in Latin America and Haiti.

The first significant feature of the consolidation is the fact that the process of democratization has taken place during some of the worst economic, social, and political crises in the history of these nations. In general, these include the commission of massive human rights violations (murder, rape, and torture), enormous debts, hyperinflation, epidemics, dramatic and surprising increases in already high rates of infant mortality, extremely high rates of unemployment, and the collapse of entire systems of social welfare. Haiti presents the most extreme example of many of these problems. There, the human and material resources are in such short supply, or have been degraded by such severe poverty (even destitution), illiteracy, malnutrition, disease, violence, corruption, overpopulation, rapid urbanization, deforestation, and soil erosion, as to raise serious questions about Haiti's continued survival as a society and as an independent nation-state.

50. See GRAHAM GREENE, *THE COMEDIANS* (1966).

Even before the crisis erupted, between 1991 and 1994, over the military's refusal to restore President Aristide to power, Haiti was the poorest country in the Western Hemisphere. It remains so today. In a country of approximately eight million people, it is estimated that there are fewer than a thousand doctors. The life expectancy is a mere fifty-six years, one in every eight babies dies before reaching the age of one, and seventy percent of all children are estimated to suffer from some form of malnutrition. At least two-thirds of the population is illiterate, and the state school system is so inefficient and small that fewer than five percent of eligible students are enrolled in government high schools.⁵¹ As if these problems were not enough in themselves, many of the doctors, engineers, administrators, and others with the necessary skills to change Haiti have been killed or driven into exile.⁵² Most of those who are in exile do not wish to risk their lives and fortunes by returning to Haiti until positive changes occur.⁵³ The irony is that Haiti needs these very same people to make the changes that would attract them to return. Unfortunately, these conditions have not improved since the "restoration of democracy." Some suggest that these conditions have even become more serious since the international military intervention.⁵⁴

The most difficult obstacles to democracy in many countries, particularly in Haiti, however, may be psychological and cultural. For example, the traditions of a predatory, oppressive state have left Haitians deeply distrustful of government and of foreigners. Haiti's political culture has long been characterized as an admiration of force. Political disputes are often settled not by negotiation, but through the exercise of force, and respect for democratic procedures and obligations, including reasoned justifications for actions, is minimal.

Furthermore, there is great controversy in the international commu-

51. See Larry Rohter, *Haiti Is a Land Without a Country*, N.Y. TIMES, Aug. 14, 1994, at E3. The state of education, a key to development, is one of the major reasons that Haiti remains one of the poorest countries in the world. The teachers remain wholly inadequate to the task of educating the millions of those desiring to improve their lives. For example, in December 1996 and January 1997, Haiti's approximately twelve hundred grade school teachers took a simple test, and almost all of them failed it. Only four hundred teachers could alphabetize a list of words; only forty-one could arrange fractions by size. This ignorance is reflected in the students. More than half of the children between six and twelve cannot read. In addition, classrooms are extremely overcrowded—some have more than two hundred students—and most classrooms do not have benches, chalkboards, or even doors. See Michael Norton, *Teacher Strike Highlights Education Crisis in Haiti*, MIAMI HERALD, Jan. 13, 1997, at A8.

52. Indeed, there are sizable populations of exiled Haitians in New York, Montreal, Paris, and Miami.

53. I base my conclusion on several confidential interviews with various exiled Haitians (1981-2000).

54. This is based upon information collected in confidential interviews with various United Nations officials, Haitian government officials, and human rights workers stationed in Haiti (1994-2000).

nity about whether the problems associated with these transitions and the attempts to address them are leading to a change in the economic and social structures of these countries necessary to allow for a new oligopolization of the economy. To put it another way, it remains unclear whether a new oligopolization will develop which will greatly restrict the avenues of access for the powerless sectors of society to the basic goods necessary for leading a life of dignity, or whether, on the contrary, the crisis is leading to more efficient schemes of production, thereby benefiting all sectors of society. In Haiti, the unequal distribution of resources, and thus the general living conditions, have become even more disparate since the international military intervention. The elites have obtained an even larger share of the wealth than they possessed before the intervention, and everyone else (more than ninety percent of the population) has been made worse off. This has led to a loss of hope; indeed, even to a sense of desperation on the part of the vast majority of Haitians. The problem is even more difficult than it is usually perceived to be. In many of the nations in the transition process, but particularly in Haiti, the present circumstances result from a long-fought war of attrition against the vast majority by a small but ruthless ruling class.⁵⁵

Under the best of circumstances, a nation such as Haiti cannot be changed structurally without some yielding of power by the haves—the economic elite. But, of course, rulers who profit from stasis are disinclined to risk change. Moreover, if it is to be the policy of the United States and the rest of the international community, which it appears to be, to sustain at all costs the present distribution of economic power in Haiti, hardly anything can be done that will necessarily have long-range beneficial political and social consequences and thus allow Haiti to become a democratic nation.

A second prominent obstacle that nations face in the transition process is the corrosive power of the phenomenon known as corporatism.⁵⁶ Indeed, for the transition process to succeed, the people must dissolve the network of *de facto* power relationships which corporations create and jealously protect by taking advantage of the power vacuum left by representatives of popular sovereignty. Under the umbrella of authoritarian rule, a number of social groups representing particular interests sculpt a place for themselves after a bargaining process which includes their support for the present regime. Such groups include the military, religious organizations, coalitions of entrepreneurs, trade unions, and

55. For a detailed discussion of this "relationship," see IRWIN P. STOTZKY, *SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY* 18-27 (1997).

56. For an interesting discussion of the concept of corporatism and its relationship to state and society in Latin America, see generally *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* (James M. Malloy ed., 1977).

even the so-called independent press. Once democratic rule is established, these groups stubbornly resist relinquishing their power to representatives of the people.

Corporatism is usually expressed and functions in complicated ways. There is some control by the State over these interest groups and organizations, and there are a variety of official and unofficial mechanisms that are used to alter their operation. Simultaneously, however, these organizations exert enormous pressures upon government actors and agencies. These pressures allow the corporative forces to obtain favored treatment of various kinds, amounting to a legal monopoly of particular interests. Sometimes this monopoly power of the corporative interests is unaccompanied by any significant State influence over these forces. In other situations, alternative legal or even constitutional privileges short of monopoly may be granted that shield the organization from the raw competitive forces of popular expression, such as a free market.

Corporatism is an insidious and powerful force, and it is very difficult to overcome. Haiti is a harsh example of the devastation created by corporatism. Between 1991 and 1994 the military corporative force assumed total power and influence in, and completely violated and destroyed any semblance of, democratic practices and institutions. The military forces consolidated their rule by intentionally and ruthlessly suppressing Haiti's once diverse and vibrant civil society. They assassinated approximately 5,000 people, brutalized and tortured thousands of others, and forced perhaps 500,000 people to go underground.⁵⁷ The military systematically repressed virtually all forms of independent association in an attempt to deny the Haitian people any organized base for opposition.

