DOCUMENTARISM AND THE LAW

ON *DICHTUNG UND WAHRHEIT* AS A PROBLEM FOR LAW-MAKERS

BY

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1.

On a late summer day in 1926 two police officers—two sheriffs—were tracking two safe blowers in a forest area not far from Oslo. One of the criminals—we shall meet him later under the name of Gustav—had not yet reached the age of 19. The other—a Swede—was in his mid-thirties. They had shared their predatory excursions for a couple of years, and had committed a large number of burglaries. Both carried loaded revolvers.

The sheriffs came upon the two while they sat eating. The details of what happened then are perhaps not quite clear. The sheriffs were found the next day. One was dead. The other was dying, and all he was able to tell was that there had been *two* criminals.

The murders resulted in the most extensive manhunt in Norwegian criminal history. Findings at the scene of the murders revealed the identity of the Swede, and he and Gustav were chased for two months by police patrols assisted by troops, including cavalry, and armed posses. Finally Gustav was surprised and captured while the Swede—wounded and surrounded—took his own life.

Gustav stated in court that when the sheriffs came, the Swede had fired and then shouted to him that he should shoot too—which he had done. He was sentenced to life imprisonment as one of the murders was found to have been premeditated.[1]

2.

In 1933 a book was published which is considered by many to herald *documentarism* in Scandinavian literature; a *genre* which in Sweden has more recently been worked in masterly fashion by Per Olov Enquist, Per Olof Sundman and others. The book was Gunnar Larsen's *To mistenke-*

[1] 1927 NRt 190. Three of the seven members of the Supreme Court voted for a sentence of 16 years, with reference to Gustav's dependent relationship to the Swede and to the fact that he could probably not have been found guilty of premeditated murder, had he not confessed.

lige personer (Two suspicious-looking characters). It tells the story of the hunt for the sheriff murderers, mainly as experienced by Gustav.

The author had, as a press reporter, covered the hunt and the subsequent court proceedings, and he had probably visited Gustav in prison. But there is no indication that Gustav gave him his account of the chase, and we must presume that Gunnar Larsen's tale of the run as experienced by Gustav is pure fiction. The names of the persons involved were also made up—Gustav was not the boy's true name. But the *external* events are authentic. The book leaves no doubt about which murders are being related, the evidence in the case is accurately described, the route and the extent and character of the hunt conform to what really happened.

On one essential point, however, the facts given in the book deviate from the sequence of events on which the court based its sentence. In the book, Gustav's recollection of what happened when the sheriffs arrived on the scene, is only kaleidoscopic pictures. The Swede is the one who puts the pieces together for him and impresses on him that he shot and killed. Towards the end of the book the reader—but not Gustav—is told in so many words that Gustav fired into the air.

3.

Gustav was released towards the end of the thirties, but soon became involved again in criminal activities and served new terms in prison. Not until 1946 was he definitely out of prison, at the age of 39.

Three years later he had reached an amazing degree of rehabilitation. He lived in a railway town not far from Oslo, was married, had two small children and had a permanent job as an upholsterer. People in the neighbourhood knew about his past, but he had been accepted and was respected as a good and decent citizen.

At this time he became aware, through a newspaper, that a film company was preparing a film based on Gunnar Larsen's book. He applied to the Ministry of Justice, which found no authority under which to intervene. The vicar and a number of local organizations made protests to the film company and to the director of the film, but to no avail.

The finished film was not represented as one about the 1926 hunt for the sheriff murderers: the events had been made to happen after World War II. However, the film essentially followed Gunnar Larsen's book, and the external chain of events was, like in the book, very similar to and in part identical with the events of 1926.

On one point, however, the film departed from the book: It went one step further in emphasizing the mitigating and extenuating circumstances as far as Gustav was concerned. And in the film the Swede confesses explicitly that it was he alone who killed the two sheriffs.

Nevertheless Gustav brought an action claiming a ban on showing the film. He won his case in the City Court (one judge of three dissenting) and in the Supreme Court (one judge of five dissenting). The decision, reported in Norsk Retstidende (NRt.) 1952 p. 1217, created quite a sensation[2] and has earned Norway a reputation as a pioneer country in the field of the law of privacy.[3]

4.

