SHOULD IRELAND PROHIBIT THE CONTEMPORANEOUS MEDIA REPORTING OF JUVENILE TRIALS?

Abstract: Whenever serious crimes such as murder, manslaughter or rape are allegedly committed by children, they are heavily reported by the media. This occurred during the murder trial of Ana Kriégel, and may be observed again if children are ever tried in the Central Criminal Court. But what does the Ana Kriégel case tell us about the way juvenile trials are reported in Ireland? Do recent legislative and judicial developments threaten childrens' right to anonymity during trials? Can contemporaneous media reporting of juvenile trials infringe upon the right to a fair trial? Are there any legal impediments towards the prohibition of contemporaneous media reporting of juvenile trials? This paper seeks to answer these questions.

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Introduction

On 14th May 2018, a 14-year-old girl by the name of Ana Kriégel went missing in Lucan, Co. Dublin.[1] Following an extensive search by the local authorities, the girl's body was found on 17th May 2018 in an abandoned derelict house in the local area. On 24th May 2018, two boys who were aged 13 at the time of the murder were arrested on suspicion of the girl's murder. The two boys were given the pseudonyms 'Boy A' and 'Boy B' by the media reporting the case in order to protect their identities as they were juveniles. The trial of both boys, which was lauded for 'how swiftly it took place',[2] began on April 2019. It was one of the highest profile murder trials in the nation. Delahunt argues that this can be attributed to both the young age of the defendants and the circumstances of the case.[3] The trial was extensively reported by the press from its beginning to its conclusion. In the middle of the trial, a ban on contemporaneous media reporting was imposed by McDermott J, the presiding judge.[4] When imposing the ban, McDermott J expressed a concern that the jury may be influenced by media publications.[5] The ban was implemented following the publication of a front page headline by a newspaper stating, 'CCTV shows Ana being led to her death'; the judge feared such reports would 'incite public outrage against the accused'.[6] However, for reasons unstated by the judge, the ban was overturned on the same day it was imposed for all newspapers apart from the newspaper that had published the scathing headline.[7] On 18th

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[1] Conor Gallagher, 'Ana Kriégel murder trial: The complete story' *The Irish Times* (Dublin, 18 June 2019).

[2] Miriam Delahunt, 'The trial of children in the Central Criminal Court' (2020) 25(1) The Bar Review 19-22.

[3] ibid.

[4] Miriam Delahunt (n 2) 22.

[5] ibid.

[6] ibid.

[7] Natasha Reid, 'Latest: Judge lifts order banning reporting in Ana Kriégel murder trial for all but one publisher' *Irish Examiner* (Dublin, 3 May 2019).

June 2018, both boys were convicted for the murder of Ana Kriégel, with Boy A facing an additional sentence for aggravated sexual assault.[8]

Should the Court have removed the ban? More importantly, should Ireland prohibit contemporaneous media reporting of juvenile trials? This is important to consider because whenever serious crimes such as murder, manslaughter or rape are allegedly committed by children, they catch the attention of the nation. They are heavily reported by the media who are eager to get into the courtroom if the cases go to trial.[9] This occurred in the murder trial of Ana Kriégel,[10] and may be observed again if children are ever tried in the Central Criminal Court. However, what does the Ana Kriégel murder case tell us about the way in which juvenile trials are reported in Ireland? Can contemporaneous media reporting of juvenile trials infringe upon the right to a fair trial? Lastly, are there any legal impediments towards the prohibition of contemporaneous media reporting of juvenile trials? This paper seeks to answer these questions. The Ana Kriégel case is utilised as an illustrative example to re-consider conceptual notions, rationales and legal grounds for contemporaneous media reporting of juvenile trials in Ireland. The ability of the media to be present in the courtroom during child trials derives from section 257 of the Children Act 2001 (Children Act) which provides that:

> Where in any proceedings for an offence a person who, in the opinion of the court, is a child is called as a witness, the court may exclude from the court during the taking of his or her evidence all persons except officers of the court, persons directly concerned in the proceedings, *bona fide representatives of the Press* and such other persons (if any) as the court may in its discretion permit to remain.[11]

This section prevents the judge from barring bona fide members of the media from the courtroom if a child is a witness in proceedings. It also specifically refers to 'child witnesses' as opposed to 'child defendants', so it is uncertain whether section 257 extends to child defendants. This paper is concerned with the latter case only, specifically with proceedings involving child defendants for indictable offences tried in the Central Criminal Court. [12] If the provision applies to proceedings where a child is a defendant, then the court is prohibited from excluding *bona fide* members of the press from the courtroom in such cases. However, if the provision does not apply to child defendants, the media can indeed be excluded. In any event, the significance of the provision is that it permits the press to obtain evidence during certain child trials. Although we can assume that this is done with a view to eventual publication, the media are not mandated to publish the evidence obtained, and there is nothing in the provision preventing the court from delaying publications until trials are over. This paper will argue that delaying publications should be the preferred practice.

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[8] Neil Leslie, 'Gardaí review CCTV footage after attack on Ana Kriégel killer Boy A at Oberstown detention centre; It's understood Gardai have reviewed CCTV footage of the alleged incident but there have not been any arrests' *Irish Mirror* (Dublin, 5th June 2020).

[9] See Natasha Reid, '"You left me for dead": Teenage boy pleads guilty to attempted murder of woman he met on social media, court hears' *The Journal* (Dublin, 5 March 2019). See also Michelle Hennessey, 'Thousands of crimes, including rape, not prosecuted due to serious failings in Garda youth scheme' *The Journal* (Dublin, 17 January 2019).

[10] Miriam Delahunt (n 2). See also Conor Gallagher (n 1).

[11] Children Act 2001, s 257.

[12] The paper is not concerned with cases heard in the Children Court which is a special Court for children that sits in the District Court and hears summary offences committed or involving children. It has the jurisdiction to hear almost all child cases apart from murder which must be heard in the High Court. See also: Children Act 2001, s 71.

This paper is divided into three sections. Section one analyses the current Irish legal framework to assess whether the anonymity of children in the criminal justice system is adequately protected. Protecting the identity of children in the juvenile justice system has always been in the interest of justice. On this point, Webb observes that 'since the early days of the juvenile courts, anonymity had been one of the hallmarks of the juvenile justice process'.[13] The right to anonymity was also supported by O'Connor in the 1960s who asserted that despite being opposed to 'the accent on informality' in child cases (such as the requirement for legal counsel not to be robbed, or for the guards not to appear in uniform), he was in favour of the prohibition on the publication of the identities of young offenders.[14] Section one evaluates recent legislative and judicial development to determine if reporting restrictions adopted by the government could potentially vitiate the right to anonymity of children in conflict with the law. In doing so, the United Nations Convention on the Rights of the Child ('UNCRC'), which was ratified by Ireland on 28th September 1992, will be used to review whether Ireland is in conformity with international law. [15]

Section two explores whether contemporaneous media reporting of juvenile trials may lead to an infringement of the right to a fair trial recognised under Article 38.1 of the Irish Constitution.[16] Brooks has recognised two components of the right to a fair trial. First, the trial must 'render fair verdicts.'[17] Second, a fair trial 'must be understood to be fair…fairness entails impartiality upon the part of the judge and the jury.'[18] This section is only concerned with the latter component. Section two is divided further to discuss 1) the right to be tried by an impartial jury and the possibility of jury members gaining access to media publications (which is particularly problematic if the publications are prejudicial), and 2) how prejudicial media publications can vitiate the presumption of innocence.

Section three discusses three potential legal arguments against prohibiting contemporaneous media reporting of juvenile trials: 1) that a prohibition may be a violation of the requirement that justice shall be administered in public,[19] 2) that such a prohibition may be a curtailment of the freedom of expression right of the press,[20] and 3) that a ban on contemporaneous media reporting of juvenile trials may be an infringement upon the right of the public to be informed.[21] In rebuffing first argument, it will be made clear that the requirement for justice to be administered in public does not apply to juvenile trials. In ascertaining whether freedom of expression would be infringed, the section analyses the 'proportionality test' in Ireland, which is used to determine whether a restriction imposed on a constitutional right is justified.[22] The section notes that a proposed ban on contemporaneous media reports should

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13 Patrick Webb, 'Privacy or Publicity: Media Coverage and Juvenile Proceedings in the United States' (2008) 3(1) International Journal of Criminal Justice Sciences 3.

14 James O'Connor, 'The Juvenile Offender' (1963) 52 Irish Quarterly Review, 70 -71.

15 UN General Assembly, *Convention on the Rights of the Child* (United Nations Treaty Series, 20 November 1989, vol. 1577) 3.

16 Artide 38.1.

17 Thom Brooks, *The Right to a Fair Trial* (Routledge 2009), Xi.

18 ibid.

19 Elaine Lucille Fahey, 'Open Justice? The Practical Operation of Artide 34.1 of the Constitution—Part I' (2003) 21(21) Irish Law Times, 303-308, 304.

20 See *Irish Times v Murphy* [1998] 2 ILRM 161; *Murphy v IRTC* [1998] 2 ILRM 361 and Rachel Joyce, 'A New Approach to Freedom of Expression?' (2002) 3(1) Hibernian Law Journal, 85-114.

21 See Charles Lysaght, 'Publicity of Court Proceedings' (2003) 381(1) The Irish Jurist, 34-57, 46. See also Gordon A Jr Martin, 'Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings' (1995) 21 New Eng J on Crim & Civ Confinement 393.

22 See *Heaney v Ireland* [1994] 3 IR 593; [1994] 3 IR 593 (Digest); [1994] 2 ILRM 420; [1994] 6 JIC 2902 1998 WJSC-HC 7869. See also David Kenny, 'Proportionality, the burden of proof, and some signs of

pass the proportionality test. In response to the third legal argument, it is suggested that the press could publish reports on juvenile trials after the conclusion of the trial so the right of the public to be informed is not curtailed.

Do Recent Legislative and Judicial Developments Threaten Children's Right to Anonymity During Trials?

Section 252 of the Children Act 2001 seeks to protect the anonymity of children during trials. The section provides that:

> in relation to any proceedings for an offence against a child or where a child is a witness in any such proceedings
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> (a) no report which reveals the name, address or school of the child or includes any particulars likely to lead to his or her identification, and
>
> (b) no picture which purports to be or include a picture of the child or which is likely to lead to his or her identification,
>
> shall be published or included in a broadcast.

The scope of application of section 252 was extensively discussed in the recent Court of Appeal case of *DPP and EC v In the matter of an appeal by the Irish Times, Independent News and Media, RTE and News Group Newspapers*.[23] In this case, Birmingham J upheld the decision by the trial Judge to prohibit the media from revealing the identity of a deceased child victim. The appellants challenged the ban in respect of a deceased child victim by arguing that section 252 only applies to protect living child victims of crime . In rejecting this argument, Birmingham J asserted that section 252 works to protect the identity of all children; even in circumstances where the child is dead or has attained the age of majority.[24] Therefore, the section applies to any type of proceedings for an offence against a child or where a child is a witness. This is regardless of whether the child is living or dead. But does section 252 apply to child defendants?