Aristide's major accomplishment as President was to abolish the military. Recently, the democratically elected government has attempted to prosecute military officials who were involved in massive human rights violation.⁵⁸ But security is an absolute necessity to pursue this

57. See confidential interviews, *supra* note 54.

58. For example, in August 1995, a mid-level member of the para-military group Front for the Advancement of Haitian People (FRAPH) was convicted of the murder of Antoine Izméry, a prominent businessman and supporter of Aristide. There have been on-going investigations of human rights offenses committed by the de facto regime between 1991 and 1994 since the return of Aristide in 1994. On September 20, 2000, after an investigation that started shortly after President Aristide's reinstatement in 1994, the Haitian government began the prosecution of dozens of former military leaders for the massacre of at least fifteen residents of a poor neighborhood in Gonaïves in April 1994. The Raboteau slayings were part of a series of attacks undertaken by the coup leaders to break support for Aristide. At the trial, only twenty-two of the defendants actually appeared in court. On November 9, 2000, sixteen of these twenty-two defendants were convicted of taking part in the massacre. Twelve of the sixteen, including the

strategy. With approximately 250,000 automatic weapons cached around the country,⁵⁹ stability remains fragile. The failure to understand corporative power and the fear of placing international forces in harm's way led to a failure by the multinational forces to disarm the military, in spite of the fact that such a campaign was clearly compatible with Security Council Resolution 940.⁶⁰ Part of this misunderstanding was the belief that removal of all privately held weapons in Haiti would have seriously disturbed the balance of power in Haitian society, dangerously concentrating all fire-power in the hands of a democratically elected government whose long-term commitment to the rule of law and democracy could not be guaranteed. This grave error has led to unnecessary suffering. Indeed, the international community's failure to disarm the former military forces has led to a surge in garden variety crimes, attacks on the National Palace, on the Parliament, and on the Haitian National Police, and an increasingly large number of drug related murders committed by former military officials who have formed criminal gangs.⁶¹

The entrepreneurial sector constitutes another corporative source directed at the democratically elected government. It seeks to obtain a variety of privileges or protective measures and preserve those previously secured. In Haiti, the entrepreneurial sector has attempted to boycott many measures designed to achieve progressive levels of taxation. It has also pushed hard for the complete privatization of nine state owned industries, hoping to secure them and reap huge profits. This elite class has ruled Haiti since its independence in 1804, using the state resources

military commander of the town at the time of the massacre, Captain Castera Cénafils, and a grassroots figure turned paramilitary leader, Jean Tatoune, were sentenced to life in prison with hard labor. The other four defendants received sentences of up to nine years imprisonment. Six defendants were acquitted. All of the convicted defendants also were ordered to pay the equivalent of \$2300.00—a large amount in Haiti—to a fund to benefit the families of the victims.

On November 16, 2000, a Haitian court sentenced the thirty-seven defendants who did not appear in court, and were being tried in absentia, to life in prison with hard labor. The absent defendants include coup leaders Raoul Cedras and Philippe Biamby, both of whom received asylum in Panama; former Port-au-Prince police chief, Michel Francois, who is in Honduras; and paramilitary leader Emmanuel Constant, who cut a deal with the Central Intelligence Agency and lives in New York City. Prosecutors alleged that they masterminded the attack. Lawyers were not allowed to defend the absent defendants. Judge Napla Saintil tried them without a jury exclusively on the basis of a 172-page bill of accusation presented to the court by the Haitian government prosecutors. The absent defendants will be arrested if they return to Haiti, but would have the right to a new trial if they return. See Marie-Andre Auguste, *Haitian Court Sentences 30 Officers*, ASSOCIATED PRESS, Nov. 16, 2000. Moreover, the Haitian government has asked a number of nations, including the United States, to extradite several former military officials who have been indicted in Haiti for committing murders during the coup period.

59. See confidential interviews *supra* note 54.

60. See S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., at 23, U.N. Doc. S/RES/940 (1994).

61. See confidential interviews, *supra* notes 53-54; STOTZKY, *supra* note 55.

as its personal bank account and keeping the vast majority of Haitians in a state of extreme poverty, even slavery.⁶²

Inextricably intertwined and connected in a multitude of ways to these two features of the transition and consolidation process (the economic, political, and social crises and the problems of corporatism) is a third factor – the failure to fulfill the requirements of the rule of law in both the formal and informal aspects of public and private life. In Haiti, as in virtually every other nation undergoing the transition from dictatorship to democracy, this failure manifests itself in the concentration of power solely in the executive branch of government, leading to massive human rights abuses and a total disregard for the functions of the other branches of government. For example, during the coup period (1991-1994), members of the Haitian armed forces systematically assassinated and tortured thousands of people, including government officials who attempted to uphold the rule of law. Indeed, the military blatantly ignored judicial orders to arrest soldiers or officers accused of human rights abuses. It ignored the basic rights guaranteed by the Constitution and any laws passed by Parliament which threatened its hold on power.⁶³ In light of this and Haiti's history of these abuses, a Creole proverb aptly summarizes the Haitian people's view about law: "Law is paper; bayonet is steel."

The violation of legal norms, however, is not restricted to formal military or de facto government officials. Unfortunately, such behavior is a distinguishing mark of political and social life at large, and has existed throughout the nation's history. This failure to follow the rule of law is evident in both social practices and in the actions of government officials.

This tendency toward unlawfulness does not, however, infect only public officials. Unfortunately, it equally infects the general society. This mentality correlates with a general trend toward anomie in society as a whole. It manifests itself in such things as enormous black markets, tax evasions, corruption in private economic activities, non-observance of efficient economic norms, and non-compliance with the most basic rules of society, such as elementary traffic and urban regulations.⁶⁴

This unlawfulness mentality is often the product and cause of collective action problems. Frequently, the combination of expectations,

62. See, e.g., Michele Montas-Dominique, *The Role of the Press in Helping Create the Conditions of Democracy to Develop in Haiti*, 56 U. MIAMI L. REV. 397, 398 (2002); see also STOTZKY, *supra* note 55.

63. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI 1-2 (1990).

64. For an analysis of this unlawfulness mentality in Argentina see CARLOS SANTIGO NINO, UN PAÍS AL MARGEN DE LA LEY (1992); see also STOTZKY, *supra* note 55, at 90-101.

interests, possibilities of actions, and their respective pay-offs is such that the rational course of action for each participant in the process of political or social interaction advises that person not to comply with a certain norm, despite the fact that general compliance with it would have been for the benefit of everybody in—Pareto's terms—or almost everybody. This "dumb anomie" is intimately connected with both the stunting and the reversal of economic and social development.