Even today the decision in the case of *To mistenkelige personer* holds a central position in Norwegian law—and in the law students' curriculum. But now it is being presented mainly in the books on *legal method* as a rare example of a decision where the Supreme Court overtly and at length undertakes a pure balancing of the conflicting interests and makes the outcome of this balancing decisive.[4] During the last few decades, less interest has, on the whole, been shown in the *rule of law* on which the Supreme Court's decision must have been based, or in the particulars of this rule. Most authors draw attention to the decision as proof that the legal protection of privacy is not exhaustively dealt with

[2] It has been discussed by among others Alvar Nelson, Filmmord, *SvJT*, 1954, pp. 21–29; Johs. Andenæs, Privatlivets fred, *TfR*, 1958, pp. 369–404 (on pp. 391–392), also printed in a German version: Der Frieden des Privatlebens. Betrachtungen zum Persönlichkeitsrecht, *Archiv für Urheber- Film- Funk- und Theaterrecht* (UFITA) 30 Bd., 1960, pp. 30–65 (on pp. 52–53); Carl Jacob Arnholm, *Personretten*, Oslo, 1959, pp. 87–98; Erik Dæhlin, Levende modell, in Lund and Alkil (ed.), *Ophavsretlige perspektiver*, Copenhagen, 1958, pp. 140–160; Knut Sejersted Selmer, Bør vi få lovregler om personlighetens rettsvern?, *NIR Nordiskt Immateriellt Rättsskydd*, 1955, pp. 1–11 (on p. 4 and pp. 7–8); Birger Stuevold Lassen, Lettre de Norvège, *Le Droit d'auteur*, 1961, pp. 76–82 (on p. 82).

More recent contributions are Åke Lögdberg, Om personlighetsrätt, in *Festskrift till Håkan Nial*, Stockholm, 1966, pp. 358–380 (on pp. 375–376 and pp. 379–380); Åke Lögdberg, Personlighetsrätt för straffade brottslingar och vissa andra personkategorier, *TfR*, 1979, pp. 568–584 (on pp. 572–574); Birger Stuevold Lassen and Helge Kvamme, Retten som vern for den enkelte, in Torstein Eckhoff et al., *Gyldendals bok om lov og rett*, Oslo, 1974, pp. 133–169 (on pp. 160–163).

[3] See e.g. Stig Strömholm, *Integritetsskydd i massmedia*, Bilag 7 to *Forhandlingerne på Det otteogtyvende nordiske juristmøde*, Copenhagen, 1978, p. 4.

[4] See e.g. Torstein Eckhoff, *Rettskildelære*, 4th impression, Oslo, 1985, pp. 323–324 and 2nd ed. Oslo, 1987, pp. 322–323 and p. 324, cf. Johs. Andenæs, *Innføring i rettsstudiet*, Oslo, 1983, p. 98.

in statutory law—privacy extends further; but there has been little willingness to attempt a more precise delimitation.[5]

For Norwegian writers and film-makers attracted by documentarism, for their publishers and producers, and for Norwegian television, this is not an altogether comfortable situation. Considerable uncertainty prevails as to what can be told and what cannot be told from our recent history, about how it can be told and for what purposes.

5.

Being a pioneer has its disadvantages. It means, for one thing, that one looks in vain for parallels from other countries that might be a help when borderlines are to be drawn. This author at any rate has not been able to unearth a parallel to the ruling on *To mistenkelige personer*.

It has been maintained—by such a prominent student of this field as Professor Stig Strömholm—that the decision is "closely similar to *Melvin v. Reid*".[6] And it is true that this Californian decision[7]—which is usually cited under the more alluring name of "The Red Kimono Case"—also concerned a film based on a murder case where the accused had been completely rehabilitated, and where the film was considered to represent an illegal invasion of her privacy. Therefore, the *type of case* was undoubtedly closely similar. But there were significant differences as regards the *facts of the cases*.

"The Red Kimono Case" was brought against Mr. Reid, a film producer, by a former prostitute who in 1918 was charged with murder, but was acquitted. After the acquittal, she changed her entire way of life. In 1919 she married Mr. Melvin and took his name. They moved to quite another part of the United States, and "thereafter at all times lived an exemplary, virtuous, honorable and righteous life".[8]

In 1925 Reid produced and released a film entitled *The Red Kimono*, presenting such events from Mrs. Melvin's earlier life as had become known in connection with the murder case. Her true maiden name was used in the film, which was advertised as a true account.

[5] See e.g. Anders Bratholm in Birger Stuevold Lassen (ed)., *Knophs Oversikt over Norges rett*, 9th ed., Oslo, 1987, p. 125.

[6] *Right of Privacy and Rights of the Personality. A Comparative Survey*. Acta Instituti Upsaliensis Iurisprudentiae Comparativae VIII, Stockholm, 1967, p. 217.

[7] *Melvin v. Reid* 297 Pac. 91 (1931).—The decision is mentioned also by Åke Lögdberg, Personlighetsrätt för straffade brottslingar (note 2 above) especially on pp. 571–572.

[8] Quoted after William L. Prosser, John W. Wade & Victor E. Schwartz, *Cases and Materials on Torts*, 7th ed., New York, 1982, p. 1106.