Does Section 252 Apply to Child Defendants?

Despite the absence of an unequivocal expression under the section stating that it applies to child defendants, the section has indeed been used in court proceedings to protect the anonymity of child defendants. In the case of *A.B. v The Director of Public Prosecutions,*[25] Twomey J used section 252 to protect the identity of a defendant who was a child at the time he allegedly committed his offense. This was a judicial review case in which the applicant, aged 19, sought the prohibition of his trial for the alleged sexual assault of a 6 year old girl when he was 15 years old.[26] The applicant in this case argued that various of his due process rights had been infringed because of the prosecutorial delay of his trial. Most importantly, he

reconsideration' (2014) 52 Irish Jurist, 141-152, 141 and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland' (2018) 66 The American Journal of Comparative Law, 538.

[23] [2020] IECA 292.

[24] ibid [13].

[25] [2019] IEHC 214; [2019] 4 JIC 0403.

[26] ibid [1].

alleged that he had lost the right to anonymity under section 252 by virtue of him being tried as an adult instead of a child. In order to rectify this problem, Twomey J anonymised the judgment and reduced any identifying details, so, *inter alia*, the applicant is referred to as A.B.[27] Likewise, in the case of *M.S. v Director of Public Prosecutions,*[28] an applicant who had attained the age of 18 was anonymised during his trial for an alleged offence he committed as a 15 year old boy. Finally, this provision was invoked in the Ana Kriégel murder trial to protect the identities of Boy A and Boy B. The media were prohibited from publishing any information which may have identified the boys. It can be inferred from these cases that the right to anonymity applies to both child witnesses and child defendants.[29] Therefore, the primary goal of section 252, as interpreted by the courts, is to protect the identity of children during their trials; regardless of whether they are witnesses, victims, defendants, living or dead.

Children (Amendment) Bill 2020 and the Potential Infringement upon the Right to Anonymity of Child Defendants

Recent legislative developments in the form of the Children (Amendment) Bill 2020 ('the Bill') threaten the efficacy of section 252 of the Children Act 2001. [30] The Bill was enacted following the decision of *DPP and EC v In the matter of an appeal by the Irish Times, Independent News and Media, RTE and News Group Newspapers*.[31] In this case, it was held that a mother charged with the murder of her child could not be named in order to protect the anonymity of her child. However, the effect of the judgment is that anyone charged with either the murder, attempted murder or manslaughter of a child cannot be named.

Although the protection of the anonymity of deceased children is desirable, an anomaly has arisen in the law where section 252 is not only used to protect children, but is also used to protect adults who commit heinous crimes against children. For example, in a recent case concerning the murder of a 16-year-old boy in Dublin, the naming of the deceased child was permitted by the media while investigations were ongoing.[32] However, as soon as a man was charged with the murder, the naming of both the child and the man was prohibited. [33] Similarly, a prohibition on naming a man who stabbed his nephew to death was imposed in order to protect the anonymity of a deceased child.[34] This was condemned by the child's mother who expressed the desire to not only have the man's identity revealed, but to also have images of her son published in newspapers as a form of remembrance.[35] Consequently,

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[27] ibid [2].
[28] [2018] IEHC 285; [2018] 5 JIC 1705.
[29] *RD v Director of Public Prosecutions* [2018] IEHC 164 [2018] 4 JIC 1002. See also *Independent Newspapers (Ireland) Ltd v IA* [2018] IEHC 120 [2018] 02 JIC 1607 and David P. Boyle, 'Publication of material identifying sex offender after conviction considered' (2019) 37 Irish Law Times 51.
[30] Children (Amendment) Bill 2020.
[31] [2020] IECA 292.
[32] Robin Schiller, Ken Foy and Conor Feehan, 'Stabbed teen tried to calm situation after altercation over theft of a bike; Tributes paid after the death of promising young footballer Josh Dunne (16)' *Irish Independent* (Dublin, 28 January 2021).
[33] Niall O'Connor, 'Government TD says 'absurd' ban on naming child victims needs to end' *The Journal* (Dublin, 29 January 2021). See also Shane Phelan, 'Pressure mounts for law change after the tragic murder of Josh Dunne' *Irish Independent* (Dublin, 29 January 2020).
[34] Eoin Reynolds, 'Man who stabbed nephew 27 times locked up for life; Monster was 'obsessed' with 11-yr-old he murdered Mum calls on minister to scrap victim anonymity law' *Daily Mirror* (Dublin, 2 February 2021).
[35] Eoin Reynolds, 'Man (28) given life sentence for murdering 11-year-old nephew; Mother urges Minister to change law on identification of child murder victims' *The Irish Times* (Dublin, 2 February 2021).

the 'Children (Amendment) Bill 2020' has been introduced and section 1.2 removes the anonymity protection from persons who commit acts of murder, attempted murder or manslaughter against a child.[36] Unfortunately, the Bill does not clarify whether this applies to child defendants who commit an offence of murder, attempted murder or manslaughter against a child. If it does apply to child defendants, this would be contrary to the ethos of the Children Act 2001, which Kilkelly has identified as the only Act in Ireland which specifically pertains to children in conflict with the law who 'by their very nature of being a child, should be treated in a different manner from adult offender'.[37] Moreover, this would be a violation of the UNCRC. Article 40(2)(b)(vii) of the UNCRC provides that State parties must ensure that during child court proceedings, the child has 'his or her privacy fully respected at all stages of the proceedings.'[38] The UNCRC does not provide any further explanation as to what privacy within the meaning of Article 40 entails. Hafen and Hafen have described the drafter's failure to expand on the meaning of privacy as 'an unfortunate omission in light of the growing complexity of privacy laws.'[39] Despite the lack of clear guidance by the UNCRC on what privacy entails, one can infer from rule 8.2 of the Beijing Rules 1985 that the dispensation of the right to anonymity would be a violation of the child's right to privacy.[40] Rule 8.2 of the Beijing Rules 1985 provides that, 'no information that may lead to the identification of a juvenile offender shall be published'.[41] The commentary on this rule explains that the provision was enacted to ensure that juveniles are protected from 'the adverse effects that may result from the publication in the mass media of information about their case (for example the names of young offenders, alleged or convicted)'.[42] Although the Beijing rules are non-binding, Kilkelly observes that the rules 'usefully flesh out the provisions of the CRC.'[43] Therefore, the rules are regarded as a useful instrument for understanding how the UNCRC ought to be implemented by States.

It can be reasonably concluded that the proposed amendment to section 252 of the Children Act 2001 threatens the right to anonymity of child defendants. If the Bill is enacted in its current form, it may potentially violate the UNCRC which urges States to protect the right to privacy of children in conflict with the law. Nonetheless, it is important to note that the Bill was introduced as a remedy to the current state of law which creates a protection for adults who commit the crimes of murder or manslaughter against a child. Thus, the Bill is desirable in so far as it proposes naming adults who commit such crimes against children. However, the Bill should be amended to uphold the anonymity clause in circumstances where children are defendants in cases and have been charged with the crime of murder, attempted murder or manslaughter against a child. If the Bill is amended to uphold the anonymity exception in respect of child defendants, it would be in conformity with the Children Act 2001 and UNCRC. However, would a continued ban on identifying child defendants safeguard against the probability of an unfair trial that could potentially emerge

[36] ibid section 2.2.
[37] John O'Connor, 'Reflections on the Justice and Welfare Debate for Children in the Irish Criminal Justice System' [2019] Irish Judicial Studies Journal Vol 3,19.
[38] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC), Artide 40.2.b.
[39] Bruce C. Hafen and Jonathan O. Hafen, 'Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child' (1996) 37 Harvard International Law Journal 471.
[40] UNGA United Nations Standard Minimum Rules for the Administration of Juvenile Justice UN A/RES/40/33 (1985).
[41] ibid.
[42] Ibid.
[43] Ursula Kilkelly, 'Youth Justice and Children's Rights: Measuring Compliance with International Standards' (2008) 8(3) Youth Justice 187–192, 188.

as a result of contemporaneous media reporting? The next section attempts to answer this question.

Can Contemporaneous Media Reporting of Juvenile Trials Infringe Upon the Right to a Fair Trial?

Jury Impartiality

One of the most fundamental rights of any individual under the Irish Constitution is the right to be tried by a jury before being convicted of a serious crime.[44] This right is explicitly recognised under Article 38.5 of the Constitution which stipulates that '…no person shall be tried on any criminal charge without a jury.'[45] This right has been enumerated by the constitutions of numerous jurisdictions.[46] In Ireland, the only acceptable constitutional derogations from this rule is when a person is charged with a summary offence, a trial is being heard by a military tribunal or when a trial is heard before the Special Criminal Court.[47] The rationale behind the insistence for a person to have their trial heard before an impartial jury is to ensure they have a fair trial and are not unjustly convicted. Indeed, Jeffers contends that 'impartiality is viewed as a fundamental facet of the jury system due to the requirement that all trials must be fair'.[48] The concomitant principle which flows from this right is the expectation that the jury must make their decisions solely on the basis of the evidence adduced in Court. This is apparent from the fact that before every criminal trial the judge will direct the jury to decide the verdict only on facts heard before the Court.[49] This was emphasised by Denham J in *Kelly v O'Neill*:[50]

> To enable an accused person obtain a fair trial not only should the trial be conducted in accordance with fair procedures but the jury should reach its verdict by reference only to evidence admitted at the trial and not by reference to facts, alleged or otherwise, contained in statements or opinions aired by the media outside the trial…[51]

Therefore, the jury is not permitted to discuss the case with anyone else outside the courtroom unless they are ordered to do so by the Judge.[52] Despite this direction from the court for the jury not to discuss or view any media sources which may bias their decision, human nature has proven that this is not always possible. This was noted by the Law Reform Commission who stated that 'the emergence of wireless technology and the proliferation of Internet use now make it possible for jurors to obtain a significant amount of information

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[44] See John L. O'Donnell, 'The Jury On Trial: Reflections On DPP -v- Haugh' (2000) 59 The Bar Review, 470-475.

[45] Artide 38.5.

[46] See: Commonwealth of Australia Constitution Act 1900 (Imp), Canadian Charter of Rights and Freedoms. 1982, U.S. Constitution, Artide III, section 2, U.S Const. amend VI.

[47] Artide 38.2, and Artide 38.4.

[48] James M Jeffers, 'The Representative and Impartial Jury in the Criminal Trial: An Achievable Reality in Ireland Today?' (2008)18(2) Irish Criminal Law Journal, 34-41, 36.

[49] See generally: *D v. DPP* [1994] 2 I.R. 465; *Z v DPP* [1994] 2 I.R. 476 at 496 per Hamilton P; *DPP v. Nevin* [2003] 3 IR 321 2003 WJSC-CCA 4217 [2003] 3 JIC 1403; *DPP v. Laide and Ryan* [2005] IECCA 24; [2005] 1 IR 209 [2005] 2 JIC 2401.

[50] [1999] IESC 81; [2000] 1 IR 354; [2000] 1 ILRM 507; [1999] 12 JIC 0202

[51] *Kelly v O'Neill* [2000] 1 ILRM 507, 522.

