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Jane E. Kirtley

FREEDOM OF THE PRESS: AN INALIENABLE RIGHT OR A PRIVILEGE TO BE EARNED?

Jane E. Kirtley[*]

The death of Diana, Princess of Wales, following a car crash in a Paris tunnel in late August 1997, was a tragedy for her family and friends. But it was a godsend for the many commentators who leapt at the opportunity to condemn the media for their individual and collective "responsibility" for the accident. These commentators ranged from legislators to media critics, academics to movie stars. Almost without exception, they demanded new laws to restrain the press from intruding on the privacy of the rich and famous, seemingly oblivious to the panoply of statutes that already prohibit stalking, harassment, trespassing, and similar crimes.

Congressman Sonny Bono introduced a bill titled the "Protection from Personal Intrusion Act,"[1] designed to create a new federal crime of harassment as well as a civil cause of action extending to any person "legally present in the United States,"[2] even if the events giving rise to the suit "occurred outside of the territorial or special jurisdiction of the United States."[3] In California, state Senator Tom Hayden called for the creation of a "Commission of Inquiry into Paparazzi Behavior to Evaluate and Make Recommendations to the Legislature."[4] Meanwhile, State Senate Majority Leader Charles Calderon revived his efforts to repeal *New York Times Co. v. Sullivan*[5] and its progeny insofar as they apply to public figures other than government officials by giving the Attorney General authority to seek civil penalties against anyone who engages in "a pattern or practice of publishing or broadcasting statements which are found to be defamatory."[6] Members of the Screen Actors Guild, many of whom had been reluctant to support

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* Executive Director, The Reporters Committee for Freedom of the Press.

1. H.R. 2448, 105th Cong. § 1 (1997).
2. *Id.* § 2(d)(1).
3. *Id.* § 2(d)(2).
4. S.B. 1379, 97-98 Sess. (Cal. 1998). Senate Bill 1379, which was authored by Senator Tom Hayden, is pending before the California Senate Judiciary Committee. Its proposed title is "Paparazzi Harassment Act of 1998." *Id.*
5. 376 U.S. 254 (1964) (prohibiting public officials from recovering damages for defamatory falsehoods relating to their official conduct unless they prove the statements were made with "actual malice" — knowledge of falsity or reckless disregard of whether statements were false or not).
6. S.B. 1777, 97-98 Sess. (Cal. 1998) (Privacy Protection Act) (also providing a 20-foot bubble zone around news subjects).

such efforts in the past due to opposition by the Motion Picture Association of America, eagerly rallied behind Calderon's undertaking.[7]

While Attorney General Janet Reno urged restraint, observing that it is difficult to legislate celebrity protection and that common sense and mutual respect should prevail,[8] University of Chicago law professor Cass R. Sunstein insisted that the law should "do more" to protect celebrities from harassment.[9] Further, the President of the Society of Professional Journalists exhorted "professional journalists" to "stand up for responsibility and professionalism" by refusing to purchase photographs from those who use "intrusive newsgathering tactics" to get them.[10] Similarly, the British Press Complaints Commission (PCC), established in 1991 as a regulatory body with no enforcement authority to speak of and cringing under the threat of Parliamentary action if it failed to put its own house in order,[11] declared that British newspapers should cease to purchase paparazzi photographs obtained "illegally or unethically."[12] Meanwhile, in Europe, where a civil rather than

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7. Bruce Orwall, *Privacy: For Hollywood Stars, Privacy Laws Are Elusive*, WALL ST. J., Sept. 5, 1997, at B1.

8. *Reno: Common Sense Is Answer to Celebrity Hounding*, AP, Sept. 5, 1997, *available in* 1997 WL 4882560.

9. Cass R. Sunstein, *Reinforce the Walls of Privacy*, N.Y. TIMES, Sept. 6, 1997, at A2.

10. *Professional Journalists Decry "Intrusive" Tactics*, NEWS RELEASE (Soc'y of Prof. Journalists), Sept. 4, 1997, at 1 (on file with *The University of Florida Journal of Law and Public Policy*).

