The British government relies on two mechanisms to control the press: the Official Secrets Act, which criminalizes the dissemination of certain government information, and the DA-Notice System. The DA-Notice System, a regulatory framework that is legally unenforceable yet mostly followed, establishes organizing principles around which British journalists structure their reporting about national security. The DA-Notice System has surprisingly survived for over 100 years, coexisting alongside the thematically similar, substantively different, and at times contradictory Official Secrets Act. But recent changes in the geopolitical climate, data dumps by WikiLeaks and Edward Snowden, and a rapidly evolving media landscape threaten this coexistence.

This Note focuses on the operations and applications of the DA-Notice System, an underappreciated enforcement mechanism, against the backdrop of the Official Secrets Act, the linchpin of the United Kingdom’s information-controlling legislation. First, this Note argues that the DA-Notice System in its current form is ultimately unsustainable in the United Kingdom. Though the DA-Notice System theoretically benefits both the government and the media in its ability to supplement the Official Secrets Act, it is undermined by the U.K. government’s frequent resort to other legal measures—even in the face of compliance
with the DA-Notice System. Along these lines, this Note recognizes the additional external factors facing the DA-Notice System that threaten its viability. Second, this Note maps the ways in which elements of a similar system might unofficially exist already in the United States, a country with fundamentally different press ideals. In doing so, this Note assesses the extent to which the increasingly contentious U.S. government-press relationship may stand to benefit from a further developed regulatory framework that learns from the strengths and weaknesses of the DA-Notice System.

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INTRODUCTION

The United Kingdom has historically maintained informal, if unconventional, mechanisms to limit the release of information that poses a threat to national security. The Defense Advisory-Notice System (DA-Notice System) is the primary embodiment of this tradition. A DA-Notice is a request from a committee of media and government officials not to publish or broadcast specific information for national security-related reasons. Compliance is voluntary and entails a decision by a journalist not to publish the flagged information. Notably, mainstream news organizations in the United Kingdom hardly ever ignore DA-Notices: “[i]t is very rare for any of the mainstream media organizations to ignore the committee’s requests.”

The DA-Notice System functions in the shadow of the Official Secrets Act (OSA), the British law proscribing espionage and the

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1. DAVID HOOPER, OFFICIAL SECRETS: THE USE AND ABUSE OF THE ACT 223 (1987) (“The fact that the press co-operates on this basis with the government is a source of some astonishment in foreign countries.”). But see PAULINE SADLER, NATIONAL SECURITY AND THE D-NOTICE SYSTEM 1 (2001) (noting and distinguishing similar systems in other countries that existed at various points in history).

2. See generally HOOPER, supra note 1, at 17–31.


dissemination of official information. Since its enactment in 1889, the OSA has stoked fears that such laws criminalizing speech are confusing at best and, at worst, “staunch[] the flow of information whose disclosure would [be] justified in the public interest.” The DA-Notice System was established, in part, to respond to such fears.

This Note centers on these fears about press regulation in the United Kingdom and whether the DA-Notice System has succeeded in quelling them. It aims to build on the meaningful but relatively small body of scholarship devoted to the DA-Notice System by exploring several unaddressed or unanswered questions: How and why has the uncodified DA-Notice System worked for over a century in the United Kingdom—a country that already, in the form of the OSA, has a legal enforcement mechanism to regulate the press? Is the DA-Notice System sustainable in light of the unsanctioned activities of such individuals as Chelsea Manning and Edward Snowden, as well as the rapidly changing, Internet-dominated media landscape? What implications does the DA-Notice System have for the United States—a country with a completely different set of free press rights—as the American government’s treatment of journalists appears increasingly similar to that of the British?

To answer these questions, this Note, drawing heavily on original interviews with London-based journalists, lawyers, and government officials, focuses on the operations and applications of the DA-Notice System, an underappreciated ad hoc regime, against the backdrop of the OSA, the linchpin of the United Kingdom’s information-controlling legislation. This analysis yields two main conclusions. First, the DA-Notice System in its current form is ultimately unsustainable in the United Kingdom. The DA-Notice System is a useful supplement to the OSA because it invites journalists to cooperate with the government in furtherance of goals similar to the

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8. HOOPER, supra note 1, at 22.
10. See infra notes 16–20 and accompanying text. See generally SADLER, supra note 1, at 14–36.
11. At the outset, it is worth noting the one-sided nature of the sources available for this topic. Specifically, the bulk of the available information, and the individuals who were willing to be interviewed on or off the record, are connected to media organizations that have an obvious stake in this area of law and policy. Throughout this Note, I have indicated where sourcing may reflect selection bias.
OSA’s but without the overt threat of legal ramifications. However, the DA-Notice System is frequently undermined by the U.K. government’s preference for law-based regulatory tools as well as by external technological factors that threaten its viability. Second, despite the DA-Notice System’s questionable force in the United Kingdom, the concept itself has important implications for U.S. media law. This Note argues that the United States already hosts an ad hoc version of the DA-Notice System, albeit one that is available only to well-established mainstream news organizations. This observation supports the proposal that, to the extent government-press relations in the United States have deteriorated in recent years, the United States should look to the DA-Notice System as an example of the feasibility of inclusive policies that all journalists and editors could refer to, affording them the opportunity to obtain specific advice when publishing national security-related information.

In order to make this case, Part I charts the histories of the OSA and the DA-Notice System, and the ways each has evolved over time. Part II analyzes the interplay between these two methods of regulation and the ways in which the British government has undermined the efficacy of the DA-Notice System by consistently favoring official, legal redress to service national security-based interests. Part II also assesses external constraints on the DA-Notice System that persist independently of competing laws. Finally, Part III explores the ways in which a similar, albeit more informal, arrangement might survive in the United States, and how a more structured but still non-binding approach could help address conflicts between the U.S. government and the press.

I. MEDIA REGULATION IN THE UNITED KINGDOM

The fraught histories of both the OSA and the DA-Notice System shed light on the challenges and criticisms each one faced at various points in British history, how each adapted as a result, and the ways these adaptations served the ultimate goals of their respective architects. The primary purpose of including brief histories of the OSA and the DA-Notice System here is to establish a comprehensive understanding of the British media law landscape and the context in which the DA-Notice System currently functions.12 The

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12. My methodology in researching and analyzing the OSA and the DA-Notice System is based on their respective natures and roles in this Note. The OSA, a storied law that encapsulates traditional conceptions of British media law, has been studied, chronicled, and analyzed. Thus, its history here is relatively truncated. In contrast, the DA-Notice System is
histories are particularly valuable in identifying which obstacles each regime has overcome, as well as the challenges each still faces today.

A. The Official Secrets Act

The British government’s central method of concealing government information is the Official Secrets Act (OSA), which “broadly criminalizes the dissemination and retention of numerous classes of government information, including by members of the media.” The OSA is the pillar of British secrecy laws and policies; it allows the U.K. government to withhold all of its papers for at least thirty years. Curiously, there is no definition in the OSA as to what constitutes an official secret.

Section Two of the OSA, which covers defense-related information, underwent the most scrutiny and change in the last century. It earned “a place of notoriety” in British law for once criminalizing mere receipt of classified information. The provision “proved to be both over-inclusive and inefficient,” and enforcement

an underappreciated facet of British media law that is rarely written about, particularly in U.S. scholarship. It also remained a secret for a large portion of its history, limiting the availability of objective sources. Thus, my research on the DA-Notice System relies on original interviews to compensate for the dearth of relevant or objective published works.

13. Pozen, supra note 5, at 626.

14. See Laura K. Donohue, Terrorist Speech and the Future of Free Expression, 27 Cardozo L. Rev. 233, 305 (2005). Contrast this policy with that of the United States, which relies on a classification scheme to “control[] employees and information in its purview” by maintaining a limited backlog of soon-to-be released information so that federal employees may review sensitive information before disclosing it to the public. Id. at 294.

15. See Official Secrets Act; see also Hooper, supra note 1, at 7.


18. See Donohue, supra note 14, at 308.

19. Id. at 306; see Zellick, supra note 17, at 803 (“Despite a consensus that section 2 was overbroad in its reach and should be replaced, there was no common ground on what a new law should say or how its objects might be achieved. . . . Fears that a new law would continue to inhibit public knowledge and discussion . . . [coupled with] anxieties that a much curtailed law would release information too freely and do genuine damage to the public interest and national security . . . combined to preserve the [OSA] in the face of protracted and universal condemnation.”).
remained inconsistent throughout the second half of the twentieth century.20

In May 1989, problems with this section prompted state officials to redraft the OSA into its current form, which provides criminal sanctions for disclosing information relating to any of four categories: (1) security or intelligence; (2) defense; (3) international relations; and (4) crime and special investigation powers.21 In addition, the OSA now limits its scope to the prevention of any actual or potential harm to “state interests” in particular.22 The sense after this redrafting was that the overhaul produced a new law that made “U.K. law on leaks . . . less draconian.”23

For a sense of how the OSA currently operates, consider the following five “notable improvements”24 widely attributed to the 1989 revision. First, the newly enumerated classes of information narrow the scope of the OSA from its original “blanket coverage of all official information”25 to specifically prohibited categories. Second, the OSA applies to fewer categories of public servants.26 Third, a multi-person jury rather than a single government official must determine whether the disclosed information “falls within one of the listed categories and, where necessary, whether its disclosure was harmful.”27 Fourth, the Attorney General must consent to bringing an action under the OSA,28 unless the disclosures are crime-related, in which case the Director of Public Prosecution must consent.29 Fifth and finally, the penalty for violating the OSA is capped at two years’ imprisonment or a fine.30 These changes provide an ostensible check on the ease with which an action may be brought under the OSA.

Despite these revisions, however, the OSA remains remark-

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20. There were 23 prosecutions, 34 defendants, and 27 convictions from 1945 to 1971. By contrast, there were 29 prosecutions and 5 pending prosecutions from 1978 to 1987—a time span less than half as long. Donohue, supra note 14, at 306.
22. Id. § 2(2).
23. Pozen, supra note 5, at 626.
24. Zellick, supra note 17, at 804.
25. Id. (noting that the current list is shorter than what was officially recommended).
26. Id.
27. Id.
29. Id. § 9(2).
30. Id. § 10(1).
bly open-ended and far-reaching—and, as a result, malleable to a range of potential actions against the press. The following four interpretations of the OSA’s text demonstrate the law’s broad and unclear terms. First, disclosures must be “damaging” to constitute a violation, but the OSA construes “damaging” in general terms, broadly referencing disclosures that would hinder “the armed forces of the Crown [. . .] carry[ing] out their tasks” or “endanger the interests of the United Kingdom abroad.” Furthermore, the OSA lacks any definition of harm or a description of what sorts of disclosures would likely cause harm; the interpretations of these loaded words are left to the discretion of the government. Second, there is no opportunity for a defendant to demonstrate that a disclosure was made to further a legitimate public interest—a defense previously available under the legislative scheme. Third, disclosures made without “lawful authority” are forbidden, yet that authority is premised on an “official duty” that the OSA leaves undefined. Fourth, OSA violations can be found through a broad showing of knowledge or reasonable knowledge rather than a specific finding of intent. One may even be charged with violating the OSA for disclosure of “any confidential information, document, or other article [. . .] from a State other than the United Kingdom or [. . .] an international organization.”