[52] Courts Service of Ireland, 'What Jury Service Involves' <https://www.courts.ie/what-jury-service-involves> Accessed 26 March 2021.

about a defendant and about the crime with which they are charged should they so wish.'[53] It was similarly observed by Stewart that 'trusting a jury to forget publicity but to remember all that they hear in court is something of a leap of faith'.[54] Likewise, Coonan and Foley argue that 'in the absence of evidence, judicial blind faith in jurors fully accepting warnings and directions is hard to accept'.[55] These assertions are supported by studies which have shown that judicial instruction is not an effective deterrent against the influence of prejudicial material.[56] This can be attributed to the fact that 'people generally attach a great deal of credibility to news about crime.'[57]

Instances when Media Publications Influenced Jurors

On 5th December 2018, a trial adjudicated by Stewart J collapsed in the High Court because the media had influenced the opinion of the jury. The trial concerned a man charged with murder who sought to reduce his indictment to manslaughter through the defence of provocation. In the midst of jury deliberations, an RTÉ programme had aired the night before the verdict where the panel in the programme diminished the defence of provocation by describing it as 'an ancient defence where somebody could make any allegation against the deceased who can't rebut it and, in particular, an unwanted sexual advance.'[58] Although the programme did not specifically mention the particular case, the issues discussed in the programme were synonymous to the facts of the case. In ascertaining whether the jury were affected by the programme, Stewart J asked the presiding jury members if they had listened to the RTÉ programme and five of the members answered 'Yes'.[59] Moreover, she asked if the five members who had listened to the programme had discussed the matter with the other jurors and they all admitted that they had. Thus, the Judge had no choice but to dismiss the jury and order a re-trial. In making the decision to order a re-trial, Stewart J had referred to a similar case in late November where a re-trial was also ordered because the jury were biased by media reports. This was a rape trial where the media had published reports which vitiated the accused persons right to a fair trial. The case was heard before McDermott J who noted that the right to a fair trial of the accused would be at risk if the case was permitted to continue with the same jury.[60]

Thus, it is apparent that as media reporting of trials becomes more ubiquitous, the accused persons right to a fair trial is becoming curtailed. If the accused is lucky, similar to the aforementioned cases, the case will be re-tried. However, the ordering of re-trials is something which is undesirable for the accused, the victim, and both their families. In particularly serious cases such as murder and rape, it could be difficult – and potentially traumatic – for witnesses to re-live painful experiences on the witness stand for the second time. The threat with this perceived trauma is that the courts may stop re-ordering re-trials

[53] Law Reform Commission, Consultation Paper *Jury Service* ((LRC CP 61-2010) p.181
[54] Nora Pat Stewart, 'In Jurors we Trust: the Futility of Research into Pre-Trial Publicity' (2010) The Bar Review, 15(3), 44-49, 47.
[55] Genevieve Coonan and Brian Foley, *The Judges Charge in Criminal Trials* (Round Hall, Dublin 2008) 512.
[56] See Norbert Kerr, 'The Effects of Pre-trial Publicity on Jurors' (1994-1995) 78 Judicature 127.
[57] Gary Moran and Brian L. Cutler, B, 'The prejudicial impact of pretrial publicity' (1991) 21(5) Journal of Applied Social Psychology, 345–367.
[58] Natasha Reid 'Murder trial collapses over Prime Time discussion about another case' *The Journal* (Dublin, 5 December 2018).
[59] ibid.
[60] Colm Keena, 'Newspaper's reporting leads to collapse of rape trial' (*The Irish Times*, Dublin 26 November 2018).

and opt to continue with a biased jury. In addition to this, criminal cases are expensive and have the potential of exhausting the courts resources. Hence, to avoid the consequences of this, the courts may cease ordering re-trials where a jury may have been adversely influenced. This could result in accused persons being unjustly convicted. This failure to discharge a biased jury occurred in the English Court of Appeal case of *R v McCann,*[61] where a conviction was quashed on the basis that the trial judge had failed to discharge the jury following prejudicial media publications.[62] Similarly, in the case of *R v Taylor,*[63] a conviction was also quashed following adverse publications of the trial. It was noted by Stewart that this case is 'cited by commentators as being of far greater significance in terms of pre-trial publicity, as the conviction was quashed despite repeated warnings from the trial judge to the jury to ignore the publicity'.[64] Therefore, media publication of trials can adversely affect the impartiality of the jury which can subsequently lead to an unfair trial. This is further supported by studies undertaken by Haney and Bakhshay in the US proving that 'exposure to media coverage has been shown to have a prejudicial impact on potential jurors' attitudes toward criminal defendants… exposure to pretrial publicity has resulted in more guilty verdicts and harsher sentences.'[65]

Rattigan Principles

The effect of trial by media was also extensively considered by the Supreme Court in the case of *Rattigan v DPP*.[66] This case was highly praised by Coen who opined that 'it represents a welcome vindication of the right to a fair trial'.[67] The case involved an allegation by the plaintiffs that there was a real risk of an unfair trial in their case because pre-trial publicity could have affected the jury. It was ultimately held that pre-trial publicity did not affect their trial because the pre-judicial media articles had been published twelve months prior to the trial. Therefore, the jury could not have been biased by the media reports because they would have most likely forgotten about them.

It is arguable that if cases are contemporaneously reported, one cannot be certain that the jurors have forgotten about the content of the publications. A significant time lapse does not exist when cases are contemporaneously reported. Despite directions from the Judge to the jury not to read or watch any broadcasts of an ongoing trial, it is simply naïve in this day and age to believe that jurors will abide by those instructions. We live in a generation where news is readily accessible, and jurors are not monitored once they leave the courtroom.[68] It is virtually impossible to definitively assure that all jurors will strictly adhere to orders from the

[61] [1991] 92 Cr App Rep 239 CA.
[62] ibid 253, per Beldam LJ.
[63] [1994] 98 C.A.R. 361. See also Michael Levi and David Corker, 'Pre-trial publicity and its treatment in the English Courts' (1996) Criminal Law Review 622 -632.
[64] Nora Pat Stewart, 'In Jurors we Trust: the Futility of Research into Pre-Trial Publicity' (2010) 15(3) The Bar Review, 44-4, 46.
[65] Shirin Bakhshay and Craig Haney, 'The media's impact on the right to a fair trial: A content analysis of pretrial publicity in capital cases.' (2018) 24(3) Psychology, Public Policy, and Law, 326–340, 330.
[66] [2008] IESC 34; [2008] 4 IR 639 27 ILT 250; [2008] 5 JIC 0704.
[67] Mark Coen, 'Judicial Comment on the Evidence After Rattigan' (2018) 60(6) The Irish Jurist, 90-111, 90.
[68] Although it can be suggested that jurors should be sequestered once they leave the courtroom, this is unlikely to be beneficial or legally enforceable. Even if jurors were hidden away in hotel rooms until the conclusion of their trials, it would be impractical to confiscate any of their electronic devices which give them access to the internet or prevent them from listening to the radio or watching TV. If there was an attempt to sequester them and ban their communication devices, this may be an infringement of their liberty, which could in turn be illegal, if not unconstitutional. Therefore, jury sequestration is not a viable option.

court not to talk about the trial or listen to reports on the trial they are adjudicating.[69] These laws were enacted prior to the proliferation of the internet and may have worked then. However, it may be more difficult to access publications of ongoing trials. However, international, local, and national news is now accessible online in a matter of seconds. Therefore, as the world changes so must the law.

Despite the distinction between the *Rattigan* case and contemporaneous media reporting of cases, it is still important to consider the court's discussion of prejudicial media reports. In making their decision, the Supreme Court applied the test formulated in *D v DPP*,[70] which was subsequently adopted by Finlay CJ in *Z v DPP*.[71] In *D v DPP,*[72] Denham J recognised that there is a hierarchy of rights in criminal proceedings and that the right to a fair trial is the most superior right.[73] Despite acknowledging the superiority of this right, Denham J declared that the onus of proving that there is potential for an unfair trial due to pre-trial publicity lies with an accused person: 'he [the accused] should establish that there is a real risk that by reason of those circumstances he could not obtain a fair trial.'[74] This test was critiqued by Stewart who noted that 'to date this test has proved an insurmountable hurdle for those seeking to prohibit their trial on grounds of pre-trial publicity.'[75] As a consequence, no applicant has succeeded in establishing the judicially-required threshold.[76]

Problems with the Current Test

It is highly problematic that the burden of proof is on the applicant to prove that there is a real, serious and unavoidable risk that they will not receive a fair trial. It places an unduly high burden on the defendant which is contrary to the well-established common law principle that the prosecution bears the onus of proving the defendant's guilt beyond a reasonable doubt. The onus placed on the accused to establish that he could not obtain a fair trial is unjust because the accused person has very few resources compared to the State. Accordingly, there should be an automatic presumption that the accused person will not obtain a fair trial once a defendant alleges that prejudicial reports have been published. The State should bear the onus of proving that such reports are not prejudicial and if the reports are found to be prejudicial, the State should bear the onus of proving that the accused can still receive a fair trial. Nevertheless, this proposed test may be time consuming and overly burdensome on the State. Thus, it may be easier if contemporaneous media publications were prohibited. This would eliminate the likelihood of media reports adversely impacting the right to a fair trial.

The current test would be reasonable if all jurors were truthful and would readily admit if they had been reading reports which could have potentially biased their views. Although this occurred in the cases previously discussed by Stewart J and McDermott J, it must be appreciated that those cases may have been an anomaly and their outcome cannot be expected in every case. Research conducted in this area indicates that jurors do not always

[69] Alec Samuels, 'The jury is being killed by the internet' (2020) 84(2) J. Crim. L. 163-167.
[70] [1994] 2 I.R. 465.
[71] [1994] 2 I.R. 476.
[72] [1994] 2 I.R. 465, 474.
[73] ibid.
[74] ibid.
[75] Nora Pat Stewart (n 64) 44.
[76] Tom, O'Malley, *The Criminal Process* (Round Hall, Dublin 2009) 611.

respond to questions honestly in court.[77] Therefore, the fact that the onus has been placed on an accused person to prove that they may have been prejudiced by publications is a slightly unrealistic expectation. As noted by the Supreme Court in the *Rattigan* case:

> [t]here cannot be complete avoidance of the risk [of an unfair trial] because even in a case where eleven out of the twelve jurors may never have noticed particular names when reading an article, if they did read it or equally probably may have forgotten the names, there may still be one single juror who did know who the accused was and who may remind his or her fellow jurors of the offending article. Quite frankly, every eventuality cannot be catered for.[78]

This principle applies to every juvenile case reported by the media and to every adult case that is heavily reported by the media. However, as will be discussed, unlike adult cases, there are no legal barriers against the prohibition of contemporaneous media reporting of juvenile cases.