11. *See* Louis Blom-Cooper, *Freedom and Responsibility*, 3 INDEX ON CENSORSHIP 2, 3 (1992).

12. Dan Balz, *British Newspaper Editors Endorse Rules Curbing Harassment by Media*, WASH. POST, Sept. 26, 1997, at A21. Although complaints that the British news media frequently invade privacy have been voiced for many years, several incidents finally attracted parliamentary attention. *See Report of the Committee on Privacy and Related Matters*, 1990, Cmnd. 1102, at 1, 64-65. These included instances of journalists intruding upon hospitalized patients, publishing stolen correspondence, and revealing details of individuals' private lives. *Id.* at 1. In the 1988-89 session of Parliament, two bills were introduced to create a right to privacy and a right to reply to media criticism. *Id.* Although neither was enacted, they prompted creation in April 1989 of a parliamentary committee headed by David Calcutt, Queen's Counsel and master of Magdalene College, Cambridge, to " 'consider what measures (whether legislative or otherwise) are needed to give further protection to individual privacy from the activities of the press.' " *Id.* (quoting Rt. Hon. Douglas Hurd, member of Parliament).

In June 1990, the Calcutt Committee issued its report on privacy and the press. *Id.* Among other things, it recommended that the British Press Council should be disbanded. *Id.* at 65. Established in 1953, the Council's mandate included both defending press freedom and adjudicating complaints about press conduct. *Id.* at 64. Financially dependent upon newspaper and magazine publishers, the Council was attacked as partisan, inherently conflicted, and ineffectual. *Id.* It was explicitly prohibited from issuing a code of conduct and had no authority to impose any kind of sanctions on media organizations, but could only "encourage, exhort or censure." *Id.* The Calcutt Committee recommended that an entirely new body, specifically charged with handling complaints of "press malpractice," should be created. *Id.* at 65. The Press Complaints Commission was duly established in January 1991. *Id.* It was assigned the "daunting task" of demonstrating that self-regulation would adequately

a common law system holds sway, the European Parliament scheduled an "emergency" debate on privacy laws, and its Culture and Media Committee asked the European Commission to launch a comparative study of privacy laws with an eye to developing a media "code of conduct."[13] For those who have followed the evolution of modern attempts by governments around the world to regulate the media and to compel them to act in accordance with someone's idea of "responsibility," these initiatives are only the latest round in a relentless campaign to control the press in the name of the public interest.

For nearly twenty years, special interest groups have urged the United Nations to fashion international rules to control the type of news and information disseminated by wire services and other news organizations. In 1978, nonaligned developing nations called for the creation of a "New World Information and Communication Order" (NWICO), to regulate the gathering, processing and transmission of news across national borders. NWICO would force media to eschew initiatives that " 'misrepresent or deform or show in an unfavorable light the activities of developing countries' " and to create a body to review and sanction complaints against news organizations.[14] Throughout the next decade, debate raged in UNESCO over concepts, such as codes of conduct for journalists, recognition of "a 'right to communicate, . . . a 'right to reply,'. . . [and the] formulati[on of] 'national communication policies,' "[15] all in the name of promoting pluralism[16] in the news media and supporting the interests of the developing world, as articulated by their governments.[17]

Although UNESCO abandoned discussion of NWICO in the late 1980s, in part because the threat that NWICO would undermine press independence by mandating government interference of media content had contributed to the decisions of the United States and Britain to withdraw from that agency,

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address the public's concerns. Brian MacArthur, *Deadline Looms as Editors Press On with Reform*, SUNDAY TIMES (London), Jan. 6, 1991, § 3, at 8 (quoting Louis Blom-Cooper).

13. Leayla Linton, *Diana's Death to Spur Media Curbs?*, NAT'L L.J., Sept. 22, 1997, at A18.

14. *NWICO: An Old Threat Returns*, NEWSL. WORLD PRESS FREEDOM COMM. (World Press Freedom Comm., Reston, Va.), Mar. 6, 1997, at 2 [hereinafter *NWICO*] (quoting a paper submitted in 1978 by Tunisian Information Minister, Mustapha Masmoudi, to the MacBride Commission, UNESCO).