Moreover, the OSA maintains severe restrictions on the press. Though the 1989 overhaul represented a concerted legislative attempt to “control disclosures by government workers and contractors,” the press remains liable for communicating such disclosures. To that end, the OSA makes it a crime for a journalist to disclose information that a U.K. government employee or contractor disclosed without lawful authority or entrusted in confidence.

31. Id. § 2(1).
32. Id. § 2(2). It is debatable whether this requirement narrows or widens the scope of the OSA. See, e.g., Zellick, supra note 17, at 804 (noting that, “[i]n most cases, the prosecution must prove that the disclosure was damaging in fact”).
33. See CRAM, supra note 9, at 133–34, for a brief discussion about how juries occasionally still apply their own version of this defense.
36. Id. at 739.
37. Official Secrets Act § 3(1)(b).
38. Sandler, supra note 35, at 739.
information is now insufficient for criminal charges, receipt followed by disclosure of that information is illegal. Further, the receipt-disclosure tweak does not meaningfully narrow the OSA’s reach for journalists, whose utility from official secrets lies primarily in the dissemination of that information; receipt of newsworthy information without the ability to disclose it is antithetical to a journalist’s job description. Moreover, the application of the OSA to the press is particularly significant because it “gives the government a wide berth to punish almost any media disclosure when the source can be traced to a government worker; the government could easily argue that the press should have known that the information was restricted.” This latitude not only subjects the media to potentially limitless liability but also dis incentivizes reportorial oversight of the government or related stories. Finally, the U.K. government often seeks civil injunctions to prevent the publication of information when it is made aware that a journalist is preparing to disclose information prohibited under the OSA, thereby undercutting the intended leniency of the 1989 modification.

In sum, the 1989 revision of the OSA facially addressed the OSA’s so-called draconian capacities through such changes as limiting the categories of secret information and decriminalizing possession of secret information by third parties. However, the remaining ambiguities—including the malleable categories of official secrets and various undefined terms that are crucial to the provisions’ implementation—afford a great deal of discretion to prosecutors and judges while leaving journalists uncertain as to whether a particular piece of information is actionable under the OSA. To the British media’s detriment, there is no official U.K. government channel for journalists to determine prospectively whether a story is subject to OSA enforcement; the only quasi-official manner for journalists to parse that question is the DA-Notice System.

40. Donohue, supra note 14, at 308.
41. On the other hand, unpublished information may be valuable for evaluating other publishable information.
42. Sandler, supra note 35, at 739.
43. See infra Part II(B)(2).
44. See Zellick, supra note 17, at 805 (noting that “[s]ecurity and intelligence services’ are not defined, and whether it refers only to those working in MI5 and MI6, or whether it includes, for example, staff of [Government Communications Headquarters] or military intelligence is not clear”).
B. The DA-Notice System

The DA-Notice System\(^{45}\) is the officially unofficial arrangement between the British media and the government whereby the media agrees not to publish military and intelligence information in the interest of national security. The original “D-Notice System,” as it was formerly called, was the outgrowth of a series of meetings in 1912 between British press associations and Parliament officials.\(^{46}\) The primary goal of the arrangement that transpired—a committee comprising government and media officials issuing notices to any editor planning to publish sensitive information—was to prevent the press from publishing state secrets.\(^{47}\) Parliament officials praised it as a “filter” that could retard, if not halt, the release of sensitive government information.\(^{48}\)

But despite the unanimity grounding this arrangement, it was plagued by a variety of concerns that foreshadowed the debate surrounding the DA-Notice System that persists today. For example, the military worried about the DA-Notice System’s inability to capture information beyond governmental control.\(^{49}\) Conversely, the press feared that the system would inevitably be used to “stifle” criticism

\(^{45}\) Spellings of the DA-Notice System are inconsistent in the academic literature and news reports that refer to it. This disparity is probably because its name was formally changed from D-Notice System to DA-Notice System in 1993 and perhaps because of its secretive and frequently misunderstood character. See infra note 55 and accompanying text. For the sake of consistency and clarity, I have changed all references to comport with the current name, the DA-Notice System, unless otherwise indicated.


\(^{47}\) Sadler, supra note 1, at 14–26.

\(^{48}\) See Donohue, supra note 14, at 287–88; see also DPBAC, History, supra note 46.

\(^{49}\) An unattributed letter published on the DA-Notice System website encapsulates this concern: “So far we have considered on the Committee, and are using the organisation of the Committee, for the purpose of the suppression of the publication of news which, until we have given it ourselves to the Press, is not known beyond [the government officials at the London road] Whitehall; but there are cases at times of important information supplied from entirely outside sources to the Press which they publish without question, though on the face of it the information is of a Confidential or Secret nature and is such that its publication is clearly against the public interest.” DPBAC, History, supra note 46.
and inhibit its freedom.50

The DA-Notice System remained a secret to the general public during its first fifty years.51 Such secrecy persisted for so long because the DA-Notice System was not tied to any statute, and thus there was no need for Parliamentary approval to impose what was effectively press censorship.52 The DA-Notice System finally became known to the public in May 1961, when then-Prime Minister Harold Macmillan was forced to acknowledge its existence when answering a question in the House of Commons.53 This public acknowledgment was crucial: It marked a major turning point in the relationship between the OSA and the DA-Notice System and, importantly, began to “disabuse[] many editors of the assumption that participation would effectively protect them from trouble with the [OSA].”54

The DA-Notice System as it is known today started to take shape in 1993, when a committee comprising government and media officials known as the Defense Policy Board Advisory Committee (DPBAC) renamed its organization the Defense Advisory-Notice System—a concerted effort to emphasize its quality as such.55 The DPBAC maintained a variety of categorical policies that dictated publication permissibility and, by May 2000, consolidated these “standing notices” to the present five: (1) Military Operations, Plans, and Capabilities; (2) Nuclear and Non-Nuclear Weapons and Equipment; (3) Ciphers and Secure Communications; (4) Sensitive Installations and Home Addresses; and (5) United Kingdom Security and Intelligence Services and Special Services.56 This consolidation

50. Id.; see Grimley, supra note 5 (“It was all kept very hush-hush,” says Nicholas Wilkinson, the official historian of the DA-Notice Committee and its former secretary. ‘The press side didn’t want the public to know they were co-operating with the government in a kind of voluntary self-censorship.’). Note that the DA-Notice System website implicitly acknowledges—and quickly dismisses—freedom of the press concerns: “[t]he Press representatives sought, and got, assurance that only matters that really did affect the National interest would be concerned.” DPBAC, History, supra note 46.
51. Cram, supra note 9, at 140.
52. Sadler, supra note 4, at 205–06.
53. Id. at 206.
54. Lustgarten & Leigh, supra note 46, at 269.
55. See Grimley, supra note 5.
clarified the notices’ scope while “retaining those parts that are appropriate for the current level of threat that involves grave danger to the State and/or individuals.” The standing notices operate as a backdrop for journalists and are often referenced in many British media organizations’ editorial guidelines.

Today, the DPBAC comprises four government representatives and fifteen senior-level journalists from national and regional newspapers, periodicals, news agencies, television networks, and radio programs. Despite their numerical advantage, the sitting journalists—top-level executives with largely corporate responsibilities—are hardly representative of the mainstream media, let alone of the increasingly prevalent niche or citizen-generated publications. A secretary oversees the DPBAC as its executive; he technically reports to the Chairman, a position held by the Permanent-Under Secretary to the Ministry of Defense but, in practice, enjoys “almost total independence from government control.”

Though the standing five DA-Notices are a background reference for journalists, the Secretary may, at his discretion, actively issue a reminder or advisory based on one of the standing five to a particular news organization about a particular story. Specific DA-requests that, unless there has been prior wide disclosure or discussion, details of covert and counter terrorist operations, personnel (names, addresses, photographs, and family details), or their targets should not be revealed—the rationale being that such information would prove useful to terrorists. Id.

57. Id.
60. The fifteen media members are nominated by the media and include three journalists from the Newspaper Publishers Association; two from the Newspaper Society; two from the Professional Publishers Association; and one each from the Scottish Newspaper Society, the Press Association, the BBC, ITN, ITV, Sky TV, the Society of Editors, and the (Book) Publishers Association. Id. A full list of current DPBAC members is available at Def. Press & Broad. Advisory Comm., Committee Membership, DA-NOTICE SYSTEM, http://www.dnotice.org.uk/committee.htm (last updated Apr. 8, 2014).
61. DPBAC, How the System Works, supra note 59.
Notices either refer the recipient to one of the standing five notices or warn the recipient that further pursuit of the story will likely encroach on forbidden territory. Though the contents of these advisories are expected to remain confidential, they are often circulated on media gossip blogs and mainstream newspaper websites. This clandestine attitude, and the rumors it inspires, preserves and reinforces the aura of secrecy that has traditionally generated criticism about the DA-Notice System and its contribution to press censorship.

The DPBAC does not try to obtain articles before publication. Members of the media generally do not submit articles for any kind of clearance or review. On rare occasion, an editor might actively get in touch with the DPBAC and initiate a conversation about a particular story. Generally the most senior-level editors of a news organization interact directly with the DPBAC, but journalists of every level are expected to comply.

For a deeper sense of the operation and consequences of a DA-Notice, consider the following three episodes. First, a DA-Notice might function preemptively. This approach is often taken if a DPBAC member hears about a particular story (for example, through a press spokesperson) or if certain events trigger significant interest. For example, on August 21, 2014, the DPBAC e-mailed editors regarding the then-breaking stories about the Islamic State crisis and the activities of British special forces. The e-mail referred editors to DA-Notice 5, which governs intelligence services and forbids the disclosure of covert operations, and urged editors to exercise caution and consult with the DPBAC in advance of publication. One British newspaper reporter surmised that the DPBAC ei-

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65. See SADLER, supra note 1, at 42–49.


67. Id.

68. E-mail from a British newspaper reporter (Aug. 22, 2014) (on file with author).

ther knew someone had been working on a related story, or was responding more generally to the widespread speculation that special forces could try to rescue hostages held in Syria or kill the captors. Such preemption has led critics to argue that the “elevation of security concerns to a position of equal importance with core democratic rights [of free speech] demands that, when threats to security rise, rights claims must be commensurately cut back even though the state’s existence is not substantially threatened.” Similarly, after the September 11 attacks, the DPBAC Secretary wrote to newspaper editors and broadcasters “requesting that there be no speculation regarding a possible military response in Afghanistan.”