Therefore, for a successful transition to democracy to occur in Haiti, it is critical for the international community to help Haitians consolidate the rule of law. This is important not only to secure respect for fundamental rights and for the observance of the democratic process, but also to achieve satisfactory levels of economic and social development. But the international community seems to have misunderstood the contours of the rule of law, placing its resources almost solely into strengthening the judiciary. Even those efforts have not appreciably improved the system of justice. In point of fact, despite the international community's best efforts to help strengthen the integrity of the judicial system, it remains corrupt and inefficient. Indeed, years of corruption and governmental neglect have left the judicial system nearly moribund. For example, a shortage of adequately trained judges and prosecutors, among other systemic problems, has created a huge backlog of criminal cases, with many detainees waiting months or even years in pretrial detention before getting a court hearing. If an accused person ultimately is tried and found not guilty, there is no redress against the government for time served.⁶⁵ While it is certainly necessary to strengthen the judiciary, this is simply insufficient to achieve the goal of establishing the rule of law in Haiti.

As this discussion demonstrates, the problems associated with the transition from authoritarianism to democracy and the consolidation process itself are complicated and all encompassing. Moreover, because of the illiteracy and extreme poverty in Haiti, the broadcast media, particularly radio, must play an unusually important role in the democratization process. In point of fact, the electronic media, particularly radio, is almost the only method of transmitting important information about the relevant issues and their possible solutions to the vast majority of people. It is therefore absolutely critical to the democratization process that there be a lively, engaged, professional broadcast media striving to meet its "Fourth Estate" function.

The afternoon session of the conference thus concentrated on the

65. See U.S. State Dep't, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HAITI (2000), available at <http://www.state.gov/G/drl/rls/hrrpt/1999/391pf.htm>; see generally STOTZKY, *supra* note 55.

role of a free press in the transition and consolidation process in Haiti. It began with the premier of an extraordinary, unfinished documentary film by the academy award winning director, Jonathan Demme, on the life of Jean Dominique, the most celebrated radio journalist in Haitian history.⁶⁶ The major reason for showing the film was to demonstrate the importance of the media to the democratization process and to show how significant one person can be in that process. As the film makes clear, it is almost impossible to overestimate the importance of Mr. Dominique to the political life of Haiti and the Haitian people's hope for a better life. Indeed, the vast majority of Haitian people who had been shut out of the nation's political life for almost 200 years, and who took part in the democratic explosion at the grass-roots level in the late 1980s and early 1990s, saw Mr. Dominique as a progressive force who helped give formal expression to their lives. Unfortunately, on April 3, 2000, Mr. Dominique was assassinated as he arrived at his radio station to begin his daily broadcasts.

As Mr. Demme states in describing the making of his film, entitled *The Agronomist*.⁶⁷

For *The Agronomist*, we videotaped a number of encounters where Jean held forth on the great *passions* of his life—including Haiti past and present, justice, democracy, the arts, agriculture, and . . . Michele Montas.

When the *junta* of Cedras, Constant and their supporters in the United States government was finally cancelled in 1994, we did travel back to Haiti with Jean and Michele—only to discover that Radio Haiti had been so trashed by the military that it was going to be a long time before transmission could resume and provide me with the desired ending for the film.

Besides, Jean pointed out with typical candor, now that he was getting back to work, the earnest Americans with their little cameras in his face were starting to become a big pain in the *bunda*! (“ass” in *Kreyol*).

Not only *that*, Jean told me—but if I *really* wanted to do anything so crazy as to attempt a film about him, it should end *not* at a Port-au-Prince radio station microphone, but rather in the fertile agricultural regions of Haiti's outer country, ideally the Artibonite River Valley—because in order to *really* know Jean, *there* is where he must be seen to be fully understood. *There* exists his *true* heartland.

So. . . what we *won't* see tonight are the segments covering the *real* Radio Haiti story, including—

66. Approximately 250 people watched the movie. Almost everyone had the same intense reaction. They were deeply moved by it, simultaneously saddened and uplifted by it.

67. Jonathan Demme's opening remarks on *THE AGRONOMIST* supplied at the Symposium (unpublished paper) (on file with author).

- The challenges, the achievements, and the struggles
- The assaults, arrests, chases, and tortures at the hands of the Duvalier's and others
- The intrigues, reversals, and triumphs
- The amazing impact of Radio Haiti on the country of Haiti and abroad over the past 30 years—and *vice versa*.

Tonight we *also won't see* the central parts of *The Agronomist* involved with the story of Jean and Michele's personal history together, as deep and beautiful a love story as can be imagined.

Finally in tonight's segments, we *also won't see* the parallel story of a great Radio Haiti listener from the Artibonite River Valley, Mr. Charles Suffrard.

- How Charles and his friends grew up inspired and empowered as kids listening to JeanDo's voice and words in stolen moments on borrowed radios, close to the rice paddies cultivated by their families, under the starlit skies.
- How Charles, with 70,000 of his countrymen, traveled to Port-au-Prince airport in the spring of 1986 to witness, with their own eyes, the triumphant return from exile of Jean and Michele when Jean Claude Duvalier's downfall reopened the door to democracy and progress in Haiti.
- And of how, after Jean and Michele's *second* return from exile in 1994, Charles and Jean met in person and an extraordinary friendship was born.

Anyway—you'll get all that stuff and more when *The Agronomist* is completed some time next year. The film is not in any way an investigation into the cowardly, heinous, and catastrophic assassination of JeanDo. That is a matter for President-elect Aristide's judicial system and their counterparts in the United States Government, whose fingerprints cover every dimension of the political and social scene in Haiti today. Rather, this film is intended as a celebration of a great man, a great woman, and a great shared vision for a great and determined people, the people of Haiti.

In learning about Mr. Dominique, from meeting Mr. Dominique, watching Mr. Demme's film, interviewing many Haitians, including his wife, Michele Montas, and reading about him, it is clear that he was a most extraordinary person, who lived an extraordinary life. Born into Haiti's light-skinned mulatto elite, Dominique—"JeanDo" to his friends—broke ranks to become an early champion of the country's poor peasants and slum dwellers. He was considered an enemy of his class because of his life-long support for the poor in Haiti. After training as an agronomist in France, he turned to journalism as a vehicle for social change. In the 1960s he hosted a one-man program on a time-leased slot on Radio Haiti. By 1971, he had purchased the station, and began a

meteoric rise in the profession because of his eloquence and lively, even bombastic style and willingness to challenge abusers of power.

Wearing a trademark black leather cap and armed only with a pipe and a typewriter, Dominique simply revolutionized Haitian broadcasting. Realizing radio's potential to reach the country's illiterate poor majority, he began broadcasting not just in French, the language of the elite, but in Creole.⁶⁸ Over four decades, his vehement, witty, and deeply probing editorials became famous for denouncing government officials (dictators) and powerful private actors who abused their authority and caused great harm to the people and the nation.