The Californian Court of Appeals stated that the defendant must have a right to recount in a film such events from mrs. Melvin's life as had become known because of the murder case. However, the limits of legitimate use of these events had been transgressed in that her true maiden name had been used in the film itself and in the advertising.

The woman in "The Red Kimono Case" had thus actually *not been convicted of murder*, her *true name had been used*, her *past as a prostitute had been revealed*, whereas Gustav had been *convicted of murder*, and had in all contexts been *shielded by a false name*—besides having been presented as innocent of the murder of the sheriffs. For such discretionary assessment of impropriety that was decisive in both court rulings, these must be essential differences implying that the ruling in the case of *To mistenkelige personer* goes appreciably further than the decision on *The Red Kimono*.

> Nor does the well-known German case on Klaus Mann's book *Mephisto—Roman einer Karriere*, which is often mentioned in this context, offer an illustrative parallel.[9] This case concerned a lampoon in the form of a novel, where Klaus Mann painted a spiteful and distorted picture of his former brother-in-law, Gustaf Gründgens, the famous theatre man. He is presented under the name of Hendrik Höfgen, but is clearly recognizable to most people with an interest in the theatre. In Norway a book like Mann's could have been stopped without this giving rise to discussions about the scope of the protection of privacy; the book contained markedly defamatory and clearly untruthful accusations.
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> Klaus Mann stated originally that the book *portrayed* Gründgens. He later modified his statement: the book was not meant to be a *roman à clef* but described a *type*. And the book was banned, not for depicting Gründgens' life in a rather indiscreet manner, but because freely fictitious acts and attitudes were attributed to the easily recognizable Gründgens, putting him in a negative light without appearing as exaggerating satire. Höfgen is represented as a spineless climber pandering to the Nazi authorities, while Gründgens had been a true anti-fascist who had exposed himself to danger by helping Jews. Höfgen also has a masochistic relationship with a black female dancer whom he later lets the Gestapo arrest for the sake of his career—an entirely fictitious story which, however, would make readers pass a harsh judgement upon Höfgen/Gründgens.

There are more similarities between the decision on *To mistenkelige personer* and the judgement in the German case about the television

[9] BGH 20/3 1968, BGHZ 50 p. 133, NJW 1968 p. 1773. Cf. BVerfG 24/2 1971, BVerfGE 30 p. 173, NJW 1971 p. 1645. The decisions are discussed by Hans-Gunnar Axberger, Dikt och annan fiktion ..., in *Festskrift till Hans Thornstedt*, Stockholm, 1983, pp. 55–73, on pp. 59 et seq. and by Åke Lögdberg, *Personlighetsrätt*, Stockholm, 1972, pp. 48–50 and p. 75.

documentary drama *Der Soldatenmord von Lebach*. Some readers might recall the crime itself. In January 1969 a military arsenal was raided by two young men seeking arms. They planned to commit a number of crimes in order to finance a dream life on a yacht in the South Seas. They killed four guards who were asleep in their beds, and seriously injured a fifth. After the killings, they tried to extort money from a finance broker. After a comprehensive investigation they were caught and sentenced to long prison terms.

A third young man—let us call him Wolfgang—who had not taken part in the raid, but had taught the other two how to handle a gun, was sentenced to six years in prison for this and for being an accessory to attempted extortion.

Two or three years later German television produced a documentary play about the murders. Wolfgang brought an action to stop transmission, and in the Bundesverfassungsgericht his claim that such transmission would violate his constitutional right of privacy was upheld.[10]

The parallels here are striking. Like Gustav in *To mistenkelige personer*, Wolfgang had been sentenced for complicity in murders that had shaken a whole nation and had led to an unparalleled hunt for the criminals. Like the film, the documentary play was closely similar to the external chain of events, but like the film, a partially fictitious story was spun around the established facts. Gustav was in the especially vulnerable situation of the newly rehabilitated ex-convict, Wolfgang stood on the threshold of the difficult rehabilitation stage—conditional release was to be effected only a few weeks after the Bundesverfassungsgericht's judgement.

However, for an assessment of equity, for a *mores* test, the differences between the two cases are no less pronounced.

Whatever might be the truth about Gustav's complicity in the murder of the sheriffs, he was a *principal character* of that tragedy. An account of what happened could hardly leave him out. Wolfgang, on the other hand, was an *entirely subsidiary character* in the Lebach tragedy. He did not take part in the actual killings, he did not even participate in the raid on the arsenal. Wolfgang was so much a subsidiary character in the real tragedy that the act of which he was convicted in connection with the murders was not even included in the documentary play. His function in the play seems only to have been to reveal the homosexual affinity

[10] BVerfG 5/6 1973, BVerfGE 35 p. 202, NJW 1973 p. 1226. The decision is mentioned by Lögdberg, Personlighetsrätt för straffade brottslingar (note 2 above) on pp. 577–579 and by Axberger, *op. cit.* pp. 55 f.

between the three young men—it was a main thesis of the documentary play that the forming of a homosexual group was an important part of the psychological background to the crimes. Thus the play also exposed Wolfgang's homosexual character—a factor which has no parallel in the description of Gustav.