Alternatively, the DPBAC might step in after the first in a series of stories has been published. For example, on June 7, 2013, DPBAC Secretary Andrew Vallance issued a DA-Notice to the British press about a slew of articles that included information obtained by Edward Snowden. Vallance cautioned: “Although none of these recent articles has contravened any of the [DPBAC] guidelines . . . [they] may begin to jeopardize both national security and possibly U.K. personnel.” Reflecting on this advice a few months later, the DPBAC published committee meeting notes saying that following the notice from June 7, 2013, the Guardian “had begun to seek and accept DA-Notice advice not to publish certain highly sensitive details, and since then the dialogue with the [DPBAC Secretary] had been reasonable and improving. The events of the last few months had undoubtedly raised questions in some minds about the [DA-Notice] System’s future usefulness.”

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70. Interviews with a British newspaper reporter (Feb. 4, 2014; Aug. 22, 2014) (transcripts on file with author).
71. Cram, supra note 9, at 142.
72. Id. at 142–43.
73. E-mail from Gillian Phillips, Director of Editorial Legal Services for Guardian News & Media Limited (Feb. 4, 2014) (on file with the author). This DA-Notice was made public on the gossip blog Guido Fawkes and then subsequently published by the Guardian. Halliday, supra note 64.
74. Halliday, supra note 64.
75. DPBAC, Records, supra note 5. This example provides additional insight into the sometimes tense relationship between the press and the DA-Notice System, revealing what each sees as its role or scope of authority in persuading the other. Though the DPBAC framed its June 7, 2013 advisory as successful, depicting the Guardian’s “failure to seek advice” as a violation of the newspaper’s obligations, Ms. Phillips noted that the newspaper does not “accept for example that we were ever ‘obliged’ to consult the DA-Notice Committee as they suggest.” E-mail from Gillian Phillips, Director of Editorial and Legal Services for Guardian News & Media Limited (Aug. 22, 2014) (on file with author).
Second, a DA-Notice might actually change what is reported. On January 29, 2014, the London Evening Standard published a story on its website about police raids of the home of Nicholas Sutcliffe, a senior U.K. diplomat, in a search for toxic chemicals. A DA-Notice was subsequently issued, warning that linking a person’s identity with his membership in the security services “is likely to cause a significant increase in the threat to a person’s life . . . [and cause] major disruption to current security operations.” The DA-Notice concluded by urging the newspaper not to continue to publish such identifying information. The London Evening Standard seemingly complied; in its follow-up article the next day, there is no mention of James Sutcliffe’s relationship to any security service.

In a similar case five years prior, the Assistant Commissioner of the Metropolitan Police inadvertently showed secret documents detailing a major counter-terrorism operation to the press as he entered the British government’s headquarters at 10 Downing Street. DPBAC Secretary Andrew Vallance reached a compromise with the witnessing journalists that ensured that published photographs of Quick’s entrance into the building would blur out specific document details.

Two additional points about the DA-Notice System’s relationship to the law are important to bear in mind to understand its op-

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77. Id.


79. Id.


82. See id.; Grimley, supra note 5.
erations fully. First, the DA-Notice System has no legal authority.\textsuperscript{83} “[T]he final responsibility for deciding whether or not to publish rests solely with the editor or publisher concerned.”\textsuperscript{84} There is no official sanction for failure to comply with a DA-Notice;\textsuperscript{85} insofar as it operates as a warning, it is one without direct legal consequences. Moreover, the DA-Notice System does not “necessarily reflect the government’s view as to whether certain information should be made publicly available,” but solely represents the views of the advisory body.\textsuperscript{86} This distinction is important to bear in mind for the potential scenario where a publication complies with a DA-Notice but might still face legal action from another party.

Second, the DA-Notice System is not subject to the same scrutiny as government bodies. Despite its expressed commitment to a “policy of maximum disclosure,” the DA-Notice System is not bound by the Freedom of Information Act 2000 or the Freedom of Information (Scotland) Act of 2002.\textsuperscript{87} The DPBAC is therefore not obligated to disclose publicly its internal reviews of various media stories or its correspondence with media organizations. For all of its work in regulating journalists and preserving a “gentleman’s agreement”\textsuperscript{88} between the press and the government, the DA-Notice System is neither enforceable nor subject to the same requirements as other government organizations. Ultimately, the government must rely on other regulatory tools to control the media, namely the OSA.

II. THE IMPACT OF COMPETING LAWS AND SOCIETAL CHANGE ON THE DA-NOTICE SYSTEM

The DA-Notice System is “an extra legal way of effecting some balance between government secrecy (here invoked in the name of national security) and open government (or freedom of

\begin{itemize}
  \item 83. DPBAC, \textit{Standing DA-Notices}, supra note 56.
  \item 84. Id.
  \item 85. See DPBAC, \textit{Frequently Asked Questions}, supra note 3 (stating that the DA-Notice System does nothing if an editor publishes damaging information contrary to a notice).
  \item 86. Donohue, supra note 14, at 289.
  \item 87. DPBAC, \textit{Standing DA-Notices}, supra note 56; see also CRAM, supra note 9, at 142 (noting that the DPBAC “still operates in a comparatively clandestine manner outside the reach of the Freedom of Information Act”).
  \item 88. LUSTGARTEN \& LEIGH, supra note 46, at 269–76 (“The key characteristics of the [DA-Notice System] are its lack of compulsion and its extra-legal status.”).
\end{itemize}
“Generally speaking, the DA-Notice System is an editorial matter and not a legal one. It is really for [journalists] to use as a reference point.”

The United Kingdom already has a formal tool for regulating the press: the OSA. Indeed, that both regimes co-exist is confusing at first glance given their overlapping subject matter. However, unpacking the two reveals their respective strengths and weaknesses, and sheds light on why it is advantageous to have both working in tandem. In other words, in a country reliant on the OSA, it is advantageous for all parties involved to have the DA-Notice System as a functional counterpart.

Preliminary line-drawing is useful to distinguish key features of the OSA and the DA-Notice System. The contents of DA-Notices do not fall under formal government security classification. Ignoring a DA-Notice is not considered a violation of the OSA, though the DPBAC has suggested that ignoring a DA-Notice could itself spur independent police or legal action. Conversely, compliance with the DA-Notice System does not relieve a journalist from complying with the OSA. If the British government were to take legal action against a journalist, it would technically need to source its investigation independently rather than rely on any materials gathered by the DPBAC. “All discussion between the media and the [DA-Notice System’s] Secretary is carried out in confidence, and government departments do not subsequently initiate police/legal action unless they have information from some other source (possibly the published article or book, of course).”

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89. Sadler, supra note 4, at 205.
90. Phillips, supra note 73.
91. DPBAC, Frequently Asked Questions, supra note 3 (considering “when a government department initiates police/legal action against an editor or author” and noting that “[t]his [action] usually happens when the DA-Notice System has not [been] used by the media for some reason, or when a government department is so concerned that serious damage is imminent that they wish to take immediate preventative action”). There is some ambiguity over whether failure to comply with the DPBAC could constitute grounds for legal action by the government: the DPBAC states on its website that, in the event a journalist publishes information “likely to damage national security[,] . . . the government department concerned can initiate police and/or legal action, including seeking a court injunction to stop something [from] being published.” Id. It is unclear whether the government department would be the one with a representative on the DPBAC and thus privy to classified discussion, or whether such initiation of legal action would stem solely from the publicly available piece of damaging information.
92. See generally Lustgarten & Leigh, supra note 46, at 272–76; see also supra notes 84–86 and accompanying text.
93. DPBAC, Frequently Asked Questions, supra note 3 (considering “[w]hat happens
official government channels—channels that enforce the OSA—promotes trust and cooperation between the DPBAC and the media, with the latter intrinsically more likely to work with an organization voluntarily than under law-based obligations.\textsuperscript{94}

The DA-Notice System and the OSA differ in scope, overlapping on some themes but not others. For example, Standing DA-Notice 05, “United Kingdom Security & Intelligence Services & Special Services,”\textsuperscript{95} and Section One of the OSA, “Security and intelligence,”\textsuperscript{96} both implicate security and intelligence. Standing DA-Notice 01, “Military Operations, Plans & Capabilities,” and Section Two of the OSA, “Defense,”\textsuperscript{97} are likewise thematically parallel. However, no DA-Notice deals with international relations (as OSA Section Three does\textsuperscript{98}) or crime and special investigation powers (as OSA Section Four does\textsuperscript{100}). In this way, the OSA and the DA-Notice System operate like a Venn diagram, with the overlapping area ripe for confusion.

As this section discusses, the two also differ in when and how they might be applied. The DA-Notice System effectively operates as a non-compulsory prior restraint, formalized as a request of the press not to publish certain information.\textsuperscript{101} The OSA takes an oppo-

\textsuperscript{94} This argument also cuts the other way: Cooperation and collaboration may be undermined by the DPBAC’s lack of legal authority. However, the notion that voluntariness leads to compliance is compelling given the genesis of the DA-Notice System and the sense of a longstanding collaborative tradition between the press and the DPBAC. For further discussion about reasons the British media (generally) comply with the DA-Notice System, see infra notes 116–19 and accompanying text.

\textsuperscript{95} DPBAC, Standing DA-Notices, supra note 56.

\textsuperscript{96} Official Secrets Act § 1.

\textsuperscript{97} DPBAC, Standing DA-Notices, supra note 56; Official Secrets Act § 2.

\textsuperscript{98} Official Secrets Act § 3.

\textsuperscript{99} Fairley, supra note 62, at 432 (pointing out some of these comparisons as well as charting similar anomalies that existed before the DPBAC consolidated its standing notices to the five current ones).

\textsuperscript{100} Official Secrets Act § 4.

\textsuperscript{101} “Standing DA-Notice 05 (U.K. Security & Intelligence Services & Special Services) for example ‘requests’ that, unless there has been prior wide disclosure or discussion, details of covert and counter terrorist operations, personnel (names, addresses,
site, *ex post* approach, penalizing a publication for violating its provisions, i.e., “operat[ing] as a restraint only by virtue of the threat of subsequent punishment.” In these ways, the two generate different incentives for compliance.