The Presumption of Innocence

Contemporaneous media reporting of juvenile trials is likely to affect the principle of the presumption of innocence. As already mentioned, there is no guarantee that the jury does not access media publications and reports of trials they are adjudicating. If the jury do in fact gain access to trial adverse publications, they may influence the jury's judgment, which in turn threatens the principle of the presumption of innocence. It has been argued that prejudicial media reports are capable of creating a 'presumption of guilt' which is the antithesis to the presumption of innocence.[79] The essence of the principle is that 'the accused is to be considered innocent until proven guilty of a criminal offence'.[80] The rationale behind this is to sustain the rule of law. It derives from a famous phrase by Blackstone (i.e. the 'Blackstone Formulation'): 'it is better that ten guilty persons escape than that one innocent suffer'.[81] The principle is said to be implicitly recognised under Article 38.1° of the Irish Constitution by various cases in Irish law[82]. For instance, in *O'Leary v Attorney General,*[83] Costello J affirmed its significance under Irish law by asserting that:

> [I]t has been for so long a fundamental postulate of every criminal trial in this country that the accused was presumed to be innocent of the offence with which he was charged that a criminal trial held otherwise than in accordance

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[77] See Dale W. Broede, 'Voir Dire Examinations: An Empirical Study', (1965) 38 S. CAL. L. REV. 503; Richard Seltzer Mark A.Venuti Grace M.Lopes., 'Juror Honesty During Voir Dire', (1991) 19 CRIM. JUST. 451, 455. and Robert G Loewy, 'When Jurors Lie: Differing Standards for New Trials' (1995) 22 Am J Crim L 733.

[78] *Rattigan v DPP* Appeal No. 353/2006 (WLIE 1) (Supreme Court, 7 May 2008), p.7.

[79] See: Anna K LaRoy, 'Discovering Child Pornography: The Death of the Presumption of Innocence' (2008) 6 Ave Maria L Rev 559 p.560, and Ariana Tanoos, 'Shielding the Presumption of Innocence from Pretrial Media Coverage' (2017) 50 Ind L Rev 997.

[80] Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) The Modern Law Review Limited, 67(3) 402- 434 p. 402.

[81] *Coffin v. United States*, 156 U.S. 432, 456 (1895). See also: Francois Quintard-Morenas, The Presumption of Innocence in the French and Anglo-American Legal Traditions', (2010) 58 Am. J. COMP. L. 107, 110-14.

[82] See: *Heaney and McGuinness v Ireland* (2001) 33 EHRR 334, *Woolmington v DPP* [1935] AC 462, *DPP v Forsey* [2018] IESC 55 [2019] 1 ILRM 73 [2018] 11 JIC 0801. *Donnelly v Judges of Metropolian District Court* [2015] IEHC 125 [2015] 4 IR 406 [2015] 3 JIC 0305 2015 WJSC-HC 6430.

[83] [1993] 1 I.R. 107.

> with this presumption would, prima facie, be one which was not held in due course of law.[84]

If prejudicial media reports of trials are released, they may vitiate this cardinal principle by creating a presumption of guilt. A presumption of guilt is often created when journalists publish biased reports in the guise of facts adduced in courts. The journalists may create what has been described by Mayer as 'guilt by media'.[85] This guilt by media can be captured by a statement made by Professor Henry Mayer who, according to Kirby J of the High Court of Australia, 'expressed total incredulity at the lawyers' naive concern with fair trial in the context of the media.'[86] Mayer opines that 'journalists won't admit that [media trial publications are] an artificial product. They rationalise their position with notions of fairness, while they play on people's beliefs that all accused are guilty.'[87] Although this statement is not true of all media publications, it highlights the potential risks that can arise from adverse media coverage of trials.

It is argued that all contemporaneous media reports of juvenile trials should be prohibited to eradicate the risks associated with prejudicial media reports. If prejudicial media reports are accessed by juries, they can influence the outcome of the case, as the juries would not be basing their verdict solely on evidence heard in court. This, in turn, could result in an unfair trial.

Experiments on the Impact of Pre-trial Publicity on Jurors

It has been argued that one of the biggest mistakes made by the judiciary is that they assume that 'juries are especially good at catching errors, rejecting irrelevant information, and balancing out the biases of their members.'[88] However, studies have shown that pretrial media publications can hinder the jury's ability to decide based solely on evidenced adduced in Court.[89] This is particularly evident from an experiment conducted by Davis which exposed 10 juries to prejudicial media publications to determine how the jurors' deliberations were impacted.[90] Davis waited a either a day or a week in some instances before showing the juries a video tape of a trial. He found that when the juries deliberated, six out of the 10 juries who had been exposed to prejudicial media reports discussed the reports.[91] This was despite an admonition that they should only decide the case on evidence viewed on the tape. Similar studies were carried out by Kramer, Kerr and Carroll who used 81 jury groups and exposed

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[84] ibid 107.

[85] R. Castan cited in J. Loren, 'Police and Press – A Joint Threat to Civil Liberties', (1985) Law Institute Journal (Vic), Aug. 813.

[86] Michael Donald Kirby, 'Pre-Trial Publicity - Free Speech v Fair Trial' (1985) 6 J Media L & Practice 221, 224.

[87] R. Castan cited in Judy Loren, 'Police and Press – A Joint Threat to Civil Liberties', (1985) Law Institute Journal (Vic) 814.

[88] See: Martin J. Bourgeois and others, 'Nominal and interactive groups: Effects of pre-instruction and deliberations on decisions and evidence recall in complex trials' (1995) Journal of Applied Psychology, 80, 58-67. See also Mary E. Pritchard and Janice M. Keenan, 'Memory monitoring in mock jurors' (1995) 84 Journal of Applied Psychology, 340- 348.

[89] Amy L. Otto, Steven D. Penrod and Hedy R. Dexter, 'The biasing impact of pretrial publicity on juror judgments' (1994) 18 Law and Human Behaviour, 453- 469. Christine L. Ruva & Michelle A. LeVasseur, 'Behind closed doors: the effect of pretrial publicity on jury deliberations' (2012) 18(5) Psychology, Crime & Law, 431-452.

[90] Roger W. Davis, 'Pretrial publicity, the timing of the trial, and mock jurors' decision processes' (1986) Journal of Applied Social Psychology, 590- 607.

[91] ibid.

them to prejudicial media publications.[92] They found that 54 of the 81 jury groups discussed the prejudicial material while deliberating. In Kline and Jess' experiment, eight jury groups were set up, with four groups being exposed to prejudicial media publications of trials and four groups exposed to non-prejudicial reports.[93] All juries were taken to a law school moot court competition based on the media reports they had read. It was found that all the jury groups who had been exposed to the prejudicial media reports discussed the reports when they deliberated. However, none of the jury groups who had read the non-prejudicial publications discussed the reports.[94] These results were reaffirmed by Ruva and LeVasseur, both of whom examined the impact of pre-trial publications during deliberations and more specifically, how jurors interpreted and discussed ambiguous trial testimony.[95] They found that:

> Negative pre-trial publicity has a biasing effect on jury verdicts and that pre-trial publicity exposure can influence jurors' interpretations and discussion of trial evidence. This study also suggest that jurors are likely to discuss pre-trial publicity during deliberations, even after being admonished not to, and this discussion is unlikely to be corrected by jury members.[96]

Therefore, whenever prejudicial publications are released in the media, there is a real risk that the jury will consider the material while deliberating. Although not all media publications are prejudicial in nature, it must be recognised that there will always be a possibility that at least one if not more media outlets will inadvertently release prejudicial reports. This occurred in the Ana Kriégel murder trial when McDermott J imposed a publication ban on a newspaper outlet that has released a prejudicial report.[97] The experiments above are concerned with pre-trial publicity and not contemporaneous media reports, but it is argued that the impact of contemporaneous media publicity is even greater than pre-trial publicity. This is primarily because in the studies mentioned, there was a time lapse between the moment the juries had been exposed to the media reports and when they heard the trial evidence. Yet, the publications still made an impact on their judgment. It can be inferred from this that the impact on jurors will be even more profound if the media reports are read whilst the trial is ongoing.

Thus, it is arguable that the best way to ensure that prejudicial media publications do not impact the jury is to prohibit contemporaneous media reporting of juvenile cases. A prohibition might be more effective than trying to regulate the nature of media reports because in most instances, journalists may not even realise that they are publishing biased reports. In demonstrating this point, it is important to analyse the nature of media publications that emerged in the Ana Kriégel murder trial and how some of the reports may have created a presumption of guilt.

The Ana Kriégel Case and the Presumption of Guilt

[92] Geoffrey P. Kramer, John S. Carroll and Norbert L. Kerr 'Pretrial publicity, judicial remedies, and jury bias' (1990) 14 Law and Human Behaviour, 409- 438.
[93] Gerald F. Kline and Paul H. Jess, 'Prejudicial publicity: Its effect on law school mock juries'. (1966) 43 Journalism Quarterly, 113- 116.
[94] ibid.
[95] Christine L. Ruva and Michelle LeVasseur, 'Behind closed doors: the effect of pretrial publicity on jury deliberations' (2012) 18(5) Psychology, Crime & Law, 431-452, 433.
[96] ibid 444.
[97] Miriam Delahunt, 'The trial of children in the Central Criminal Court' (2020) 25(1) The Bar Review, 19-22, 19.

The creation of a presumption of guilt is evidenced by how the media depicted the children in the Ana Kriégel case. Although the boys were later convicted of the murder, it must be remembered that all the media publications referenced below were made prior to their conviction. Thus, they were made whilst the boys were presumed innocent by law. The media began the trial by constructing personalities of the children involved in the trials. This method of reporting ultimately serves to undermine the credibility of Boy A and Boy B during their trial. The media tarnished the reputation of the boys by reporting the case like a horror film with three main characters.

i. Ana Kriégel

The victim in the media narrative was Ana Kriégel, a young and innocent 14-year-old girl who was an outcast and struggled to make friends (an image which is initially created by her mother during the trial). According to the Irish Times, her mother was advised to give evidence in court describing her daughter so she could be humanised; so she was not merely a piece of evidence in a murder trial.[98] During the trial, we are told by the media reports that Ana was 'endlessly bullied' in school and that she 'struggled to make friends and was targeted by bullies'.[99] We are told that she had a hearing impairment which was caused by a tumour in her right ear; her mother allegedly tells the court that 'she could hardly hear in her right ear and she had poor eyesight'.[100] We are informed that she had no friends and 'must have thought "her dreams came true" when she heard that one of the boys accused of her murder wanted to meet her in a local park'.[101] According to news publications during the time when the trial was ongoing, the prosecution told the jury that 'Ana "craved friendship" and "bounded out of the house" when Boy B told her that Boy A wanted to meet her'.[102]

ii. Boy A

In contrast, some of the media publications indirectly depicted the boys as monsters and killers who must not warrant any sympathy amongst members of the public.[103] For instance, an article reporting the Kriégel case in the United Kingdom provides: 'Satan-obsessed boy sexually assaulted girl as pal watched before they killed her'.[104] The children in the headline are indirectly described as bearing innate demonic features. This occurred before the boys were convicted of the murder. Similarly, at the early stages of the trial, a news article reveals that counsel for the prosecution told the jury that there is nothing to suggest that Ana, 'simply succumbed to some kind of overture. She fought with her life. She was murdered by [Boy A] and he sexually assaulted her in a very violent way in the process.'[105] This line draws a conclusion that Boy A is guilty of murder before he is even convicted. The mere fact that the paper publishes this submission of guilt without providing the defence argument is proof of bias. It is a prejudicial report which may resonate with readers some of whom may be

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[98] Conor Gallagher (n 1).

