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# The Caroline Verdict: Protecting Individual Privacy Against Media Invasion as a Matter of Human Rights

Robin D. Barnes\*

The European Union's Court of Human Rights is leading the way in recognizing the continuing duty of democratic societies to protect the sphere of privacy that not only leaves its citizens secure in their person and property, but also cultivates family dignity, privacy and opportunities for self-determination. On June 24, 2004, in *Case of Von Hannover v. Germany*, the European Court of Human Rights radically altered the rules governing the unauthorized publication of exposés that offer intimate details of celebrities' private lives.<sup>1</sup>

This case, which involved a woman of enormous courage and celebrity, is less momentous for its visibility than for its considerable value to democracy. While most celebrities remain relatively secluded, convinced they lack power against the media, Princess Caroline of Monaco has been resolute in her quest for justice.<sup>2</sup> After fighting in the German courts for nearly ten years, Caroline Von Hannover took the case for protection of her privacy to the European Court of Human Rights.<sup>3</sup> Invariably, others will benefit from her perseverance in ways that she could not as she waded through the appellate process.<sup>4</sup> In *Von*

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\* Professor of Law, University of Connecticut School of Law. I'd like to thank participants of the DEFAMATION, MEDIA AND PRIVACY CONFERENCE held at the Mainz Media Institute, Johannes Gutenberg University, Mainz, Germany, June 8-9, 2005. In addition, I offer special thanks for the comments, editing and research assistance provided by Julia Sitarz and Linda LeFever, and for the comments offered by Kaaryn Gustafson.

1. *Von Hannover v. Germany*, 2004-III Eur. Ct. H.R. 294.

2. *See id.*; *see also* Daniel Kaboth, *Germany: The Publicity of Privacy*, LEGAL WEEK, July 29, 2004 [hereinafter Kaboth, *Germany*] (describing Princess Caroline's legal efforts in the courts of various European countries to protect her privacy).

3. Jonathan Coad, *Europe: Public Image*, LAWYER, Aug. 2, 2004, at 17 [hereinafter Coad, *Public Image*].

4. *See Von Hannover*, 2004-III Eur. Ct. H.R. 294, for the complete procedural history. *Cf.* Kaboth, *supra* note 2 (chronicling Princess Caroline's appeal to the ECHR after the German courts upheld an injunction prohibiting the publication of photographs

*Hannover*, the European Court of Human Rights offers an exceptionally clear statement of judicial recognition of the relationship between privacy and personal development. Considering this decision emanated from one of the world's most respected courts, the international community will reap enormous benefits.

This essay outlines the fundamental claims raised by Princess Caroline against media invasion of her personal life. In addition, this essay notes the clear departure of the European Court of Human Rights from American media law, highlighting the nexus between the expansion of privacy rights and the strength of democratic institutions, since the right of familial privacy and autonomy is a salient feature of democratic societies. However, the importance of the case has been overshadowed in the United States by the very genre of tabloid-style reporting that formed key elements of the European Court of Human Right's analysis. The claimant's position as presented was necessarily confined to the narrow parameters of existing German law.<sup>5</sup> If such constraints did not exist, a plausible argument could have been advanced for even stronger privacy protections. Unfortunately, the media itself continued to exert a significant influence on public opinion and material knowledge of the issues in the case. As "interested parties" in terms of the outcome and its future precedential value, many reports served to do little more than disparage celebrity plaintiffs.

An overview of media coverage of the case reveals what I call the mindset of infringement. Disregard for basic elements of personal privacy and individual autonomy are widening media trends in the United States and abroad. The press has reported that the case was about the publication of five photographs.<sup>6</sup> Articles appearing in the European press tend to emphasize that they showed "scenes from her daily life (such as while shopping, skiing or spending time on the beach)."<sup>7</sup>

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showing Princess Caroline with her children but sanctioned the publication of photographs of Princess Caroline taken in a public place, even if they showed scenes from her daily "private" life).

5. See *Von Hannover*, 2004-III Eur. Ct. H.R. 294, §§ 18-25. In the first of several unsuccessful suits in German courts, Princess Caroline claimed an infringement of her right to protection of her "personality rights" and her right to protection of her private life and to the control of the use of her image, as guaranteed under German law.

6. See Doreen Carvajal, *Ideas & Trends: Paparazzi Beware; For the Famous, 'Privacy' Even in Plain Sight*, N.Y. TIMES, Oct. 10, 2004, § 4, at 12 [hereinafter Carvajal, *For the Famous*]; Doreen Carvajal, *Photo edict muffles gossipy press*, INT'L HERALD TRIB., Oct. 4, 2004, Finance Sec. at 13 [hereinafter Carvajal, *Photo Edict*]; Coad, *Public Image*, *supra* note 4; Gabby Libarios, *Photographers, Take Note of Caroline Verdict*, MANILA STANDARD, Oct. 8, 2004 [hereinafter Libarios, *Photographers*]; Joshua Rozenberg, *Caroline wins legal ban on paparazzi pictures, Human rights judgment extends privacy law*, DAILY TELEGRAPH (London), June 25, 2004, at 15.