These introductory paragraphs preview the confusion over the interplay between the DA-Notice System and the OSA that is deeply rooted in British history. But unpacking this interplay elucidates the role of the DA-Notice System as an underappreciated institution “that has always been very much on the periphery of the legislation and the litigation.” The following subsections explore the different ways in which the official and unofficial frameworks have interacted with each other, both to strengthen and detract from the other. They aim to address the consistency with which the DA-Notice System is followed despite its inability to impose legal sanctions. Subsection A examines how DA-Notices operate as a supplement to the OSA—beyond simply preventing publication of information whose dissemination might later be penalized under the OSA. Subsection B explores the conflicts that arise when the DPBAC and the U.K. government disagree on whether disclosure of information would jeopardize national security, and thus whether publication of that information should be stymied. Subsection C assesses the external constraints that bear on the DA-Notice System independently of the photographs, and family details), or their targets should not be revealed. The rationale behind the request is that such information would prove useful to terrorists.” *Cram*, *supra* note 9, at 143; *see* DPBAC, *Standing DA-Notices*, *supra* note 56 (noting that “[p]ublicity about an operation which is in train finishes it” and that information of a completed operation, “whether successfully or not, may well deny the opportunity for further exploitation of a capability, which may be unique against other hostile and illegal activity”).


103. *See supra* notes 91–94 and accompanying text; *infra* notes 115–18 and accompanying text.

104. *See generally* NICHOLAS WILKINSON, SECRECY AND THE MEDIA: THE OFFICIAL HISTORY OF THE UNITED KINGDOM’S D-NOTICE SYSTEM 352–64 (2009). For a telling example, consider the following: In 1971, a *Sunday Telegraph* editor was charged under the (old version of the) OSA for disclosing a confidential, official assessment of Nigeria—despite having been advised by the DPBAC Secretary that such disclosure would be benign. This episode prompted the House of Commons Select Committee on Defence to publish a report in August 1980 that took a close look at the DA-Notice System. The committee considered—and rejected—the possibility of abolishing the DA-Notice System altogether in favor of “an amended and more open system of regulation by a DPBAC.” *Cram*, *supra* note 9, at 140–41. The confusion between the operation of the OSA and the DA-Notice System was among the Report’s four chief criticisms. *Defence Committee, Third Report: The D-Notice System, 1979–80*, H.C. 733, ¶ 21 (U.K.).

OSA. These three subsections are collectively useful to assess the sustainability and future of the DA-Notice System in the United Kingdom, ultimately raising the question of what role the institution will continue to play in the future.

A. DA-Notices as a Supplement to OSA Enforcement

DA-Notices offer a gap-filling service for both the U.K. government and the press regarding the OSA. The DA-Notices’ provisions are more specific than the OSA’s and offer a potential source of guidance where the OSA might be unclear. For example, Section Two of the OSA criminalizes “damaging” disclosure of defense-related information, including information about the “invention, development, production and operation of such equipment and research relating to it.”

But the comparable DA-Notice (“Nuclear & Non-Nuclear Weapons & Equipment”) specifies the subjects of its coverage as “design details, technical specifications and materials,” “performance figures and operational capabilities,” and “areas of vulnerability to counter-measures.” The DA-Notice also adds a rationale (all five do) for its request to suppress information relating to nuclear and non-nuclear equipment.

The OSA’s and the DA-Notice System’s respective treatments of intelligence-related information give another example of the DA-Notice’s specificity relative to the OSA. The OSA prohibits disclosure of “information . . . relating to security or intelligence which is or has been in [the offender’s] possession by virtue of his [job] . . . or in the course of his work.” This provision adds:

“[S]ecurity or intelligence” means the work of, or in support of, the security and intelligence services or any part of them, and references to information relating to security or intelligence including references to information held or transmitted by those services or by persons in support of, or of any part of, them.

However, that definition entails more words than substance and is

107. DPBAC, Standing DA-Notices, supra note 56.
108. One rationale provides that “[r]elease of highly classified operational plans and security arrangements could potentially jeopardize the safety and security of our nuclear forces and reduce their deterrent value.” Id.
110. Id. § 1(9).
difficult to follow. By contrast, the relevant DA-Notice details the types of disclosures that could constitute intelligence, including “the interception of communications, and their targets,” “the identities, whereabouts and tasks of people who are or have been employed by [various listed intelligence services] or engaged on such work, including details of their families and home addresses, and any other information, including photographs,” as well as “addresses and telephone numbers used by these services, except those now made public.”

The DA-Notice System’s gap-filling role has implications for how an alleged OSA violation is adjudicated. Under the OSA, it is a defense if the transgressor had “no reasonable cause to believe[] that . . . disclosure would be damaging.”¹¹² Third parties, such as the media, may invoke this defense where they disclose otherwise prohibited information without “knowing, or having reasonable cause to believe, that [disclosure] would be damaging.”¹¹³ But the existence of a DA-Notice on the topic, an individual’s compliance with one, or the pursuit of advice about a particular story could each be relevant to the adjudication of an OSA allegation—and cut in either direction. These scenarios are merely hypothetical; the absence of a DA-Notice, or evidence of DPBAC-generated publication advice, does not have inherent legally binding consequences. Moreover, while “the absence of advice will generally indicate that the proposed publication of a particular piece of information is ‘safe,’ it could equally well mean that the disclosure in question is simply not covered by any of the [five DA-Notice] headings.”¹¹⁴ The multiple potential scenarios in which compliance with one or the other produces a certain set of results underscore the confusion in having both regimes.

These differences in scope and specificity reflect the nature of each regime. If the DA-Notice System were too broad or convoluted, it would likely fall on deaf ears; compliance is voluntary and it is in the DPBAC’s interest to make its notices easy to understand and follow. The coherency of the five standing DA-Notices may result from the fact that they were drafted, at least partially, by members of the press, whose job is to communicate plainly and succinctly—and who would be inclined to draft notices that potentially limit the contours of their reporting only in a carefully calculated way.¹¹⁵ Most im-

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¹¹¹ DPBAC, Standing DA-Notices, supra note 56.
¹¹² Official Secrets Act §§ 1(5), 2(3), 5(3); see Fairley, supra note 62, at 433.
¹¹⁴ Fairley, supra note 62, at 431.
¹¹⁵ Alternatively, given that journalists and media companies treat the DA-Notice
important, given that the DA-Notice System’s primary purpose is to promote and preserve national security, the DA-Notices, by their very design, must be clear, accessible, and a reliable source of guidance for media companies. Facilitating compliance is important: “Mainstream media news organisations are unlikely for the most part to want to breach the confidentiality of this arrangement since it is likely to jeopardize working relationships with the Ministry of Defence and the armed forces in the future.”

As the Director of Editorial Legal Services for Guardian News put it:

It’s not really about “compliance” as such. [The DA-Notice System] is a voluntary means of checking things out in a particular case if you know a story is touching on something covered by one of the five standing notices. No one wants to be responsible for an intelligence officer being shot or an army patrol blown up or a terrorist escaping because they inadvertently gave away a seemingly innocuous but in fact key piece of information. And when an advisory is issued, it’s just a useful reminder to editors that there might be a dangerous area that they could unwittingly be stumbling into.

In sum, the DA-Notice System’s ability to supplement the OSA ultimately benefits both the government and the press in OSA litigation by giving each side more material to utilize when building a case. The DA-Notice System also helps promote the OSA’s main goal—protecting national security—by offering the media a mechanism for cross-checking potentially explosive stories with a team of connected officials whose very job is to advise the press. The DA-

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117. CRAM, supra note 9, at 142.

118. Phillips, supra note 73.
Notice System creates an organizing principle through its five standing notices and effectively creates a set of (legally unenforceable) rules against which the government and the press may check their behavior, and with which they may negotiate. These mutual advantages help explain the endurance of this voluntary system and the ongoing cooperation between the U.K. government and the press.

B. When Regimes Collide: Clashes Between the DA-Notice System and the Law

Despite their ability to help each other, the DPBAC and the U.K. government sometimes disagree about whether disclosure of particular information would threaten national security. In these situations, journalists might receive guidance in the form of DPBAC advice, but heeding that advice might be to no avail should the U.K. government decide that the final publication was still unlawful. The following two cases illustrate the implications of disagreements between the DPBAC and the U.K. government. They also demonstrate the DA-Notice System’s weaknesses that emanate from its lack of legal weight, which in turn undermines journalists’ incentives for complying with it.

1. Spycatcher and Its Progeny

The infamous Spycatcher saga, a series of cases in the late 1980s, centered on Peter Wright, a former MI5 official who wrote Spycatcher, an autobiography detailing Wright’s work in the British domestic counter-intelligence and security agency that he subsequently published in the United States and in Australia. The Guardian and Observer published outlines of Wright’s book, including brief descriptions of Wright’s allegations about his MI5 tenure. The U.K. government argued that the two newspapers violated the (old version of the) OSA by releasing sensitive national security information and obtained an interim injunction against the newspapers

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119. The United Kingdom’s domestic counterintelligence and security agency is known as the MI5. Its counterpart for foreign intelligence is known as the MI6.

120. The Spycatcher cases, as they are colloquially called, have a long and complicated history that is beyond the scope of this Note. For a detailed discussion about this litigation, see Geoffrey Robertson & Andrew Nicol, Media Law 23 (4th ed. 2002).

that would prevent them from reprinting the excerpts prior to trial.\footnote{122} The House of Lords ultimately discharged the injunction, holding that although Wright had breached his duty not to disclose certain information, the newspapers did not breach any duty of confidentiality by publishing information from \textit{Spycatcher} in conjunction with the publication of the book abroad.\footnote{123}

This decision stands for two propositions. First, it signals that at least some U.K. courts diverge on whether to temper free press ideals in favor of national security concerns, or vice versa. Second, the balance to be struck between the needs of national security and freedom of speech may differ according to who is disclosing the information.\footnote{124} In this case, “the balance between national security needs and the freedom of the press was not the same as that between national security needs and \textit{Peter Wright’s} freedom of expression.”\footnote{125}

The court’s application of a fluid balancing test when adjudicating OSA transgressions highlighted the DA-Notice System’s ambiguous implications for OSA enforcement and raised the question of “[w]hat, indeed, would happen if the [DPBAC] Secretary’s opinion differed from that of the Government?”\footnote{126} It also prompted Lord John Donaldson to ponder whether the DA-Notice System should be granted legal force and operate like an injunction:

\begin{quote}
[The DA-Notice System] has worked well in the past, but if any part of the media is not only going to ignore it, but also resort to subterfuges to prevent any adjudication by the courts, the time may have come to think again. . . [W]hat, as it seems to me, may not be required is some right in the Home Secretary to issue instructions equivalent to a [DA-Notice], but having the force of an ex parte injunction, the media being entitled to appeal to the courts or to some special tribunal to have it set aside or modified.\footnote{127}

Around the same time as the \textit{Spycatcher} book litigation, the BBC sought to air a radio series about the case in general, a pursuit
that ultimately failed but again demonstrated the tensions that arise where purveyors of each mechanism—the OSA and the DA-Notice System—assign different disclosure standards to national security-related information. Here, upon being briefed about the proposed radio program, a member of the DPBAC expressed his “reassurance” that the radio program was “non-prejudicial.” But the DPBAC Secretary refrained from issuing a direct comment, remarking that his role was “to offer advice on national security grounds alone.” This non-answer implicitly contradicted the U.K. government’s claim that airing the series would promote “long-term damage to the security services[…] as a result of pressure by the media on other members of MI5 for similar disclosures; and of damage to morale, as well as of loss of confidence, on the part of other countries and potential informers of MI5.” Despite the DPBAC’s clearance to broadcast the series, the Attorney General sought injunctions to stop it, declaring in Parliament “that the issue at stake was ‘the duty of the Government to protect the confidentiality that is owed to them by members and former members of MI5.’” The injunction was ultimately lifted, but BBC’s litigation costs prevented it from broadcasting the program.

