The Lord Advocate, Colin Boyd QC, delivered a lecture for the Howard League for Penal Reform in the Playfair Library, Old College, University of Edinburgh on Tuesday, February 19, 2002.

It was Thomas Jefferson who said that advertisements contain the only truths to be relied upon in a newspaper.

I do not, of course, subscribe to the Jeffersonian theory – I have less faith in the truthfulness of advertising.

The media is the principle source of information for the public and journalists and reporters have a significant role in informing (as well as forming) public opinion. This is particularly so in the context of the judicial process. The public benches in the courts are rarely crowded and most individuals rely on press reports and TV coverage for information about the operation of our judicial system. Lord Denning described court reporters as "watchdogs of justice" being there "to represent the public … to see everything is rightly done".

The contribution of the media in informing public opinion and promoting political debate is fundamental to a fully democratic society. In the case of Lingens v Austria the European Court of Human Rights (1986 8 EHRR 407 at page 419) stated:

Freedom of the press … affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society …

Article 10 of the European Convention on Human Rights guarantees everyone the right to freedom of expression. Interestingly, the European Convention, unlike the First Amendment to the United States Constitution does not specifically refer to the freedom of the press or of the media. Nonetheless, the Strasbourg authorities have acknowledged the fundamental importance of the application of Article 10 in the context of the media.

Of course, this right is not absolute – in a media context it is evident that an absolute freedom of expression would inevitably lead to interference with the fundamental rights of others – such as the right to respect for private and family life or the colloquial "right to a fair trial". Article 10 recognises that the exercise of the right to freedom of expression brings duties and responsibilities and explicitly recognises that conditions or restrictions on freedom of expression may be necessary

- in the interests of national security, territorial integrity or public safety,
- for the prevention of disorder or crime,
- for the protection of health and morals,
- for the protection of the reputation or rights of others,
- for preventing the disclosure of information received in confidence, or
- for maintaining the authority and impartiality of the judiciary.

Similarly, Article 6 which confirms the right to a "fair and public hearing" in "the determination of civil rights and obligations or of any criminal charge" explicitly recognises that exceptional circumstances arise where the normal rights afforded to the press require to be tempered:

"… the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The incorporation of the European Convention on Human Rights into domestic law does appear to be promoting a more liberal interpretation of the Contempt of Court Act. This Act provides amongst other things, that it is a contempt of court to publish material about live cases which create a substantial risk that that the course of justice of the proceedings in question will be seriously impeded or prejudiced. Scottish courts had interpreted these provisions narrowly and strictly. However in the Petition of Her Majesty's Advocate v Scottish Media Group and others in 1999 the court adopted a more lenient approach.

In that case it was alleged that the Daily Record was in breach of sections 1 and 2 of the Act in reporting the circumstances surrounding the arrest of Ian Patrick McColl, better known as "Big Tam" of "City Lights" fame. Reference was made to specific details of the allegations together with personal details which were said to be prejudicial to a fair trial.

The Court however pointed out that the Contempt of Court Act had been passed by Parliament with the obligations under the Convention fully in mind. The test was whether or not the court could be satisfied beyond reasonable doubt that there was a risk of substantial prejudice. It pointed out that the trial was not likely to start for some time. The fact that he was a television personality was an unusual feature. The court went on to say that where personalities from politics, sport or entertainment stood trial before a jury it was inevitable that the jurors may often know more about their way of life and the background to any charge than they would in an ordinary case. That might mean that the judge should consider giving more pointed directions to the jury about reaching a verdict based only on the evidence given in court.

In that case the court held that there was no contempt of court and there was no reason to suppose that even if a juror remembered the article that it would diminish their ability to reach a proper verdict on the evidence.

It is not yet clear whether the courts will be less inclined to grant restraint orders under s.4 of the Act than has been the case in the past. Nevertheless there appears to be a perceptible shift in the balance between ensuring that the course of justice is not impeded and the rights of the press to publish articles about live cases.