7. Coad, *Public Image*, *supra* note 3; Jonathan Coad, *Von Hannover v. Germany: A*

American news sources characterize the photographs in a manner that appears calculated to prompt readers toward the writer's perspective on the legitimacy of their publication.<sup>8</sup> For example, an article in the *New York Times* characterized the photos as "benign enough to fill a staid family scrapbook," "a pensive Caroline on horseback," "a blurry portrait of her in a swimsuit," in short, "a mundane collection of paparazzi photographs."<sup>9</sup> Such descriptions suggest that the case was much ado about nothing and that the European Court of Human Rights had gone too far. However, this particular story's headline misrepresents the relevant arguments. In addition, the article's title, which reads in relevant part, "For the Famous, 'Privacy' Even in Plain Sight," is significant for what it reveals about the general disposition of most journalists. Invoking the old "class-struggle rhetoric," the article's tone insists that "plain sight" is the determining factor.<sup>10</sup> Without offering a single significant detail, the writer concludes that "the so-called 'Caroline Verdict' is really about protecting the famed and fabled so that privacy, in theory, now exists in public spaces for high-watt stars who want to block publication of unauthorized photographs."<sup>11</sup> The article goes on to say that:

In the United States the press is much more clearly protected by the constitutional right to freedom of expression. . . . But in Europe, the Court of Human Rights concluded that there are limits to how the press can meet the public's fascination with the daily lives of the rich and famous.<sup>12</sup>

As this report favors unqualified intrusion into celebrity privacy, it completely ignores the merits of the case. In sum, the *New York Times*, which has been dubbed the nation's premier source for printed news,<sup>13</sup> "informed" the American public through the tone of its coverage of the case that it has a right to know and be concerned that the rich are once again being given special privileges. The article further implies that in the United States, the fact that one wants to know details of celebrities'

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*Summer of Discontent for the Paparazzi*, MICHAEL SIMKINS LLP, Nov. 8, 2004, <http://www.simkins.co.uk/articles/JKCVonHannoverArticle.aspx> [hereinafter Coad, *Summer*]; Rozenberg, *supra* note 6, at 15.

8. See Carvajal, *For the Famous*, *supra* note 6, at 12; Carvajal, *Photo edict*, *supra* note 6, at 13.

9. Carvajal, *For the Famous*, *supra* note 6, at 12.

10. *Id.*

11. *Id.*; Libarios, *Photographers*, *supra* note 6.

12. Carvajal, *For the Famous*, *supra* note 6, at 12.

13. *The Paradies Shops Signs Exclusive Agreement with the New York Times Company; The New York Times to Also Receive Prominent Placement in Existing Paradies Shops*, PR Newswire, Jan. 3, 2005, <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/01-03-2005/0002762327&EDATE=>.

private lives is apparently enough justification under our constitution to continue expanding the circumstances under which that information is provided. In contrast, English reporter Jonathan Coad observed the following about the European Court of Human Rights:

The European Court of Human Rights drew a distinction between “reporting facts . . . capable of contributing to a debate in a democratic society relating to politicians and the exercise of their functions, for example, and the reporting of details of the private life of an individual who . . . does not exercise official functions.” Where no contribution was made to any debate of general interest, freedom of expression had to be given a “narrow interpretation,” one judge observ[ed] that the [court] had (under American influence) to some extent “made a fetish of freedom of the press.”<sup>14</sup>

Describing them as mere photographs, mostly benign, or downright mundane when arranged in the center of a conference table, makes sense. However, once you consider the context in which they were actually published, it would be unreasonable to assume that the descriptions are innocent distortions. In fact, they resonate with the superficial genre of reporting known as “infotainment.”<sup>15</sup> The American public would expect that news reports of major first amendment cases in the *New York Times* would, in due course, offer a candid recital of the facts. In isolated instances, struggles between celebrities and the press may indeed reflect power plays, attempts at controlling public image, double standards for the wealthy, or jurisdiction over what is arguably part of the public domain. *Von Hannover*, on the other hand, is about something much deeper.

*Von Hannover* is about the need for a reasonable verdict on a basic question of civil and human rights for those whom German courts characterize as “figures of absolute general interest.”<sup>16</sup> The characterization, defined as those “individuals who, by birth, professional position, or personal achievements, are exposed to increased public interest over a long period of time,” is more accurate than “public figures,” its American counterpart.<sup>17</sup> However, the nature of the photographs at issue in *Von Hannover* is only half the story.