Moreover, Wolfgang had not been anonymized, as had Gustav. Wolfgang was presented under his *full, true name*, which was used throughout the play. And that was not all, Wolfgang's *photograph* was shown in the introduction to the play—a photograph that had been taken some five years before the conditional release was to take place. Against this background, the disclosure of his sexual bias becomes of considerable importance —it was assumed that it would create insurmountable barriers for resumption in the obviously rather bigoted environment from which he came.

Thus, we must again conclude that the cases do not constitute parallels. The decision in the case of *To mistenkelige personer* goes appreciably further than that in the case of *Der Soldatenmord von Lebach* as regards ordering concealment of recent history to protect one of the persons involved.

> The Supreme Court itself in its decision on *To mistenkelige personer* searched for parallels in foreign law, but with little success. The most enlightening find, it seems, was the commentaries to sec. 867 of the American Law Institute's 1939 Restatement of the Law of Torts. But the Supreme Court's rendering of these commentaries is no less than amazing:
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> Mr Justice Qvigstad, as spokesman for the Court's majority, quotes the commentaries at some length in order to establish that American law gives even the rehabilitated criminal a right of privacy. In addition, the commentaries do say that a criminal who has returned to the law-abiding and unobtrusive life lived by most people should not have to put up with such "unwelcome publicity" as people in the public eye have to endure.
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> However, what the spokesman for the majority omits from his quotations, and does not render in any other way, is the commentaries' clarification of *the kind* of "unwelcome publicity" referred to. While the quotations leave the impression that the phrase is meant to cover *all kinds* of "unwelcome publicity", the commentaries speak of "unwelcome publicity *through reports upon his private life and photographic reproductions of himself and his family*".[11] This is something quite different from the situation in the the case of *To mistenkelige personer*. *Nothing* in the 1939 Restatement commentaries on sec. 867 can be construed as giving a rehabilitated criminal a right to demand that also *his sensational crime* should be covered by the veil of

[11] American Law Institute, *Restatement of the Law of Torts*, vol. IV, St. Paul 1939 p. 400 (italics added).

oblivion which he has a right to throw over his rehabilitated person of today.

6.

However, the inability to find any parallel to the decision on *To mistenkelige personer*, refers to the Supreme Court's *ruling* in the case and not to the rule of law itself on which the decision must be based.

As the present author reads it the Supreme Court decision, the *rule of law* is that literary, artistic or filmed renderings of factual events is not permitted where the rendering under the circumstances appears unreasonable and is felt to be offensive to the general sense of justice.[12] Apart from the fact that this rule suffers from the vagueness and unpredictability that is the hallmark of "legal standards", the present author harbours no remonstrances against it. The rule appears closely related to e.g. the *"mores" test* which has, to some extent, been applied in the United States,[13] and there is no apparent reason why our writers, publishers, film-makers and television producers should not be able to live with it.

It is in its assessment of *what* must be considered unreasonable and offensive to the general sense of justice, and in the balancing of the conflicting interests, that the decision on *To mistenkelige personer* goes further than any other court decision that has come to the present author's knowledge. And the fact that there has not yet been any similar case in this country underlines the need for renewed discussion, a discussion in which at least two questions should be asked;

First, did the Supreme Court majority go too far in 1952; should more weight have been attached to the objections, to considerations of artistic freedom and of the freedom of expression in general?

Secondly, can assessment in 1987 reach the same conclusion as in 1952? The general sense of justice and conceptions of what is unreasonable are not constant factors.

[12] See 1952 NRt 1222. The minority would not "go beyond considering illegal such violations of privacy as could be characterized as improper" (p. 1225).

[13] For more details, see Strömholm, Right of Privacy (note 6 above) pp. 212–213; W. Page Keeton (ed.), *Prosser and Keeton on the Law of Torts*, 5th ed., St. Paul, 1984, p. 857; William L. Prosser, Privacy, *48 California Law Review* (1960) pp. 383–423, on p. 397.

7.

With regard to the first question, the 1952 decision is not so consistently lucid as one would wish although the overt and thorough balancing of the conflicting interest is in itself very enlightening. However, there remains some uncertainty as to the very basis on which the balancing rests in its considerations of how far the right of privacy might conceivable be stretched.

