Curbing the Media: Should Reporters Pay When Police Ride-Alongs Violate Privacy?

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CURBING THE MEDIA: SHOULD REPORTERS PAY WHEN POLICE RIDE-ALONGS VIOLATE PRIVACY?

I. INTRODUCTION

When Warren and Brandeis meditated on "the right to be let alone" in 1890,¹ so-called reality-based television shows were still a century away.² But the justices eerily foretold the impact of such programs, which typically involve law enforcement agents shadowed by video crews as they serve warrants, make arrests, and interrogate suspects.

The authors, in explaining how the harm caused by certain invasions of privacy extends beyond the individual to society, wrote:

Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality.... When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.... Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive, under its blighting influence.³

The frequent breaking down of doors in shows such as Cops⁵ also

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². However, the forerunner of such shows, Allen Funt's Candid Camera, appeared less than 60 years later. Associated Press, Fun-Loving Candid Camera Creator Was Pioneer in Reality TV, MILWAUKEE J. SENTINEL, Sept. 7, 1999, at B10 (reporting on Funt's death). Funt, who introduced his show in 1949, is credited with creating "what has become an entire programming genre." Id. (quoting Michael Naidus, spokesman for the Columbia Broadcasting System television network).
³. Cops Staying on the Beat, SAN DIEGO UNION-TRIB., Apr. 15, 1998, at E9, available at 1998 WL 4003578 (announcing Fox Television's renewal of the reality-based show Cops for an 11th season). The half-hour show "visits different cities to follow real-life cops as they go about their rounds." Id.
⁴. Warren & Brandeis, supra note 1, at 196.
⁵. Benjamin Smith, Spotlight to Shine Again on IPD, IND. STAR, June 20, 1999, at B3, available at 1999 WL 3851329 (detailing how the Indianapolis Police Department hoped to "clean up its national image" by letting Cops film its officers). The story, attributing its information to the show's producer, notes, "Remember, this is entertainment. Cops tries to
serves to break down the traditional partition between news ("matters of real interest to the community")6 and entertainment. As the spectacle of police bursting into a stranger's home becomes just another of television's visual clichés,7 viewers—including other law enforcement officers—seem to become indifferent to underlying questions about its appropriateness,8 or how it would feel to have police and television cameras storm their own homes for the sake of entertainment.

Those still capable of "robustness of thought"9 have been horrified, so much so that even non-entertainment-driven "ride-alongs"10 become suspect." What had once been considered a legitimate newsgathering


The growing popularity of the tabloid press, and the adaptation of its methodology to television, have increased the demand for "inside" information about our stars, our politicians, our heroes, our victims, and our villains. The explosion of "reality programming" with its insatiable appetite for visual and aural images of exciting, bizarre, and tragic human occurrences threatens to intrude on the privacy of ordinary citizens.

Id. See also Joanne Trestrail, Reality Theater: Where Real Live is Real Life, CHI. TRIB., May 2, 1999, at 2, available at 1999 WL 2869481 (describing the "tawdry pleasures" of shows such as Cops in discussing the allure of real-life drama). "All of the reality shows are windows into neighborhoods, subcultures and emotional landscapes previously overlooked by TV." Id. See also Joanne Weintrab, Live, from TV: It's . . . Reality, MILWAUKEE J. SENTINEL, Jan. 22, 2000, at A1 (linking the popularity of game and reality-based shows to "the allure of spontaneity, the suggestion that something wonderful, terrible or bizarre might happen at any moment").

8. Police officers in Los Angeles, for example, recently allowed a television show to videotape their discovery of "the body of a drug overdose victim" and subsequent phone call to the victim's parents. The parents sued the show's producer and syndication company. In the News, Television Program LAPD: Life on the Beat May Have Invaded Privacy of Parents of Drug Overdose Victim, California Appellate Court Rules; Videotape Showed Police Officer Informing Parents By Phone of Their Son's Death and Included Parents' Unintelligible Responses, ENT. L. REP. Nov. 1999, at 25 (reporting on Marich v. QRZ Media, Inc., 73 Cal. App. 4th 299 (1999)).


10. James C. Goodale, Ride-Along Into the Sunset, N. Y. L. J., Dec. 15, 1998, at 3 (discussing how recent cases "cast doubt on this journalistic custom and practice"). "Ride-along works this way: The authorities obtain a search warrant and notify the press to ride along with them. The cops love it because subsequent publicity aids their crime-busting activities." Id.

11. Ayeni v. Mottola, 35 F.3d 680, 685 (2d Cir. 1994) (upholding district court decision that a CBS video crew "seized" the image of those whose home was searched for narcotics, making the search illegal), cert. denied, 514 U.S. 1062 (1995). The court noted that, "A private home is not a soundstage for law enforcement theatricals." Ayeni, 35 F.3d at 686.
technique, protected by the First Amendment, instead is seen as an attempt to "magnify needlessly" the privacy invasion authorized by a search warrant.