Part B is the ambush, the eavesdropping character of the

14. Coad, *Summer*, *supra* note 7.

15. Infotainment, also called “soft journalis,” refers to a trend in the mass media to cover stories combining high levels of human interest, drama and sensationalism instead of public affairs. See generally Matt Nisbet, *That’s Infotainment!*, Generation Skeptic (Apr. 30, 2001) [www.cscicop.org/genx/infotainment/](http://www.cscicop.org/genx/infotainment/).

16. See Kaboth, *Germany*, *supra* note 2.

17. *Id.*

formulation of the stories.<sup>18</sup> Under the law restricting defamatory expression, tabloid schemes are generally prohibited without resort to extensive analysis of whether the target understood herself to be in a “public arena,” had “reasonable expectations of privacy” or is classified (under German law) as “a person of contemporary history.”<sup>19</sup> From a societal standpoint, the crux of the matter is only tangentially related to rampant commercialization. The freelance photographer positioned one hundred feet away from an individual whom he shoots with a telephoto lens, who then sells the product for use by the tabloid press without regard for the likelihood of personal humiliation, mental anguish or suffering, is a pawn in a game where the validity of the rules of civility is under attack. We outlaw stalking because these rules “represent the special claims which members of a community have on each other.’ . . . [T]hey embody the very substance and boundaries of community life.”<sup>20</sup> Their continued violation strikes at the heart of constitutional democracy.

The European Court of Human Rights’ fortification of the link between privacy and reputation interests is far-reaching and beneficial to the great social contract. It strengthens the core of anti-defamation law in so far as it acknowledges that an important reason why the law protects the reputation and privacy surrounding one’s personal and political consciousness is to “safeguard ‘the essential dignity and worth of every human being.’”<sup>21</sup> The European Court of Human Rights has prescribed it as a matter of law.<sup>22</sup> As noted by Coad:

The fundamental importance of protecting private life from [public scrutiny relates to opportunities for] development of every human being’s personality. That protection . . . extends beyond the private family circle and also includes a social dimension. [Everyone], even if they are known to the general public, must be able to enjoy a “legitimate expectation” of protection of and respect for their private life.<sup>23</sup>

In a liberal democracy, the first order of business for those espousing representative government is to encourage the free flow of ideas. This current is then filtered through a course of political interactions, which

18. See *Von Hannover v. Germany*, 2004-III Eur. Ct. H.R. 294, §§ 11-17.

19. *Von Hannover*, 2004-III Eur. Ct. H.R. 294; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1999, 10 *Entscheidungen des Bundesverfassungsgerichts* [BVerfGE]131 (F.R.G).

20. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 *HARV. L. REV.* 601, 618 (1990) [hereinafter *Post, Concept*].

21. *Id.* at 616.

22. See *Von Hannover v. Germany*, 2004-III Eur. Ct. H.R. 294.

23. Coad, *Summer*, *supra* note 7.

are fueled by civic culture and desire for self-governance. Free expression, association and privacy rendezvous en route to an authentically developed personal and political consciousness.<sup>24</sup>

Publication of a random group of photographs without narrative rarely satisfies the curiosity, voyeurism or entertainment wishes of the public at large. Without the narrative, the overwhelming majority of the public may not even recognize those portrayed. Upon reviewing the nature of the magazine articles that spawned the lawsuit against the publisher, it would be difficult to conclude that the overall objective was to prompt recognition of Princess Caroline's role in a matter of public concern. Even voyeurism and curiosity about celebrities do not explain the intrusive nature of the publications.

Table One describes the front covers, photos, captions, headlines, layout and dates.<sup>25</sup>

**Table I. Facts presented in Von Hannover v. Germany, 1999**

Contents of Photographs	Headlines & Captions
Caroline with actor Vincent London kissing her hand at a table one evening in an open-air café in France	Front Cover: The Most Tender Photographs of Her Romance with Vincent.  Freizeit Revue No. 30, 22 July 1993
Caroline riding a horse  Caroline with her two minor children	Headline: <i>"I Don't Think I Can Be the Ideal Wife for a Man."</i> Caption: Caroline and Melancholy. "Her life is a novel with countless disasters." [quoting a Spanish author] Caption: Caroline with _____ & _____, her children.*  Bunte No. 32, 5 August 1993
Caroline in a close-up shot with her daughter in a canoe	Headline: Simple Happiness Caption: It is a hot day this summer. Princess Caroline is canoeing with her daughter _____ on the Sorgues. This is a small river not far from St-Rimy, the village in Provence where Caroline lives. From New York to London the rich