The fact that restrictions on reporting in this country are few, and that they are justified by sound public interest considerations, recognises and respects the importance of the media in providing information to the public. To that extent journalists and reporters, like judges and prosecutors, are servants of the public interest.

The public interest, unlike public curiosity, is served by truth and justice. It is not well served by scare mongering, innuendo, scapegoating and unfounded speculation.

I do not believe that, in general, the media is intent on misrepresentation or misinformation. The media, like the justice system, relies on public confidence. Newspaper circulation and TV ratings will fall where the public lacks confidence in the quality of reporting just as confidence in the judicial process will waiver where injustice is seen as its product. More than ever, the public is inquiring and well informed; the plethora of communication channels has increased the appetite for information and, more than ever, there is an educated scepticism abroad. The public is alive to "spin" – there is increasingly a healthy scepticism, a critical evaluation of the words and deeds of lawyers, politicians, journalists – and many others. This is a mark of a grown up, educated democracy. It is not universal but it is evident.

I am not alone in the view that, in general, the media in the United Kingdom recognises the importance of its role and respects the restrictions and limitations on its freedom of expression.

As recently as 13 February 2002 similar sentiments were expressed by the Attorney General, Lord Goldsmith QC at a seminar on media and the law when he observed that, on the whole, the media act responsibly in their reporting of proceedings in the criminal courts.

He then spoke of the unfortunate consequences which arise when the media strays beyond the bounds of acceptable reporting and when it fails to observe the legal restrictions on publication which are

necessary in the public interest. He referred to the collapse of the first trial of Johnathan Woodgate and Lee Bowyer, the Leeds United footballers charged with causing grievous bodily harm to a young Asian student as an example of

"the very real harm that can be caused to the trial process by premature and inappropriate comment in the press".

He also pointed to the resultant damage in terms of public confidence in the judicial system and to the human cost in terms of the pressures suffered by the victim, the accused and their families in consequence of the necessity for a re-trial.

But he also observed that in his view most media contempts were accidental, resulting from a blunder or momentary lapse.

In general, we in Scotland enjoy a responsible media. And while, in general, the public will scrutinize and evaluate what it is told, some will receive the editorial line like a tablet of stone and will readily and uncritically adopt the tabloid view. And there lies the danger. There the vulnerability.

Fat cat lawyers, inept prosecutors, crooked defence lawyers, senile judges, corrupt policemen, mobsters and sex beasts are all familiar figures in the pages of the tabloid press and so in the public mind. Such stereotypes do not serve the public well. They do not reflect reality; they promote an unfounded lack of confidence in the judicial system and they lead to unwarranted fear and mistrust. Taken to extremes they promote vigilantism and a fear of crime which can be as debilitating as crime itself. In undermining public confidence they discourage victims and witnesses from participation in the judicial process.

There is one stereotype which I consider is particularly damaging. It is the way in which the judiciary are sometimes depicted, mostly in the tabloid press. I am not for one moment suggesting that the judiciary are immune from criticism. Nor should we be too squeamish if at times the criticism appears robust. But we should be concerned about headlines and articles, which appear to hold judges up to ridicule, are personally derogatory, undermine their authority, or have the effect of lowering their standing in the eyes of the public.

With these sorts of stories we do, I believe, enter dangerous territory. Freedom and the rule of law are of fundamental importance in a democracy. The independent judiciary are the final guarantors of the rule of law. But the judges are perhaps the most vulnerable part of our system of freedom under the law. Upholding the law can be inconvenient and controversial. Of necessity judges must from time to time take decisions which are unpopular. And, of course they are not in a position to answer their critics. While one can see the short-term advantages for some in terms of capturing a popular mood or increasing ratings, the long-term effects on our democratic system could be very damaging. If judges are afraid by the prospect of public opprobrium from doing what they believe to be right then we undermine the effectiveness of our judiciary in advancing and protecting individual rights and freedoms. And if their standing in the community is damaged then we undermine the public's confidence in and commitment to the rule of law.