Thus the stage was set for the U.S. Supreme Court's May 24, 1999 decision in Wilson v. Layne that law enforcement officials violate the Fourth Amendment by inviting the media on ride-alongs to private homes. The Court specifically noted that:

We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.

However, because the Fourth Amendment right in question had not been clearly established at the time of the Wilson incident, the Court found that the officers being sued should be able to claim qualified immunity.

12. Goodale, supra note 10, at 3. "For decades, years, maybe even centuries, reporters have 'ridden along' with federal agents as they searched private places for criminal activity. Some of the best icons of the 1920s, for example, are photos of narcotic agents breaking expensive bottles of champagne at '21.' Id. See also Wilson v. Layne, 526 U.S. 603, 616 (1999) (citing Florida Publ'g Co. v. Fletcher, 340 So. 2d 914, 919 (Fla. 1976) (stating "it is a widespread practice of long-standing" for media to accompany officers into homes)).

13. Warren Richey, When Cops Bust In, News Crews in Tow, CHRISTIAN SCI. MONITOR, March 24, 1999, at 1, available at 1999 WL 537800 (noting media and federal agents urged the Wilson court to "strike a balance on a case-by-case basis, keeping in mind the First Amendment's right to know").


15. 526 U.S. at 604.

16. Id. at 614. The Court earlier noted: "It may well be that media ride-alongs further the law enforcement objectives of the police in a general sense, but that is not the same as furthering the purpose of the search." Id. at 612.

17. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

18. Wilson, 526 U.S. at 615. The Court also said in Wilson:

Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that
The Court failed to address other questions surrounding the ride-along issue, such as whether the ban should extend to police activities outside of private homes.19 Such activities include safety-check roadblocks, of which police often notify the media in advance,20 as well as ride-alongs to street-corner drug busts or raids on public establishments.21

Even more conspicuous by its absence was any reference to whether the media itself violates the Fourth Amendment during ride-alongs by virtue of police-media cooperation that rises to the level of state action. The issue did not arise in Wilson, because the citizens involved sued only the officers responsible and not the media outlet.22

But it has factored into a case stemming from CNN's taping of a raid by federal marshals on a Montana couple's ranch.23 The Court, based on Wilson, found that federal marshals had violated the ranchers' Fourth Amendment rights but the officers were entitled to qualified immunity.24 Yet, it refused to hear an appeal from CNN over a Ninth Circuit ruling enter homes subject the police to money damages. If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy. Id. at 618. (citations omitted). See also infra Part III.

19. "But what about the less dramatic news gathering by beat reporters and investigators from both print and electronic outlets?" Richard M. Knoth, Tuning Out Blue News: Court's Rejection of Police-Media Ride-Alongs Will Hinder Legitimate Reporting, LEGAL TIMES, July 12, 1999, at S27 (questioning whether the Wilson decision will "quash the media's legitimate role of oversight").

20. Tipping off reporters to such police operations is common because departments have a "vested interest in promoting their public image; consequently they are often selective in what they report to the media." Thus the activities often are those that "demonstrate a social need for their services." David E. Bond, Note, Police Liability for the Media "Ride-Along," 77 B. U. L. REV. 825, 826-27 n.7 (1997) (quoting W. Clinton Terry, Crime and the News: Gatekeeping and Beyond, in JUSTICE AND THE MEDIA 41-42 (Ray Surette ed., 1984)). See also Alan Vinegard, Law Enforcement and the Media: Cooperative Co-Existence, 1999 ANN. SURV. AM. L. 237, 243 (2000) (noting the police community "is oftentimes amenable... to publiciz[ing] its exploits or otherwise draw[ing] attention to some investigative or prosecutorial effort it has undertaken"). But see Henry R. Rossbacher et al., An Invasion of Privacy: The Media's Involvement in Law Enforcement Activities, 19 LOY. L. A. ENT. L. J. 313, 335 (1999) (describing media-police cooperation as mainly resulting in "prosecutions motivated by publicity, not the public interest").


22. The Washington Post had a reporter and photographer present but never published photos taken at the home. Wilson, 526 U.S. at 608.

23. Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), withdrawn, 188 F.3d 1155 (9th Cir. 1999) (affirming the district court's decision in part, reversing in part, and remanding in part, due to the Supreme Court's opinion in Hanlon v. Berger, 526 U.S. 808 (1999)).