24. American Jurists and scholars perpetuate this understanding through their most widely used quote on the subject: "If there is a fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

25. See *Von Hannover v. Germany*, 2004-III Eur. Ct. H.R. 294.

<p>Caroline walking to the market with a wicker shoulder bag Two shops in which she is supposedly shopping The bistro in which she customarily has coffee Her country house</p>	<p>and beautiful whisper about "Le Style Caroline." A canoe instead of a yacht. A sandwich instead of caviar.</p> <p>Caption: Housewife Caroline Casiraghi. She loves to go shopping herself. Side text in large print: "Wednesday is market day. "Le Style Caroline" is copied worldwide. Her strappy sandals in which she goes to the flower market, her pareo that she wears as a dress.</p>
<p>Caroline and Vincent seated at an Inn</p>	<p>Caption: Here every Saturday evening table no. 3 to the right of the entrance is reserved for Caroline. Larger Text: In the evenings, people sit in Sous les Micoculiers and drink the light red summer wine. Caroline and Vincent are guests like the baker, the olive grower or parish priest.</p>
<p>Caroline cycling alone on a country lane</p>	<p>Caption: Caroline cycles home. Her [house] lies at the end of the bumpy country lane " C_____ " Side text in large print: The end of loneliness approaches. "Le Style Caroline" attracts the rich and beautiful. Lady Di is said to have authorised an estate agent to find a plot of land. Julio Iglesias is searching too.</p>
<p>Caroline with Vincent, her son and another child</p>	<p>Caption: Caroline's youngest, _____, 6 has bumped himself. Vincent and Caroline comfort him.</p>
<p>Caroline wearing sunglasses with a female companion at the market</p>	<p>Caption: Caroline's bodyguard is a woman. She even looks like the Princess. Mostly they go to the market together.</p> <p>Bunte No. 34,19 August 1993</p>

\*Names have been omitted in order to protect the privacy of these individuals.

The exposés in the German media demonstrate that the "details—however banal—of the life of the complainant as the eldest daughter of the reigning Prince of Monaco"<sup>26</sup> were not conveyed in the photographs alone. The extent to which the articles conveyed anything worthy of public notice is open to debate and more often than not appear defamatory in nature. If a picture is worth a thousand words, then the

26. See headnote to Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1999, 10 Entscheidungen des Bundesverfassungsgerichts [BVerfGE]131 (F.R.G).



photographs were de rigueur to lend credence to the narrative. For many years now, celebrities have reported that the media, armed with stealth photographers, is simply making it up as they go along.

The *Von Hannover* court recognized the crucial links between human dignity, familial privacy, and the development of the human personality.<sup>27</sup> Securing the realm of independence around personal choice allows an individual to establish their own boundaries, develop their civic nature and the fortitude to articulate their political viewpoint. The High Court has provided basic safeguards for celebrities against media assault and misappropriation of their everyday lives as a matter of fundamental right. Under principles of equality such protection is guaranteed to every citizen in a liberal democracy. Media rights to shape or shatter reputation as a matter of fiat or entertainment should remain strictly prohibited around the world under legitimate rule of law.<sup>28</sup>

When coupled with a storyline, the “mundane collection” leaves the press free to mix fact with conjecture, exaggerate comments from disgruntled associates, ex-lovers, and former employees, and offer comparisons out of context.<sup>29</sup> The point that Princess Caroline intended to make, one that more celebrities ought to seriously consider, is that no amount of hype about the public’s “right to know” justifies allowing the media to convert celebrities’ lives into an ongoing reality show, known as *cinéma vérité*.<sup>30</sup>

The European Court of Human Rights has provided a guiding hand in setting forth principles under which future cases should be viewed. As Coad reports:

A clear “*public interest*” is now required to justify a photograph of a person who neither holds public office nor is engaged in an “official” activity. The ubiquitous candid pictures of celebrities in public places reproduced daily in tabloid newspapers or glossy magazines are no longer justifiable, and prominent individuals therefore have at least some privacy rights even in public places.<sup>31</sup>

The superior feature of a liberal democratic nation is that its constitutional law should not allow interference with the rights of the individual. Despite the public’s fascination with celebrities’ lives, a

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27. See *Von Hannover*, 2004-III Eur. Ct. H.R. 294, §§ 50-51.

28. See *Campbell v. MGN Ltd.*, [2004] UKHL 22, para. 8 (Naomi Campbell sued and the Daily Mirror took revenge).

29. See Diane Rowland, *Gripping, Bitching and Speaking Your Mind: A Free for All on the Internet?* 110 PENN ST. L. REV. §19 (suggesting that it is defamatory to repeat words out of context).

