Legal Memorandum/Brief

And

Comparative Legal Analysis

In Re: May Favorable Publicity Be Deemed a "Bribe?"

Submitted to

Dr. Avichai Mandelblit

Attorney General of the State of Israel

October 2019

WARNING: DANGER

This Legal Memorandum is being submitted to Attorney General Mandelblit by the undersigned Associate Counsel for Prime Minister Netanyahu to discuss one paramount legal and policy issue presented by the proposed criminal charges against Mr. Netanyahu:

Is it a criminal "bribe" for an owner of print or other media to provide exceedingly favorable coverage to an elected public official (or provide exceedingly damaging coverage of his or her potential election adversary) at the official's request if the official exercises his governmental authority for the owner's personal benefit?

If this case answers "Yes" to this pivotal question, the unprecedented Netanyahu prosecution will, in undersigned counsels' view, isolate Israel in the democratic judicial world. Foreign jurisdictions will reject its legal theory, but in Israel it will pave the way for damaging governmental conduct that will cripple freedom of the press, suppress free speech, and impair democratic political processes.

In presenting the reasons why we believe all "bribery" allegations should be dismissed or withdrawn at this juncture, we do not denigrate the Attorney General's effort to elevate ethical standards for public officials, but only wish to illustrate the dangers of such a prosecution.

This Memorandum is equivalent to a Motion To Dismiss an indictment in the United States. Hence it does not contest (or concede) the truth of the factual allegations in the 257 paragraphs of the Interim Charge Sheet. Many of these factual allegations are challenged by the Israeli attorneys representing Mr. Netanyahu. In determining, however, whether to proceed to a formal allegation and a full trial, the considerations presented in this Memorandum are, in the opinion of undersigned counsel, members of the Bar in foreign jurisdictions, dispositive. They compellingly require dismissal of all charges asserting "bribery" in any form.

REASONS SUPPORTING OUR CONCLUSION

I.

GOVERNMENT INVESTIGATION AND PROSECUTION OF HOW AND WHY THE MEDIA COVERS CANDIDATES FOR ELECTIVE OFFICE WILL CURTAIL FREE SPEECH AND PRESS

A. Candidates and Public Officials Invariably Seek Favorable Publicity.

In all modern democratic civilized nations that enjoy a free press, individuals running for elective office or campaigning for re-election seek favorable coverage from owners of print and other media. Publicly elected officials in democratic societies rely on the strength of their public persona to continue in elected positions and to pursue goals on behalf of the country and the people they serve. Votes by politicians and decisions by public officials (whether elected or not) are designed, at least in part, to garner

favorable coverage from the media and to achieve other legitimate self-serving results. To inhibit a public official from seeking favorable press coverage and enhancing his or her public image is to endanger democracy itself.

B. The Media Trade in Publicity.

Reporters, editors, and media owners publish pieces calculated to some degree to promote self-interest – whether economic, political, or career-related. Media representatives promise to deliver positive coverage in exchange for access to candidates and for promises of favorable policies. Candidates make campaign promises to win votes and support and offer to take official action if elected. Such action may financially benefit a media owner or a particular journalist.

There has never been a single case in the democratic world in which a public figure was prosecuted, let alone convicted, of the "crime" of receiving a requested "bribe" of favorable publicity. Non-defamatory publicity favorable to a candidate or critical of his or her opponent has not, to our knowledge, ever generated a criminal prosecution.

In 2011-2012 the United Kingdom's "Inquiry Into the Culture, Practices and Ethics of the Press" chaired by Lord Justice Leveson ("the Leveson Report") disclosed publicly the explicit bargains between Prime Minister Margaret Thatcher and Rupert Murdoch, the media mogul, as well as the later bargains between Murdoch and Tony Blair, the

Labour Party leader who became Prime Minister in 1997.