Behind the microphone his beady eyes, angular jaw, and skeletal cheeks gave him an intense, hawk-like look. His rasping voice, acid tongue, and mocking on-air laughter earned him almost legendary status among peasant groups and pro-democracy activists. But they also made him an enemy of Haiti's dictators, Francois "Papa Doc" Duvalier and his son, Jean-Claude "Baby Doc" Duvalier.⁶⁹

While there were things in Haiti he dared not report on directly, he cleverly used accounts of upheaval in other repressed countries as a way to raise political awareness at home. In 1979, for example, the station closely followed the toppling of the Somoza dictatorship in Nicaragua and the fall of the Shah of Iran, using this information as a poorly disguised vision for Haiti. He did not make these statements lightly. Dominique was acutely aware of the dangers he ran. He jokingly called his style of consciousness-raising journalism "risky business." The bullet-riddled facade of Radio Haiti Inter testifies to the station's front line role in the country's fight for freedom and democracy. The bullets date from at least six different attacks between 1980 and 1994.

Dominique and his wife, Michele Montas, were twice forced to flee into exile. On their return to Haiti in 1986 after the collapse of the Duvalier regime, a crowd of at least 60,000 joyous people greeted Dom-

68. Variations in the use of language is one manifestation of cultural division. All Haitians speak Haitian Creole to some degree of fluency; eight to ten percent of the population (the elites) speak French well enough to claim fluency. Only a tiny minority within the elites, however, is truly bilingual in both French and Creole. More important than the fact of bilingualism, are the number of times elite children are told that it is unacceptable for members of their class to speak Creole. Until Aristide's reinstatement to office in 1994, French was the official language in schools and in the judicial system. In this way, language was effectively used as a social barrier and one that denied majority participation in certain state institutions. Thus, language was used to exclude approximately ninety percent of Haitians from any political, social, or economic power. Dominique's use of Creole in his radio broadcasting was a political act of great courage.

69. For a discussion of the Duvalier reign see, e.g., BERNARD DIEDERICH & AL BURT, *PAPA DOC: HAITI AND ITS DICTATOR* (1986); JAMES FERGUSON, *PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS* (1987).

inique at Haiti's International airport.⁷⁰ They celebrated wildly and some people hoisted him on their shoulders above the throng. With the help of donations from all over the country, Radio Haiti Inter was rebuilt.

The station soon was charting an emerging grass-roots popular movement known as *Lavalas*, led by a diminutive Salesian priest with a radical discourse: Jean-Bertrand Aristide. Dominique became an enthusiastic supporter of Aristide's victorious 1990 presidential campaign. He described it at the time as "the most wonderful experience of my life." But when a bloody military coup forced Aristide from power in 1991, Dominique's radio station was shut down. He and his wife spent two months in hiding before fleeing once more to New York. Only when United States troops intervened in 1994 to reinstate Aristide were they able to return.

Over the years, Dominique became intensely popular throughout Haiti, especially among peasants in the countryside because his station often addressed issues of land ownership and agriculture. His station was the first to offer Creole-language radio programs, a decision later copied by others in a country where the majority of its citizens are illiterate and speak Creole, not French, the official language. "Dominique helped lay down the groundwork for an independent press in Haiti," said Jean Jean-Pierre, a Haitian-American journalist who lives in exile in New York.⁷¹

Dominique and his wife, Michele Montas, hosted *Inter Actualities*, Radio Haiti's most popular morning show, which included news reports, commentary, and editorials. Montas, a United States-trained journalist, delivered the national news, while Dominique read international news, and wrote the station's editorials and commentary, which were sizzling tirades against corrupt politicians and businessmen.

An early Aristide supporter, Dominique embraced his handpicked successor, President René Préval, who served from 1996 to February 2001. Also an agronomist, Préval and Dominique both believed in bringing change in Haiti through political access in the countryside. Together they founded *Kozepep*, a peasant organization that could congregate thousands of peasants for political meetings and began to run into problems with the *Lavalas* leadership, who saw it as competition. Several *Kozepep* members were attacked by *Lavalas* people in Haiti's interior. Although many serious problems affected the Préval govern-

70. The photograph printed at the beginning of this Symposium was taken at the airport when he returned to Haiti.

71. Continuing interview with Jean Jean-Pierre in Miami, New York, and Port-au-Prince, (1994-2002).

ment, including his entirely constitutional decision to dissolve the Parliament, Dominique maintained hope for an improved society during Préval's presidency.

Dominique was a casual dresser in this tropical capital, where men wear coats and ties in ninety-degree weather. He clearly preferred to work in shirtsleeves and shoes without socks. But he was an unbending moral conservative. He told his wife he would not permit *Lavalas*, which means cleansing flood in Creole, to become dominated by corrupt officials.

Dominique remained supportive of Aristide, according to Montas. Even at times when other prominent *Lavalas* members became part of the growing Aristide opposition, Dominique stayed with the party. In 1996, for example, when leaders of the *Lavalas* Political Organization (OPL), which supported Aristide's first election in 1991, fought with Aristide about whether to lengthen his first presidential term because of his forced exile, and broke off from Aristide, Dominique stayed on. Dominique joined Aristide's new *Fanmi Lavalas*, helping rescue the *Lavalas*' popular name recognition away from the other party, which became known as OPL. "Jean's motto was transparency, truth and participation,"⁷² said Montas, an eloquent, elegant, soft-spoken woman who continues to run Radio Haiti, and is determined to keep her husband's name in the news until the case is solved.

In May 2000, a month after Dominique's murder, *Lavalas* won seventy-one of eighty-one Lower House seats⁷³ and eighteen of nineteen Senate seats.⁷⁴ They won several more seats in the November elections. But tabulating methods used to count votes in the May elections are hotly contested. Vote counting in nine areas was declared irregular by both the Haitian opposition and independent international organizations such as the Organization of American States and the United Nations. "If Dominique were alive, he would not have allowed this to go unnoticed," said a political observer.⁷⁵

The day he was killed, Dominique arrived at the radio station at his usual time, shortly after 6 a.m., to have a few minutes alone to work on his editorial. The news show started at 7 a.m. The killers apparently watched the station for several weeks prior to the murder. During that time, Michele Montas had been arriving at the station with Dominique

72. Interview with Michele Montas, in Miami, Fla. (Jan. 27, 2001) and in Port-au-Prince, Haiti (Oct. 15, 2001). Any unattributed quotes by Michele Montas are taken from notes of these interviews.

73. See Michael Norton, *Haiti's Election Results Official*, ASSOCIATED PRESS, Aug. 16, 2000.

74. Joanne Mariner, *Haiti's Election Results Don't Add Up*, FINDLAW, July 21, 2000, available at <http://www.cnn.com/2000/LAW/07/columns/fl.mariner.haiti.07.21/>.

75. Confidential interviews *supra* note 54.

because of a back problem. That was not their normal routine. They had different schedules and preferred to take different cars. As fate would have it, on April 3, 2000, Montas was driving herself for the first time in days. "Apparently they had two shooters. I suppose one was for me," she explained in an interview that took place in Miami and at her home in Port-au-Prince.