To be well informed and well equipped to participate in democratic debate, the public relies upon the media for accurate information. Without a balanced approach by the media there is a risk, indeed a likelihood, of ill-informed opinion. Achieving an appropriate balance makes demands on journalists, it requires not only a willingness to embrace this responsibility but also an understanding of the complexities of the issues.

There are, of course, pressures on the media just as there are pressures on the judicial system. There deadlines and targets to be achieved, and the business is to sell newspapers and achieve ratings. Faced with such pressures there may be a temptation to restrict the focus of the investigation, to rush to conclusions, to avoid consideration of the complexities, and to resort to these well-used stereotypes. There is always the temptation to distort reality to achieve the sexy soundbite or the sensational headline.

In the context of criminal justice there is a significant risk not only that sensationalist reporting will undermine public confidence in law and order but lead to public pressure for more severe sentences, in particular for longer jail sentences at the expense of considerations of dealing with the offending behaviour or tackling recidivism.

These are real concerns. There is some evidence that jail sentences have been getting longer. The public mood has been for a shift in the balance between punishment and rehabilitation.

There seems little discussion in the media of the alternatives to prison which are available. If they are referred to they are often characterised as soft options thereby undermining their effectiveness.

It is with serious, violent criminals and sex offenders that the need for balanced reporting and informed comment is brought into sharp focus. The revulsion against such crimes and against their perpetrators is readily understandable and the temptations of sensationalism often more alluring than the discipline of moderation in the interests of justice, fairness and responsible reporting. Trial by media may hold a superficial attraction in some quarters but its inherent dangers are amply illustrated by a number of recent cases.

One of these is the case of William Beggs, described in the tabloids as "The Gay Ripper". The pre-trial publicity referred to the murder and dismembering of Barry Wallace as the "Limbs in the Loch Murder", and featured disclosure of Beggs' previous convictions and sexual character. It included allegations that he was forced out of Northern Ireland by the UVF because of his activities with young children.

Following his extradition from the Netherlands and the service of an indictment, it was claimed by his defence counsel that the nature of the reporting was such as to violate his right to a fair trial. The defence arguments did not succeed. In holding that there was not a substantial risk of prejudice, the court, in accordance with the earlier authorities, recognised that appropriate directions from the trial judge would direct the attention of the jury to the evidence and away from any extraneous material. The court also placed significance on the lapse of time (around 18 months) between the publicity and the trial itself. In his judgement in the Appeal Court Lord Coulsfield observed that, but for the lapse of time, the Crown would have had to consider whether Beggs should be released for a period pending trial within the twelve month time limit. Such is the risk of sensationalism that the interests of justice may demand the postponement of the judicial process and the untimely release of what may prove to be dangerous criminals. However, circumstances could also arise where the nature of the pre-trial publicity might operate to frustrate the Crown's ability to bring an accused to trial.

In the reporting of sex offences there is, in some sections of the media, a tendency to focus on the salacious. Less well promoted is the importance of ensuring that society is equipped to deal effectively and appropriately with these crimes and with their perpetrators. The psychology of the sex offender and the effects of such crimes on their victims are complex.

The recent reports by Lord McLean (on serious violent and sex offenders) and by Lady Cosgrove (on sex offenders) offer recommendations both for the better management of sex offenders and for more effective protection of the public. Both recognised the dangers of driving offenders underground and the need to ensure that the risk of further offending is addressed appropriately. That means that for some (but not all) there is a need for lifelong restriction, although not necessarily lifelong incarceration. The McLean and Cosgrove reports recognised the importance of promoting a better understanding of the nature of sex offending in general and of the risks posed by particular individuals.

The solutions offered by the media campaign following the murder of Sarah Payne favoured publicationthe sex offenders register but neglected to address its predictable consequences which would follow. We then saw the excesses of vigilantism, examples of a paediatrician's vilification as a paedophile (as a result of the similarity in nomenclature) and witnessed the victimisation of suspected offenders. The failure to promote a more complete understanding of the complexities did not serve the public interest. It promoted the stereotype of the sex offender as an outsider and deflected public attention from the need for vigilance within the home, the school and the youth club; for the vast majority of child sex abuse (like murder) occurs in a domestic context. The majority of offenders are

not strangers but are known to the child, most in a relationship which should be characterised by care and by trust.