15. *Id.* at 3 (quoting excerpts from various NWICO-linked proposals submitted to UNESCO during the 1980s). A "right to reply" is a legally enforceable right of a news subject to respond to news reports or commentary that the subject believes to be false or unfair. *See, e.g.*, FLA. STAT. § 104.38 (1997). The U.S. Supreme Court explicitly held in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 241 (1974), that the First Amendment precludes enforcement of such statutes in the United States.

16. "Pluralism" as used in international legal and human rights circles denotes diversity of voices, viewpoints, and ownership in the news media.

17. *NWICO*, *supra* note 14, at 3.

the notion that "journalism is too important to be left to journalists" refused to die.[18]

In December 1995, the United Nations General Assembly endorsed the Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women in September of that year.[19] The Beijing Declaration and Platform is a 150-page document that attempts, among other things, to define the media's responsibility to promote the delegates' concept of women's equality.[20] Although scattered passages in sections dealing with diverse topics make conclusory reference to the media's role in contributing to stereotyping and violence against women, it is the dozen paragraphs of Chapter IV, Section J that form the nucleus of a manifesto to control the press.[21]

For example, Section J calls for (1) the establishment of professional guidelines and codes of conduct for the media, to be drawn up with the participation of governments and women;[22] (2) the adoption of a gender perspective on news;[23] (3) the use of the media as a "tool" for government propaganda;[24] (4) government initiatives to promote women in the media by establishing goals for gender balance in both the public and private sectors;[25] and (5) the establishment of media watch groups to ensure that women's concerns are "properly reflected."[26]

Regardless of the validity of the Declaration's conclusions or the merits of its goals, under U.S. constitutional standards any attempt by the government to compel media participation in these undertakings would run afoul of the First Amendment. An interpretive paragraph, introduced by the U.S. delegation at the Main Committee's meeting on September 12, 1995, which was eventually appended to the Declaration, recognized the limitations placed on any governmental attempts to compel media participation. It states:

> A number of institutions, organizations and others have been

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18. *Id.*

19. U.N. GAOR, 15th Sess., 86th mtg., Agenda Item 165, at 1, U.N. Doc. A/50/L.46 (1995).

20. Jane E. Kirtley, *Discussion Forum: Analysis of Media Provisions in Beijing Platform for Action*, 13 GOV'T INFO. Q. 109 (1996).

21. Beijing Declaration and Platform for Action, adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, ch. IV, § J (Beijing, Sept. 15, 1995) [hereinafter Beijing Platform]; Kirtley, *supra* note 20, at 112 (containing excerpts from the Beijing Platform relating to media control).

22. Beijing Platform, § J, ¶ 244(b).

23. *Id.* ¶ 244(c).

24. *Id.* ¶ 243(b).

25. *Id.* ¶ 239(d).

26. *Id.* ¶ 242(a).

> requested to take actions to implement the Platform. Although many institutions have participated here as observers, and non-governmental organizations have provided helpful inputs into the deliberations, governments alone will adopt the Platform. As a result, it is necessary to underscore the fact that when the Platform mentions the actions these other actors may take, it thereby invites and encourages the suggested actions; it does not, and cannot, require such actions.
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> In this context, we understand that references to actions the media may take . . . are in the nature of suggestions and recommendations, and may not be construed to impinge on the freedom of the press, speech and expression, which are fundamental democratic freedoms.[27]

But old ideas die hard, and in September 1996, information ministers from nearly thirty nonaligned countries produced a seven-page declaration, drafted at their conference in Abuja, Nigeria, calling once more for "reactivation of the concept of the new world information and communication order."[28] Among other things, they proposed that journalism curricula should be revised to train "media practitioners" to "serve the interests of member States of the Movement of Non-Aligned Countries;"[29] that efforts should be undertaken to "break the present monopoly of the international information system;"[30] and that the mass media in the member states should be urged to "disseminate information on the activities and functions of the Movement . . . to encourage efforts and cooperation . . . on the principle of collective self-reliance."[31] The proposals repudiate the "views, model and perspectives"[32] of the media of developed countries and encourage developing nations to replace them with an "equitable new world information and communication order."[33]