24. Hanlon, 526 U.S. at 808.
exposing the cable news network to liability for invading the ranchers' privacy.

The court of appeals had reversed a grant of summary judgment to CNN on the ranchers' claims, based on its conclusion that the media participated as "joint actors" with the law enforcement officers.\(^{26}\) In the wake of the Supreme Court's ride-along decision, the media aspect of the case has been remanded to federal district court in Montana for further proceedings.\(^{27}\)

This Comment examines the scope of the Court's ride-along opinion and its impact on newsgathering, and asserts that the Ninth Circuit's opinion on what elevates media cooperation in a police activity to the level of state action is fact-specific and so cannot be universally applied. This Comment further calls for courts facing questions over media-police cooperation to focus on what is "highly offensive"\(^{28}\) in balancing society's dual interests in protecting privacy and staying informed.

Specifically, Part II outlines the conflict between traditional privacy interests and the public's right to know about events and issues of social significance. It also examines the evolving judicial interpretation of what the First Amendment really protects when it comes to freedom of the press. Part III explains the U.S. Supreme Court's reasoning in Wilson as to why police violate the Fourth Amendment by taking reporters into private homes to witness searches and arrests, as well as why the officers involved in the Wilson case deserved qualified immunity anyway. It further discusses when non-police defendants should be able to claim a "good faith" defense to such suits, even without qualified immunity.

Part IV looks at the Wilson companion case, Hanlon v. Berger,\(^{29}\) in which the Supreme Court again granted qualified immunity to the officers involved but denied certiorari on the issue of whether CNN could be held liable for its role. It also more closely examines the joint actor doctrine invoked by the Ninth Circuit to hold the media accountable. Part V, meanwhile, assesses the impact on news coverage of both Wilson and the Ninth Circuit's assertion in Berger that news outlets may be held liable for Fourth Amendment violations if it is determined the media organization became a state actor. It further

\(^{25}\) See infra Part II.A.


\(^{27}\) Berger, 129 F.3d at 516.

\(^{28}\) Berger, 188 F.3d at 1155 (affirming in part, reversing in part, and remanding in part).

\(^{29}\) 526 U.S. 808 (1999).
argues that the Ninth Circuit's *Berger* reasoning should not extend to all cases involving media-police cooperation, because it is based on an extraordinary factual situation and the joint actor doctrine is not intended to be invoked in lesser circumstances.

II. PRIVATE V. PUBLIC INTERESTS

A. The Concept of Privacy

The oft-quoted article by Warren and Brandeis on privacy has led many jurisdictions over the years to recognize a common law right to privacy, the idea that, "[o]ne has a public persona, exposed and active, and a private persona, guarded and preserved. The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close." 30

The four traditional invasion of privacy torts are for intrusion upon seclusion, appropriation of name or likeness, publication of private facts, and false light publicity. 31 The test for each tort is whether a reasonable person would find the invasion to be highly offensive. 32 For example, intrusion upon seclusion is when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns" and the test is whether "the intrusion would be highly offensive to a reasonable person." 33

The second privacy tort, meanwhile, protects individuals from having their identities appropriated for the use or benefit of another. 34 The third refers to giving "publicity to a matter concerning the private life of another" in cases where the information revealed would be "highly offensive to a reasonable person" and not of legitimate interest to the public. 35 The fourth privacy tort covers situations in which one publicizes "a matter concerning another that places the other before the public in a false light." 36 That false light must be highly offensive to a reasonable person, and the actor must have had "knowledge of or acted

30. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998). Only two states have yet to recognize any of the four torts for invasion of privacy (although two others rejected "a common law basis for the right to privacy and instead provide statutory protection"). *Id.* at 234-35.


32. *Id.*

33. *Id.* § 652(B).

34. *Id.* § 652(C).

35. *Id.* § 652(D).

36. *Id.* § 652(E).
in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.\textsuperscript{37}

Although codified by statutes in only a few states, in recent years courts have increasingly adopted these invasion of privacy torts so that now only two states fail to recognize any of these torts.\textsuperscript{38} A third state, Minnesota, only recently acknowledged the common law right to privacy—but its supreme court recognized just three of the four actions in tort.\textsuperscript{39}

Debate continues, however, on where to draw the lines for each tort and on their relation to other torts, such as trespass. Yet it is well-established that one area protected by the common law right to privacy is the home.\textsuperscript{40} In issuing its ban on media ride-alongs to private residences, the U.S. Supreme Court noted that the sanctity of the home has been recognized at least as far back as 1604.\textsuperscript{41} And as William Blackstone noted in the 1760s:

\begin{quote}
[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome .... For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private.\textsuperscript{42}
\end{quote}

Courts today draw the line at the castle door even in cases involving the media.\textsuperscript{43} For example, in \textit{Dietemann v. Time}, the Ninth Circuit

\textsuperscript{37} Id.

\textsuperscript{38} See Lake v. Wal-Mart Stores, 582 N.W.2d 231, 234 (Minn. 1998) (identifying North Dakota and Wyoming as the holdouts and noting that Georgia was the first state to recognize the common law right to privacy).