Dominique drove up to the station's entrance on Delmas Road, a thoroughfare connecting the upscale neighborhood of Petionville and downtown Port-au-Prince. Jean-Claude Louissaint, the security guard, opened the blue metal gate. One man was loitering nearby, but Dominique did not pay attention to him. Two cars were parked in front of the station with other men inside. Dominique parked his car and took a few steps towards the station's door. The man loitering entered the gate on foot. Catching up to Dominique, he pulled a gun and shot him seven times with deadly hollow-point bullets, apparently to make sure Dominique would die even if he was wearing a bulletproof vest. One shot pierced his aorta. The gunmen then shot and killed the security guard.

The murder stunned the country.⁷⁶ Dominique's death provoked demonstrations and massive displays of mourning. President Préval declared three days of mourning and ordered the national palace draped in black. Approximately 16,000 people packed the capital's soccer stadium for Dominique's funeral. Unfortunately, as of the publishing of this volume, the culprits have not yet been brought to justice.

The search for Dominique's killers has turned into a dramatic test of Haiti's justice system, an opportunity to gauge the strength and reliability of it, and a way of helping Haiti improve the system and end impunity.⁷⁷ All of the issues involved in the case, of course, must become a part of the on-going public debate. The press must be in the vanguard of the discussion and provide the relevant information to the public.

Michele Montas continues to run the radio station from Dominique's former office, even in the face of serious threats to her life. She is clearly an heroic figure. In honor of her husband, she has kept his desk unaltered, complete with his pipe rack. Dominique's indomitable spirit remains a strong presence at the station. In a taped announcement, his voice can be heard announcing the morning news the way he always did: "It's seven o'clock. To everyone I say good morning." Sitting in

76. It also shocked neighboring nations, nations in Latin America and Europe, and it even had a major impact in the United States.

77. The investigation has not gone well. For a devastating critique of the investigation by Michele Montas-Dominique see *Is Another Assassination of Jean Dominique About to Take Place* (Radio Haiti, Editorial, Mar. 3, 2002) [hereinafter *Another Assassination*].

the studio, Montas replies: "*Bonjour Jean.*" In the station entrance a few feet from where he was gunned down, a large poster of Dominique's face announces in Creole: "Jean Dominique may have fallen but the fight goes on." As is appropriate to the work of a journalist in an evolving democracy, Michele Montas is the driving force in the investigation. Ms. Montas, a top journalist in her own right, never delved into Haiti's underworld until her husband's murder forced her to look at a Haiti she did not know. "Jean was murdered because he was going to stop a lot of people from making a lot of money," she said. She uses the radio station and whatever few connections she has in the Aristide government to twist arms and move the case along.⁷⁸

Montas met Dominique when she came to work for Radio Haiti in the early 1970's. Fresh from Columbia University's Graduate School of Journalism, where she witnessed the 1969 anti-Vietnam War movement and demonstrations, Dominique swept her off her feet with his passionate politics. Married for twenty-five years at the time of his death, Montas has suffered tremendously with the murder. She considered closing the station, but with the help of Dominique's daughter, Gigi, she resumed operations a month after his death. She also swore to solve her husband's murder. It is certainly a very dangerous mission. But she is determined. "They killed me when they murdered my husband," she explains, in her soft French-accented English, her eyes welling up with tears.⁷⁹

The Préval government gave her four bodyguards who follow her everywhere. She still seems in shock over her ordeal. Images of her husband are everywhere at the radio station and in her home. At Radio Haiti, a life size portrait of a photogenic Dominique welcomes visitors. At home, his pipes and leather cap remain where he left them. Montas remains under intense scrutiny by those who planned and executed her husband's murder. She sometimes gets more bodyguards. "When the trail gets hot," she said with a nervous laugh. She has written her will but does not believe the killers will come after her. Limited by the secret clauses controlling the investigation, she only writes stories on the case when she fears the investigation is being stymied and sidetracked. "They thought I was going to go away because I am a woman."

In February 2001, before the Aristide presidential inauguration, for example, Montas suspended all transmission at Radio Haiti. The action was to protest a motion to investigate Judge Gassant, the original judge in Dominique's murder case, by the *Lavalas*-controlled Senate, after his

78. Interview with Michele Montas, in Miami, Fla. (Jan. 27, 2001) and in Port-au-Prince, Haiti (Oct. 15, 2001).

79. *Id.*

third attempt to force a Senator to testify. "They have to understand that there won't be impunity in this case," she added, although she is aware she will need international support to get the case through Haiti's labyrinth-like judicial system.⁸⁰

Since Jean Dominique's murder, there have been a growing number of reports of harassment and attacks on journalists in Haiti.⁸¹ The majority of these incidents may have been perpetrated by state functionaries, including the police. Moreover, many people, including Michele Montas, believe that the difficulties and dangers experienced by Haiti's journalists have been exacerbated by the failure of the judiciary to conclude the investigation into Mr. Dominique's murder.

Michele Montas's paper makes an important contribution by analyzing the role the press has played for the past twenty-five years in establishing a democracy in Haiti. She describes this as a movement from an era of strict government censorship in a dictatorship to "an era of slowly increasing self-censorship under a democratic government."⁸² Her paper begins with a short historical view, arguing that the entire nineteenth century and the early twentieth century were part of an age in which politics and the media were strictly controlled by a tiny elite, and the vast majority played no role in the affairs of state. Journalism was a tool used to gain political power. Newspapers, the main arena of political debate, rarely lasted more than a season or a government. For example, of the forty-two major newspapers between independence in 1804 and the American occupation of 1915, thirty lasted only a year. Only two daily newspapers created during that time still survive.

During the early years of the Duvalier dictatorship (1957-1970), many newspapers were closed and the four daily newspapers that survived were strictly pro-Duvalier. Official speeches, printed in full, replaced political editorials. Stories about Haiti came from foreign newspapers and magazines. Local news coverage consisted of social and cultural stories about the tiny elite. Moreover, there was no tradition

80. *Id.*; see also *Another Assassination*, *supra* note 77.

81. See *Haitian Journalists Still Negotiating*, ST. VINCENT HERALD, Apr. 13, 2002; *Radio Haiti-Inter Staff Accuse President of Blocking Murder Investigation*, BBC MONITORING SERVICE, Apr. 4, 2002; Michael Narton, *Two Years After Unsolved Murder of Influential Journalist, widow denounces Haiti*, ASSOCIATED PRESS, Apr. 3, 2002; *Signal FM Radio News*, BBC MONITORING SERVICE, Mar. 28, 2002; Michael McGuire, *Journalists Attacked—SA and Haiti*, CHI. TRIB., Mar. 25, 2002; *Signal FM Accuses Security Forces of Threatening Reporters*, BBC MONITORING SERVICE, Jan. 24, 2002; *Lavalas Party Supporters Threaten Haitian Journalist*, BBC MONITORING SERVICE, Jan. 18, 2002; *Head of Reporters Sans Frontieres Makes Second Visit in Two Months*, BBC MONITORING SERVICE, Jan. 9, 2002; Stanley Lucas, *Journalists Seek Way Out*, ST. VINCENT HERALD, Dec. 22, 2001; Press Release, Reporters without Borders, RSF on Jean Dominique (Mar. 28, 2002) (on file with author). Press Release, Amnesty International, Haiti: No Justice for Jean Dominique, No Real Rule of Law (Feb. 4, 2002).