The Supreme Court majority emphasized that the film company's declared purpose with the film—to show how disaster is brought on a young boy because he chooses a brutal gangster as his hero—did not necessitate its degree of similarity to the real chain of events. But if we now imagine that the purpose of the film company had been different, that it had been to *recreate the drama of 1926 on the screen*—that is, simply to make a cinematographic account of the hunt for the sheriffs' murderers? In that case, the purpose would have necessitated the similarities which the majority now deemed unnecessary.

This raises the question of whether the film company lost its case because it had *made an attempt* to deviate from the actual events, but had not deviated *far enough*. Must one *choose* between *Dichtung und Wahrheit*? Does the decision on *To mistenkelige personer* mean that one can make *documentary* films *stricto sensu* about most things, but must refrain from *documentarism*, from documentary *plays*, where fiction fills the gaps where facts are elusive or unrecorded? Or does the decision simply imply that even a film rendering a purely historic account would have to be banned just like the film about Gustav? The present author would have liked to be free to answer the latter question: *Of course* not. But statements in the decision seem to imply underlying opinions that such an account *could* be banned.

> The present author's concern is not that much of the majority's argument might similarly be advanced in its balancing of the interests with regard to a real documentary, for here the necessary counterweight lies in the factor mentioned already: the necessity of making the film come close to reality.
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> However, the Supreme Court majority did "essentially" endorse the reasoning of the City Court majority. And the latter's reasoning contains a statement which appears rather alarming:
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> "It has been stated that the murders of the sheriffs are mentioned *inter alia* in historical surveys and that this must be legitimate. The majority of the City Court agrees, and also agrees that the use of the murders in scholarly papers must be justified. It is quite a different matter, however, to represent them in a film which may be seen by 500,000 people, and which may

easily seem more realistic and intense to most people than for instance a book read by a few thousand only. One must also keep in mind that the film may be shown again after a few years have passed" 1952 NRt 1236, cf. p. 1218.

This statement rather clearly implies an opinion that even a purely historic film account of the murders might, or would have to, be banned. However, the statement is not a necessary part of the reasoning that led the Supreme Court majority to ban the film. It can therefore be disregarded: it forms no part of the decision's *ratio decidendi*. Nevertheless, the statement tells us something essential about the impact of considerations of freedom of expression at that time. And certainty of the Supreme Court's having made a wise balancing of interests would be greater had the Court's majority made explicit reservations regarding that particular statement.

In its balancing of the conflicting interests, the Supreme Court majority emphasized especially that the film would lead to fresh publicity concerning the sheriff murders, involving a risk of disclosing Gustav's identity. The risk was particularly great because the medium was a film: it reached far more people than the book and was particularly vivid in its mode of expression. Should the veil of oblivion on which Gustav and family were dependent be torn, the embarrassing consequences could not be foreseen. Add to this the importance of avoiding publicity concerning the crime while the released criminal was fighting the difficult struggle to find again a place for himself in society. Oblivion was a significant ally in this struggle, and would normally remain so for years until publicity could no longer have appreciable detrimental effects. It should also be mentioned that Gustav had refused to accept compensation in any form, maintaining all the time his objections to the release of the film.

On the other hand, one must consider the literary, scenic and cinematographic arts' legitimate interest in collecting material and ideas from real events and persons, and accept treatment of such material in accordance with what is usually called the "freedom of the arts". However, this freedom, like those of the press and of speech, has its limits, and one of these must be an obligation to avoid unnecessary injury to others.

Therefore, it was necessary to establish the film company's purpose in making the film and whether, in order to achieve this it was necessary to let the film's action come so close to the real events. The declared purpose of the company, to make a moral and educational picture showing the dangers of adopting anti-social individuals as heroes, could not necessitate inclusion of exactly the characteristics that in the mind

of the general public were most strongly connected with the actual events.

The film company was aware that Gustav was still alive, and knew of his objections when production started. Despite increased expense, the company ought to have taken steps to *modify* the film to remove those features of the story and the dialogue that particularly made visible the link to the real events and Gustav's personal participation therein.

The Court majority, balancing the conflicting interests, concluded that release of the film must be "considered unreasonable and offensive to the general sense of justice". It added that the film company's conduct bore witness of "a lack of understanding, consideration and care which transgresses the limits of propriety" (1952 NRt. 1222).

The rule of law thus laid down by the Court majority is not applicable to motion pictures only. The grounds emphasize, however, that film is a particularly powerful medium, and that e.g. a book does not have a similar effect. Considerable weight is also attached to the fact that, according to the information given by the film company, the film's close conformity with the actual events had not been necessary.