\textsuperscript{39} See id. at 235 (recognizing the torts of intrusion upon seclusion, appropriation, and publication of private facts, but rejecting the tort of false light publicity because the court feared such claims would be too similar to claims under defamation).

\textsuperscript{40} See Wilson v. Layne, 526 U.S. 603, 610 (1999).

\textsuperscript{41} Id. at 609.

\textsuperscript{42} Id. at 610 (quoting \textit{WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND} 223 (1765-1769)).

\textsuperscript{43} See Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (ruling against magazine whose employees helped police while gaining entrance to man's home for a story); see also Miller v. NBC, 232 Cal. Rptr. 668 (Ct. App. 1986) (finding intrusion into privacy when television crew followed paramedics into woman's bedroom). \textit{But see} Deteresa v. ABC, 121 F.3d 460 (9th Cir. 1997) (finding no intrusion when media surreptitiously taped woman in front of her home).
found that *Life Magazine* invaded the privacy of a California man when it cooperated with Los Angeles County's district attorney to investigate whether the self-described "healer" was practicing medicine without a license.\(^{44}\)

A.A. Dietemann, a plumber, let a reporter and photographer into his home because they said a third person referred them for his services as a healer.\(^{45}\) Once inside, the two photographed Dietemann with a hidden camera and transmitted his conversation outside to a car occupied by another *Life* employee, a representative for the district attorney, and a public health official.\(^{46}\) The court, basing its decision on California law, rejected *Life*'s argument that it was not liable because its employees were gathering news and thus protected by the First Amendment.\(^ {47}\)

Yet each new invasion of privacy case involving the media must balance the individual's privacy against the First Amendment protections usually extended to news publishers and broadcasters, because of the public service involved in publicizing news.

**B. The Public's Right to Know**

The media defends its right to gather news on the grounds of "the public's right to know." Yet, the profession is sensitive to the balance required, as industry literature on ethics attests:

> There are few greater conflicts than the need for free information flow versus the rights of individuals to personal privacy. The public has a need for much information that others, for a variety of motives, would like to keep private . . . . Harm from privacy invasion is almost certain, but it is more difficult for a journalist to fully identify benefits from an intrusion. Thus, it is important to recognize that the primary ethical obligation of journalism is to inform the public by seeking truth and reporting it as fully as possible. That obligation must then be balanced against the obligation to respect individuals and their privacy.\(^ {48}\)

\(^{44}\) Dietemann, 449 F.2d at 246.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id. at 248.

\(^{48}\) JAY BLACK ET AL., DOING ETHICS IN JOURNALISM: A HANDBOOK WITH CASE STUDIES 167 (Sigma Delta Chi Foundation and the Society of Professional Journalists 1993). Journalism textbooks also take pains to warn future reporters to respect the balance: "Today, more than ever, many readers and viewers are asking the mass media to exercise
The "bible" of many daily newspapers, the Stylebook and Libel Manual produced by The Associated Press, even includes a chapter on "The Right of Privacy" that tries to guide reporters in their approach to privacy issues. It states in part:

When a person becomes involved in a news event, voluntarily or involuntarily, he forfeits the right to privacy. Similarly, a person somehow involved in a matter of legitimate public interest, even if not a bona fide spot news event, normally can be written about with safety. However, this is different from publication of a story or picture that dredges up the sordid details of a person's past and has no current newsworthiness.

Meanwhile, the Supreme Court has made it clear that even if an individual meets the requirements of a public figure, a media outlet still can be liable for invasion of privacy if a story contains "knowing or reckless falsehood." But it also makes allowances for non-malicious errors. In the 1967 case that applied First Amendment considerations to privacy issues, the Supreme Court wrote:

"The line between the informing and the entertaining is too elusive for the protection of... (freedom of the press)." Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent... "it must be protected, if the freedoms of expression are to have the 'breathing space' that they 'need... to survive'...." We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in a news article with a person's name, picture or portrait, particularly as related to non-defamatory matter.

restraint .... Journalists would do well to ponder these requests. Publish and be damned is still an appropriate response in some situations. But more often a thoughtful journalist will take a different tack." DON R. PEMBER, MASS MEDIA LAW 235 (McGraw Hill 2000).