30. Wikipedia, The Free Encyclopedia, Reality Television, [http://en.wikipedia.org/wiki/Reality\\_tv](http://en.wikipedia.org/wiki/Reality_tv) (last visited Nov. 21, 2005).

31. Coad, *Summer*, *supra* note 7.

single rule regarding privacy is warranted, instead of permitting an insufferable double standard endorsed by tortuous reference to journalistic hues. Under what reasonable jurisprudential standard should the press be given free reign through words and pictures to announce personal information about Caroline to the world? Specifically, the names of places where Caroline may be found on certain days; digital images of her home and directions to its location, photographs of her children, descriptions of roads that she cycles on alone, or photos and descriptions of her bodyguard(s) *makes no contribution to a debate of general interest*. Caroline exercised no official function and the stories related solely to her private life and could have compromised her safety. If Caroline had agreed to an interview in which she identified herself as melancholy or lonely and the quote found its way into ninety-seven magazines in twenty-six languages, no invasion of privacy would exist. However, when members of the press reach in and extract whatever they find useful to suit their own purposes, those actions jeopardize an already fragile quest to establish the legitimacy of democratic governance worldwide. History demonstrates that the clause guaranteeing freedom of the press was ratified for an altogether different purpose.

It often seems that we have settled for the theory of free speech and self-governance, while throwing away the practice. In the United States, the best rulings in service of freedom elevate the spirit of the First Amendment from a holistic perspective giving the rights to peaceably assemble and petition the government for redress of grievances the protections that they deserve. In matters of conscience, the most important freedom is reposed in the individual—not the nation or any of the branches of government or their extensions (such as large-scale corporate and religious interests). Thus, we fashioned a doctrine of protection for freedom of speech, religion, press, assembly and petition.<sup>32</sup> The media's contribution, christened by Edmund Burke as the "fourth estate," is to draw attention to abuse of corporate and political power.<sup>33</sup>

Century-long debates over the value of free speech and its highest justifications led to nullification of these central principles. We abandoned the substance and elevated the form. Today, representatives from the American Civil Liberties Union routinely declare that the First Amendment is all about the "right to give offense."<sup>34</sup> Then they spend

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32. U.S. CONST. amend. I.

33. See David Walker & Nicholas Jones, *Invisible Political Actors: the press as agents of anti-politics*, <http://www.new-politics.net/publications/pamphlets/invisible-political-actors/> (last visited Nov. 21, 2005).

34. ACLU Action Alert, *Torching the Constitution: 12 U.S. Senators Targeted by Citizens Flag Alliance*, Nov. 20, 1995, available at [http://www.eff.org/Censorship/?f=flagburning\\_amendment\\_alert.old](http://www.eff.org/Censorship/?f=flagburning_amendment_alert.old) (quoting Roger Pilon, director of the Center for

valuable resources justifying their defense of neo-Nazi's marching in the residential neighborhood of Holocaust survivors.<sup>35</sup> While many European countries have long recognized the detrimental affects of providing public forums for hatemongers, lawyers from the ACLU appear obsessed with defending them. The ACLU's mantra weakens the First Amendment's most vital protection—securing citizens' rights to peaceably assemble and to petition the *government* for redress of grievances.

A recent panel discussion at the University of Connecticut School of Law addressed the topic of how little American high school students know about the First Amendment. During the discussion, there was negligible appreciation for the view that challenges us to prove to today's youth that it's worth their while to believe in and support the kind of "free expression" that we espouse, rather than demand that they take it as an article of faith. We must demonstrate the long-term advantages politically, socially and spiritually. Maslow's theory about the hierarchy of human needs comes closest to developing a non-literary discourse around human nature and a need for expression that does not stand in total opposition to our general conceptions of reason and knowledge.<sup>36</sup>

Is there reason to doubt that celebrities deserve the same opportunities to become "model citizens" as other individuals in a free society? Model citizens see both themselves and others as free and equal individuals, who are not exhaustively described by attributes they possess as members of particular ethnic, religious, or class-based communities.<sup>37</sup> Model citizens tend to engage civic culture, speak up; vote, and take seriously the notion that they give consent to those who govern.<sup>38</sup>

Suppose Princess Caroline wanted to deliver the message that human rights violations are everywhere; that every nation stands guilty as charged in one form or another and it is time to own up to it; that the time has come to implement those policies toward freedom that lend themselves toward a peaceful co-existence with our neighbors to the North, South, East and West. If she became a spokeswoman on behalf of the International Monetary Fund Debt Forgiveness to developing countries, should that alter her current status or rights in relation to her

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Constitutional Studies at the Cato Institute, in a *Washington Post* opinion piece in June 1995).