[99] Niall O'Connor and Cate McCurry, 'Girl, 14, 'sexually assaulted and murdered by boy as friend watched voyeuristically' *The Mirror* (London, 1st May 2019).

[100] Ibid.

[101] Eoin Reynolds, 'Ana Kriégel 'suffered very violent death where she fought for her life,' prosecution tells murder trial' (Breaking News, 7 June 2019) <https://www.breakingnews.ie/ireland/ana-Kriégel-suffered-very-violent-death-where-she-fought-for-her-life-prosecution-tells-murder-trial-929438.html> (accessed 4th July 2020)

[102] ibid.

[103] See Gareth MacNamee, 'No talking about Jesus or God, only Satan: Court hears details from copybook seized from Boy B's house' *The Journal* (Dublin 29 May 2019). Gareth MacNamee, 'The 'overwhelming forensic evidence' against Boy A and the 'devious lies' of Boy B: Prosecution counsel's closing statement' *The Journal* (Dublin, 29 May 2019).

[104] Tom Davidson and Amber Hicks, 'Satan-obsessed boy sexually assaulted girl as pal watched before they killed her' *Mirror* (United Kingdom, 18th June 2019)

[105] Eoin Reynolds (n 101).

members of the jury. Although not all media publications publish in this manner, one cannot say for certain that none of the jury members had access to the prejudicial reports. Prejudicial media publications are made primarily when reporters publish prosecution arguments without providing information about what the defence have argued. For instance, another article published by newspaper was entitled, ''No talking about Jesus or God, only Satan': Court hears details from copybook seized from Boy B's house.'[106] At first, the publications appear to be unbiased and a mere replication of the evidence adduced in court. However, following an analysis of the publications, it becomes apparent that they predominately refer to the arguments made by the prosecution. This is a common method of crime reporting. In fact, empirical research in the United States has demonstrated that media coverage of crime is often skewed and one-sided.[107] Any reference to the defence arguments and submissions in the Kriégel case was sparse (and in most cases non-existent).

iii. Boy B

Adverse media publications probably had the most effect on the trial of Boy B. Unlike Boy A, there was no DNA evidence tying Boy B to the murder of Ana Kriégel. Thus, the evidence against him was largely circumstantial.[108] However, the media desecrated his reputation, which may have subsequently contributed to his murder conviction. Boy B was portrayed by the media as a pathological liar who was complicit in the murder of Ana Kriégel. The media constructed this persona by selectively publishing extracts of police interviews of the boy while he was in custody. At the early stages of the trial, the media implicitly states that Boy B is a compulsive liar. An article in The Sun reveals that 'the garda told Boy B that this was his chance to tell the truth, adding: "For once and for all, what happened in that room?"'[109] Likewise, a different article publishes the prosecution arguments whereby they submit that, 'Boy B "aided and abetted, he assisted or helped it to happen, knowing what would happen"…Boy B lied repeatedly to gardai and his denials were "not credible".[110] One article begins its publication with the following line, 'one of the boys who denies murdering Anastasia Kriégel told gardai he saw his co-accused "raping" the 14-year old schoolgirl, the Central Criminal Court has heard'.[111] The mere fact that the paper uses the word, 'denies' is problematic. This implies that the boy did in fact commit murder but is refusing to admit the truth. The word deny is often used in a context where someone refuses to admit something that is true. Thus, the writer strongly implies guilt before it has already been established by the court. Additionally, most articles produce a transcript recording of a video interview with Boy B in which he reveals that '[BoyA] went to his other friend's house and told him he was going to kill somebody and that he was going to kill Ana Kriégel'.[112] This statement is inculpatory, especially in the absence of the defence arguments. It reinforces the idea that

[106] Gareth MacNamee (n 103).

[107] See: Craig Haney and Susan Greene, 'Capital constructions: Newspaper Reporting in death penalty cases' (2004) 4 Analyses of Social Issues and Public Policy, 129-150. See also Dorothy Imrich, Charles Mullin and Daniel Linz, 'Measuring the extent of prejudicial pretrial publicity in major American newspapers: A content analysis'. (1995) 45 Journal of Communication, 94-118.

[108] See: Conor Gallagher, 'Ana Kriégel murder trial told no evidence Boy A intended to kill her' *The Irish Times* (Dublin, 10th June 2019).

[109] Eoin Reynolds, 'Boy B to cops: 'I then asked Boy A who he was planning to kill and he replied Ana Kriégel' *The Sun* (England, 29th May 2019).

[110] Niall O'Connor and Cate McCurry, 'Girl, 14, 'sexually assaulted and murdered by boy as friend watched voyeuristically' *The Mirror* (London, 1st May 2019).

[111] Eoin Reynolds, 'Ana Kriégel murder trial hears that Boy B told gardai he saw co-accused Boy A 'raping' her' *Irish Mirror* (Dublin, 27th May 2019).

[112] William Dunne, 'Ana Kriégel murder trial hears Boy B told gardai Boy A said he was planning to kill Kildare schoolgirl' *Irish Mirror* (Dublin, 28th May 2019). See also Conor Gallagher, 'Ana Kriégel murder trial told no evidence Boy A intended to kill her' *The Irish Times* (Dublin, 10th June 2019).

the Boy A had intended to kill Ana and that Boy B knew; it is a statement of guilt. Although the jurors in the case had heard both sides of the argument in court, there is a possibility that they may been vacillated in Court and the media reports swayed their decision.

Aftermath of Kriégel Case

Clearly, some of the media reports emerging from the Kriégel murder trial strongly inferred guilt before the boys were convicted. Although it cannot be definitively proven that the jury in the Kriégel murder case did in fact read these media reports, it can also not be definitely contended that the jury did not access the reports. Thus, did the boys receive a fair trial if the jury had access to such prejudicial reports? One of the key tenets of the right to a fair trial is that the jury must decide a case solely on facts heard in court. However, if contemporaneous media reporting of trials is permitted, the jury might also consider such publications while deliberating.

Are juveniles disproportionately affected by contemporaneous media reporting?

There is no evidence suggesting that juveniles are disproportionately affected by contemporaneous media reports than adults. Why then does this paper argue for a prohibition on the contemporaneous media reporting of juvenile cases specifically? There are two primary reasons for making this argument. Firstly, it is submitted that there is a higher probability that prejudicial media reports will emerge in juvenile trials than in adult trials. This assertion is premised on the precedence of the case of *DPP v Nevin,*[113] a seminal case on the right to a fair trial and contemporaneous media reporting of adult trials. In this case, the applicant argued that she had received an unfair trial after she was convicted of murder and soliciting of murder. Mrs Nevin had faced three trials – two of which were aborted because of jury-related procedural problems.[114] The applicant was appealing the decision of the trial judge, Carroll J , who held that the adverse media publication she faced during her third trial did not result in an unfair trial. Mrs Nevin's trial had attracted what was described as 'enormous public curiosity and relentless media commentary throughout its course',[115] because of the publication of what was later referred to as 'colour pieces' during her first trial. Colour pieces are published when 'constant comments are made by certain popular newspapers on the applicants appearance and her clothing etc...'[116] These colour pieces were described by Carroll J as 'the worst kind of tabloid journalism designed solely to sell newspapers without any regard to Mrs Nevin's dignity as a human person.'[117] At the beginning of her third trial, Carroll J ordered a ban on the publication of *inter alia* any photographs of Mrs Nevin during the trial. Despite imposing the ban, Carroll J refused to abort the trial on the basis that there was not a real or serious risk that Mrs Nevin would not get a fair trial because the media reports referred to her appearance and demeanour, not what she was being tried for. The Court of Criminal Appeal upheld this ruling.

The decision of this case is distinguishable from that of juvenile trials because it is not legally permissible for the media to publish colour pieces of children. This is because colour pieces by their nature are factors which lead to the identification of the child and would be contrary

[113] [2003] 3 IR 321 2003 WJSC-CCA 4217; [2003] 3 JIC 1403.
[114] ibid [8].
[115] Paddy Dillon-Malone, 'Mrs Nevin's Pictures—A European Gloss' (2000) 5 *Bar Review* 510.
[116] [2003] 3 IR 321.
[117] ibid.

to section 252(1)(a) of the Children Act 2001 which prohibits the publication of 'any particulars likely to lead to [the child's] identification'.[118] As a result, the media are more likely to publish evidence adduced in Court during juvenile trials to avoid being held legally liable under this section. There is a possibility that this evidence will be prejudicial, especially if media publications are similar to some of the reports that emerged during the Kriégel case by only portraying one side of the case.[119] These types of reports are capable of influencing the jury by reinforcing a one- sided narrative of guilt.[120] Thus, the best way to ensure the that the jury are not influenced by media reports while deliberating would be to ensure that such reports do not exist. Another reason this paper argues for a prohibition on contemporaneous media reporting of juvenile cases, but not adult cases, is because, unlike adult trials, there does not appear to be any legal barriers towards the prohibition of contemporaneous media reporting of juvenile trials. This statement is supported by the following section.

Are There Any Legal Impediments Towards the Prohibition of Contemporaneous Media Reporting of Juvenile Trials?

There are three primary concerns with the suggestion that contemporaneous media reporting of juvenile trials should be prohibited. Firstly, that a prohibition may be a violation of the requirement that justice shall be administered in public,[121] secondly, that such a prohibition may be a curtailment of the freedom of expression right of the press,[122] and thirdly, that a ban on contemporaneous media reporting of juvenile trials may be an infringement upon the right of the public to be informed.[123]

The Administration of Justice in Public

Recent developments indicate that the judiciary has become frustrated with the contemporaneous publications of trials. In an attempt to circumvent the ubiquitous nature of such reports, the Chief Justice announced a new Practice Direction in November 2018 which 'seeks to limit the use of electronic recording devices in the courts'.[124] The effect of the practice direction is to ban live tweeting and messaging during trials except for bona fide journalists and lawyers.[125] However, the enactment of this practice direction does not eradicate the potential harm that could be caused by prejudicial media publications of juvenile cases. It is arguable that the only way this could be eliminated would be if contemporaneous

[118] Children Act 2001, s252(1)(a).
[119] See Robert E Jr Shepherd, 'Film at Eleven: The News Media and Juvenile Crime' (1999) 18 QLR 687, 695, where Shepherd noted that media coverage of the court during juvenile trials is spasmodic, and is usually of a particularly sensational or heinous case.
[120] See: Amy L. Otto, Steven D. Penrod and Hedy R. Dexter, 'The biasing impact of pretrial publicity on juror judgments' (1994) Law and Human Behaviour, 18, 453- 469. See also Ruva (n 89).
[121] Elaine Lucille Fahey, 'Open Justice? The Practical Operation of Artide 34.1 of the Constitution—Part I' (2003) 21(21) Irish Law Times, 303-308, 304.
[122] See *Irish Times v Murphy* [1998] 2 ILRM 161; *Murphy v IRTC* [1998] 2 ILRM 361 and Rachel Joyce, 'A New Approach to Freedom of Expression?' (2002) 3(1) Hibernian Law Journal, 85-114.
[123] See Charles Lysaght, 'Publicity of Court Proceedings' (2003) 38(1) The Irish Jurist, 34-57, 46. See also Gordon A Jr Martin, 'Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings' (1995) 21 New Eng J on Crim & Civ Confinement 393.
[124] Paul O'Higgins, 'Trials and the media' (2019) 24(1) The Bar Review, 16-18, 16.
[125] Supreme Courts Practice Directions, SC 18: Use of cameras and electronic devices in court, para 9.

media reports of trials were prohibited. Nevertheless, one of the biggest concerns with imposing a ban on contemporaneous media reporting of juvenile trials is that it may be a curtailment of Article 34.1 of the Irish Constitution which calls for the administration of justice in public. However, this author argues that the requirement for the administration of justice in public does not apply to juvenile trials in the High Court.