50. Id.

51. Id. at 292 (quoting the Supreme Court in Time, Inc. v. Hill, 385 U.S. 374 (1967)).

52. Time, 385 U.S. at 388-89 (citations omitted) (discussing a privacy suit against Life magazine for its characterization of the new play The Desperate Hours as representing an incident from the plaintiff's life).
Yet recently many courts balancing privacy and First Amendment concerns have placed more emphasis on the rights of individuals. As the Dietemann court noted:

The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.\(^{53}\)

Such sentiment seems to signal a change from decisions in which courts upheld the media's First Amendment rights even over the concerns of individuals. For example, the 1964 landmark libel case, *New York Times Co. v. Sullivan*,\(^ {54}\) established that public officials cannot recover damages for stories "related to official duties unless they prove actual malice."\(^ {55}\) Three years later, the Supreme Court ruled that "the constitutional guarantees of freedom of the press are applicable to invasion-of-privacy cases involving reports of newsworthy matters."\(^ {56}\)

Courts that have taken a harder line toward the media in recent cases perceive a distinction between the broad First Amendment protection of the media's right to publish the news and the narrower right to gather the news. As the Dietemann court noted, "[p]rivilege concepts developed in defamation cases and to some extent in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication."\(^ {57}\) But the court also found that, "[n]o interest protected by the First Amendment is adversely affected by permitting damages for intrusion to be enhanced by the fact of later publication."\(^ {58}\)

More recently, the California Supreme Court distinguished between a documentary film crew's right to cover an accident scene and the

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55. ASSOCIATED PRESS, supra note 49, at 285. Although the Supreme Court later extended the rule to public figures in 1967, the definition of who is a public figure has narrowed in the ensuing years. See id. at 285-87.
56. Id. at 291 (commenting on Time, 385 U.S. at 374).
57. Dietemann, 449 F.2d at 249-250.
58. Id. at 250.
unreasonableness of continuing to film an accident victim who was being transported to a hospital.69

The 1990 car accident that injured Ruth Shulman and her son, Wayne, also pinned them in an overturned car.68 A camera operator riding along with the rescue helicopter crew called to the scene filmed efforts to free the Shulmans; footage was used for a segment of *On Scene: Emergency Response*, a documentary-style local television program.61 The material included audio obtained via a wireless microphone worn by a nurse on the helicopter crew.62

Ruth and Wayne Shulman sued Group W Productions for invasion of privacy, alleging publication of private facts and intrusion.63 California's highest court rejected the claim for publication of private facts, finding that "the material broadcast was newsworthy as a matter of law and, therefore, cannot be the basis for tort liability under a private facts claim."64 But the court said the intrusion claim—based on the Shulmans' "objectively reasonable expectation of privacy in the interior of the rescue helicopter"—should be heard by a jury.65

The *Shulman* court also concluded Group W could not argue that its alleged intrusion was permissible as long as there existed a legitimate public interest in the information gathered and the conduct itself was lawful.66 The court concluded that "[t]he constitutional protection accorded newsgathering, if any, is far narrower than the protection surrounding the publication of truthful material."67

This distinction between the media's First Amendment right to publish (or broadcast) and reporters' permissible conduct in gathering information to publish (or broadcast) is reflected in judicial decisions on

60. Id. at 475.
61. Id. at 474-75.
62. Id. at 475.
63. Id. at 476.
64. Id. at 477.
65. Id. at 490. An earlier California case noted that the *Restatement (Second) of Torts* § 652(B) reference to an intrusion "highly offensive to a reasonable person" may be a jury standard, but a court must make a preliminary finding of "offensiveness" based on "the degree of intrusion;" the context, conduct, and circumstances of the intrusion; "the intruder's motives and objectives;" the setting into which the intrusion occurs; and "the expectations of those whose privacy is invaded." Miller v. NBC, 232 Cal. Rptr. 668, 679-80 (Ct. App. 1986).
66. See *Shulman*, 955 P.2d at 495-96.
67. Id. at 496. The court also noted, "[n]o constitutional precedent or principle . . . gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast." Id. at 497.
the appropriateness of media ride-alongs during the execution of search warrants. For example, a federal district court in New York considering a Fourth Amendment cause of action against a Secret Service agent and media outlet found that the broadcaster "had no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the photographic record . . . . CBS claims no First Amendment right to be present." 68

Second Circuit Court of Appeals judges, in affirming the lower court's refusal to dismiss the suit against the Secret Service agent, noted that the officer "exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there." 69 The appeals court thus denied the agent's assertion of qualified immunity, finding that the Fourth Amendment ban on unreasonable searches (which includes bringing along the media) was well-established and that the agent "could not with objective reasonableness have believed" his conduct was constitutional. 70

When the Ninth and Fourth Circuits later split on whether qualified immunity extended to government agents who let reporters join them during the execution of search warrants, the U.S. Supreme Court chose to weigh in on the issue of media ride-alongs. 71 Its decision ultimately clarified matters regarding ride-alongs to private homes, but left other questions unanswered.