According to the Leveson Report (Volume III, Part I, Chapter 2, para. 1.11), Prime Minister Thatcher obtained "press support" by "using the [state-awarded] honours system to reward supportive owners and editors." Thereafter, Murdoch caused Labour's Neil Kinnock to lose the 1992 election with biased coverage that Conservative Prime Minister John Major, who won the election, called "over the top." Murdoch's Sun newspaper celebrated the 1992 Conservative win with a headline "It's the Sun Wot Swung It."

In 1997 Murdoch's newspapers campaigned against Conservative Prime Minister John Major. Although Blair denied any explicit bargain, the Leveson Report describes how Blair traveled round-the-world to meet Murdoch and his media staff on Hayman Island and how Blair's administration, once elected, relaxed Britain's cross-media ownership laws and endorsed other Murdoch-supported policies. The Leveson Report notes (Volume III, Part I, Chapters 3, 5) that some senior members of the Blair administration attributed the change in Murdoch newspapers' coverage to a quid pro quo arrangement.

The Leveson Report (Volume III, Part I, Chapter 2, para. 2.22) quotes Major: "It is not very often someone sits in front of a prime minister and says to a prime minister: 'I would like you to change your policy, and if you don't change your policy, my organization cannot support you.' . . . [I]t's not often that point is directly put to a prime minister in that

fashion, so it's unlikely to have been something I would have forgotten."

Rupert Murdoch's media empire was also party to bargains with political figures in Australia. In his autobiography titled "Things You Learn Along the Way" (1999), John Menadue, a politician who later became chief executive of Qantas Airlines, described how Murdoch exploited positive coverage of Labour Prime Minister Bob Hawke to have regulatory authorities forbid a potential merger of Qantas with two other airlines. The Murdoch media empire was also widely understood to have traded positive coverage of the Hawke administration for favorable regulation that permitted Murdoch to acquire the *Sydney Morning Herald* and the *Weekly Times*. Paul Keating, Minister of the Treasury in Hawke's government (and later Prime Minister), worked actively with Murdoch by secretly providing him with inside information about government proceedings. In exchange, Murdoch's newspapers supported Keating in his leadership challenge to Hawke. See Dennis Coyle, "Murdoch's Flagship: Twenty-Five Years of the Australian Newspaper 332 (2008); Colleen Ryan, "Fairfax: The Rise and Fall" (2013), and Blanche D'Alpuget, "Hawke: The Prime Minister" 336-337 (2011).

Although the Leveson Report runs to nearly 2000 pages and includes extensive legal analysis, it never suggests that Murdoch's flattering and hostile coverage could be deemed a "bribe" to Thatcher or to Blair. Nor have Australia's prosecutors opened investigations of the relations between Murdoch and Hawke or Keating. Uncontradicted historical

evidence establishes that Murdoch is not the only – or the first – influential owner of news media to trade positive coverage for official policy. William Randolph Hearst, Henry Luce, and Joseph Pulitzer showed no reluctance to exchange publicity for policies they favored which frequently benefited them financially.

C. **The Exchange of Publicity for Political Favor Promotes Free Speech and Press.**

Because free speech and free press are universally respected in virtually all civilized countries, media owners and the reporters employed by them now make editorial decisions with little fear of reprisal. So long as they avoid defamation, they can praise or condemn elected public officials and candidates for public office.

Media empires smaller than Murdoch's may be more discreet than he has been, but they routinely exchange favorable coverage for beneficial official acts. Candidates are interviewed, pressed for commitments to take official action if elected, and then supported (or opposed) in editorial endorsements and media coverage.

An independent press can influence readers, shape public policies, and promote or destroy elected and aspiring candidates. To impede this power of the press to probe, to challenge, and to advocate policy changes is to deny the essence of democracy.