82. Montas, *supra* note 62, at 397.

of actual, on the spot reporting. Rather, "reporters" covered stories by simply sitting at their desks.

As she describes it, the media revolution began in the early 1970s, led by Jean Dominique. For the first time in Haitian history, his radio program, Radio Haiti, introduced Creole as a working language for news. Traditionally, of course, newspapers and radio *only* used French, thus excluding over ninety percent of the population. Broadcasting in Creole, therefore, was a revolutionary act. It expanded democratic horizons for the Haitian people and broke their traditional isolation. People in most remote parts of Haiti, pejoratively referred to as "the country outside," began to understand the politics of "the Republic of Port-au-Prince."⁸³ The strategy of dividing and separating the peasants into small units would no longer work as a method of keeping power in the hands of a small but ruthless elite.⁸⁴ Broadcasting in Creole also helped to break the mass economic slavery. For example, coffee growers in one part of Haiti could now hear the price of coffee on the international markets and compare the prices of coffee traders all over the country.

The use of Creole had other revolutionary effects. It helped empower the majority. It spread the methods and spirit of resistance, it gave a voice to the majority's problems, and it allowed the people to discuss possible solutions. Even with this new opportunity for openness, it remained dangerous for newspaper and radio journalists to cover political topics. Nevertheless, journalists continued to talk of previously unacceptable political topics. The "golden age of pioneers" ended abruptly on November 28, 1980, however, when the political police closed Radio Haiti. They ransacked its studios, jailed all of Radio Haiti's journalists, and tortured several of them. They also arrested many other activists—journalists, human rights activists, labor union leaders, and students. These actions coerced other radio stations to stop their broadcasting.

In 1986, after the fall of the Duvalier regime, there was a journalistic rejuvenation. This so called rebirth did not open up the political arena. The vast majority remained excluded from the political sphere. Nevertheless, to a degree, it promoted the rights of free speech and association. Montas argues that while between 1986 and 1991 the press remained an "echo chamber for opinions,"⁸⁵ this muted role still contributed positively to rebuilding Haitian civil society in the major cities because it allowed for the free circulation of ideas and information. The media did not, however, venture into serious investigative journalism.

83. Montas, *supra* note 62, at 399.

84. See ШТОТЗКУ, *supra* note 55.

85. Montas, *supra* note 62, at 401.

Montas describes the *coup d'etat* of 1991 as an attempt to crush the popular participation of the people in the 1990 election of Aristide. This included the murders of 5,000 people, internal exiles, and mass departures of people from Haiti. The coup also had a profound negative effect on the press, particularly the electronic media. The same elite that sponsored the coup now opened and controlled numerous radio stations. Their sheer numbers, and the fact that many do not have to rely on advertising revenues, has kept the population confused and split. Moreover, the lack of professional ethics and objectivity of the majority of journalists has eroded the strong bond of trust that existed in 1986 between the media and the majority of the population. This has clearly aggravated the existing political divisions and harmed the ability of the press to help rebuild Haiti's fledgling democratic institutions.

Montas argues that sensationalism "breeds the violence that undermines democracy in today's Haiti."⁸⁶ Indeed, she argues that libelous accusations and threats, made by journalists on a daily basis, "is the major failure of democracy in today's Haiti."⁸⁷

The control of the media by commercial interests has created a new form of private, not government, censorship. Some reporters are bribed, causing under reporting. Many journalists are on the payrolls of private companies or government agencies, and this certainly biases their reporting. In addition, very few positive stories that affect the rural peasants are even reported. Again, the majority is becoming invisible.

Montas concludes quite correctly that the Haitian press is at a crossroads. Will the media continue to play a negative role in helping to create a democracy or will it begin to take a hard look at the profession? There is cause for some hope. Jean Dominique's death has led some journalists to begin to cover issues and institutions, such as the judiciary, that are integral to consolidating a democracy. Montas does not have an answer, but her commitment to truth and objectivity certainly are an inspiration for those who desire democracy. Her reporting is the model that journalists in Haiti must follow to help democratize the nation.

Biased, uncritical reporting is not endemic to developing democracies in general, or to Haiti in particular. It also occurs all too frequently in well-developed democracies, most notably the United States, and with quite serious affects. Ira Kurzban's paper makes that point. He argues that the media, the academy, and Congressional reports have painted an incomplete, inaccurate picture of Haiti, resulting in a belief that the United States investment in Haiti, in dollars, people, and resources, has been an abject failure.

86. *Id.* at 403.

87. Montas, *supra* note 72.

Moreover, the international community in general, attributes little blame to the United States for this failure. Rather, this failure is viewed as being directly traceable to the actions of the various Haitian governments that have served since the "restoration of democracy." Mr. Kurzban further argues that this false vision of Haiti has very harmful affects because it results in a failure by the relevant United States officials to analyze the nature of our foreign policy and to correct any defects in that policy which may hinder Haiti's transition process. Mr. Kurzban's conclusion about United States policy toward Haiti is not the conventional one. He claims, and convincingly so, that "Haiti has not failed the United States. Rather, the United States has failed Haiti."⁸⁸

To bolster his argument, Mr. Kurzban demonstrates that what have been described as "facts" about Haiti are actually normatively viewed and falsely interpreted. For example, the claim that the United States has spent \$2 billion dollars on or in Haiti to bring democracy there implies that the money went directly to the Haitian people and was used solely for that purpose. Indeed, that is exactly how this "fact" is portrayed in the main stream press. Kurzban shows that this "fact" is portrayed inaccurately. Over \$250,000,000 of that money was used to support the interdiction of Haitians at sea, hundreds of millions were spent by the United States military on services supplied by American companies, ("corporate giveaways"), a great deal of money went to the psychological operations program, and hundreds of millions of dollars went to United States companies for studies that have had no benefit whatsoever for the vast majority of Haitians.

Kurzban continues by addressing a series of misconceptions about Haiti propagated by the United States media. He claims that in order to develop a rational, helpful policy toward Haiti, the United States government "must see Haiti as it is and not what we hope it to be."⁸⁹ He then lists a series of seven major facts that are poorly understood in the United States. These include the fact that Haiti is largely an agrarian society, and that people survive off the land, that the economy is controlled by a small but ruthless elite who have no interest in helping the masses, and that the manufacturing sector is of only marginal assistance in helping the serious unemployment problem. Other significant facts are that Aristide and the *Lavalas* movement are overwhelmingly popular in Haiti because they represent the vast majority of the Haitian people's hopes and aspirations, and that the transition to democracy cannot happen overnight but takes many years to develop. In addition, Haiti is not

88. Ira Kurzban, *A Rational Foreign Policy Towards Haiti and How the Media Shapes Public Perception of Haiti*, 56 U. MIAMI L. REV. 405, 406 (2002).