III. A BRIGHT LINE IN WILSON V. LAYNE

A. Constitutional Right Violated

Charles and Geraldine Wilson were still in bed the morning of April 16, 1992, when U.S. marshals and county police entered their home with

69. Ayeni, 35 F.3d at 686.
70. Id. See discussion of qualified immunity infra Part III.B.
71. Compare Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) (holding police officers deserve qualified immunity because at the time of the 1992 search, no court had found that media presence during the execution of a warrant violated the Fourth Amendment), with Hanlon v. Berger, 129 F.3d 505 (9th Cir. 1997) (holding agents who invited media along on a raid violated the Fourth Amendment and so are not entitled to qualified immunity), withdrawn, 188 F.3d 1155 (9th Cir. 1999) (amending order based on U.S. Supreme Court decision).
a search warrant, looking for the Wilsons' son, Dominic. When he went to investigate, the partially dressed Charles Wilson found armed men in street clothes in his living room. His wife, still in her nightgown, arrived to find the men restraining her angry husband on the floor. Once the officers determined Dominic Wilson was not in the home, they left.

Having police enter their home in such a manner might have been startling enough for the Wilsons, but the fact that the officers had invited along a reporter and photographer from the Washington Post made the situation worse. The Wilsons sued the officers as individuals for damages, alleging the officers violated their constitutional rights by including the media in the execution of the search warrant.

The U.S. Supreme Court agreed with the Wilsons that the officers violated their Fourth Amendment rights, and banned police from inviting reporters or others along during the execution of a warrant when the presence of third parties is not needed to execute the warrant. The Court noted:

Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home. And even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant.

The Court's work was not finished, however; it next had to decide whether the right not to have police include the media while serving

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72. See Wilson v. Layne, 526 U.S. 603, 607 (1999). The police action was part of Operation Gunsmoke, a fugitive apprehension effort carried out by U.S. Marshals and local police. Dominic Wilson became an Operation Gunsmoke target by violating his parole on previous felony convictions. Id. at 606-07.
73. Id. at 607.
74. Id.
75. Id.
76. Id. The reporter and photographer had been invited under the Marshal's Service's standard ride-along policy. Id.
77. Id. at 608. The Wilsons sued the federal officers directly under the Fourth Amendment (a Bivens suit) and the state officers under 42 U.S.C. § 1983. Both allow plaintiffs "to seek money damages from government officials who have violated" their Fourth Amendment rights. Id. at 609.
78. Wilson, 526 U.S. at 604.
79. Id. at 613.
warrants at private homes had been clearly established at the time of the Wilson raid. The Court's answer—that the right was not clearly established—meant the officers involved could assert the doctrine of qualified immunity and thus avoid paying any damages to the Wilsons. The case thus provides a bright line regarding ride-alongs to private residences: Officers who let reporters join them in serving warrants prior to May 1999 are not liable for the constitutional violation, but any police officer foolish enough to invite the media along in the future will personally pay for the mistake.

Meanwhile, only days later the Court avoided deciding whether the media itself should reach for a checkbook in either instance. But, it would be premature to assume the Court denied certiorari because it agreed with the circuit court's analysis that the media involvement had risen to the level of state action. It is as reasonable to assume the Court wanted a trial court to consider the liability issue.

B. Qualified Immunity

The doctrine of qualified immunity shields "government officials performing discretionary functions" from civil damages as long as their actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." This doctrine recognizes that there are "special policy concerns involved in suing government officials," including the harm to government efficiency

80. "[G]overnment officials performing discretionary functions' generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Court's landmark Harlow decision endorsed "[r]eliance on the objective reasonableness of an official's conduct" over a subjective test for "malicious intention" in weighing when a state actor may assert qualified immunity so as to further the interests of governmental and judicial efficiency. Id.

81. Wilson, 526 U.S. at 615.


83. See Richardson v. McKnight, 521 U.S. 399, 413 (1997) (noting "it is for the District Court to determine whether ... defendants actually acted 'under color of state law'" for purposes of § 1983 liability).

84. Wilson, 526 U.S. at 614.

85. Harlow, 457 U.S. at 818 (1982). The Supreme Court's approach to immunity (absolute v. qualified) for a government actor depends on "the function performed by that official in a particular context." Karen M. Blum, Section 1983: Qualified Immunity, in 14TH ANN. SEC. 1983 CIVIL RIGHTS LITIG., at 407, 410 (PLI Litig. & Admin. Practice Course, Handbook Series No. H0-002B, 1998) available at Westlaw at 595 PLI/Lit 407. Generally, only officials carrying out judicial, legislative, or prosecutorial functions have been given absolute immunity. Id.

caused by "lengthy judicial inquiry into subjective motivation."\textsuperscript{87}

The Court has refined its qualified immunity analysis in several cases over the years.\textsuperscript{88} The overall immunity analysis starts by allocating immunity—whether absolute or qualified—according to the official's function in a given circumstance.\textsuperscript{89} Judges and lawmakers, for example, have absolute immunity anytime they act in their official capacities.\textsuperscript{90} Other government actors, including law enforcement officers, can be immune from civil damages when performing their duties under certain circumstances.\textsuperscript{91}