Article 34.1 of the Irish Constitution provides that, 'justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public'.[126] This article is closely linked with the right to a fair trial.[127] It enshrines into Irish law the concept that justice must not only be done but must be seen to be done.[128] Thus, the primary rationale for enacting it was to protect litigants by ensuring that the rule of law is upheld and that there is consistency in the application of the law.[129] The rule is historically entrenched in the justice system and Bentham articulates its importance by declaring: 'publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial'.[130] As a consequence, Article 34.1 is the article most informally referred to as a justification for allowing the contemporaneous reporting of juvenile trials.

Meaning of Article 34.1 of the Irish Constitution

The meaning of Article 34.1 of the Irish Constitution was extensively discussed in *In the Matter of R Ltd.*[131] In explaining Article 34.1, Walsh J declared that 'the actual presence of the public is never necessary but the administration of justice in public does require that the doors of the court must be open so that members of the general public may come and see for themselves that justice is done'.[132] This is a very pragmatic interpretation of Article 34.1. Walsh J uses the word 'require', which means that whenever the doors of the courtroom are closed, justice is not being administered in public. It was opined by Noctor that this must be construed in very strict terms.[133] Walsh J did not say justice administered in public includes the 'option' that the doors of the courtroom should be open, nor did he use any other phrase to indicate that the courtroom doors may not always be open for justice to be administered in public. Had he used such wording, administration of justice in public could possibly encompass more than just having the doors of the court open. Therefore, for the administration of justice to take effect, it is paramount that the doors of the courtroom remain unlocked. The public must be able to walk in and spectate all cases; otherwise there would be a breach of Article 34.1.

The Administration of Justice in Public and the Necessity of Contemporaneous Media Reporting

126 Artide 34.1.
127 Elaine Lucille Fahey, 'Open Justice? The Practical Operation of Artide 34.1 of the Constitution—Part I' (2003) 21(21) Irish Law Times, 303-308, 304.
128 *Scott v Scott* [1913] AC 417.
129 See Charles Lysaght, 'Publicity of Court Proceedings' (2003) 38(1) The Irish Jurist, 34-57.
130 Quoted by Lord Shaw in *Scott v Scott* [1912] A.C. 417, 477.
131 [1989] I.L.R.M. 757.
132 ibid 764.
133 See Cathleen Noctor, 'The Presence of McKenzie Friends in in Camera Proceedings' (1999) 17 Irish Law Times, 214-216, 213.

A further prerequisite of the administration of justice in public is that all trials being administered in public must be open to being contemporaneously reported by the media. This was enunciated in the case of *Irish Times Ltd v Ireland*.[134] This was a challenge to the trial judge's decision to ban the media reporting on the trial of four non-nationals who were charged with 'importing and exporting, with an intent to supply, cocaine.'[135] In this case, it was ultimately held that the trial judge had made an error by banning the media because under Article 34.1 of the Constitution, the media had a right to report ongoing trials to the public unless there was a real risk of an unfair trial. Likewise, in the case of *Murphy v The Irish Times,*[136] the Supreme Court held that for the administration of justice in public to be satisfied, the media must be permitted to contemporaneously report ongoing trials so they can inform the public who are unable to attend court about what is said during trials. Denham J remarked 'we are not living in ancient times or in a city state; it is entirely impractical for all people to attend all courts'.[137] This approach is consistent with the US Supreme case of *Richmond Newspapers, Inc v Virginia,*[138] where it was held that contemporaneous media reporting of trials was a way of ensuring that members of the public who cannot attend the court are informed about what is said. The court stated that while public attendance at court was once 'a common mode of "passing the time", nowadays very few members of the public attend and observe judicial proceedings'.[139] One can infer from this that contemporaneous media reporting of trials is a constituent element of the administration of justice in public. Consequently, the administration of justice in public in Ireland has two vital components. Firstly, the trials must be heard in an open court where the press and public can spectate. Secondly, all evidence in the court must be communicated publicly by the press. This two-part test derives from the English principle of 'open justice' established in the case of *Attorney General v Leveller Magazine Ltd.*[140] In this case, Lord Diplock announced that:

> [t]he application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly.[141]

Thus, in both Ireland and England, a vital component of the administration of justice is that the doors of the courtroom must be open to members of the public and the media must be able to contemporaneously report cases. Therefore, if the doors of the open are closed to the public, justice is not being administered in public. Likewise, if the media are not permitted to contemporaneously report cases while the doors of the public are open, there will be a breach of Article 34.1 of the Irish Constitution. [142]

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134 *Irish Times Ltd v Ireland* [1998] 1 IR 359; [1998] 1 IR 359 (Digest); [1998] 2 ILRM 161.
135 ibid.
136 [1998] 1 I.R. 359.
137 ibid 398.
138(1980) 448 US 555, 564.
139 ibid.
140 [1979] AC 440, [1979] 1 All ER 745, HL. See also Jason Bosland and Judith Townend, 'Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom' (2018) Comms. L 23(4), 183-202.
141 ibid [1979] 1 All ER 745, 749 – 750.
142 This is particularly emphasised by Walsh J's use of the word 'require' when explaining the meaning of Article 34.1 of the Irish Constitution in *In the Matter of R. Ltd* [1989] IR 126 [1989] IR 126 (Digest) [1989] ILRM 757, 764.

Exception to the Rule

Nevertheless, there is an exception to the requirement that justice shall be administered in public. This exception is embedded under Article 34.1 as 'save in such special and limited cases as may be prescribed by law.'[143] This was construed by Walsh J as meaning 'law enacted, or re-enacted, or applied by a law enacted by the Oireachtas subsequent to the coming into force of the Constitution.'[144] Therefore, the Oireachtas, and not the courts, is the only institution that can create an exception to justice not being administered in public.[145] Whenever the Oireachtas creates an exception to the administration of justice in public, it must be strictly adhered to. This was affirmed in the case of *M.P. v A.P,*[146] where Laffoy J held that the phrase 'proceedings shall be heard otherwise than in public' pursuant to section 34 of the Judicial Separation and Family Law Reform Act 1989 was mandatory.[147] It was said that the court has the 'inherent jurisdiction to take whatever steps are necessary to ensure that the statutory section was complied with'.[148] Similarly, in the case of *Re A Ward of Court (withholding medical treatment) (No.1),*[149] the court interpreted the meaning of 'otherwise than in public' as embedded under section 45(1) of the Court (Supplemental Provisions) Act 1961.[150] Section 45(1)(c) of the Act provided an exception to the administration of justice in public for lunacy and minor matters. Lynch J held, (while adverting to *Attorney General v X*),[151] that 'the interests of justice and the welfare of the ward entailed that the application should be heard *in camera* both as to evidence and argument' and that the judgment should be delivered in public in a manner that would preserve the anonymity of the parties involved.[152] In other words, the public are not entitled to know the evidence and arguments adduced in court; but the judgment may be delivered in public after the conclusion of the trial.

Does the Exception Apply to Juvenile Cases?

In relation to juvenile cases, the Oireachtas created an exception for the administration of justice in public through section 252 of Children Act 2001. Section 252 seeks to anonymise children during trials.[153] Although the enactment of the 'Children (Amendment) Bill 2020' threatens the efficacy of the right to anonymity of children in conflict in the law, the Bill has not yet been passed. Thus, at the moment, the identity of children in conflict with the law is strictly forbidden in accordance with section 252. Therefore, whenever juvenile cases are heard in the Central Criminal Court, the general public are not permitted to enter the court

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143 Artide 34.1.

144 *In the Matter of R. Ltd* [1989] I.L.R.M. 757 at 765.

145 See *Re R Ltd* [1989] I.R. 126; [1989] I.L.R.M. 757; *Maguire v Drury* [1994] 2 I.R. 8; [1995] 1 I.L.R.M. 108; *Roe v Blood Transfusion Board* [1996] 3 I.R. 67; [1996] 1 I.L.R.M. 555; *Re Countyglen* [1995] 1 I.R. 220; [1995] 1 I.L.R.M. 213; *The Irish Times v Murphy* [1998] 1 I.R. 359; [1998] 2 I.L.R.M. 161.

146 [1996] 1 I.R. 144.

147 ibid.

148 Elaine Lucille Fahey, 'Open Justice? The Practical Operation of Artide 34.1 of the Constitution—Part I' (2003) 21(21) Irish Law Times, 303-308, 307.

149 [1996] 2 I.R. 73.

150 Court (Supplemental Provisions) Act 1961.

151 [1992] 1 I.R. 1.

152 *In Re A Ward of Court (withholding medical treatment) (No.1)* [1996] 2 I.R. 73, 77.