Though both the OSA and the DA-Notice System have since been updated, the underlying tension prevalent in the Spycatcher cases remains. The two are incompletely congruent, with some areas that do not overlap, and with the possibility of differences in judgment between the DPBAC and the government. Notwithstanding the OSA’s and the DA-Notice System’s capabilities to supplement each other, the regimes’ overlap can be confusing and precarious where, in cases such as this one, the two sides disagree about the risks at stake and effectively talk past each other to achieve their individual goals. The Spycatcher cases demonstrate the primacy of the OSA from a legal standpoint: Just as the media may choose to ignore a DA-Notice, the government may disregard compliance with the DA-Notice System and pursue a case under the OSA.

128. Fairley, supra note 62, at 435.
129. Id.
130. Id.
131. Donohue, supra note 14, at 289.
132. CRAM, supra note 9, at 142.
133. See supra Part II.A.
2. Circumventing the OSA and the DA-Notice System through Civil Injunctions

The second example of conflict between the OSA and the DA-Notice System centers on the case of Lord Advocate v. The Scotsman Publications, in which Anthony Cavendish, also a British former intelligence officer, sent nearly 300 copies of Inside Intelligence, his tell-all book about his tenure at the MI6, to friends and relatives for Christmas. The U.K. government responded by obtaining injunctions against the Observer and The Sunday Times, and later The Scotsman, to prevent the information from being published in any of those newspapers.

As in Spycatcher, the U.K. government in this case did not go after its ex-employee, but after the newspapers. Although the DPBAC Secretary approved the printing, the U.K. government claimed that “it was not the content, but the disclosure itself that threatened national security.” This argument stipulated, in terms similar to those used by the U.K. government in Spycatcher, that publishing details about the MI6 “would damage the confidence of the security and intelligence services of friendly countries, . . . the morale of members of the service[,] and might even encourage some . . . to make similar disclosures.” Ultimately, Lord Ross rejected this argument, suggesting that “if the Government wishes to stop publication, it should frame its argument in terms of contents, since the judiciary will accept, virtually without question, Governmental assertions of such prejudice to national security.”

This suggestion from Lord Ross undermines the DA-Notice System’s effectiveness by affording the U.K. government an easily attainable opportunity to circumvent the DA-Notice System entirely: The government merely needs to frame its justifications for a legally enforceable prior restraint in terms of the disclosure’s content. Successful application of the OSA requires a demonstration that the

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135. Fairley, supra note 62, at 436.
136. Id. (referencing a report that though no action was taken against Cavendish, “senior government sources regarded his decision to publish as deplorable, and a breach of his duty of lifelong secrecy”).
137. Donohue, supra note 14, at 289 (emphasis added).
139. Id. at 437.
140. Id. (“Such a claim would almost certainly succeed, even if the Secretary of the [DA-Notice Committee] had offered ‘no advice.’”).
disclosed information was damaging to or had the potential to damage national security.141 In civil cases generally, “where the issue is of prior restraint, the question of damage is always speculative and will inevitably attract a more cautious approach by the court.”142 Nonetheless, consensus among British academics indicates that when the British government puts its weight behind fears of potential harm to national security interests, courts will often grant an injunction.143 This tendency ultimately undermines the DA-Notice System by giving a boost to alternative, law-based structures that call into question the DA-Notice System’s efficacy and purpose.

Furthermore, the U.K. government’s reliance on civil injunctions has major ramifications for the sustainability of the DA-Notice System. Since the 1989 OSA revamp, journalists are unlikely to face prosecution under the OSA, both because of the jury’s tendency to find (unofficially) a public interest defense144 and, to a lesser degree, because of the public relations nightmare it would bring the U.K. government. Thus, the U.K. government instead relies on the civil law of breach of confidence,145 which infers a “duty of confidence . . . when confidential information comes to the knowledge of a person . . . in circumstances where it would be unfair were that information to be disclosed to others.”146 When faced with this claim, a court must be persuaded that the public interest requires the so-called confidence—the previously undisclosed information—to be preserved, which is not difficult to do.147 Unlike in the OSA context, where even an unofficial public interest defense generally favors the press, in the breach of confidence context, “[t]he courts are fond of reminding media defendants that not everything of interest to the public is in the public interest.”148 The injunctions might later be deemed an infringement of rights, as the now-defunct European Commission on Human Rights held in the aftermath of the Spycatch-

141. See Official Secrets Act § 1(4).
142. Fairley, supra note 62, at 437–38 (“As Lord Diplock observed in the GCHQ case, the action needed to protect the interests of national security, ‘is, par excellence, a non-justiciable question.’”).
144. Id.
145. Id.
147. ROBERTSON & NICOL, supra note 120, at 223.
148. Id.
er case, but such relief is only provided after the fact. Moreover, the lingering chance of an OSA prosecution against a journalist affects the media’s behavior, further questioning the relief, if any, brought from compliance with the DA-Notice System.

Thus, where the court takes a more flexible approach, the input of the DA-Notice System’s Secretary suddenly becomes more important. On the other hand, the strength of the DA-Notice System breaks down if the uptick in civil penalties brought to effectuate a prior restraint is interpreted as a severance of the mutual trust between the government and the press. The DA-Notice System depends on a minimal threshold of trust to function as well as to incentivize compliance by the media, who see it as a safeguard against legal action by the government. The tendency toward legal action in these cases indicates that such safeguards may not actually exist, and that the government is actively regulating the press as opposed to promulgating rules that promote ideal behavior but lack direct sanctions.

C. External Strains on the DA-Notice System

In addition to its challenge to co-exist alongside the OSA, the DA-Notice System faces a number of independent constraints that threaten to undermine its efficacy. Two main factors are of particular import. First, geopolitical concerns raise the question of how the DA-Notice System might function in conjunction with an aggressive administration focused on monitoring domestic and foreign national security developments. Second, and more broadly, whereas the DA-Notice System was conceived during a time of limited press outlets


150. See Benjamin Shore, Commentary, in GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS xviii (2011) (noting that, in the United Kingdom, “the media are well aware that the Official Secrets Act is not to be ignored” and that “there have been times when foreign intelligence agencies have hesitated to share fully with their American counterparts for fear of leaks to the U.S. media”).

151. See, e.g., Fairley, supra note 62, at 438 (suggesting that “the recent use of civil litigation has given editors greater cause than they already had to consult the [DPBAC] Secretary”). But see supra notes 128–32 and accompanying text.

152. See Donohue, supra note 14, at 290 (“[I]n light of increasing efforts by the state to pursue transgressions through civil penalties, the government has lost some of the trust the [DA-Notice] system previously enjoyed. The net effect has been for publications to rely more heavily on legal advice than on the informal consultative committee.”).
with limited technology, the media landscape of today, overcrowded with websites and whistleblowers, is patently different.\textsuperscript{153}

1. Global Security Concerns

The DPBAC has pushed back against the notion that national security changes in the aftermath of September 11 and the July 7, 2005 bombings transformed the way the DA-Notice System operates.\textsuperscript{154} However, two recent episodes suggest that both the British government’s and the media’s attitudes vis-à-vis the DA-Notice System have, in fact, shifted.

The first example, from February 2007, involves Operation Gamble, “an operation against a Birmingham-based Islamic plot to kidnap and behead a British Muslim soldier.”\textsuperscript{155} Advanced information supplied to journalists caused “media representatives to be in situ as police officers came to arrest suspects at a house in Birmingham.”\textsuperscript{156} The incident prompted the Intelligence and Security Com-

\textsuperscript{153} Tim Ripley, \textit{MoD Secrecy Panel Faces the Axe}, \textit{SUNDAY TIMES}, Jan. 26, 2014, available at http://www.sundaytimes.co.uk/sto/news/uk_news/article1367675.ece (quoting an anonymous source as stating, “[i]n the current media landscape the committee does not seem to be very relevant when our secret stuff can be posted on the internet anywhere in the world”). The DPBAC is well aware of this concern. It states on its website: “The internet has produced some new considerations, and has the increasing importance of citizen journalism assisted by the opportunities for real-time reporting using information technology. There are many unanswered questions about the future, but the very size and diversity of the net means that, just because something is on a foreign website, it does not necessarily mean that it has immediately been widely seen.” DPBAC, \textit{Frequently Asked Questions}, supra note 3 (considering whether “the internet mean[s] that the DA-Notice System is no longer operable”).

\textsuperscript{154} See, e.g., Sadler, supra note 4, at 210 (quoting Nicholas Wilkinson, DPBAC Secretary from 1999 to 2004, on the impact of September 11 on the DA-Notice System: “September 11 has changed nothing—the standing [DA-Notices] remain as before, and I have very consciously ensured that the way I interpret them has also remained unchanged. In my perception, although we live in an unstable and sometimes dangerous world, we also did so before 9/11. We are certainly now more aware of the threat from one particular direction, and that threat is possibly more directly focused on us now because of our role since 9/11, but on the other hand[,] the intelligence and security services are also now better organised to counter it, even if no measures against terrorists can ever be 100%, and an element of good luck is needed. So the situation is not significantly more dangerous now that we need to go overboard on new security measures, especially any that greatly erode civil liberties”).

\textsuperscript{155} \textit{Cram}, supra note 9, at 144.

\textsuperscript{156} \textit{Id.}
mittee—which oversees British intelligence agencies but is not a committee of Parliament—to conclude that “‘[t]he current system for handling national security information through [DA-Notices], and the Agencies[’] relationships with the media more generally, is not working as effectively as it might and this is putting lives at risk.’” After all, if DA-Notices are relied on as safeguards against the disclosure of sensitive information, this incident indicated how they might be disregarded in ways that yield tangible results. The lack of a source to hold accountable for the Birmingham leak exacerbated governmental frustration; all parties agreed that this leak, which jeopardized national security interests, pointed to a serious flaw in the DA-Notice System.

Conversely, the media and general British public expressed discomfort with the ramifications of a DA-Notice issued in the case of Gordon Gentle, a nineteen-year-old Scottish soldier serving with the Royal Highland Fusiliers in Iraq when his vehicle was blown up by a roadside bomb. Gentle’s family subsequently organized a series of war protests and initiated a campaign to investigate the Ministry of Defense’s handling of military equipment. This campaign led to a DA-Notice advisory seeking to dissuade journalists from reporting on the issue of equipment supplied by the Ministry of Defense to British troops in Iraq, or at least to do so in general terms.