89. *Id.* at 407.

alone as a nation in the transition process that faces increases in crime and insecurity. Moreover, drug trafficking plagues Haiti, leads to corruption, and is a substantial threat to national security.

Kurzban not only addresses these factual misunderstandings, he also lays out a prescription for creating a rational United States foreign policy for Haiti. He argues that it is in the best interests of the United States to help create the conditions—economically, politically, and socially—in which Haitians will flourish by remaining in Haiti and not leaving. According to Kurzban, the formula for success includes stopping our interference in the domestic politics of Haiti by spending limited resources to create opposition to the democratically elected government, listening to the Haitians about what they need rather than dictating to them what we think is good for them, providing Haiti with the necessary technical expertise and financial resources to help Haiti change from an unsophisticated agrarian society to a more modern society, improving its health care (and I might add educational systems), and helping them fight drug trafficking and other crime.

Kurzban's suggestions are, of course, only preliminary. They are, however, important because they lead to a serious questioning of United States foreign policy. Moreover, his argument has important ramifications for democracy in the United States. Only if the media relays the relevant information to the public can the debate and eventual policy decisions about our foreign policies be a truly informed one, with the best chance of it actually meeting the stated goals. So far, the media has not met its constitutionally recognized function when it comes to our policy toward Haiti.

Kurzban's critique of the established media's coverage of Haiti is accurate, informative, and devastating to the belief that the United States has a robust, unbiased, and fair-minded press, but it is nevertheless somewhat incomplete. Kurzban's paper is not intended to, and he simply does not address many of the underlying reasons for the inaccurate portrayal by the mainstream media of the Haitian situation, the international community's—lead by the United States—policy towards Haiti, and its affect on the Haitian people's attempt to establish a true democracy. Jean Jean-Pierre's paper takes on this task.

One of the major reasons for the media's failure to present accurate, informative, and relevant information and thus to meet its democratic function, comes from the market itself. To put it simply, the market, exerting strong pressure on the press, may cause the media to be too deferential to the government and therefore reluctant to criticize its policies, especially when certain government policies favor the economic interests of the press. In other cases the influence is more subtle. The

desire to maximize profits causes the press to slight issues that should be thoroughly analyzed to fulfill the conditions of democratic governance but will not be because performing this task will simply not generate enough revenue.

Jean Jean-Pierre, a highly skilled and experienced journalist who has covered world events for over fifteen years for several papers and radio stations, invokes statistical evidence about the "media monopoly" to prove the inadequacy of the media in providing accurate, important information to the public. For example, it is shocking, as Mr. Jean-Pierre tells us, that, in 1984, some fifty corporations controlled most of the major media outlets in the United States and that by 1993 the number of corporations controlling those outlets dropped to less than twenty.⁹⁰ To bolster his argument, he may have also mentioned the number of cities in the United States without major newspapers or with only one newspaper, and referred to the privileged position of the three major networks in capturing viewers.⁹¹

I believe, however, that this way of analyzing the issues, as a question of monopoly power, is insufficient to explain fully the media's failures in accurate and full reporting, and not necessarily because of the advent of cable or other new information technologies. Rather, it is insufficient to rely too heavily on a monopoly power theory because those who construct their arguments in these terms conceive of the market too narrowly. For constitutional and democratic purposes—for purposes of free speech and press—I believe that the relevant market must be defined in broader terms. The market should be seen as an informational one, the domain from which the public finds out about the world that lies beyond its immediate experience. Thus, the relevant market includes all informational sources—newspapers, radio, television, the internet, magazines, books, journals, and perhaps even movies. It cannot be defined simply medium-by-medium. While there are certainly leading forces that shape public opinion, it is less clear that there is a monopoly.

Jean-Pierre recognizes this distinction. He argues, and quite convincingly, that there is a gap between market-determined speech and democratically determined speech (the coverage and reportage that would be chosen by a people assembled in some imaginary democratic convention). It is clear that the market is an imperfect reflection of what people want and democracy may require. There are several reasons for this serious imperfection and limitation of the market. The major reason

90. Jean Jean-Pierre, *How the Major U.S. Media Are Undermining Democracy*, 56 U. MIAMI L. REV. 413, 413-14 (2002).

91. See generally BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (1991).

is that the profit motive creates incentives for media executives not only to maximize revenue but simultaneously to minimize costs. This dynamic sometimes leads the media to stay away from or to slight high-cost news gathering activities, such as any serious analysis and reporting about the democratic revolution in Haiti,⁹² and to rely instead on low-cost reruns of silly sit-coms or “attractive” local stories. A second distortion in the market results from advertising, the primary method used to raise revenue by the privately owned media. Media corporations must be sure that the content of their reporting—their broadcasts or newscasts—help and do not harm the sale of their advertised products. Sharply criticizing government military intervention in Afghanistan, for example, or simply creating too much political controversy, is a poor way to sell soft drinks.

Moreover, advertising dependence leads the media executives to discriminate among potential readers, listeners, and viewers in determining the content and manner of the material they present to the “public.” Indeed, market pressures drive the media to target audiences in terms of their purchasing power and susceptibility to advertising. Thus, they do not necessarily target the public in general. This is certainly not living up to the democratic role of the press. In addition, there is an absence of collective deliberation in a market-driven system. In this system, people register their preferences through individual transactions, such as selecting a certain television show to watch at home or purchasing a specific detergent or article of clothing. These choices made in these private settings may well be different than those people would make in a more public setting and with collective discussion and debate of all possible options.

Jean-Pierre suggests another, perhaps even more serious problem, with a market-driven system—the incestuous nature of the relationship between the media and political actors. As an example, he discusses the large amounts of money the media receives as advertisements from politicians running for office. More insidiously, establishment media representatives have close personal relationships—sometimes too close—with government officials. Indeed, many media types, after serving in high government posts, return to highly paid media positions. This sometimes causes the slighting of publicly important stories. To illustrate this important point, Jean-Pierre quotes Katherine Graham, former owner of the *Washington Post*, talking about the value of the relationships between government officials and the press at a party she threw for

92. For a well-argued criticism of the reporting of Larry Rohter, the *New York Times* reporter who has covered Haiti since July 1994, see JACK LULE, DAILY NEWS, ETERNAL STORIES: THE MYTHOLOGICAL ROLE OF JOURNALISM, 147-71 (2001).