Whether this particular campaign was borne of a desire to improve the administration of justice or whether it was fuelled by a lesser motive is not for me to judge. But just as its message was embraced by some sections of the public for others it served only to promote distrust of the media and to question its responsibility.

It is important to note however that many sections of the media did not support the campaign and questioned whether it was indeed the most effective way of dealing with sex offenders. Indeed one positive aspect was that it did in the end provide a forum for debate through not a solution to the problem.

Lest I be accused of a lack of balance in pointing out the problems without recognising the strengths of the media in the reporting of the judicial process let me turn to more of the positive aspects of the press.

First we must pay tribute to the role of the media in uncovering injustice. Britain has a long and proud tradition of investigative journalism and the criminal justice system has not been immune from their attentions. The BBC Frontline Scotland programme on the case of Shirley McKie, the Strathclyde police officer who stood trial and was acquitted on a charge of perjury, changed public perceptions of her case. More importantly it helped uncover what were at best serious defects in the analysis of fingerprinting at the Scottish Criminal Records Office and forced the authorities, including myself, to act to ensure that such a case would not happen again.

Equally I believe that those of us who operate in the legal system have been too slow to recognise the role the media have to play in informing the public about the judicial process in general and individual cases in particular. In this area there is, I believe, a huge ignorance even among relatively well informed people of the legal system in this country. And yet a mature democracy must recognise and acknowledge the place of the judicial system within it. This can only be done by communicating its role and function to the public and in publicising the operation of justice.

There is of course a natural tension in the relationship between those responsible for operating the judicial process and the media.

To a significant extent these tensions are borne of distance and the lack of a constructive and productive relationship. There are a number of barriers to effective communication with the media. These include, not only logistical difficulties and pressure on resources, but also a perception among the legal profession that there is within the media a disinterest in good news, a preference for criticism, justified or not. There is an element of once bitten ….. and a lack of confidence that the press is willing to compromise a compelling editorial line by introducing consideration of contrary arguments or by providing a complete analysis of the full circumstances. It is easier to damn the system as ineffectual in providing solutions than to recognise the delicate balance of rights and interests which are weighed daily in the scales of justice.

I also recognise that a significant barrier to communication has been the perception that the legal profession in general and the judicial system in particular as remote, aloof and autocratic. I recognise the origins of that view and I recognise that there is much more that can be done to enhance our relationship with the media in the 21st century. I also recognise that the relationship cannot be completely open and that there are limits and boundaries which must be respected. But all too often in the past we have taken the view that the only place for the press in reporting on the judicial system was from the press benches in court That is no longer a tenable position. Nor do such attitudes serve the public interest.

Another barrier may be said to be my role as Lord Advocate in bringing to the attention of the court cases where I believe that the interests of justice may have been infringed by reporting which breaches the Contempt of Court Act. I hope that the media do understand the independent role that I have to act in the public interest and that may not always be in favour of publication.

We need to break down those barriers – not completely because we have different functions and roles. The Crown in particular has to be careful not to discuss the details of individual cases outwith the court process lest it prejudice a fair trial. I also strongly believe that where no prosecution is taken the Crown must be careful not to suggest that the former accused did indeed commit the offence and that the only reason no trial has taken place is a lack of evidence. The only proper place for the Crown to make an accusation of a criminal offence is in the criminal courts.

I am not suggesting that the relationship between the media and lawyers should be cosy or that journalists should collude to make life easier for lawyers, but we need to improve the relationship to promote effective reporting in the public interest. For that is our common ground; where we serve our professions well, we work to promote the public good.

There is I believe a need for dialogue between people in the legal system and the media. We need to understand each other better. What, responsibly do the press want to report? What do broadcasters want to televise? What is it that as prosecuting authorities we need to protect? How can be best enhance and preserve the authority of the court. These are issues which I believe can be jointly considered and debated.