35. See *Colin v. Smith*, 578 F.2d 1197 (1978).

36. See W. Huitt, *Maslow's Hierarchy of Needs*, EDUCATIONAL PSYCHOLOGY INTERACTIVE, <http://chiron.valdosta.edu/whuitt/col/regsyst/maslow.html> (last visited Nov. 21, 2005).

37. *Issue Three: The Postmodern Reconstruction of Personal Life*, THE ISSUES: AN OVERVIEW, at [www.civsoc.com/issues/issues\\_three.htm](http://www.civsoc.com/issues/issues_three.htm) (last visited Jan. 27, 2006).

38. *Id.*

private life? Should the answer be different in the United States than abroad in the wake of social and economic globalization?

Media Heiress Patricia Hearst, once photographed robbing a bank as a member of the revolutionary Symbionese Liberation Army in the 1970s, has retired into a fairly secluded life.<sup>39</sup> Could she speak today about her previous experience? If she wanted to share a story about what it meant to be revolutionary, to have radical ideas, or about whether she still believes that she was, in fact, “brainwashed,” is she permitted under prevailing social and political forces to share that story? Should opponents then be allowed to publish intimate details of Ms. Hearst’s private life in order to silence her because under American law she is considered a “public figure?” Lesser-known revolutionaries would face the same dilemma as private citizens speaking on topics of public interest.

The late Princess Diana of Wales came under unprecedented attack in Britain’s two biggest-selling papers, *The Sun* and *The Daily Mirror*, for taking her sons to see a film that was attacked for “its glamorous depiction of the IRA.”<sup>40</sup> Her judgment was called into question as well as her fitness as a parent and status as a role model.<sup>41</sup> Although she apologized for causing any distress, news reports focused upon the plausibility of her statement concerning her prior knowledge of the movie’s content (labeling it terrorist propaganda) and emphasized that a series of coincidences resulted in her decision to go to the movie.<sup>42</sup> The coincidences Diana claimed were that: she was not really “paying attention;” “rainy weather” restricted the royals to indoor fun; they “often visit the cinema;” Brad Pitt and Harrison Ford are among “the boys’ favorite actors;” and the time of the show was “convenient for getting them back to school on time.”<sup>43</sup> After all was said and done, in today’s climate of repression and rebuke, it seems unlikely that she could have ever stood before the press to say that she:

[C]onsidered it for five incredibly long days and ultimately decided that because they may well be part of the next generation of leaders in the free world, her sons needed to understand how important it is for Europe to find a way of mediating the tensions that exist between

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39. See Gersh Kuntzman, *DA Putting Patty Hearst on Stand; Will Testify at Trial of Radical ‘Soccer Mom’*, N.Y. POST, Oct. 27, 1999.

40. Sarah French, *The Ill-Conceived Actions of a Mother*, THE NORTHERN ECHO, June 24, 1997 at 12.

41. *Id.*

42. Richard Kay & Michael Harvey, *Diana So Sorry for Harry’s IRA Movie Trip*, DAILY MAIL (London), June 24, 1997 at 5.

43. See *id.* Cf. Clive Walker, *Cyber-terrorism: Legal Principle & Law*, in Free Speech/First Amendment Forum, School of Law, Leeds Univ. (May 2005).

both sides, so as to avoid the level of conflict that exists in the Middle East and other parts of the world. Thus, seeing this particular movie at this particular time seemed the best way to broach a topic that causes so much anxiety in so many quarters.

Actress Jane Fonda attended a meeting of the United Nations Panel on Population Control where she stated that there were “children in north Georgia (US) who are starving to death,” “living in tar-paper shacks with no indoor plumbing,” and that based on such conditions, “we are, in some ways, like some developing countries.”<sup>44</sup> The Governor called her comments “ridiculous and personally offensive,” stating that, “[her] view from [the] penthouse is not as clear as it needs to be.”<sup>45</sup> Former President Jimmy Carter entered the dialogue to say that Jane’s comments were inappropriate and regrettable, but “she is almost certain to continue doing a lot more for Georgia than some of her critics. . . .”<sup>46</sup> Her protest of the Vietnam War resulted in her being nicknamed Hanoi Jane.<sup>47</sup> During the last presidential election, conservative Senator Sam Johnson from Texas sought to capitalize on former Democratic candidate John Kerry’s membership in the group Veterans Against the War in Vietnam by suggesting that they call him Hanoi John.<sup>48</sup> It had worked so well the first time around that Ted Samply, a retired Green Beret who ran a website for veterans devoted to defeating Kerry, said he spent months looking for a photograph of John Kerry and Jane Fonda together.<sup>49</sup> Miraculously, a message from a stranger arrived telling him exactly where he could find it.<sup>50</sup> He paid \$170 and posted it on the Internet.<sup>51</sup> Why is it that the press only discovered that former President Nixon was escalating the War in Vietnam, rather than pulling out as he had claimed, after Ms. Fonda traveled to Vietnam?