Even though not explicit in the decision, it has probably been of some importance to the Court majority that films are not protected equally with the written word by the constitutional provision that "Freedom of the press should prevail".[14] Altogether, the grounds seem to indicate that the reasons for banning a *literary* presentation of our *contemporary history* would have to be pretty strong—also when the presentation comes within the concept of "documentarism". Constraint on the use of "living models" and on the publication of "documentary" novels dealing with people who have never been in the public eye is one thing:[15] there is no cause for the law to accept the classic *roman à clef*. Quite different, however, is the question of protection for those who—willingly or not—have been *actors in contemporary historic dramas* presented publicly though the mass media. Such people must, it seems, put up with

[14] Sec. 100, first sentence; for more details see e.g. Johs. Andenæs, *Statsforfatningen i Norge*, 6th ed., Oslo, 1986, pp. 394–395.

[15] The Swedish case of Märit (1970 SvJT rf. p. 2) was decided on the grounds that the novel was libellous. Judging from the report on the case, the book contained a rather indiscreet description of identifiable people who had never been in the public eye, and there are several indications that it might be illegal under Norwegian law even if it could not be said to be defamatory. The decision is mentioned by *i. a.* Lögdberg, *Personlighetsrätt* (note 9 above), pp. 121–122.

both *Dichtung* and *Wahrheit about their roles* in print, as long as it is done fairly, without defamation or disclosure of private circumstances, and also without malice. In such cases, protection by the law of privacy cannot extend beyond a right to anonymization where, under the circumstances, this is desirable and practicable. The treatment of our contemporary history cannot be reserved for professional historians. And there is surely no reason to say that such literary presentation cause "unnecessary injury to others".

There are clear indications, therefore, that the *practical* significance of the decision in the case of *To mistenkelige personer* will in the main be limited to films and television plays.[16] However, when trying to estimate its significance for these media, one must keep in mind that the Supreme Court majority used strong words: "a lack of understanding, consideration and care which transgresses the limits of propriety", although the majority were of the opinion that a ban would be justified if the film must be considered "unreasonable and offensive to the general sense of justice". One is left with the impression, as already mentioned, that the Court majority felt that it had a good margin, and that a ban also on weaker grounds than in this case was conceivable.

Although the Court majority mentioned both freedom of speech and freedom of the press, as well as "the freedom of the arts", a conspicuous feature of the decision is that its balancing is so strictly limited to the interests of *Gustav* against those of the *film company*, as if they were the sole interested parties; the Court majority's perspective does not extend beyond the interests of these two. True, they were the only litigants, but one might nevertheless have wished for an explicit widening of the perspective. Some people would probably think that society's intellectual life *per se* was a third party to the case and should have been explicitly included in the Court's perspective; some might find it problematic that the limits to freedom of expression may vary according to the time at which protests against the expression are submitted.

8.

More important than whether the Supreme Court went too far in 1952 is the question of whether the standard ought to be the same today as it

[16] Certain forms of exposure, e.g. in the yellow press, must possibly be regarded from a similar angle, cf. Lögdberg, Personlighetsrätt för straffade brottslingar (note 2 above), p. 583.

was then. For those who share the present author's views on the practical significance of the decision on *To mistenkelige personer*, this question is important as far as films and television plays are concerned. The discussion will therefore be limited to these media. As already pointed out, there is considerable uncertainty regarding the limits of legitimate use of actual events. The discussion must, therefore, be very much one of the law as it ought to be.

In some respects we are faced with a changed factual situation. The most conspicuous factor is that the entire *media situation* has changed. Television was introduced in Norway eight years after the Supreme Court's decision in the case of *To mistenkelige personer*. To the average person today, television as a purveyor of information is at least as important as the printed word. No more do you see moving pictures once a week: a quite substantial part of *everyday life* is filled with live pictures. Greater familiarity with the medium does probably lead to a *somewhat* more critical attitude: we know that even photos and film can lie and distort. Moreover, televised films and plays come under more relaxed circumstances—the viewers pour coffee, knit, answer the telephone, while following what is happening on the screen with those parts of the senses that are not otherwise occupied. Though it is probably still correct that the film makes a particularly strong impact, it is hardly so special as it was in 1952.

Equally important is that this development of the media situation has been accompanied by a complete transformation of the mode of *dissemination of information* in our society. Around 1950 it was possible to distinguish quite sharply between dissemination of information/knowledge and entertainment. Learning in school was not meant to be fun, and radio listeners were offered learned lectures for thirty solid minutes. Today the radio gives music for recuperation after five minutes of knowledge. If knowledge is to be provided for longer periods, it is considered a task for television, which has entirely different possibilities of serving *information cloaked as entertainment*. Though this may not be true to the extent that some radio and television people seem to believe, today's public clearly expect and demand that information and knowledge, including knowledge of our recent history, be presented in an entertaining form.