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158. Cram, supra note 9, at 144 (quoting INTELLIGENCE & SECURITY COMMITTEE, ANNUAL REPORT 2006–2007 Cm. 7299 at ¶ 72 (U.K.)).

159. Id. Though the DPBAC “suggested that a more effective system was needed to safeguard the work of the intelligence agencies and criminal prosecutions whilst allowing the media to report on ‘important matters of public interest,’” the U.K. government’s published response “appeared to commit to a strengthened DA-Notice system, rather than its wholesale abandonment.” Id.; see Richard Norton-Taylor, The Media is Not the Enemy, GUARDIAN, Nov. 10, 2008, available at http://www.theguardian.com/commentisfree/2008/nov/10/press-freedom-mi5 (“[L]eaks about security operations, probably including the one about Operation Gamble, invariably come from the police, ministers, or Whitehall departments. Any new measures designed to control the media would merely be punishing the messenger.”).

160. Cram, supra note 9, at 145.


162. Cram, supra note 9, at 145 (“The [DA-]Notice stated that, following [Gentle’s mother’s] press conference, certain issues relating to counter measures (electronic jamming devices) should not be discussed in other than ‘general terms.’ News editors were told to
News coverage from this time period suggests that the press perhaps initially complied, but only three years later, reports surfaced criticizing, in specific terms, the deficiencies in military equipment that contributed to Gentle’s death.

When the government persisted in pressuring news editors about how to report on these matters, there was a general sense that the DA-Notice System was frustrating the goals of political accountability and the ideals of self-governance. The Gamble and Gentle affairs suggest that, at least recently, where the DPBAC’s procedures have restricted media disclosures about matters relating to national security issues, there is a breakdown in political accountability and trust in the continued efficacy of the DA-Notice System.

2. Technology and the New Media Landscape

Changes in technology, and in the way that information is disseminated today, pose a significant threat to the longevity of the DA-Notice System. Information enters the public domain “more rapidly and readily, and this negates the purpose of the DA-Notice system which is to keep information secret.” Increased competition among news outlets is also relevant. Though competition in the industry has always been fierce, the landscape today is undoubtedly more intense than it was when the DA-Notice System was established. The potentially unlimited number of information-providers may undermine both the media’s incentive to limit itself and the DA-Notice System’s ability to rein in journalists, especially considering the ease with which anyone can publish anything.

remind their staff of the risks posed to UK military personnel by detailed discussion.” (internal citation omitted).


164. See Duncan Gardham, Army Failings Led to Death of Gordon Gentle, TELEGRAPH (Nov. 7, 2007, 1:34 PM), http://www.telegraph.co.uk/news/uknews/1568577/Army-failings-led-to-death-of-Gordon-Gentle.html; Rachel Williams, Coroner Criticizes MoD and Army in Ruling Soldier Unlawfully Killed After Logistics Failure, GUARDIAN, Nov. 7, 2007, available at http://www.theguardian.com/uk/2007/nov/08/iraq.iraq; see also CRAM, supra note 9, at 145 (“In [sic] light of the coroner’s published criticism, it is not clear whether the DA-Notice is extant or has been annulled.”).

165. CRAM, supra note 9, at 145.

166. Sadler, supra note 4, at 210.

167. Id.
Skepticism about the DA-Notice System’s longevity has further increased in the wake of episodes such as WikiLeaks, where the dissemination of sensitive information may not only be beyond an editor’s or government official’s control but also come as a total shock to either one.\textsuperscript{168} Mainstream news coverage of Edward Snowden, the American ex-Central Intelligence Agency (CIA) employee who disclosed classified documents from the U.S. National Security Agency (NSA) to several media outlets in June of 2013,\textsuperscript{169} demonstrates how the DA-Notice System responds to such technological challenges.

For example, on June 16, 2013, the \textit{Guardian} published an exclusive story, sourced by Snowden, reporting that “[f]oreign politicians and officials who took part in two G20 summit meetings in London in 2009 had their computers monitored and their phone calls intercepted on the instructions of their British government hosts . . . .”\textsuperscript{170} That story was published nine days after the \textit{Guardian}—along with other media organizations—received a DA-Notice responding to the Snowden leaks and urging editors not to publish information that may “jeopardise both national security and possibly UK personnel.”\textsuperscript{171} Even without this specific notice, publication of the G20 story seems to disregard the standing DA-Notice regarding “United Kingdom Security & Intelligence Services & Special Services,” which specifically requests pre-publication review of infor-

\begin{itemize}
\item 168. See Grimley, \textit{ supra} note 5 (reflecting on the obstacle that social media poses to the DA-Notice System: “The advent of social networking websites means it is increasingly hard to achieve a complete news blackout on anything”); \textit{see also DPBAC, Frequently Asked Questions, supra} note 3 (considering whether “the internet mean[s] that the DA-Notice System is no longer operable[:] The DA-Notice System has never been a 100% watertight system. Not only its voluntary nature, but also the enormous diversity of the British media (including some small outlets that have never followed the DA-Notice guidance), mean that it has always been a ‘damage limitation’ mechanism. The Internet has produced some new considerations, [as] has the increasing importance of citizen journalism assisted by the opportunities for real-time reporting using information technology. There are many unanswered questions about the future, but the very size and diversity of the net means that, just because something is on a foreign website, it does not necessarily mean that it has immediately been widely seen”).
\item 171. Halliday, \textit{ supra} note 64.
\end{itemize}
mation involving “specific covert operations, ... including the interception of communications, and their targets.”172

As the Guardian continued to publish stories based on Snowden’s leaks, U.K. Prime Minister David Cameron warned the newspaper that it could face “injunctions or DA-Notices or the other tougher measures” if it continued to print such stories, and accused the publication of behaving without social responsibility.173 British media bloggers pointed to Cameron’s apparent misunderstanding of the way the DA-Notice System functions—the threat of a DA-Notice does not actually threaten any legal sanction, though there are of course unofficial related consequences. Cameron’s incorrect characterization typified the pervasive ambiguity that still surrounds the regime.174 Indeed, during the Guardian’s publication of the Snowden revelations, the U.K. government used the DA-Notice System to “let other newspapers in Britain know that it would take a dim view of efforts to follow or add to the Guardian’s reporting,”175 effectively transforming the DA-Notice System into a scare tactic while disregarding its foundational purpose as well as the way it works on a daily basis.

The combination of these rapidly intensifying factors—both global security and technology-related—has prompted the DA-Notice System to undergo considerable soul-searching as its relevance and efficacy unravels. To that end, the DPBAC has articulated goals of becoming “more proactive in developing contacts with journalists with the aim of spreading the word and developing trust” in order to “remain relevant.”176 The Ministry of Defense initiated a formal review of the DPBAC in 2014 and solicited views from the public “about the purpose, utility, and effectiveness of the [DA-Notice Sys-

172. DPBAC, Standing DA-Notices, supra note 56.


174. See Dominic Ponsford, Cameron’s Counter-Productive Threats Against The Guardian Show Apparent Ignorance About the DA Notice System, PRESS GAZETTE (Oct. 29, 2013), http://www.pressgazette.co.uk/content/cameron-threats-against-guardian-show-apparent-ignorance-over-how-da-notice-system-works (ridiculing Cameron’s comments for his apparent misunderstanding about how the DA-Notice System works); see also Shipman, supra note 173.


176. DPBAC, Records, supra note 5.
system], whether there is room for improvement, and about the future generally for [the DA-Notice System].” The U.K. government has suggested that it is likewise concerned about the DA-Notice System’s effectiveness given demonstrated disregard for it. Such comments have spurred reports that the DA-Notice System is nearing extinction. Naturally, those reports have, in turn, spurred more reports defending the DA-Notice System’s existence and forecasting its longevity.

Whatever the future holds for the DA-Notice System, the reality is that today, a large percentage of the British population gets its news from traditional sources, and the journalists at those publications seem inclined to continue to respect the DA-Notice System. However, as more news comes from non-mainstream sources, the influence of and impetus for the DA-Notice System will likely wane. Should the U.K. government respond with increased OSA prosecutions or civil injunctions, the DPBAC may see even less inclination among journalists to cooperate with DA-Notices.

III. FOR AMERICAN EYES, TOO? LESSONS OF THE DA-NOTICE SYSTEM FOR U.S. MEDIA LAW

During the summer of 2013, the Guardian published a myriad of exclusive stories based on a cache of documents leaked by Snow-
den, the NSA whistleblower. Despite the newspaper’s clearing all but one of its Snowden-sourced stories by the DA-Notice System, the Guardian was forced, under government orders, to destroy the caches containing an unquantifiable number of leaked documents. What followed was a remarkable—though not the first—partnership between the Guardian and the New York Times, which Guardian editor Alan Rusbridger contacted for support to pursue the Snowden stories in light of his government’s suppressive actions. The Guardian expressly attributed the partnership to the “intense pressure from the U.K. government” to turn over its files.

This anecdote bespeaks the serious differences in each country’s media law regime. Conventional wisdom dictates that, compared to the United Kingdom, the United States is “a kinder environment for anyone trying to inform the sort of public debate regarding security and privacy that, post-Snowden at least, everyone seems to agree is desirable.”


183 This story is the one involving the G20 summit. See supra note 170 and accompanying text.


185 Janine Gibson, U.S. Editor-in-Chief, Guardian, Journalism after Snowden, Panel at Columbia Journalism School (Jan. 30, 2014), available at http://www.cspan.org/video/?317512-1/journalism-edward-snowden (noting that one cache contained 56,000 documents, and that it is impossible to quantify the total size of Snowden’s leak).


188 O’Carroll, supra note 187.

of each country—most especially the United States’ First Amendment guarantees of press freedom190—enhance this tradition.191 The United States does not have an Official Secrets Act, or a formal analogue to it.192 Conversely, the United Kingdom’s authorities on freedom of expression are, at best, quasi-constitutional.193 In this spirit, “virtually everyone agrees that the United States would never abide [by] such a sweeping criminal prohibition” as the OSA.194

At second glance, however, there is a case to be made for how the two countries, despite traditional notions distinguishing their respective media law regimes, share similar features relating to the press.195 This convergence theory is significant because the more the U.S. government’s treatment of the press resembles the United Kingdom’s, the more relevant U.K. ad hoc press regulatory frameworks appear. Discussions about similarities between the two countries’ press regimes, once understood to be virtual polar opposites, abound, and many U.S.-based journalists now point to a transformation of national security journalism.196 Such discussions center on the Obama

190. U.S. Const. amend. I.


193. See Pozen, supra note 5, at 628 n.524.

194. Id. at 516–17 (contrasting national security hawks’ “routine[] call for legislative strengthening of the leak laws and more vigorous executive enforcement” with civil libertarians’ fight for “federal shield legislation for journalists and enhanced doctrinal protections for their sources”); see Benjamin Wittes, The Washington Post on Wikileaks, Lawfare (Dec. 12, 2010, 10:12 AM), http://www.lawfareblog.com/2010/12/the-washington-post-on-wikileaks/#.UtGtDv02kpE (discussing the lack of an American analogue to the OSA and that such an analogue would pose First Amendment issues in implementation).