Ask anyone involved in anti-government protests during the past fifty years what freedom of speech meant to the world’s foremost champion of liberal democracy or what it meant on the campus of Kent State University in 1970.<sup>52</sup> Before his assassination, England’s native

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44. *Carters defend Jane Fonda against her Georgia critics*, CHI. TRIB., Apr. 22, 1998, at C2.

45. *Id.*

46. *Id.*

47. See Roy Eccleston, *Smears, sneers in dirty tricks duel*, THE AUSTRALIAN, Feb. 13, 2004, at 8; Anne Hendershott, *Hanoi Jane Memories*, NATIONAL REVIEW ONLINE (Feb. 18, 2004) at <http://www.nationalreview.com/comment/henershott20042180852.asp>.

48. See Ann McFeatters, *Kerry’s War Record Attacked; Seen as a Response to Critics’ Questioning Bush’s Service; Fonda Photos Circulated*, PITTSBURGH POST-GAZETTE, Feb. 13, 2004, at A1.

49. *Id.*

50. *Id.*

51. *Id.*

52. See Karen Dacko, *Dance Alloy recalls Kent State massacre; 25th anniversary of*

son, John Lennon, simply asked if we could “give peace a chance.”<sup>53</sup> Malcolm X returned from Africa declaring that Civil and Human rights were inextricably linked.<sup>54</sup> Martin Luther King Jr. declared that one could not plausibly belong to the Civil Rights Movement and ignore the Peace Movement.<sup>55</sup> As these and other celebrities moved from the national to the international political stage, their days were numbered but their legacies live on.

Around the globe, we are confronted with the inescapable reality of cultural difference and the power of historical circumstance to shape belief. Free Speech doctrines can no longer be credibly explained and justified by appeal to self-evident truths, universal law, principles of reason, or any other supposedly culture-neutral metaphysical or epistemological theory. At this historical juncture, it is imperative to question why we have made a fetish of protecting the press when it crosses the boundary into an individual’s private life.

Ideally, the press would be stationed at the frontline, protecting the rights of individual speakers, rather than silencing them through the offering of salacious personal facts mixed with rumor and innuendo under the guise of reporting what the public has a right to know. Given daily reports of global protests against seething political corruption, the time has come to reclaim the abandoned clauses and demand greater enforcement of citizens’ right to assemble and petition for redress. Under Burke’s analysis, the original role of the press is to inform the public of those matters that affect social, political and economic change. Neutral reporting, rather than celebrity stalking, is the mandate under which the freedom was granted.

According to David Walker of *The Guardian*, “journalists and editors undertake deliberate political activism in their writing, demonstrating a dangerous trend toward mixing commentary and factual reporting, increasing public distrust of political discourse.”<sup>56</sup> The business of trading off-the-record information or leaked information for favorable coverage and the phenomenal growth of stories based upon un-

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*Kent, Ohio, killings during its military occupation*, DANCE MAGAZINE, May 1995, at 28.

53. See Jonathan Levi, *The U.S. Campaign Against John Lennon*, L.A. TIMES, Dec. 30, 1999, at E3 (reviewing JON WEINER, GIMME SOME TRUTH, THE JOHN LENNON-FBI FILES (1999)).

54. See *Legacy left by Malcolm X*, NAT’L PUBLIC RADIO (NPR), Feb. 21, 2005; see generally William J. Harrison et. al., *Examining ‘Malcolm X’*, ST. LOUIS POST-DISPATCH (MO.), Nov. 22, 1992, at 1F.

55. See Tom Chaffin, *King reveals his foreign policy 1967*, ATLANTA J. & CONST., Apr. 12, 1992, at M2.

56. See Walker & Jones, *supra* note 33. See generally David Walker, Evidence from David Walker, Journalist, available at <http://archive.cabinetoffice.gov.uk/gcreview/evidence/walker.doc>.

substantiated information weaken representative politics.<sup>57</sup> If the press is to play a constitutionally protected role in providing checks and balances against abuse of power, then setting adequate priorities is the place to start and the Courts can assist in that process. In short, detailed coverage of Enron and similar corporate scandals is far closer to what the public has a right to know than whether Angelina Jolie was actually telling the truth in the moment she declared that she had not shagged Brad Pitt. According to Robert McChesney, many things have led to the demise of professional journalism, but all of them center around two things: the media is no longer a watchdog protecting the citizenry from the criminals in government and business, and the media is no longer a very reliable source of credible information about things that matter.<sup>58</sup>