However, here one comes up against an absolutely crucial limitation of the possibilities of the medium. A *book* can adequately recount past events as long as it is possible to acquire knowledge of what really happened. The *pure documentary film* cannot do so unless *the camera was on the spot*. While it does sometimes happen that the camera is in position

at the right moment, even then it will catch only bits and pieces of what goes on. And while we do have film shots showing both murderer and victim in the killing of Lee Harvey Oswald, such dramas are of course not usually played in front of a camera. Therefore, a pure documentary film about e.g. a murder could hardly become a film in the ordinary sense. It would have to make do with stills of murder weapons etc., and maybe a newsreel cut of policemen on the scene. It would be a presentation for the specially interested.

Film and television *cannot* recount historic events in a way that attracts viewers and film-goers except through documentarism, through the documentary *play*. Banning the documentary play because it is *also* intended as entertainment means banning one of today's most important instruments for the spread of information and the creation of opinions, from recounting our recent history and making it a subject of debate.

Unless one were to entirely renounce film and television as a medium of contemporary history, one must therefore abandon the standard on which the Supreme Court majority based its decision in the case of *To mistenkelige personer*.

We must be allowed to subject our recent history to debate, also by means of moving pictures. It must be legitimate to make and release a film like the 1987 Norwegian *Over grensen* (Across the Border), which aimed at raising a fresh debate on a wartime tragedy. A Jewish married couple attempting flight to Sweden were killed and robbed. The perpetrators were tried after the war, but the jury returned a verdict of not guilty—probably because the men were presumed to have killed in an emergency justifying the act. The case caused a heated debate—a debate which the film was intended to reopen at a time when the war had receded more into the past.

Both perpetrators were still alive. They tried with the assistance of a solicitor to stop production of the film. However, after all personal names, except those of the victims, had been changed, and the name of the place where the murders had taken place was camouflaged, the opposition stopped and the film was released.

The film aimed at the most neutral presentation possible of the two perpetrators. Nevertheless, most viewers probably felt that the perpetrators ought to have been found guilty. This is a distressing situation for two ageing men in a society where the strains of war have become a thing of the past. Yet the present author is of the opinion that a suit demanding a ban on this film ought not to succeed.

The case was rather unique and appealed to strong emotions. Rakel and Jakob Feldmann, both in their fifties, tried in October 1942 to escape to Sweden. In the spring of 1943, their bodies floated to the surface of Skrikerudtjern, a small lake in Trøgstad, a district close to the Swedish border. The couple had been beaten to death, robbed of their money and gold watches and sunk in the lake by means of stones lashed with wire.

Jewish lives were not given high priority by the police of those days, and no real investigation was initiated until after the war. Not until the beginning of 1947 did a patient detective sergeant manage to unravel the threads which led to two former "border guides".[17] These soon confessed to having killed the Feldmanns, and claimed that the situation had made escape with them impossible. German troops and Nazi police were out in great force searching the whole escape area in a hunt for the brother of one of the guides who had shot and killed a Nazi frontier policeman during an unsuccessful attempt to take a group including the Feldmanns' son across the border.[18] The Feldmanns were scared, they would not be able to make it through the forest to the border and one must expect that they would reveal all they knew about escape routes etc. if they were caught alive. One must also fear reprisals against local people if it was disclosed that somebody had housed and helped fleeing Jews.

The border guides had not taken the money and the gold watches for gain; they had not intended to keep them. However, returning to Norway at the end of the war—one from service in the free Norwegian air force in Britain and France, the other from two years in the German concentration camp of Sachsenhausen—they discovered that it was a common belief that the Feldmanns had become victims of the most cold-blooded murder with intent to rob. Therefore, fearing misunderstanding, they had chosen silence, but had agreed to put their cards on the table if new inquiries should be made.

They were charged with premeditated murder and larceny, but not with murder with intent to rob. Counsel for the defence maintained that the killings were justified by the emergency, that the guides were soldiers who had to kill to protect the network of escape routes and transport. At the end of court proceedings which had filled the entire front pages of the newspapers and started a heated debate,[19] the jury brought in a verdict of not guilty with regard to both charges. Then, after new court proceedings, the guides were sentenced to ten months' imprisonment for embezzlement of the Feldmanns' money and gold watches. The money, which, by the way, had already been paid to the Norwegian state as the sole heir of Rakel and

[17] *Grenselos*—a wartime term for people running clandestine escape routes across the border to Sweden.

[18] The guide's brother—who was executed later—was caught on the morning of the day the Feldmanns were killed. This caused the calling off of the extraordinary patrols, about the same time that the Feldmanns were put to death.

[19] An excellent summary of this debate is given by Oskar Mendelsohn, *Jødenes historie i Norge gjennom 300 år*, bd. II, Oslo, 1986, pp. 330–334.