These public benefits will be extinguished if authors of highly favorable or extremely critical reports in the electronic media or in print may be

investigated to determine whether they were promised anything of value in exchange for their stories, their support, or their criticism. May the police or a prosecutor initiate a criminal investigation and interrogate a journalist and a candidate he has interviewed to discover whether favorable or derogatory publicity was a "bribe" to the candidate? Prosecution of the Netanyahu case would signal to journalists and media executives that favorable or damaging publicity about a candidate may be investigated by the police and by prosecutors to determine whether the publicity was a quid exchanged for the quo of official action. If the police and prosecutors are empowered to probe the mixed motives of journalists and politicians, they can exercise arbitrary control over essential institutions of democracy.

D. **Criminal Investigation of Publicity As a "Bribe" Will Discourage and "Chill" Media.**

Many extremely favorable and harmful stories have been written or broadcast about public officials and candidates in Israel in recent years, and even in the past few weeks. Were any of these stories generated by conversations between the reporter and the official or candidate in which the latter promised to take official action favoring the media representative? Should such an allegation prompt a criminal investigation?

If so, future authors of publicity favoring or attacking a public official will hesitate before considering, writing, or directing such a story. Will publication result in an allegation of "bribery?" Will

the reporter, the media executive, the official, and the candidate be interrogated and forced to retain attorneys? Most journalists will be deterred and will choose to be silent rather than risk possible investigation. Candidates will avoid speaking with journalists because a journalist may be suspected of giving a bribe and the candidate of taking one if their conversation results in publicity favorable to the candidate or damaging to his or her opponent. The result will be diminished free speech, reduced free expression, and a muted free press.

II.

FREE SPEECH AND PRESS ARE SO REVERED IN DEMOCRATIC SOCIETY THAT GOVERNMENT MAY NOT "CHILL" THEM WITH REGULATION THAT MIGHT GENERATE SELF-CENSORSHIP

Thomas Jefferson, the author of the Declaration of Independence who later served as America's third President, condemned the "thousands of calumnies so industriously propagated against myself" by the journalists of his time[1] and deplored "the putrid state into which our newspapers have passed and the malignity, the vulgarity, and mendacious spirit of

[1]From Thomas Jefferson to Thomas Seymour, 11 February 1807," Founders Online, National Archives, accessed September 25, 2019, https://founders.archives.gov/documents/Jefferson/99-01-02-5075.

those who write for them."[2] Yet he famously declared that "were it left for me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter."[3] This reverential respect for a free press – regardless of its lapses – has governed court rulings in our own time.

In the United Kingdom, in Europe, and in the United States speech and press are shielded today against government regulation that could "chill" the media, journalists, and public officials, and discourage them from speaking even if the regulation does not directly suppress or punish speech. Courts preserve the precious values of free speech and free press by rejecting remedies and claims that limit the media's freedom and could possibly result in self-censorship. A comparable rule of Talmudic Civil Law (*Mishpat Ivri*) directs courts to refrain from exercising judicial authority that could jeopardize a primary Biblical precept.

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[2] Letter from Thomas Jefferson to Dr. Walter Jones (Jan. 2, 1814) (on file with the United States National Archives) *available at* https://founders.archives.gov/documents/Jefferson/03-07-02-0052#TJ831669_11.

[3] Letter from Thomas Jefferson, United States Minister to France, to Edward Carrington, Virginia Delegate to the Continental Congress (Jan. 16, 1787) (on file with the United States National Archives) *available at* https://founders.archives.gov/ documents /Jefferson/01-11-02-0047.

The United Kingdom

In *Derbyshire County Council v. Times Newspapers Ltd*, [1993] AC 534, at 548, the House of Lords acknowledged that "'the chilling effect' induced by the threat of civil actions for libel is very important." And in *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127, at 192, Lord Nicholls observed that "[t]he common law has long recognized the 'chilling' effect" of broad legal protection of reputation. The principle of English law that most immediately applies to the charges now made in the Netanyahu case was expressed by Eady J in *Jameel v. The Wall Street Journal Europe*, [2004] EWHC 37 (QB): "[T]here is no more 'chilling effect' upon freedom of communication . . . than uncertainty as to the lawfulness of one's actions." This case subjects discussions between media owners and the Prime Minister to unprecedented criminal investigation and possible criminal prosecution. Hence it "chills" future speech and press by creating "uncertainty as to the lawfulness of one's actions."[4]