195. Pozen, supra note 5, at 626–28 (positing that “the United States and the United Kingdom have been converging on a common approach to regulating leaks” despite the conventional wisdom that would place the two countries’ regimes on opposite ends of the regulatory spectrum. “This approach combines expansive formal prohibitions and permissive enforcement practices, together with weak whistleblower protections; strong norms against ‘unpatriotic’ high-risk, low-value disclosures; and the effective exemption of full-time journalists from civil or criminal liability”).

administration’s treatment of Snowden\textsuperscript{197} and prosecution of journalists under the Espionage Act\textsuperscript{198}—which criminalizes the gathering, receipt, and dissemination of national defense-related information\textsuperscript{199}—as well as on the government’s general crackdown on national security reporting.\textsuperscript{200} In her capacity as executive editor of the \textit{New York Times}, Jill Abramson cautioned that the threat of legal prosecution has effectively criminalized journalism about sensitive national security issues, arguing that “a real freeze is setting in in what had been to this point . . . a healthy discourse between sources and journalists.”\textsuperscript{201} This rapidly changing relationship in the United States between the press and the government, further accelerated by the British media’s involvement, raises the question of how various U.S. parties might reach a working arrangement to navigate the new landscape.

The DA-Notice System is severely vulnerable in its current form, and the British government’s ability and tendency to obtain civil injunctions in the face of it undermine its durability. There is an obvious tension in assessing the DA-Notice System’s serious weaknesses while also advocating for its utility. But the United States should be mindful of the achievements, if not the goals, of the DA-Notice System. Notwithstanding the two countries’ foundational differences, the United States could benefit from looking seriously at the DA-Notice System’s successes and failures in an effort to develop further its own national security reporting guidelines.


\textsuperscript{199} Id.

\textsuperscript{200} See, e.g., Pozen, \textit{supra} note 5, at 515 n.8 (noting that the Obama administration has brought eight media leak prosecutions—roughly two-thirds of the total number that have been brought since the Espionage Act’s enactment).

\textsuperscript{201} Abramson, \textit{supra} note 187.
A. An Unofficial DA-Notice System

The United States prides itself on enjoying a unique set of free speech rights. This attitude is manifest in a number of ways. Legislative efforts to restrict speech, even when premised on public interest or positive policy goals, run into serious trouble in the U.S. Supreme Court.\footnote{202 See, e.g., Brown v. Entm’t Merchs. Ass’n, 131 S. Ct. 2729 (2011) (striking down a California law intended to ban the sale of certain violent video games); United States v. Stevens, 559 U.S. 460 (2010) (striking down a statute that regulated the sale of videos depicting animal cruelty). Less intuitive notions of what could constitute appropriate censorship meet similar fates. See, e.g., Bantam Books, Inc., v. Sullivan, 372 U.S. 58 (1963) (striking down a Rhode Island law that censored “impure” books).} In addition, the culture of American journalism is uniquely adversarial;\footnote{203 See Alexander M. Bickel, The Morality of Consent 81–82 (1975) (“The contest between press and government is in a sense analogous to the collision between prosecutor and defense in our system of the administration of criminal justice. Ours is an adversary, accusatory system, as opposed to the European inquisitorial system.”); see also David H. Weaver et al., The American Journalist in the 21st Century: U.S. News People at the Dawn of a New Millennium 140 (2007) (noting the media’s “watchdog” role); Timothy W. Gleason, The Watchdog Concept: The Press and the Courts in Nineteenth-Century America 13 (1990) (charting the history of the watchdog concept of the press). See generally Vincent Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 527 (1977) (“In the last decade, the First Amendment has had at least as much impact on American life by facilitating a process by which countervailing forces check the misuse of official power as by protecting the dignity of the individual, maintaining a diverse society in the face of conformist pressures, promoting the quest for scientific and philosophic truth, or fostering a regime of ‘self-government’ in which large numbers of ordinary citizens take an active part in political affairs.”). Though the concept of an adversarial press is traditionally attributed to Bickel, it has taken on additional connotations as figures such as Glenn Greenwald use it to differentiate their new media ventures from the attitude of the mainstream press, including the New York Times. See Josh Feldman, Glenn Greenwald: N.Y. Times Has ‘Helped to Kill’ ‘Adversarial Journalism,’ MEDIAITE (Oct. 28, 2013, 4:55 PM), http://www.mediaite.com/online/glenn-greenwald-ny-times-has-helped-to-kill-adversarial-journalism; Bill Keller, Is Glenn Greenwald the Future of News?, N.Y. TIMES, Oct. 27, 2013, available at http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html.} reporters pride themselves on not bowing to government pressure when deciding whether to pursue or publish a story. Moreover, and similarly to the situation in the United Kingdom, media companies are not inclined to handcuff themselves with restrictions given that they are already threatened with competition from other news sources and the challenge of adapting to a 24-hour news cycle. By most accounts, a legally enforceable arrangement that would strongly encourage the U.S. press to confer with the U.S. government would be unworkable, and the realities of the modern news cycle further problematize the applicability of such an ar-
There are, however, compelling reasons for both journalists and government officials to warm themselves to the idea of an informal arrangement whereby each side agrees to check itself against the other. Pre-publication consultation between media and government officials already occurs, particularly with regard to stories about national security. For example, a New York Times article on the Bush Administration’s warrantless wiretapping was published on December 16, 2005, though the newspaper reporters had actually written the article over a year earlier only to have it withheld by their editors. While the Times editors have not publicly disclosed all of the details behind their decision to hold the ar-

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204. See, e.g., Hooper, supra note 1, at 223 (noting that the DA-Notice System would “not be lawful” in the United States).

205. See, e.g., Rahul Sagar, Secrets and Leaks: The Dilemma of State Secrecy 192–93 (2013) (“The absence of an American equivalent to the DA-Notice System has not, however, precluded officials from informally pressuring reporters, editors, and publishers to refrain from publishing harmful or malicious disclosures. Anecdotal evidence suggests that these efforts have been met with a fair degree of cooperation when officials have asked journalists to withhold classified information that is only incidental to a news report.”); Pozen, supra note 5, at 531 (“In many instances, media outlets have delayed publication or withheld certain especially sensitive details in light of the national security concerns raised by forewarned officials.”). After September 11, then-White House Press Secretary Ari Fleischer organized a conference call with “every leading editor in Washington” and effectively made an agreement with the press that no one would publish “any stories that would go into details about the sources and methods of [U.S.] intelligence programs.” Michael Calderone, James Clapper Warned Ex-New York Times Editor Jill Abramson Of ‘Blood On Your Hands,’ HUFFINGTON POST (July 14, 2014, 6:57 PM), http://www.huffingtonpost.com/2014/07/14/james-clapper-jill-abramson-new-york-times_n_5585810.html. Abramson also noted that, “in the wake of 9/11, all of [the editors] readily agreed to that,” adding that “the [U.S.] press has historically not published information about troop movements, the identities of covert agents, or details that could put someone’s life in danger.” Id.


 Article's sourcing, they have pointed to questions about the original article’s sourcing, conversations with the Bush administration regarding its claims about the program’s legality, and the fact that President Bush personally asked that the story be withheld. Abramson, the former Times Executive Editor, has likewise discussed her decision to withhold the names of senior Al-Qaeda operatives in a story about the U.S. government’s interception of their communications. In addition, the Department of Justice has a set of internal guidelines that it follows regarding the issuance of subpoenas to journalists.

These examples should not be overstated to suggest that the United States already has a DA-Notice System of its own. These customs are informal and sporadic. Compliance with government requests is inconsistent yet cyclical: Periods of reflexive compliance result in complacency only to generate eventual regret for misplaced trust that then culminates in zealous pursuits of stories about the government. In addition, and similarly to journalists who heed the ad-

209. Id.
210. Abramson, Lecture at Dcheautauqua Amphitheater, supra note 206 (noting the unusual nature of Bush’s involvement).
212. Calderone, supra note 205. Another example includes James Risen’s story about U.S. infiltration of Iran’s nuclear program, a story that The Times withheld from publication but that Risen ultimately published in a book that is now the subject of a subpoena. Id.
213. 28 C.F.R. § 50.10 (2012); Pozen, supra note 5, at 538 (noting that “the guidelines prohibit use of such subpoenas except as a last resort and with the express authorization of the Attorney General”).
214. See SAGAR, supra note 205, at 193 (“[S]uch interventions have met with far less success when officials have asked journalists to withhold news reports whose very subject matter concerns a state secret, be this CIA Director William Colby’s attempt to keep the Glomar Explorer project under wraps or the Bush administration’s request that the New York Times withhold the story on the Terrorist Financing Tracking Program.”).
215. Reflecting on the New York Times’ so-called agreement with the Bush administration not to report on post-9/11 security initiatives, and the paper’s general complacency with regard to government reports about the Iraq War (including Abu Ghraib) and warrantless wiretapping, Abramson said: “Those three things, in some ways, made the press more vigilant and somewhat more aggressive about leaning in the balancing test . . . [of] the need to protect national security, but the need urgently to fulfill our First Amendment mandate to keep all of you informed. We leaned too far, I think, toward being too meek, going along with the government, holding back some stories and information, not being skeptical enough.” Abramson, Lecture at Dcheautauqua Amphitheater, supra note 206; see also Weaver et al., supra note 203, at 140 (noting that the media’s “government watchdog role seems ironic in view of the relatively strong press support the Bush administration enjoyed between the September 11 tragedy and the war in Iraq”); David
vice of the DA-Notice System, U.S. journalists are increasingly dis-incentivized from cooperating with government reporting restrictions because of the growing number of competitors in a crowded space.\footnote{216} Still, the American media and government stand to benefit from the structure and organizing principles of the DA-Notice System. If all sides agree on the premise that First Amendment tenets of a free press must be preserved alongside the public’s interest in a secure republic, then a background set of guidelines, rather than individual policies or recurrent practices, could offer guidance and accountability.

\textit{B. Regulatory Frameworks in Other First Amendment Contexts}

A more structured framework for national security is particularly attractive in today’s media landscape, which is populated by outlets that are less connected or funded than companies like the \textit{New York Times} and, therefore, may lack the same sources or experience to draw on when handling sensitive pieces of information.\footnote{217} Two models of voluntary guidelines that implicate First Amendment interests suggest the possibility of obtaining such an arrangement notwithstanding the constitutional claims at stake: trial coverage guidelines and the ratings of movies.