The Declaration aims to prompt the United Nations to reopen the NWICO concept, with the expectation that new proposals for the establishment of regulations on the gathering and transmission of news across international borders would follow. Debate on this topic was deferred at the May 1997 meeting of the United Nations Committee on Information, to be considered at subsequent sessions.[34]

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27. *Id.* at app. C; Kirtley, *supra* note 20, at 112.
28. U.N. GAOR, 51st Sess., prov. Agenda Item 87, at 3, U.N. Doc. A/51/372 (1996).
29. *Id.* para. 12, at 3.
30. *Id.* para. 17, at 4.
31. *Id.* para. 33, at 6.
32. *Id.* para. 13, at 4.
33. *Id.* para. 26, at 5.
34. *United Nations Defers NWICO Debate*, NEWSL. WORLD PRESS FREEDOM COMM. (World Press Freedom Comm., Reston, Va.), June 16, 1997, at 1.

The urge to regulate, manipulate, and control the media in the name of promoting higher interests is seemingly irresistible. Various international conventions, declarations, and covenants give lip service to the importance of freedom of expression.[35] But almost without exception, freedom of expression is qualified by concerns such as "respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society."[36] More specifically, Article 8 of the European Convention on Human Rights declares: "Everyone has the right to respect for his private and family life, his home and his correspondence."[37] Even before the death of the Princess of Wales, England's Lord Chancellor had announced his intention to seek incorporation of the convention into British law, triggering an alarmed reaction from the British press and Lord Wakeham, chair of the PCC, that new privacy legislation was sure to follow.[38]

Previous attempts in England to legislate against press intrusion into private lives had been aborted, in part because the self-regulatory measures taken by the PCC had been perceived as effective against all but the most egregious violators of journalistic standards.[39] But renewed calls for restrictive statutes in the wake of Diana's death suggested that this time the British press might well be "drinking at the Last Chance Saloon," as disgraced politician David Mellor had threatened when he was National Heritage Secretary and before his extramarital affair led to his ouster.[40]

A clear distinction between U.S. law and that of other countries is the

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35. *See, e.g.*, Universal Declaration of Human Rights, art. 19, Dec. 10, 1948, *adopted by* G.A. Res. 217 A (III), U.N. GAOR, *reprinted in* ARTICLE 19, INTERNATIONAL CENTRE AGAINST CENSORSHIP, PRESS LAW AND PRACTICE 295 app. B (UNESCO, Sandra Coliver et al. eds., Mar. 1993) [hereinafter PRESS AND PRACTICE]. "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." *Id.*

36. *Id.* art. 29.

37. European Convention on Human Rights, Nov. 4, 1950, Contracting States of the Council of Europe art. 8. Privacy is recognized in a variety of international human rights instruments and is usually considered to encompass the right to respect for a person's private life, home, and correspondence. Breach of privacy right by government or by private actors is perceived to have a chilling effect on the enjoyment and exercise of civil and human rights, including the right of free expression. ARTICLE 19, INTERNATIONAL CENTRE ON CENSORSHIP, INFORMATION FREEDOM AND CENSORSHIP: WORLD REPORT 1991, at 412 (Am. Libr. Ass'n Chicago).

38. *See* Nicholas Rufford, *Focus: Don't Look Now . . .*, SUNDAY TIMES (London), Aug. 3, 1997, § 1, at 11; Emma Wilkins, *Press at Risk from Privacy Law, Says Wakeham*, TIMES (London), Nov. 3, 1997.

39. *Press, Politicians and Privacy*, SUNDAY TIMES (London), July 26, 1992, § 2, at 3; Ivan Fallon, *Scandal*, TIMES (London), July 26, 1992, § 1, at 11.