The difficulties and dangers of regulating, let alone criminalizing, interactions between politicians

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[4] The subject of "chilling effect" in British law is surveyed by Judith Townend in "Freedom of Expression and the Chilling Effect," The Routledge Companion to Media and Human Rights, Ed. Howard Tumber and Silvio Waisbord, Routledge 2017.

and the media are demonstrated by the experience of the United Kingdom with Rupert Murdoch's media influence. This was a subject of the "Inquiry Into the Culture, Practices and Ethics of the Press" chaired by Lord Justice Leveson (a Judge of the English Court of Appeal) and is detailed at pp. 4 - 5, *supra.*

Although the Leveson Report considered various means of regulating media behavior, criminal investigation and prosecution of public officials for receiving "bribes" of favorable publicity was never remotely suggested. The cost to free speech and free press made such governmental interference unthinkable.

Europe

The European Court of Human Rights ("ECtHR") has shown sensitivity to the "chilling effect" of drastic action affecting media and individual journalists. Article 10(1) of the European Convention on Human Rights ("ECHR") protects freedom of expression.[5] The ECtHR has declared that a government agency has "little scope" to restrict "freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest." *Mondragon v. Spain*, appl. no. 2034/07, 15/3/2011, ¶ 50.

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[5] The Convention defines "freedom of expression" as including "freedom to hold opinions and to receive and impart information and ideas *without interference by public authority* and regardless of frontiers." (Emphasis added.)

Article 10 has been interpreted to cover "the essential function the media must fulfill in a democratic society." The Court has declared, "[N]ot only do the media have the task of imparting such information and ideas, the public also has a right to receive them." *Pentikainen v. Finland,* appl. no. 11882/10, 20/10/2015, ¶ 88.

Article 10(2) of the Convention specifies conditions under which a government may interfere with freedom of expression. A restriction on freedom of the press, like other restrictions on free expression, is permissible under the ECHR only if it is (i) prescribed by law; (ii) based on sufficient reasons;[6] and (iii) necessary in a democratic society. *Tammer v. Estonia*, appl. no. 41205/98, 4/4/2001, ¶ 34.

In balancing the public interest invoked by law enforcement authorities against the public interest in receiving information from the press, the ECtHR has considered whether a governmental restriction imposes a "chilling effect" on journalistic freedom of expression, thereby undermining the public's right to receive information. In *Kaperzynski v. Poland*, appl.

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[6] These include national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of reputation or rights of others, and preventing disclosure of information received in confidence. The Convention does not authorize restricting free press if a media story is alleged to be in exchange for a promised benefit from a public official.

no. 43206/07, 3/4/2012, ¶¶ 70 & 74, the ECtHR said that "this [chilling] effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals."[7]

In *Brambilla and Others v. Italy*, appl. no. 22567/09, 23/9/2016, ¶ 52-53, and in *Tammer v. Estonia*, *supra*, ¶ 90, the ECtHR observed that although freedom of the press is fully protected only if there is good faith and compliance with tenets of responsible journalism, the "chilling effect" of regulation affects the lawfulness of the remedy applied against reporters who have used unlawful means to obtain information.

Even where the media's conduct was "open to severe criticism" and included material that made "no possible additional contribution" to the newsworthiness of a story, a court-imposed pre-notification requirement if a publication invades privacy was invalidated because it imposed "a serious chilling effect on freedom of expression." A "narrowly defined public interest exception," said the ECtHR, only "increase[d] the chilling effect of any pre-notification duty." *Mosley v. The United Kingdom*, app. no. 48009/08, 10/5/2011, ¶¶ 130, 132. See also

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[7] See generally Trine Baumbach, "Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases," 6 Bergen Journal of Criminal Law and Criminal Justice 92-114 (2018).