153 The provision does not have an unequivocal expression under the section stating that it applies to child defendants. However, the section has been used in child court proceedings to protect the anonymity of child defendants. See *A.B. v The Director of Public Prosecutions* [2019] IEHC 214; [2019] 4 JIC 0403; *M.S. v Director of Public Prosecutions* [2018] IEHC 285; [2018] 5 JIC 1705.

during trials against juveniles to ensure that the anonymity of juveniles is protected. The closing of the doors occurred in the trial of Boy A and Boy B in the Central Criminal Court. All members of the public were excluded from the courtroom apart from persons directly concerned in the proceedings, *bona fide* representatives of the press and such other persons (if any) as the court, using its discretion, permitted to remain.[154] Therefore, all child cases in the Central Criminal Court must be heard in the absence of the public. It would be counter-intuitive for the Oireachtas to create a statutory provision insisting on the anonymity of child defendants and witnesses during trials, then have the doors of the courtroom open for the public. As already established by Walsh J in *In the Matter of R Ltd,*[155] once the courtroom doors are closed, justice is not being administered in public. Thus, the exception to justice being administered in public is automatically applied to juvenile trials through the closing of the courtroom door, and the general public cannot know what is discussed during juvenile trials. Consequently, juvenile trials fall within the exception of the need to have justice administered in public.[156] In fact, any administration of justice in public would be a breach of the Children Act.[157]

The Breach of the Exception

Despite juvenile trials not being bound by Article 34.1, the Irish judiciary have authorised the public to vicariously be present in the courtroom of juvenile trials by allowing media publications of ongoing trials. This vicarious presence was exemplified in the Ana Kriégel murder case; the media reporters of the trial practically gave readers a daily transcript of court discourse. The media reported that the jury comprised eight men and four women; they described the boys actions while in police custody ('Boy B told Gardai Ana was crying and said "no, no, don't do this" as Boy A started to "remove her clothes", court hears'); and they furnished summaries of what the boys had said to the police during their interviews ('Boy B has previously said that he brought Ana to meet Boy A and they went together to an abandoned house in a park where he saw Boy A "flip" Ana and choke her while removing her clothes.')[158] The prosecution arguments were also presented: 'Mr Grehan added the prosecution would submit the plan was to facilitate the joint enterprise murder of Ana. They will also tell jurors that Boy A was seen by witnesses limping with blood on his clothing and on his face'.[159] They even provided a visual description of the actions of the police officers whilst they interviewed the kids: 'Detective Garda Daly showed him photos of other items taken from the rucksack, including knee pads, a snood and shin guards. Boy B said he couldn't remember seeing Boy A wearing any of those on the day.'[160] These publications are not legally mandated nor are they underpinned by Article 34.1 of the Constitution calling for the administration of justice in public.

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154 See Children Act 2001 s 257.

155 [1989] I.L.R.M. 757, 764.

156 Charles R Petrof, 'Protecting the Anonymity of Child Sexual Assault Victims' (1994) 40 Wayne L Rev 1677, 1682.

157 Children Act 2001, s 252.

158 Eoin Reynolds, 'Ana Kriégel murder trial hears that Boy B told gardai he saw co-accused Boy A "raping" her' *Irish Mirror* (Dublin, 27th May 2019); and William Dunne, 'Ana Kriégel murder trial hears Boy B told gardai Boy A said he was planning to kill Kildare schoolgirl' *Irish Mirror* (Dublin, 28th May 2019).

159 Niall O'Connor and Cate McCurry, 'Girl, 14, 'sexually assaulted and murdered by boy as friend watched voyeuristically' *The Mirror* (London, 1st May 2019).

160 Eoin Reynolds, 'Ana Kriégel suffered very violent death where she fought for her life, prosecution tells murder trial' (Breaking News, 7 June 2019).

Freedom of Expression Right of the Media

As already stated, another concern with prohibiting the media from contemporaneously reporting juvenile trials is that it might be a curtailment of the media's freedom of expression.[161] However, it must be recalled that this paper does not argue that there should be a complete prohibition on the media reporting of juvenile trials. Such reporting can be implemented at the end of trials to mitigate the possibility of children receiving an unfair trial and their identities being revealed during trials. Nevertheless, it is still important to consider whether this delay on publications could still be an infringement upon the freedom of expression right of the media.

O'Reilly has described freedom of expression as 'one of the pillars of democracy, afforded an enviable position on a particularly high pedestal within many fundamental rights frameworks'.[162] Indeed, the significance of the right was recognised in international law under Article 19 of the International Convention on Civil and Political Rights (ICCPR),[163] and Article 10 of the European Convention on Human Rights (ECHR).[164] Article 19.2 of the ICCPR provides that, 'everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'[165] Article 10 of the ECHR provides that, 'everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…'[166] Nevertheless, both provisions limit the right to freedom of expression. Article 10 states that the right may be limited where it is 'necessary in a democratic society in the interests of national security, territorial integrity…protection of health or morals, or for the protection of the reputation of rights of others'.[167] Article 19.3 of the ICCPR stipulates that there may be restrictions imposed on the right 'for respect of the rights or reputations of others; and for the protection of national security or of public order (ordre public), or of public health or morals'.[168] The Irish Constitution adopts a similar limitation regarding freedom of expression under Article 40.6.1° of the Constitution which states that:

> 1° The state guarantees liberty for the exercise of the following rights, subject to public order and morality: –
>
> The right of the citizens to express freely their convictions and opinions.
> The education of public opinion being, however, a matter of such grave import to the common good, the state shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy,

[161] *Irish Times v Murphy* [1998] 2 ILRM 161; *Murphy v IRTC* [1998] 2 ILRM 361 and Rachel Joyce, 'A New Approach to Freedom of Expression?' (2002) 3(1) Hibernian Law Journal, 85-114.
[162] Aoife O'Reilly, 'In Defence of Offence: Freedom of Expression, Offensive Speech, and the Approach of the European Court of Human Rights' (2016) 19 Trinity CL Rev 234, 234.
[163] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.
[164] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[165] (n 163).
[166] (n 164).
[167] ibid Artide 10.2.
[168] (n 163).

> shall not be used to undermine public order or morality or the authority of the state.
>
> The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.[169]

Therefore, the right to freedom of expression is not absolute; it can be limited by the State where there are overriding interests. In determining whether the Oireachtas can enact a legislation prohibiting contemporaneous media reporting, it is important to discuss the circumstances under which the freedom of expression right can be limited under both the ECHR and national law. The limitation of the right under the ICCPR is not discussed because although Ireland has ratified the Convention, it has not been incorporated it into domestic law.[170]

Do the Press Have the Right to Freedom of Expression?

The freedom of expression right of the press has not been explicitly mentioned in the text of the ECHR. However, this right has been recognised by various media and press related cases coming before the ECHR.[171] Similarly, the freedom of expression right of the press has been established under Article 40.6.1° of the Irish Constitution.[172] Therefore, the right of the press to freedom of expression has been recognised under both national and international law. In the *Observer and Guardian v. the United Kingdom*, it was questioned whether an injunction imposing a delay in publications could be a violation on the press' freedom of expression.[173] It was recognised in this case that, 'news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.'[174] Thus, the right to publish promptly is a constituent element of freedom of expression and likewise, may be limited under certain circumstances.

When can Freedom of Expression be Limited?

The test for when freedom of expression may be limited was established in the case of *Thoma v. Luxembourg.*[175] The court in this case stated that:

> In cases concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the

[169] Artide 40.6.1°.
[170] UN Human Rights Committee (HRC), *UN Human Rights Committee:* Conduding observations on the fourth periodic report of Ireland 19 August 2014, CCPR/C/IRL/4.
[171] *Eerikainen and others v. Finland*, 10 February 2009, Application no. 3514/02, *Von Hannover v. Germany* (No. 2), 7 February 2012, Applications nos. 40660/08 and 60641/08, *Lingens v. Austria*, 8 July 1986, Application no. 9815/82, *Thoma v. Luxembourg*, 29 March 2001, Application no. 38432/97, *Prager and Oberschlick v. Austria*, 26 April 1995, Application no. 15974/90, *Observer and Guardian v. the United Kingdom*, 26 November 1991, Application no. 13585/88, *Jersild v. Denmark*, 23 September 1994, Application no. 15890/89 and Centro Europa 7 S.R.L. and *Di Stefano v. Italy*, 7 June 2012, Application no. 38433/09.
[172] Artide 40.6.1°.
[173] 26 November 1991, Application no. 13585/88.
[174] ibid para 60.
[175] 29 March 2001, Application no. 38432/97.

> balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued.[176]

Therefore, any limitation on the freedom of expression right of the media must be legitimate to the aim pursued, ie it must be proportionate. The Court further elucidates that in determining whether the restriction imposed is important to the aim pursued, the Court must 'look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are relevant and sufficient.'[177] This test is analogous to the proportionality test which has been adopted in Ireland to determine whether a constitutional right can be restricted. For this reason, the next section discusses the national law test on proportionality to determine whether proposed legislation to prohibit contemporaneous media reporting of juvenile trials would be disproportionate and, thereby contrary to national and international law.

The Principle of Proportionality

The principle of proportionality in Ireland was described by Kenny as being 'a standard of review for rights limitations - a reasoning process that is used to determine whether a limitation on rights is justified or unjustified.'[178] In this regard, it is used to deicde whether a constitutionally recognised right such as freedom of expression can be restricted in favour of other rights.

The modern test for proportionality in Ireland was enunciated in the case of *Heaney v Ireland*.[179] Although the *Heaney* case was not the first to mention a proportionality test,[180] the case is regarded as the primary source in Ireland on proportionality and the test outlined was later endorsed in subsequent cases.[181] The *Heaney* test was developed from various elements of case law pertaining to the Canadian Charter of Rights and Freedoms,[182] and was subsequently codified in the Canadian case of *R. v Oakes.*[183] Costello J in *Heaney* case is said to have adopted the test 'word for word' from the *R v Oakes* case when she stipulated that:

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
>
> (b) impair the right as little as possible, and

[176] ibid para 48.
[177] ibid para 49
[178] David Kenny, 'Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland' (2018) 66 The American Journal of Comparative Law, 538.
[179] [1994] 3 IR 593; [1994] 3 IR 593 (Digest); [1994] 2 ILRM 420; [1994] 6 JIC 2902; 1998 WJSC-HC 7869
[180] *Cox v Ireland* [1992] 2 I.R. 503; *Courtney v Toughy* [1994] 3 I.R. 1. Other cases which did not form a proportionality test but evaluated legislation to interpret the constitution indude: *Ryan v. The Attorney General* [1965] I.R. 294; and *McDonald v. Bord na gCon (No.2)* [1965] I.R. 217.
[181] Brian Foley, 'The Proportionality Test: Present Problems' (2008) Judicial Studies Institute Journal. See also *Fleming v Ireland* [2013] IESC 19; 35 B.H.R.C. 155; [2013] 4 WLUK 679 (Sup Ct (Irl))
[182] David Kenny, (n 178) 542.
[183] [1987] L.R.C. (Const) 477 (Sup Ct (Can))

(c) be such that their effects on rights are proportional to the objective.[184]

Therefore, the test has four essential components that must be satisfied in order for legislation restricting constitutional rights to be upheld. This criteria is usually considered when an enacted statute infringes upon a constitutional right, and is used to determine whether such a restriction can be justified. However, because the argument of this paper is a proposal to enact a legislation that may be a restriction on a constitutional right, this test must be considered prospectively.

What are Concerns Pressing and Substantial in a Free and Democratic Society?

The first component of the test is that there must be an objective that relates 'to concerns pressing and substantial in a free and democratic society.'[185] However, in terms of what is meant by this phrase, Kenny .[186] He observes that, 'in Ireland, objectives are merely stated to be important. It is almost never argued why this is the case.'[187] He further explains that when trying to answer this question, the Irish courts have chosen to, 'hypothesise the motivations for the law…only the objective intention of the legislature, as understood from the language of the statute, is considered.'[188] This paper has contended that there are compelling motivations for the enactment of a legislation prohibiting contemporaneous media reports. This is primarily because media publications may influence the decision of the jury which may subsequently lead to an unfair trial if the jury are considering more than just the evidence adduced in court. If Kenny's observation is correct, then there is a high probability that this reason constitutes 'concerns pressing and substantial in a free and democratic society'. Thus, any proposed legislation to ban contemporaneous media reports will most likely satisfy this requirement.