40. Brian MacArthur, *Was It a Hollow Press Victory?*, SUNDAY TIMES (London), July 26, 1992, § 1, at 14.

First Amendment to the U.S. Constitution, which guarantees the right of a free press to be immune from interference by the government.[41] But this First Amendment right, which never has been regarded as absolute,[42] faces new challenges as public outrage at the alleged culpability of the media for a multitude of sins has led to demands to force the press to live up to its "responsibilities." Nothing in the U.S. Constitution explicitly states that First Amendment guarantees are contingent on fulfillment of responsibilities, much less defines what those responsibilities might be. As the Supreme Court has recognized, "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[43]

It is precisely those "irresponsible" media, such as the paparazzi, who test the bounds of public toleration for the principles of press freedom, that need the protection of the First Amendment most. That protection seems to be stretched to the limit by perceived excesses or improprieties involving the newsgathering process. Numerous cases, recently decided or still pending,[44] reflect an increasing challenge for the judiciary as it struggles to balance freedom of the press with the right of the individual to be free from unwarranted intrusion into his or her private life. Whether the issue turns on gaining access to private property through deception, as in the *Food Lion Inc. v. Capital Cities/ABC, Inc.* case,[45] persistently following news subjects and their families without their consent,[46] or using undisclosed cameras and microphones to capture the image of the unwary,[47] countless plaintiffs have demanded that a legal remedy be crafted to deter such conduct.

The difficulty arises when a governmental entity attempts to draft legislation that will curb dangerous conduct but still continue to protect "legitimate" newsgathering. To the extent that any legislative fiats undertake

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41. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 347-58 (1992); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2.06[3]-[4] (3d rev. ed. 1996).

42. Frohwerk v. United States, 249 U.S. 204, 206 (1919).

43. *Tornillo*, 418 U.S. at 256 (holding that a Florida statute granting political candidates the right to equal space to reply to criticism in a newspaper violated the First Amendment).

44. *See* cases cited *infra* notes 45-47.

45. 984 F. Supp. 923, 937-40 (M.D.N.C. 1997) (finding broadcast journalists civilly liable for fraud and trespass after obtaining jobs in a grocery store by falsifying employment applications).

46. Wolfson v. Lewis, 924 F. Supp. 1413, 1434 (E.D. Pa. 1996) (appeal dismissed on stipulation of parties) (enjoining broadcast journalists from "harassing, hounding, following, intruding, frightening, terrorizing, or ambushing" health care executives and their children).

47. *See, e.g.*, Deteresa v. American Broad. Cos., 121 F.3d 460 (9th Cir. 1997) (holding that a conversation with a newsreporter taped without the source's knowledge or consent was not subject to California's eavesdropping law); Shulman v. Group W Prods., Inc., 51 Cal. App. 4th 850, 59 Cal. Rptr. 2d 434 (Ct. App. 1997) (holding that auto accident victims whose rescue by medical helicopter was taped without their knowledge or consent may sue for civil damages), *rev. granted*, 62 Cal. Rptr. 2d 753 (May 21, 1997).

to distinguish between different types of media on the basis of their "legitimacy," they are doomed to succumb to a constitutional challenge. Such content-based distinctions smack of licensing, which is generally forbidden except for the broadcast media.[48] On the other hand, statutes creating broad proscriptions on press conduct run the risk of impeding news coverage of issues and persons that are unequivocally of public interest, not merely of interest to the public, based on standards of taste dictated by government.

A debate of sorts that took place in June 1997 between two outgoing members of the Federal Communications Commission (FCC) underscores this inherent difficulty. On June 3, FCC Chairman Reed E. Hundt delivered a speech at the Museum of Television and Radio in New York.[49] He called for "a stronger and more well articulated set of First Amendment principles for broadcast news," adding that "[w]e also need a clear and absolute commitment that government should never reward or punish any broadcaster for the content, point of view or opinions that the broadcaster expresses."[50]