Pentikainen v. Finland, *supra*; *Bedat v. Switzerland*, appl. no. 56925/08, 29/3/2016, ¶ 81.

In *Kaperzynski v. Poland*, *supra*, ¶ 74, an editor had not met his professional obligations, but the ECtHR found that a criminal sentence depriving him of the right to exercise his profession was unlawfully harsh because it could have "an enormous dissuasive effect for an open and unhindered public debate on matters of public concern."

In *Tonsberg Blad AS and Haukom v. Norway*, appl. no. 510/04, 1/3/2007, ¶ 102, the ECtHR held that a newspaper's burden of defending itself "in judicial defamation proceedings pursued at three judicial levels . . . resulted in an excessive and disproportionate burden . . . which was capable of having a chilling effect on press freedom in the respondent State." Similar reasoning justified the Court's holding in *Ghiulfer Predescu v. Romania*, appl. no. 29751/09, 27/6/2019,¶61.

The United States

"Chilling effect" was introduced to American law by Justice Felix Frankfurter in 1952 in his concurring opinion in *Wiemann v. Updegraff*, 344 U.S. 183, 191 (1952). Its harmful impact is that "persons subject to an overbroad law will not engage in constitutionally protected speech for fear that they will be prosecuted under the law. They self-censor because they are

chilled by the law, even though the law is invalid, at least as applied to them."[8]

In 1965 the US Supreme Court decided *Dombrowski v. Pfister*, 380 U.S. 479 (1965), where it repeated its then-recent observation that "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions."[9] The Court held, "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." 380 U.S. at 487. Applying this rationale, the Supreme Court held that not only was any Louisiana prosecution of alleged "subversives" barred by the First Amendment, but that federal courts could enjoin enforcement of the Louisiana law because it "chilled" free speech. Unless the law was enjoined potential speakers would engage in self-censorship to avoid possible prosecution.

Most renowned of the American precedents on this subject is *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), where the Court limited public officials' right to sue for defamation. The Court said that freedom of expression must have "breathing space" to survive (376 U.S. at 271-272), and that requiring the press to guarantee the truth of all factual assertions would lead to "self-censorship" (376 U.S. at 279). "[W]ould-be critics of official conduct

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[8] Brandis Canes-Wrone & Michael C. Dorf, "Measuring the Chilling Effect," 90 New York University Law Review 1095 (2015).

[9] *NAACP v. Button*, 371 U.S. 415, 433 (1963).

may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." 376 U.S. at 279 (citation omitted).

If police and prosecutors are permitted to investigate and prosecute favorable or critical publicity on allegations that such publicity was part of an illegal "bribe," the necessary consequence will be the same as predicted by the US Supreme Court in *New York Times v. Sullivan*. The media will engage in self-censorship and it will squelch the vigor and variety of public debate in Israel.

Talmudic Civil Law (*Mishpat Ivri*)

Talmudic Civil Law (*Mishpat Ivri*) has a comparable principle under which a court must deny judicial relief if proceeding would jeopardize a revered and important precept. Just as speech would be "chilled" if a speaker is unduly penalized, a primary Biblical precept would be endangered if the ordinary court process is followed. A defendant who admits partial liability (*modeh be-miktzat*) is ordinarily required to take a Biblically commanded oath (*shvua d'oraita*). But in order to avoid possible infringement of such a venerated ritual, rabbinic courts are instructed to defer a decision and force the parties to compromise. See *Tur*, *Choshen Mishpat,* Section 12:3; *Shulchan Aruch*, *Choshen Mishpat,* Section 12:2;

Shulchan Aruch, *Orach Chaim,* Section 156. For a modern application of this rule, see Eliezer Waldenberg, *Tzitz Eliezer*, Vol. 7, Section 48:6.

III.