The immunity issue, of course, only arises if it is determined that a § 1983\textsuperscript{92} or Bivens\textsuperscript{93} suit alleges an actual constitutional violation. Furthermore, the Supreme Court reiterated in Wilson that "clearly
"clearly established" means the right must be so apparent "a reasonable official would understand that what he is doing violates that right." The Court added that because the right must be "defined at the appropriate level of specificity," the officers in Wilson could assert qualified immunity because media ride-alongs were common in 1992 and no court had held the practice to be unlawful when it continued into a home. Therefore, the right was not "clearly established" at the time of the raid because a reasonable officer could have assumed it was appropriate to invite the media to the Wilsons' home.

Complicating the issue of qualified immunity is the question of when it may apply to private actors. Although private actors may be sued in some circumstances under 42 U.S.C. § 1983 or Bivens, the Court has indicated the rationale for qualified immunity does not easily apply to private parties.

Faced with the specific question of whether qualified immunity extends to private actors facing § 1983 liability "for invoking a state replevin, garnishment, or attachment statute" the Court ruled in Wyatt v. Cole that it does not. Yet in deciding the case, the Court also said the traditional public policy rationales for extending qualified immunity to state actors "are not applicable to private parties." The Wyatt court further noted that despite "principles of equality and fairness" which might suggest extending qualified immunity to private actors, such interests do not justify any expansion.

95. Id.
96. Id.
97. Id.
98. The joint action doctrine asserts that private actors can be deemed government actors if they are "willful" participants in some government action. See Berger v. Hanlon, 129 F.3d 505, 514 (9th Cir. 1997), withdrawn, 188 F.3d 1155 (9th Cir. 1999) (affirming the district court's decision in part, reversing in part, and remanding in part, due to the Supreme Court's opinion in Hanlon v. Berger, 526 U.S. 808 (1999)). The Ninth Circuit noted the joint action test is met "when the plaintiff is able to establish an agreement, or conspiracy between a government actor and a private party." Id.; see also discussion infra Part IV.B.
100. Wyatt, 504 U.S. at 168-69.
101. Id. at 167. The Wyatt court noted since "private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good," the public interest would not be harmed by denying them qualified immunity. Id.
102. Id.
This language seems to have led some lower courts to conclude that qualified immunity may never extend to private actors facing § 1983 suits. For example, in its revised opinion in Berger, the Ninth Circuit cited Wyatt—but provided no discussion—to assert that the "media defendants... are not entitled to assert qualified immunity as a defense." It cited an earlier Ninth Circuit case that had characterized Wyatt as "concluding that private actors are not entitled to the absolute immunity it granted to some government officials" and those "'who conspire with state officials to violate constitutional rights' are not entitled to the good faith immunity, also known as qualified immunity, available to other public officials."

Meanwhile, other commentators have found in Wyatt an implicit concern that extending qualified immunity to private parties would serve merely commercial, rather than public, interests. Yet there seems to be a valid question as to whether the media should be viewed as serving only its own commercial interests, rather than the public good. Any newspaper or broadcast outlet obviously has an interest in commercial viability, but it should not be assumed that the media's public-service function is somehow less important. As Paul McMasters, First Amendment ombudsman for the Freedom Forum in Arlington, Virginia, noted recently, "You can't be a good citizen, a good voter, a good taxpayer without knowing how your government operates."

C. "Good Faith" Defense?

The Supreme Court has twice declined to address the question of whether private actors lacking immunity to federal civil rights suits may still assert an affirmative "good faith" defense. Although a pre-Wyatt decision from the Eleventh Circuit in 1988 cited the "existence of a good

103. See Richardson, 521 U.S. at 404 (noting the Sixth Circuit "conceded that other courts had reached varying conclusions about whether, or the extent to which, private sector defendants are entitled to immunities of the sort the law provides governmental defendants").
104. Berger v. Hanlon, 188 F.3d 1156, 1157 (9th Cir. 1999).
faith... defense in common law" to apply the qualified immunity doctrine to private defendants, noting "it would be unfair to treat private parties as state actors but deny them the same immunity granted to public officials," the Wyatt court rejected such reasoning. It instead reiterated that it had "established an 'immunity from suit rather than a mere defense to liability,'" seemingly preserving the two as separate concepts.

Since Wyatt, circuit courts of appeals have recognized that the Supreme Court "expressly left open the question of whether private parties acting under color of law could raise" a good-faith defense to a Bivens suit. The Third Circuit concluded in 1994 that "'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity." The Supreme Court itself noted in the 1997 case Richardson v. McKnight that Wyatt was a limited decision, not applicable to all private parties no matter their relationship to the government. The Court also said Richardson was a narrow decision, "[w]e have answered the immunity question narrowly, in the context in which it arose" and that it had not decided whether the private defendants could assert a good-faith defense.