Reflecting on the 1995 decision of CBS News to pull a *60 Minutes* segment that included an interview with a former tobacco executive because of fears that CBS would be sued for interfering with the executive's nondisclosure agreement, Hundt raised several questions including: "[s]hould [First Amendment principles] protect routine reporting techniques like asking questions and getting voluntary answers[?] . . . Do we need to think about how First Amendment protection should be applied to cover the way that news is *gathered* in addition to what news is *published*?"[51] These reasonable questions are being asked on a daily basis in newsrooms, law offices, and courtrooms across the country. Hundt then progressed to the inevitable question of whether Congress should "hold hearings on the topic of how we could buttress the protection of TV journalists, to ensure that they go about their business without being chilled by the threat of litigation," reminding his listeners that "at the same time we seek to protect journalists, we should continue to expect the highest standards of integrity from them."[52] He also asked, "[W]ouldn't we all benefit if there were some way to assure the public that news on TV will be impartial and that opinions on TV will be balanced?"[53]

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48. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

49. Chairman Reed E. Hundt, Address at the Museum of Television and Radio, New York, N.Y. (June 3, 1997) (on file with *The University of Florida Journal of Law and Public Policy*).

50. *Id.* at 3.

51. *Id.* at 4 (emphasis in original).

52. *Id.* at 5.

53. *Id.* at 3.

Statements like this sound ominous to journalists who work in the regulated broadcast industry, especially when uttered by the chair of the commission that has the authority to issue, withhold, or cancel licenses, to levy fines, and to reestablish the Fairness Doctrine, a federally-mandated requirement that broadcasters give equal opportunities to be heard to those on opposing sides of controversial issues of public importance.[54]

Hundt's observations represent a two-edged sword, as Commissioner James H. Quello observed in a speech he delivered three weeks later.[55] Quello noted with irony that Hundt's expansive praise for First Amendment freedoms was belied by "the most intensely regulatory" atmosphere at the Commission in twenty-three years.[56] He cited "the Chairman's promotion of government federal power to force broadcasters to carry programs on the subjects he considers worthy."[57] He summed up the contradiction by concluding that Hundt's theories amounted to "the notion that for free speech to exist, the government must regulate."[58] This, said Quello, has the First Amendment "exactly backwards. . . . [T]he First Amendment is not a charter or a mission statement for more regulation of the media."[59] Quello then asked who would determine which journalists would merit Hundt's greater protection by virtue of being "fair" and conducting themselves with integrity: "If the Chairman's speech is any clue . . . then the price of journalistic protection will be the obligation to be 'fair' and to have the highest ethics, as those terms are defined by the government represented by the FCC! With friends like this, the First Amendment needs no enemies."[60]

Quello's comments illustrate the inherent difficulties with governmental attempts to decree what is ethical conduct for journalists. Governments in other countries do not hesitate to define ethical limits by establishing press councils or other regulatory bodies that promulgate codes of conduct for journalists and enforce complaints against them.[61] But attempts by the U.S. government to dictate ethical standards would clearly run afoul of the First Amendment prohibitions against government interference with the press. Assuming that neither federal nor state government is about to establish a press council — Senator Hayden's proposed commission of inquiry into paparazzi behavior notwithstanding — it is reasonable to ask what

54. Report on Editorializing, 13 F.C.C. 1246, 1249 (1949).

55. Commissioner James H. Quello, Remarks Before the Florida Ass'n of Broad., Boca Raton, Fla. (June 26, 1997) (on file with *The University of Florida Journal of Law and Public Policy*).

56. *Id.* at 4.

57. *Id.*

58. *Id.* at 5.

59. *Id.*

60. *Id.* at 6.

61. *See* PRESS LAW AND PRACTICE, *supra* note 35, at 295.

constitutional impediment, or indeed what harm, could arise if initiatives to establish forums to examine press conduct are created by the private sector? The short answer is that, in many cases, this would not pose First Amendment problems.

Certainly individuals and nongovernmental organizations, including voluntary associations created by journalists themselves, have every right to utilize their own resources to review the conduct of the press. The usefulness of these enterprises, however, without at least the implicit cooperation of the press, is questionable because a council's adjudication will not do any good if organizations will not submit to it.[62] The additional possibility that courts, legislatures, and regulatory commissions like the FCC might utilize the codes of conduct and conclusions produced by these nongovernmental groups to craft legally enforceable obligations for news organizations, particularly those that took no part in the creation of these codes, is not merely hypothetical. The demise of voluntary bench-bar-media guidelines once common in many states, which had been intended to balance the interests between a free press and a fair trial, can be directly traced to the decision of a trial judge in the state of Washington to condition press access to the courtroom on acceptance of the guidelines.[63] Under such circumstances the activities of even nongovernmental press councils have First Amendment implications.