Bill Clinton to celebrate his 1992 presidential victory.⁹³ The quote states that these relationships “go beyond the office.”⁹⁴ This, of course, implies the press is less likely to condemn publicly officials with whom they have a personal relationship and who violate the public trust. Jean-Pierre cites, as other examples, the killing of certain stories,⁹⁵ the attempted bribing of reporters by the Fox News Chairman to quash a story about Monsanto’s use of bovine growth hormones in cow’s milk.⁹⁶

For all of these reasons, reporters tend to rely too heavily on official government sources, report stories tardily, when they are perhaps too late to have the maximum impact,⁹⁷ and, as Jean-Pierre convincingly argues, fail to do the hard work necessary to understand “third world” nations, especially those undergoing the movement from authoritarianism to democracy.⁹⁸ In particular, Jean-Pierre, who has covered Haiti for the *Village Voice* for many years, uses Haiti as an example of disreputable press reporting over several decades.⁹⁹

According to Jean-Pierre, most of the mainstream United States media sees “Haiti through the prism established by racist Hollywood movies since the 30s.”¹⁰⁰ Mr. Pierre meticulously catalogs the sloppy reporting and false images of Haiti, even by the so-called competent reporters. Many of these problems, of course, stem from a lack of understanding about Haitian history and culture. Moreover, most of these reporters cannot even speak Creole, the language that every Haitian can speak and now the official national language. To do a credible job in Haiti or elsewhere, a reporter must be engaged, fluent in the language of the nation he covers, knowledgeable and understanding of the culture and history of that nation, suspicious of government controlled

93. He also quotes her speaking to the senior Central Intelligence Agency officials, as stating: “There are some things the general public does not need to know and shouldn’t. . . . I believe democracy flourishes when the government can take legitimate steps to keep its secrets and when the press can decide whether to print what it knows.” Jean-Pierre, *supra* note 90, at 416.

94. *Id.*

95. *Id.* at 414-15.

96. *Id.* Jean-Pierre also could have pointed to the failure of NBC News to allow video footage of the devastating affects on civilians with the United States bombing of Iraq during the Gulf War.

97. To make this point, Jean-Pierre uses as an example the 1989 United States invasion of Panama to capture General Manuel Noriega. According to Jean-Pierre, the United States media did not report the fact that hundreds of civilians had been killed in the invasion until approximately nine months after the invasion. The story had been reported throughout Latin America and other parts of the world within days after the invasion. Jean-Pierre, *supra* note 90, at 416-17.

98. *Id.* at 417 (describing Art Kendal who wrote from 1970-1980 on Haiti for the Associated Press).

99. For a strong denunciation of Larry Rohter, the *New York Times* reporter who has covered Haiti for several years, see LULE, *supra* note 92.

100. Jean-Pierre, *supra* note 90, at 417.

information, and intent on verifying the accuracy of all information he obtains. All of this requires a real commitment to the vision of the importance of a free press to democracy and absolute support from the media executives for fulfilling this role. As Jean-Pierre makes abundantly clear, this has not been the case in the United States media coverage of Haiti.¹⁰¹

* * * *

The road from authoritarianism to democracy is a long and treacherous one. For the past several decades, the numerous nations engaged in this journey have met with varying success. Sometimes the road has been cleared of debris and sometimes it has been littered with it. Simply because people desire and favor democratic methods for resolving seemingly intractable conflicts and developing a democratic nation does not mean that authoritarianism will be easily overcome. Indeed, powerful political, social, and economic forces often block the passage to democracy. These forces include corporatism, anomie and unlawfulness, an organic conception of society that often leads to a dualistic vision of the social order, and extreme concentrations of institutional, economic, and social power. Moreover, a combination of these forces and an interplay between them are often directly related to massive human rights abuses.¹⁰²

In attempting to exercise the sovereign prerogative of collective self-governance, the people must obtain the relevant information necessary to make the correct or at least the democratically appropriate decisions. The hope of democracy is to have "the widest possible dissemination of information from diverse and antagonistic sources."¹⁰³ Informed public opinion is the most potent of all restraints upon misgovernment. The organized press is, of course, the principal institution that performs the function of providing the relevant information to the people.

To put it another way, the paramount function of freedom of speech and press is to assure the proper working of democracy by protecting the free exchange of political information and ideas. Professor Alexander Meiklejohn put it this way:

101. For other examples of inadequate and indeed even sloppy reporting in Haiti, particularly describing the inadequacy of the mainstream media in accurately reporting the United States government's failure to act privately in accordance with its publicly stated goal of helping to create a stable environment for democratic reform in Haiti, see Irwin P. Stotzky, *On The Promise and Perils of Democracy in Haiti*, 29 U. MIAMI INTER.-AM. L. REV. 1 (1997).

102. For a discussion of the moral, political, and social problems in dealing with massive human rights abuses see STOTZKY, *supra* note 55, at 114-39.

103. *Associated Press v. United States*, 326 U.S. 1, 20 (1944).

Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process against which* [freedom of speech and press] *is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government.¹⁰⁴

Freedom of speech has other justifications that are intertwined with democracy. Freedom of speech is itself an end because the human community is in large measure defined through speech. Indeed, freedom of speech is intrinsic to individual dignity. This is particularly important in a democracy, in which the autonomy of each individual is accorded equal and incommensurate respect. There is, however, more to the concept of freedom of speech than individual dignity. Freedom of speech, by fostering the values of democratic self-government, is thereby instrumental to the attainment of social ends. Again, the role of the press is crucial to this goal.

As the articles in this symposium demonstrate, however, the role of freedom of speech and press has been severely restrained in many of the nations undergoing a transition to democracy. Press autonomy has been compromised by government and private actions thus severely limiting the scope, quantity, and quality of the necessary information that reaches the people. This lack of press autonomy and integrity is caused in large part by such factors as market forces, government and private corporative coercion, tyranny, and legal, historical, and cultural barriers. Nevertheless, as the brave individual reporters, non-governmental organizations, academics, and democratic minded political actors work to develop democratic states, a democratic hope comes closer to a democratic reality.

In the long run, of course, nothing positive can be achieved in these nations without the establishment of a deliberative democracy—a democracy that allows for and facilitates opportunities for equal participation and rational discourse among all segments of the population. This discourse is essential for a process in which political decisions are based on the judgments of its members who are perceived to be and are treated as free and equal persons. The discourse has another important function: It is essential for the creation of a moral consciousness of humanity that recognizes the value of human rights and abhors any notion that disregards them. Crucial to democracy and the creation of a moral consciousness of humanity is an institutional structure that protects and encourages freedom of speech and press. Creating and preserving such

104. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1965) (emphasis in original).

an enduring structure is one of the most difficult tasks assigned to the citizenry of a democracy. The success of such a venture remains uncertain. Indeed, in nations striving to become democracies, the struggle continues on a daily basis.

A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the greater values of freedom of expression and the right of the people to know. In the final analysis, it is not merely the opinion of the editorial broadcaster, the writer, or the columnist which is protected by freedom of speech and the democratic structure. It is the free flow of information—the entire communicative process—that must be protected so that the public will be informed about the government and its actions, and so that the people can scrutinize government, hold it accountable, and protect their sovereign prerogative. A true democracy requires no less.