Jakob Feldmann,[20] amounted to approximately NOK 12,000 according to the guides' statements, and this corresponded to five or six years wages for them in 1942.

Then in 1982 a small book was published called *Ekko fra Skriktjenn* (Echo from Skriktjenn), subtitled "A documentary novel based on the 'Feldmann Case' 1942–1947". Written by Sigurd Senje, the book lacked the literary qualities which made *To mistenkelige personer* such captivating reading. It was advertised as a presentation in "the form of a novel", but actually, the novel form is only a journalistic colouring of material collected from newspapers, police reports and interviews with detectives and others. But it is absorbing in its own way, a slow development towards the solution of a riddle to which the reader knows the answer already. Nor does it appear as mere entertainment. The writer has a message, namely that the investigation was so slow, and the verdict was what it was, partly because the Feldmanns were Jews and immigrants with a foreign accent, while the border guides were nice young men who had fought for their country with courage and perseverance.

It was stated on the cover of the book that the story was true, and that facts and dates were correct as far as possible. "In observance of the rules of the law of privacy", it says, "some names have been changed". The two border guides and other persons appear under Christian names only, probably not their own. Skrikerudtjern is renamed Skriktjenn, but this may be for effect rather than to camouflage the scene of the crime.[21] A postscript also states—untruthfully—that the border guides are now both dead. Apart from that, the book's story seems to be correct in all details, right down to the names of the members of the jury.

The book does in fact draw quite a likeable picture of the two border guides. At the same time however, it provides quite convincing arguments for a verdict of guilty, and even a verdict of guilty of murder with intent to rob. The book lets the reader understand that the two would never have been involved in a crime of this kind in peacetime. The reader is also made to realize that the two, facing the court five years after the act *had themselves repressed* the fact that they had committed murder with intent to rob, and really believed in their own statements about it being a case of justification on account of emergency. But the book does, on the other hand, describe the killings as "almost a textbook example of murder with intent to rob",[22] and it is implied that the proceeds may have been several times 12,000 kroner.[23]

[20] Many years later—in 1960—the state renounced the inheritance from Rakel and Jakob Feldmann, and the money was transferred to a foundation for social support to Jews, see Mendelsohn *op. cit.* p. 464.

[21] i.e. "Jay Farm Lake" becomes "Shriek Lake".

[22] It is the detective "Mikkel"—the one who solved the case—who "thinks" this (p. 80).

[23] Statements of witnesses are quoted, saying that before the fleeing from Oslo, the Feldmanns emptied the safes in their two shops and filled their pockets and handbag with money, between NOK 150,000 and 200,000 (p. 37), and a newspaper notice saying that they brought with them between NOK 60,000 and 70,000 is cited (p. 66).

The film *Over grensen* was based on Senje's book after the director, Bente Erichsen had found through her own research that Senje's factual information was correct. Almost all the outer features of the film follow the book—and thus the story as it actually happened. As will have appeared already, the film is anonymized to a somewhat greater extent than the book; all the personal names, except the Feldmanns', are changed and the place Trøgstad renamed Stikstad. The solicitor negotiating for the border guides also demanded that the name Feldmann be changed, but this demand was not submitted until the picture was finished and the demand was rejected as an impossibility at that stage. It was in any case, obviously rather futile: considering the uniqueness of the Feldmann case, no reasonably knowledgeable film-goer would have any doubt whatsoever about *what* tragedy the film recounted.

The key characters are perhaps somewhat more conventionalized in the film than in the book. The Feldmanns speak Norwegian without an accent, the border guides are portrayed as neutrally as possible. The film is undoubtedly less explicitly condemnatory than the book; but it does leave most people with the impression that the border guides ought to have been found guilty of murder, and many will probably feel that the two should have been found guilty of murder with intent to rob. It may be symptomatic that the Oslo newspaper *Verdens Gang*—which twice in 1947 ran editorials defending the border guides and their act[24]—referred to the film *Over grensen* as "the Norwegian film about the murder of a Jewish married couple by two border guides during the war".[25]

The question of where to draw the line for what is legitimate "documentarism" in Norway today must be left unanswered. It is hard, however, to imagine that views on what is "unreasonable and offensive to the general sense of justice" could be the same today as in 1952. The Supreme Court majority balancing of interests in the decision on *To mistenkelige personer* belongs in a world which is different from today's; it is based on a sense of justice from another time.

But the uncertainty remains—and one catches oneself envying a neighbouring country which has had no pioneering court decision in the field of privacy.

[24] See Mendelsohn, *op. cit.* p. 331.
[25] *Verdens Gang*, 27 February 1987 p. 43 ("FILMguiden").