Rational Connection Between Means and Ends

The second criterion is that there must be a rational connection between the means and end. Kenny has remarked that this criterion is rarely considered in Ireland.[189] He opined that the reasoning for this may be because the 'rational connection between means and ends is not an important test and is tautological when objectives are hypothesized.'[190] This contention is supported by Hogg who notes that the rational connection test has 'very little work to do.'[191] Dassios and Prophet are equally as critical of the category and argued that 'it remains a mystery…as to why this branch of the Oakes test should even exist.'[192] Therefore, there will not be much consideration of this category in this paper. It can be assumed that if the

[184] *Heaney v Ireland* [1994] 3 IR 593; [1994] 3 IR 593, 607.
[185] ibid.
[186] David Kenny, (n 178) 538.
[187] ibid 543.
[188] ibid 544.
[189] ibid 546.
[190] ibid.
[191] Peter Hogg, 'Constitutional of Law Canada' (5th edn, Carswell 2007) para 38.34.
[192] Christopher M Dassios and Clifton P Prophet, 'Charter Section 2: The Dedine of Grand Unified Theory and the Trend towards Deference in the Supreme Court of Canada' (1993) 15 Advoc Q 289, 296.

arguments on the right to a fair trial and anonymity during trials are compelling, then this component will be achieved.

Minimum Impairment

The third criterion requires that the measures taken must be the least restrictive means of achieving an objective. This condition was said to be the 'heart and soul' of proportionality in Canada.[193] However, Kenny notes that the Irish courts have 'failed to discuss the minimum impairment analysis in anything other than a cursory analysis.'[194] As such, there is no clarification on what the provision entails. Nevertheless, it can be argued that if contemporaneous media reports are merely delayed until after the conclusion of the trial, then this would meet the minimum impairment requirement. It would not be a complete ban on freedom of expression. Although it can be suggested that an alternative means of retaining jury impartiality would be to sequester the jury, this is unlikely to be beneficial or legally enforceable. Even if jurors were hidden away in hotel rooms until the conclusion of their trials, it would be impractical to confiscate any of their electronic devices which give them access to the internet or prevent them from listening to the radio or watching TV. If there was an attempt to sequester them and ban their communication devices, this may be an infringement of their liberty which could in turn be illegal if not unconstitutional. Therefore, banning contemporaneous media reports is a much less restrictive option.

Is the Limitation Proportional to the Objective Aim?

The final prerequisite a statute must satisfy to be permitted to restrict a constitutional right is that it must be proportionate to the objective aim. In other words, it must be shown to be balanced against another right and the second right must be deemed to be substantial enough for a restriction to be imposed. Kenny indicates that 'in Ireland, it is probably fair to say there has been no discussion of the meaning or importance of balancing. It is largely forgotten. This lack of discussion means that balancing is often not done expressly.'[195] Despite this contention, the right to a fair trial has been balanced against other rights in Ireland and has been found to be a superior right.

It has been unequivocally stated by every case concerning media regulation in trials that an accused's right to a fair trial is an antecedent constitutional right.[196] This was first expressed in *D v the Director of Public Prosecutions*[197] where Denham J held:

> The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights, it is a superior right. A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights there is no doubt that the

[193] Peter Hogg, 'Constitutional of Law Canada' (5th edn, Carswell 2007) para 38.36
[194] David Kenny (n 178) 549.
[195] ibid 555.
[196] See: *Director of Public Prosecutions v. Nevin* [2003] 3 IR 321 2003 WJSC-CCA 4217 [2003] 3 JIC 1403; *Attorney General. v. Leveller Magazine Ltd* [1979] AC 440, [1979] 1 All ER 745, HL; *D v. DPP* [1994] 2 I.R. 465 ; *Director of Public Prosecutions v. Lillis* Irish Times, 6 February 2010; *Irish Times Ltd v Ireland* [1998] 1 IR 359, [1998] 1 IR 359 (Digest); [1998] 2 ILRM 161; *In the Matter of R. Ltd* [1989] IR 126 [1989] IR 126 (Digest) [1989] ILRM 757.
[197] [1994] 2 IR 465.

> applicant's right to fair procedures is superior to the community's right to prosecute. If there is a real risk that the accused would not receive a fair trial, then there would be no question of the accused's right to a fair trial being balanced detrimentally against the community's right to have alleged crimes prosecuted.[198]

The passage above was later approved by Finlay CJ in the case of *Z. v Director of Public Prosecutions.*[199] In her judgement, Denham J balances 'the community's right to have an alleged crime' prosecuted with the accused's right to a fair trial. Significantly, Denham J elucidates that the right to a fair trial is a superior right. This passage was also later adopted in *Irish Times Ltd v Ireland* in the context of the right of the media to report trials contemporaneously.[200] Hamilton CJ imparted that the constitutional right of the wider public to be informed of what is taking place in courts is a matter of public importance, but then accepted that this right can be subordinated to the interests of justice and the rights of an accused person which are guaranteed by the Constitution.[201]

It is clear from this that the courts have unequivocally expressed that the accused's right to a fair trial is superior to any other right in the criminal justice system. Most importantly, the freedom of expression right of the press is subordinate to the right to a fair trial. Therefore, if the court were to impose a ban on the contemporaneous media reporting of juvenile trials, this would most likely not be a violation of the freedom of expression right of the media because there is an overriding consideration.

Right of the Public to be Informed

Lastly, a perceived concern with prohibiting the contemporaneous publication of juvenile cases is that it may be an infringement upon the right of the public to be informed.[202] However, it has been contended that a ban on contemporaneous media reporting of juvenile trials does not encompass a prohibition on all media reports of juvenile trials. It is merely suggested that such reports should be published following the conclusion of a trial. This would ensure that the right of the public to be informed is not infringed.[203] A similar suggestion was made by Laubenstein, who has also advocated for a ban on contemporaneous media reporting of juvenile trials in the United States, especially in cases where the media is permitted to reveal the identity of the child. Laubenstein suggests that it would be equally as effective for the 'juvenile court to provide redacted transcripts of the proceedings to

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198 ibid 474.

199 [1994] 2 I.R. 476, 507.

200 [1998] 2 I.L.R.M. 161.

201 [1998] 2 I.L.R.M. 161, 172.

202 See Charles Lysaght, 'Publicity of Court Proceedings' (2003) 38(1) The Irish Jurist, 34-57, 46. See also Gordon A Jr Martin, 'Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings' (1995) 21 New Eng J on Crim & Civ Confinement 393.

203 The media have the right to publish 'fair and reasonable publication on a matter of public interest' under section 26 the Defamation Act, 2009. This means that any publications which confer a benefit to the public are statutorily protected and privileged. Although this legislation is reasonable, it should not be perceived as applying to juvenile trials. Juvenile trials are not administered in public. There is no reason why the public would benefit from knowing the everyday details of the evidence given in children's trials. This evidence can be and should only be obtained after the conclusion of their trials. This would ensure that the children receive a fair trial and would not disadvantage the public in any way.

representatives of the press for journalistic use'.[204] Therefore, the option to delay publications would ensure that juveniles receive a fair trial.

Conclusion

Children are one of the most vulnerable groups of people in society; yet they are capable of committing horrendous crimes. This is particularly evidenced by the unprecedented Ana Kriégel murder trial of boy A and Boy B in 2019 in Ireland. This case was one of the highest profile cases in the nation and attracted wide media attention. The murder trial was reported daily from its beginning to conclusion by most, if not all media outlets around the nation. This paper has argued that contemporaneous media reporting of juvenile trials should be prohibited in the State. The primary argument in support of a prohibition is that contemporaneous media reporting can result in the child defendants receiving an unfair trial. This can arise if prejudicial reports by the media are published and such reports are subsequently accessed by the jury. One of the cardinal principles of the right to a fair trial is that the jury must give a verdict solely on the evidence adduced in court. However, there is nothing preventing the jury from accessing media publications, some of which may be prejudicial in nature. Research has shown that if they jury do in fact read biased reports, they will most likely consider them while they are deliberating.[205] In light of this evidence, it cannot be categorically contended that children will receive a fair trial in circumstances where potentially prejudicial reports are accessible during trial proceedings. Moreover, it has been shown that there are no legal impediments towards the prohibition of contemporaneous media reporting of juvenile trials. The requirement that justice shall be administered in public does not apply to juvenile cases, as they are indirectly statutorily exempt through section 252 of the Children Act 2001 governing the right to anonymity during court proceedings.[206] The implications of this provision is that juvenile cases must be heard in the absence of the public so their anonymity is protected during trials. Although the Children (Amendment) Bill 2020 proposes to amend section 252 to allow the identity of persons accused or convicted in proceedings for an offence of murder, attempted murder or manslaughter against a child to be revealed, it is highly unlikely that this provision will also apply to child defendants.[207] It has been shown that this would be a violation of the Children Act 2001, whose primary purpose is to protect children in conflict with the law. It would also be contrary to the UNCRC. Thus, the doors of the courtroom must be closed during juvenile trials in the Central Criminal Court. This contrasts with the meaning of the administration of justice in public which requires that the doors of the courtroom are open so the public are able to spectate cases.[208] However, this incongruity is constitutionally permitted by the Irish Constitution which confers the legislature with the power to make exceptions to the principle.[209]

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[204] Kathleen M Laubenstein, 'Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders' (1995) 68 Temple L Rev 1897, 1906.

[205] See Amy L. Otto, Steven D. Penrod and Hedy R. Dexter, 'The biasing impact of pretrial publicity on juror judgments' 1994) 18 Law and Human Behaviour, 453- 469. See also Christine L. Ruva & Michelle A. LeVasseur, 'Behind dosed doors: the effect of pretrial publicity on jury deliberations' (2012) 18(5) Psychology, Crime & Law, 431-452.

[206] Children Act 2001, s252.

[207] Children (Amendment) Bill 2020, section 2.2.

[208] *In the Matter of R. Ltd* [1989] IR 126 [1989] IR 126 (Digest) [1989] ILRM 757, 764

[209] Artide.34.1° of the Irish Constitution.

Furthermore, if the Oireachtas were to enact a legislation prohibiting contemporaneous media reporting of juvenile trials, this would admittedly be a limitation on the freedom of expression right of the press. However, this right is not absolute and may be limited if the proportionality test under *Heaney v Ireland* is satisfied.[210] A fundamental component of the test is that any limitation must be proportionate to the objective aim. The aim of the prohibition would be to ensure children receive a fair trial. Hence, this requirement will most likely be satisfied. Lastly, the paper is merely advocating for an imposition of a prohibition on contemporaneous media reporting of juvenile trials, not an absolute ban. Thus, the media can always publish trial information following the cessation of the trials. This would keep the public informed and, mitigate the chances of children receiving an unfair trial. Therefore, Ireland should prohibit the contemporaneous media reporting of juvenile trials.

[210] *Heaney v Ireland* [1994] 3 IR 593 [1994] 3 IR 593, 607.