\textbf{Folkenflik, N.Y. Times Editor: Losing Snowden Scoop ‘Really Painful,’} NPR (June 5, 2014, 5:22 PM), http://www.npr.org/2014/06/05/319233332/new-york-times-editor-losing-snowden-scoop-really-painful (quoting the \textit{New York Times} Executive Editor Dean Baquet’s observation that “news executives are often unduly deferential to seemingly authoritative warnings unaccompanied by hard evidence”).

\footnote{216} See Pozen, \textit{supra} note 5, at 531 (“[I]t is clear that, as a group, journalists and editors do not believe that seeking, receiving, or broadcasting classified information is intrinsically harmful or unethical, while as individuals they face potential professional harm from being scooped by competitors, versus gain from the exclusives and the frisson that leak stories tend to generate.”) (internal citation and quotation marks omitted).

\footnote{217} See Sagar, \textit{supra} note 205, at 194 (“There appears, then, to be no compelling reason for the press to adopt a stubbornly adversarial stance, publishing every disclosure concerning suspected wrongdoing that comes its way. But even if the bulk of reporters, editors, and publishers accept the need to exercise judicious self-censorship (as many of them claim they do), an insurmountable practical problem remains: we lack the means by which to rein in the black sheep in the journalistic community, who delight in and profit from sensation.”).
1. Trial Reporting Guidelines

In the aftermath of the mid-twentieth century criminal cases involving Sam Sheppard—an osteopath from Cleveland whose murder conviction was overturned by the Supreme Court because of the “carnival atmosphere” that permeated his trial—the American Bar Association issued its Standards on Fair Trial and Free Press. This compilation, published in 1968, recommended a list of measures available to trial judges that could address sensationalized press coverage while preserving a fair trial for defendants: exclusion of the public from pre-trial hearings, hearings outside the presence of a jury, continuances, changes of venue, waiver of a jury trial, and jury sequestration. The ABA also issued a set of guidelines to bolster the efficacy of these measures, prohibiting attorneys and law enforcement personnel from releasing prejudicial information until completion or disposition of the trial, and prohibiting judicial employees from releasing information to the public that was not available in public records.

The ABA guidelines are not perfect. It is easy to recall criminal cases in which, these measures notwithstanding, a defendant endured a so-called carnival atmosphere trial. Courts are, moreover, increasingly unlikely to grant a change of venue in a high-profile case. Today, defendants and journalists alike are essentially at the mercy of a trial judge with regard to balancing First and Sixth Amendment fair trial rights. The guidelines’ efficacy has ultimately waned as the nature of high-profile trials and the media companies that cover them has evolved.

Still, the ABA guidelines represent an ad hoc attempt to ad-

221. Id.
dress a serious problem—media circuses during criminal trials—by trying to balance competing constitutional rights. More specifically, the guidelines implicate First Amendment rights, establishing a protocol for behavior during a trial with the understanding that compliance is voluntary. The availability of general guidelines that respond to recurring trial scenarios mirrors the availability of the five standing DA-Notices and the foundational principles they are intended to provide. Their voluntary nature and reliance on the participation of a number of parties with competing interests bode well for the prospect of implementing guidelines to regulate national security reporting.

2. The Movie Ratings System

The Motion Picture Association of America (MPAA)’s movie rating system offers another model of custom-based speech regulation through its voluntary but widely enforced movie ratings system. In 1968, the MPAA and the National Association of Theatre Owners (NATO) established a voluntary rating system with a primary objective of informing parents about movie content so that they could make effective decisions concerning their children’s exposure to controversial material. Filmmakers voluntarily submit their movies to the independent Classification and Ratings Administration (CARA), whose full-time board—parents of children ages five to seventeen with no prior affiliation with the industry—issues ratings based on a variety of factors. Filmmakers also agree to use the resulting ratings on all marketing and promotional materials, and movie theaters agree to enforce the ratings through their admissions policies. This voluntary code treads on First Amendment terrain by limiting, at least indirectly, the content of expression, but effectuates a productive way to preclude potential government intervention and avoid unfavorable publicity.


226. Id. at 11.

The MPAA is not without its critics, and it is distinguishable from the DA-Notice System in meaningful ways. Film producers, distributors, and exhibitors are usually different entities who all may be liable for obscenity or fear negative publicity and poor sales. They may, therefore, be actively interested in a standard rating system. By contrast, the production and distribution of a newspaper or broadcast is usually handled by a single corporate entity. In addition, movies generally entail signals of broad appeals, whereas any arrangement that would impose limits on the press could impinge on the spirit of independence innate in investigative journalism. Nonetheless, the ratings system indicates the potential for a consortium of media company representatives who, in the interest of other concerns such as national security, would be willing to subject themselves to voluntary reporting policies.

The notion that the media already confers with the government before publishing sensitive national security information, and the demonstration that non-binding First Amendment-limiting arrangements have succeeded in other contexts, presents a strong case for the viability of a mechanism in the United States that mirrors the DA-Notice System. Others have suggested—and then rejected—such solutions as relying on the president and Congress to persuade the public to boycott media organizations whose reporting jeopardizes national security (refuted as unreliable and untrustworthy) or self-criticism via ombudsmen (refuted as ineffective). Any arrangement would, at minimum, face the problems the United Kingdom is currently confronting, especially ones regarding technology and global security concerns. It might also face backlash among smaller publications that would criticize the government for being coopted by more established news organizations. But as Abramson and other editors often respond to such criticisms, these larger media companies are arguably best positioned to operate as gatekeepers to handle

228. Controversies involving the MPAA are beyond the scope of this Note, but for a sense of the sorts of issues that tend to arise, see generally Keertana Sastry, The 6 Biggest NC-17 and R-Rated Controversies in Film History, BUS. INSIDER (Mar. 3, 2012), http://www.businessinsider.com/the-6-biggest-nc-17-and-r-rated-controversies-in-film-history-2012-3?op=1.

229. See supra Part III.A.

230. See SAGAR, supra note 205, at 201 (ultimately advocating for “enterprising citizens [to] establish an independent and well-funded organization dedicated to scrutinizing media performance, which could name and shape reporters and editors who misuse anonymous sources, and the publishers who condone such behavior”).

231. Abramson, supra note 187.
such sensitive information responsibly.\textsuperscript{232}

These challenges are all serious, perhaps insurmountable, and should not be oversimplified. But it is worthwhile for all parties involved to seek out solutions in unlikely places. Just as the DA-Notice System developed as part of an effort to assuage the press when the British government cracked down on secrecy laws, so too could a comparable system help alleviate the disclosure concerns percolating in the United States.\textsuperscript{233}

CONCLUSION

States must conduct intelligence and security operations under some veil of secrecy in order to protect and promote national security interests. Combating national security threats sometimes requires secrecy in order to be effective. Though such conduct seems intuitively at odds with free press ideals, “[n]o serious advocate of the cause of freedom of information wishes to have put in the public domain current details of troop movements that would assist enemy combatants.”\textsuperscript{234} Conversely, secrecy should not be abused for political purposes. In democracies predicated on the idea of an informed electorate, officials must be held accountable for their actions, and so a free flow of information is crucial.

The DA-Notice System “sits at the centre of this tension between secrecy and openness in government.”\textsuperscript{235} Despite its voluntary quality, it has historically enjoyed considerable influence in the United Kingdom.\textsuperscript{236} “To an extent it is a relic of the culture of informality, personal contacts, and shared outlook which dominated Whitehall’s relations with the media in an earlier time.”\textsuperscript{237} However, the

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\textsuperscript{232} See generally ROSS, supra note 150, at 29–64 (detailing the justifications that press rights advocates typically espouse).

\textsuperscript{233} Similarly, the reporting guidelines and the MPAA both came into existence in response to crises over tensions between the state and the media.

\textsuperscript{234} CRAM, supra note 9, at 153.

\textsuperscript{235} SADLER, supra note 1, at 1.

\textsuperscript{236} Cal McCrystal, Secret Stories, GUARDIAN, July 4, 1999, available at http://www.theguardian.com/media/1999/jul/05/sundaytimes.mondaymediasection (noting that “despite editors’ ambivalence about the system, most agree that some kind of advisory pipeline is required, which would reduce the risk of crucial state security details reaching a potential enemy via a newspaper’s pages”).

\textsuperscript{237} LUSTGARTEN & LEIGH, supra note 46, at 270 (noting that the DA-Notice System’s “key characteristics” include its “lack of compulsion and its extra-legal status”); see CRAM,
DA-Notice System’s irresolvable conflicts with competing laws and external factors have seriously undermined the incentives for the press to comply with it and the reasons for the government to trust in it. As one British scholar articulated:

Some critics describe the conduct of DPBAC as “a form of censorship by wink and nudge.” and are astonished that newspaper editors continue to place reliance (thereby conferring credibility) on the system. Others favouring more transparent legal controls might argue that, in a highly competitive 24 hour news culture, the pressure on media organisations’ to beat their rivals to the latest “breaking” news event places the voluntary system under a strain that it was never intended to (and cannot) bear.\(^{238}\)

And yet, such competing laws as the OSA and their attendant threat to journalists may provide reason enough for the mainstream media to cling to whatever protections they can.

At the same time, the DA-Notice System confers a substantial benefit in its promotion of an ongoing dialogue between the government and the press, as well as in its utility as a resource to the media during high stakes reporting. The United States, in many ways, has realized the value of these benefits and has construed an analogue to the DA-Notice System in the form of an ad hoc system of norms that “regulate” reporting. A further developed structure could provide enhanced, equally accessible protections to the American press, currently struggling to reach a workable equilibrium with its government counterparts. Like their British colleagues, American journalists need a greater level of assurance in light of potentially capricious prosecutions in an area of law that has become increasingly murky.

\(^{supra}\) note 9, at 139–41 (noting that the DA-Notice System’s “key characteristics” include its “lack of compulsion and its extra-legal status”).

\(^{238}\) CRAM, \(^{supra}\) note 9, at 143 (internal citation and quotation marks omitted).
Ultimately, the DA-Notice System, and any comparable arrangement that would be implemented elsewhere, will be impermanent as the media landscape continues to change rapidly. As news-gathering shifts from a few legacy “gatekeepers” to multitudes on the Internet, the government and the press will need to strike a new balance between free press and national security. In the meantime, both parties in both countries would be well-served by an interim truce.

*Tali Yahalom Leinwand*  

*Online Executive Editor, Columbia Journal of Transnational Law; J.D. Candidate, Columbia Law School, 2015; B.A., University of Pennsylvania, 2009. For generous guidance, feedback, and support, I am very grateful to Professor Vince Blasi, Professor David Pozen, Gillian Phillips, David Hooper, Richard Winfield, the Journal staff, Judith Warshawski, Marlene Warshawski Yahalom, and especially Josh Leinwand.*