However, even without such a dialogue, in the interests of promoting public confidence in the judicial system, there are strong arguments that the legal profession should attempt to explain itself better. We should adopt a more proactive approach to the media. We have to take it upon ourselves to ensure that the good news stories are not lost and the bad news is explained. Unless we do so the public's role and confidence in the judicial process will be undermined.

I recognise that the media is concerned to test the boundaries and to seek new ways of fulfilling their role in reporting the legal process. They look across the Atlantic to televised trials and prosecutors and defence lawyers competing for soundbites on the steps of the courthouse. At first blush this may seem to bring the judicial process into the livingrooms of the public, to open the justice system to public scrutiny and to increase its accountability and transparency. On the other hand it is not without its dangers. It is a step closer to trial by the media with all its inherent dangers. It also introduces unacceptable pressures on those involved, be they judges or lawyers, witnesses, jurors or accused persons. The nature of this medium is to spotlight the highlights and edit out the pedantic detail which is crucial to a complete consideration of the relevant issues. Thus far, the Scottish courts have been reluctant to tread that path.

The issue was recently considered by the courts in the Petition by the BBC for consent to broadcast the Lockerbie trial. As Lord Advocate I opposed the televising of the trial. One of the main reasons for opposition was the potential impact on the witnesses. We knew that there were a number of reluctant witnesses and we knew from what they had told us that they would be even less inclined to give evidence if there were a risk that it would be televised. I believe that that was the right decision and the petition was refused.

These reasons of course did not have the same force in regard to the Lockerbie appeal and permission for its broadcast was granted, without opposition by me. But I can only guess at the ratings.

Nevertheless, the televising of some court cases whether live or not does offer a powerful tool in communicating the role and function of the courts. I am sure that it is an issue which will be on the agenda for some time. I offer no concluded views on what is essentially a matter for the courts. Any further developments would need however to be carefully handled to ensure that we avoid the dangers that Simpson trial for example highlighted in the United States.

In the Lockerbie trial the Crown did attempt to work more closely with the media. We attempted to keep the press advised of future progress, providing the estimated dates when evidence would be lead

about particular aspects or chapters in the case. Inevitably that was not enough for some who wished us to provide lists of witnesses and to have informal chats with them during the lunch breaks. We did, however, for the first time give off the record briefings to members of the press after the conclusion of the evidence but before the verdict so that they could understand the case against the accused. We also provided them, on the morning of the verdict, with photographs of key pieces of evidence so that they could use them in their news stories. That, to my mind was a successful exercise and, with caution, could be repeated in other cases.

In recent times there has been an increasing recognition of the need for improved communication and of the importance of those within the judicial process assisting the media to achieve an improved understanding of the justice system. This has taken the form of informal briefings as well as providing website information, press releases and press conferences. Government press offices provide services to journalists and reporters and are well placed to channel inquiries to the relevant officials and ministers as well as to herald forthcoming initiatives. There is of course a resource issue and for judges, lawyers and policy makers the first priority is not to provide copy but to discharge their core responsibilities in relation to the delivery of justice. Failure to attend to these priorities would properly attract criticism within the media as well as public concern. And so here too there is a need for balancing priorities. Nonetheless, it is not acceptable for lawyers and policy makers to neglect their responsibility to the judicial process.

I recognise that resources must be found to facilitate better communication with the media – not to serve the narrow interests of self promotion or aggrandisement, not to succumb to spin but to promote well informed public confidence in the judicial process without which the judicial system cannot operate effectively. The judicial process is not separate from the public; its raison d'être is the public interest and participation by the public, as witnesses, jurors and users of the system is essential for it to flourish.

The onus then is on those responsible for the legal system, including myself, to promote a better understanding of the judicial system. To do so effectively I believe that we must listen to the press and to broadcasters so that we can understand their requirements and their concerns. Equally I hope they will listen to us and appreciate our concerns.

At the end of the day the winners from this process should be the public whose interests we all serve.