Codes of conduct also can be difficult to enforce because they tend to draw bright lines and set absolute standards. In many controversial areas of newsgathering, a rigid standard will fail to protect First Amendment interests because it cannot accommodate the many unique factors that must be considered in order to strike an appropriate balance between the rights of a free press and competing interests. As a consequence, press codes of conduct, regardless of who authors them, tend to be either so narrow as to have no significant impact, or so sweeping as to discourage legitimate newsgathering.

A simple example, drawing on the accident that killed Princess Diana, illustrates the point. Immediately following the crash, "paparazzi" reportedly photographed the crash scene, rather than rushing to assist the victims.[64]

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62. *See* NORMAN E. ISAACS, UNTENDED GATES: THE MISMANAGED PRESS (1986) (describing the history of the creation and eventual demise of the National News Council, a failure ascribed to the unwillingness of prominent news organizations, such as *The New York Times*, to participate in the Council's adjudications).

63. Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 633 P.2d 74 (1981) (upholding trial judge's order allowing only reporters who agreed to abide by state bench-bar-media guidelines to gain access to his courtroom), *cert. denied*, 456 U.S. 984 (1982).

64. *A Sad Death, a Bad Law*, N.Y. TIMES ABSTRACTS, Sept. 15, 1997, at A1, *available in* 1997 WL 8003120; Thomas Kamm & Paul M. Barrett, *The Legal Picture: How Would Paparazzi Who Stalked Diana Fare in French Court?*, WALL ST. J., Sept. 2, 1997, at A1.

Their film was confiscated by law enforcement authorities, and their behavior was condemned as ghoulish. But in light of the many unanswered questions surrounding the accident and the circumstances that contributed to it, it is clear that the photographs taken by independent photographers might well provide the only objective version of what occurred in the tunnel. A separate question best left to the taste and judgement of editors is whether it would serve the public interest to publish grisly photographs. But there can really be no question that such photographs provide a vital alternative to the official story as disseminated by the government.

Coincidentally, bills introduced in the California legislature in 1997, prior to the death of Diana, would make it illegal to broadcast or publish crime scenes or scenes of victims.[65] The bills were promoted by decisions of print and electronic media to publish images of a slain deputy sheriff and the murdered son of Bill Cosby.[66] These bills attempted to legislate taste by controlling conduct and will ultimately fail to withstand constitutional scrutiny, because the First Amendment does not permit government to do so either through the courts or the legislature.

In the end, the only remedy for media "excesses," at least in a free society and a market economy, is an economic one. That remedy rests with those who produce and sponsor the news and those who consume it, without government intervention or involvement. As William J. Skow, an Ohio state trial judge, observed:

> It is inevitable that the role and function of the press in privacy and other areas, will continue to be argued and discussed, both within and without the profession. It is equally inevitable that courts will continue to wrestle with certain standards and precedents, and that they will occasionally hand down anomalous decisions which pose threats to all elements of the media. Unfortunately, it is likely that certain of these opinions will turn upon the vagaries and intensity of public taste and cynicism, rather than constitutional standards.[67]

Those who deplore the conduct or contents of any publication or broadcast are free not to purchase it or the products of those who underwrite it. They also are free to complain, to deplore, and to protest it. The First Amendment gives them the right to do so. However, it does not give them the power to deprive others of those same rights by attempting to use

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65. A.B. 1343, 97-98 Sess. (Cal. 1997); A.B. 1500, 97-98 Sess. (Cal. 1997).

66. Dan Trigoboff, *State Laws Target Crime Coverage*, BROADCASTING & CABLE, June 2, 1997, at 42.

67. Early v. Toledo Blade Co., No. 90-3434, slip op. at 161 (Lucas County C.P., Ohio, July 8, 1997).

government fiats to stifle speech that is controversial, distasteful, or challenges the status quo.