### Conclusion

Paul Brodeur points out the vulnerability of our times, noting that a *New York Times* article about a film that it labeled fictional biography only mentioned in passing that its subject, actress Jean Seberg, became a target of the FBI because of her support for the Black Panthers.<sup>59</sup> Her film career came to a halt, she miscarried a child, and she was found dead with barbiturates near her body.<sup>60</sup>

Seberg's decision to raise money for Black Nationalist organizations led to false reports that originated with the F.B.I.—reports that she was pregnant by a high-ranking member of the Black Panther Party rather than her husband.<sup>61</sup> The discovery of Seberg's decomposed body was "followed by a series of stunning disclosures."<sup>62</sup> Her husband revealed the following during a press conference after her body was found and before taking his own life:

When she read the rumor planted by the Bureau in *Newsweek*, she became distraught, went into labor and delivered a premature baby girl who died two days later . . . [and] she tried to commit suicide every year on the anniversary of the baby's death.<sup>63</sup>

Following this press conference, F.B.I. Director William Webster

57. See Walker & Jones, *supra* note 33.

58. Robert McChesney, *The Rise and Fall of Professional Journalism, in INTO THE BUZZSAW: LEADING JOURNALISTS EXPOSE THE MYTH OF A FREE PRESS* 363 (Kristina Borjesson ed., 2002).

59. Paul Brodeur, *How the F.B.I. Left Jean Seberg Breathless: in the Call for New 'Counterintelligence,' We Should Remember Some of the Old*, *THE NATION*, Mar. 25, 1996, at 15.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

acknowledged that the F.B.I. planted the story to discredit Seberg.<sup>64</sup> When the memo requesting permission to run the story reached J. Edgar Hoover in Washington, the stated purpose was to “cause her embarrassment and serve to cheapen her image with the general public.”<sup>65</sup> The request was approved with modification; “it would be better to wait approximately two additional months until Seberg’s pregnancy would be obvious to everyone.”<sup>66</sup> Ironically, Webster had announced that “the days when the F.B.I. used derogatory information to combat advocates of unpopular causes have long since passed . . . we are out of that business forever.”<sup>67</sup> Assuming the truth of that statement for the sake of argument, who took up that cause? David Walker believes that the political activism of the national press is “largely right of center” and has been operating under declining standards for professional journalism during the last two decades.<sup>68</sup> He and Nicholas Jones call for truth and reconciliation around the “media’s role in generating the pervasive aura of lies and misinformation which hangs over the political community.”<sup>69</sup>

What remains to be seen is the effect of the Internet and the culmination of several different phenomena. We have information overload and electronic communication devices that make tracking our pathways the rule rather than the exception. As of late, the merging of multimedia outlets with ownership increasingly held in just a handful of the most powerful corporations provides an interesting new area for further study. In order to access news reports that are more than thirty days old you have to pay to enter the archives with a credit card. There is a trend toward enabling anyone to take a photograph using cell phone technology and it seems certain that everyone will be photographed with the convergence of picture IDs on bank cards, cameras in the courtroom, alongside pervasive camera surveillance in all manner of public and private buildings. Certain technological changes have advanced streaming capabilities so that photographs can be made to look more like video, not to mention the impact of digital alterations designed to produce false images. Those who own the means of electronic storage of vast amounts of historical information hold the key to its continued existence. Presumably, they have the power to make it disappear altogether.

Observing the trends noted above leaves serious cause for concern

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64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

68. Walker & Jones, *supra* note 33.

69. *Id.*



about the way the media is used to shape public opinion worldwide. For example, Oprah Winfrey is arguably the most influential celebrity in the United States today. She was called for jury duty in a criminal trial near a major election and forced to sit, which is virtually unheard of for anyone of her stature.<sup>70</sup> Understanding that videos and photographs of her daily arrival at the courthouse circulated worldwide under who knows what captions signals that the European Court of Human Rights is indeed on the right track. Otherwise, the conflation of yellow, pink, black and white journalism indicates that the press and media law in general would have continued its descent into the black hole of opinion, undisclosed sources, leaks, appearances, sources close to the target and speculative forays, to the detriment of democracy and all that we claim to represent.

Europe's highest Court, in *Case of Von Hanover v. Germany*, has radically altered the extent to which the media can lawfully intrude into the private lives of the rich and famous. In contrast to the orthodoxy surrounding the interpretation of the First Amendment in the United States, the European Court of Human Rights' ruling signals a return to those universally recognized values that serve to sustain thriving democracies.

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70. See Patti Waldmeir, *Jury Duty Gets a Taste of the Oprah Effect*, FINANCIAL TIMES, Sept. 6, 2004.