BECAUSE OF ISRAEL'S UNIQUELY BROAD DEFINITION OF "BRIBERY," AN INVESTIGATION AND PROSECUTION FOR FAVORABLE MEDIA COVERAGE WILL SILENCE THE FREE PRESS

The media and politicians in Israel are particularly susceptible to "chilled speech" and self-censorship when there is favorable or derogatory publicity because of Israel's broad and prophylactic bribery laws. Under Sections 290-291 of Israel's Penal Law providing a thing of value to a public official is "bribery" even if there is no immediate exchange but only an expectation of some indefinite future quid pro quo. See Maor Even-Hen, "The Offense of Bribery," (2017), pp. 66-71. Moreover, Section 293(7) of the Penal Law declares it criminal for a public official to receive a "bribe" even if the in-exchange official act is one that he or she is required by law to perform. See Maor Even-Hen, *supra*, at 137-138.

A journalist or media owner is unlikely to publish favorable or derogatory publicity regarding a political candidate if a decision made by the candidate long after publication may become the basis for a criminal bribery investigation of the candidate, journalist, or media owner. Candidates will be reluctant to be interviewed for hopefully favorable stories because of fear that an official act they will be obliged to make in

the future will be microscopically scrutinized retroactively by police and prosecutors seeking to learn whether it is related to positive publicity or even a mildly favorable media story.

IV.

CRIMINAL INVESTIGATION AND PROSECUTION OF ALLEGED "BRIBERY" IS NOT JUSTIFIED TO VINDICATE THE "PROFESSIONAL JUDGMENT" OF INDIVIDUAL JOURNALISTS

Paragraph 104 of the Interim Charge Sheet alleges that Mr. Netanyahu and Shaul Elovitch "caused substantial harm to the professional judgment of the journalists and editors of the website." This allegation does not cure the basic flaw of the bribery charge.

A longstanding tradition of modern journalism that persists to this day is that individual journalists subordinate their "professional judgment" to political and ideological causes espoused by their employers. Owners and publishers of media outlets retain their authority to compel journalists who are their employees to promote the employer's views.

Some of the most famous owners of media empires, from William Randolph Hearst to Henry Luce to Rupert Murdoch, exercised total control over the political and ideological content of their publications. One typical famous anecdote relates how Hearst, who strongly favored American military involvement in Cuba, responded in 1897 to his

reporter in Cuba who had cabled: "Everything is quiet. There is no trouble here. There will be no war. I wish to return." Hearst's reply cable said, "Please remain. You furnish the pictures, and I'll furnish the war."

Rupert Murdoch exercised similar absolute control. A study of his methods reported that "if [his editors] wished to survive, they needed to internalize Murdoch's world view. . . . [T]hey always needed to seek to please him. . . . They practiced a policy of 'anticipatory compliance.'" Robert Manne, "Why Rupert Murdoch Can't Be Stopped," The Monthly (November 2013).

If Shaul Elovitch instructed his employees, even in response to perceived "egregious demands" by Mr. Netanyahu, to express views that violated their own personal "professional judgments," it did not constitute criminal conduct.

Moreover, for the reasons described in this Memorandum, the "professional judgment" of individual reporters in the future will be harmed, not helped, by this prosecution. Journalists will not choose to disobey their employers and express personal "professional judgments" if they may be investigated and prosecuted on allegations that their favorable or unfavorable statements were "bribes." Rather than articulate independent views, they will remain mute. The Netanyahu prosecution will "chill" their potential speech.

CONCLUSION

Seeking favorable publicity or offering it to a candidate or public official simply cannot be a crime in a democratic nation that reveres a free press. For the foregoing reasons, charges based on allegations that favorable publicity for Mr. Netanyahu constituted "bribery" should be withdrawn or dismissed.

REQUEST FOR ORAL HEARING

The undersigned associate counsel, each of whom are admitted to practice before the highest courts of their respective jurisdictions, respectfully request the opportunity to orally present and discuss the issues set forth in this Legal Memorandum.

Respectfully submitted,

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