This seems to leave the door open for CNN to assert a good-faith defense to the Bergers' claim and prove its subjective lack of malice in covering the Montana ranch raid. It simply does not seem logical to

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109. Schaffer, supra note 106, at 1065 (quoting Jones v. Preuit & Mauldin, 851 F.2d 1321 (11th Cir. 1988)(en banc). But see Wyatt, 504 U.S. at 167 (noting the Court recognized qualified immunity "based not simply on the existence of a good faith defense at common law, but on the special policy concerns involved in suing government officials").

110. Schaffer, supra note 106, at 1065. The author adds, "Such a result, the court stated, would render private defendants 'more liable' than public defendants." Id.

111. Wyatt, 504 U.S. at 167. Chief Justice Rehnquist's dissent notes early ambiguity over whether good faith was a defense or an immunity. Id. at 176-77.

112. Id. at 166 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

113. A good-faith defense has been characterized as traditionally requiring a showing that a defendant either "acted without malice or... acted with probable cause." Id. at 177 (Rehnquist, C.J., dissenting).

114. Blum, supra note 85, at 418 (quoting Vector Research, Inc. v. Howard & Howard Attorneys, 76 F.3d 692, 699 (6th Cir. 1996) and citing Jordan v. Fox, 20 F.3d 1250 (3d Cir. 1994)).

115. Id. (quoting Jordan, 20 F.3d at 1276).


117. Id. at 404.

118. Id. at 413-14
ignore the media's duty to report on matters of "public or general interest." 119

Of course, even such duty to the public will not afford CNN a good-faith defense to the Bergers' "state law claims for trespass and intentional infliction of emotional distress." 120 The interests of newsgathering clearly do not excuse unlawful media behavior, 121 including trespass or an intrusion that violates an individual's reasonable expectations of privacy. 122 "The press is limited by the laws that limit everyone else," Privacy Journal editor Robert Ellis Smith told the Christian Science Monitor in the wake of Wilson, adding "The press has no special standing to violate laws." 123

But even if CNN could successfully assert a good-faith defense regarding the constitutional issue in this case, the precedent would be of limited use to the Fourth Estate: The Court's bright-line ride-along rule means any such precedent logically could apply only to acts committed prior to the Wilson v. Layne 124 and Hanlon v. Berger 125 decisions, since the police and media are now on notice that such ride-alongs violate the Fourth Amendment. It seems unlikely that any future media organization could assert even a subjectively based good-faith defense when the Supreme Court has spoken so clearly.

Those in the media should be more concerned with their less clearly defined chances of being labeled, Berger-style, as government actors because of their approach to newsgathering. Since the Supreme Court did not address cases in which the media is invited to witness law enforcement activities outside of private homes, it seems certain that the issue will be raised by future litigation. In fact, a recent Second Circuit case 126 holding that police violated a criminal suspect's Fourth Amendment rights by arranging a "perp walk" 127 for the media noted

119. Warren & Brandeis, supra note 1, at 214.
120. Berger v. Hanlon, 188 F.3d 1155, 1157 (9th Cir. 1999).
122. See discussion supra Part II.A. and infra Part V.C.
126. Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000). As in Wilson, the court granted qualified immunity to police because the Fourth Amendment violation was not clearly established at the time of the incident. Id. at 216.
127. A so-called perp walk "is a widespread police practice ... in which the suspected perpetrator of a crime, after being arrested, is 'walked' in front of the press so that he can be photographed or filmed." Id. at 203.
the court did not touch on the news organization's liability because the television station "was never a party to this lawsuit." Before Berger, it seemed doubtful a court would have felt compelled to even mention the issue.

Resolution of the Bergers' case against CNN thus will provide clues to the next pendulum swing in the effort to balance society's dual interests in privacy and a free press.

IV. BERGER V. CNN

A. Setting the Scene

Paul and Erma Berger sued both federal agents and a news organization in the wake of a 1993 raid on their 75,000-acre Montana ranch. The United States Fish and Wildlife Service, acting on complaints from former Berger employees that the ranchers had poisoned or shot eagles, obtained a warrant to search the spread (including the Bergers' home). Although the Bergers did not know it, the agent leading the search wore a microphone and the video cameras being used belonged to CNN.

The Bergers found out later that CNN and TBS had learned of the upcoming search and struck a deal with federal agents to ride-along on the raid to obtain footage for an environmental program. CNN drafted a letter promising not to air video footage of the raid unless the government opted not to press charges against the Bergers, a jury had been seated in any resulting trial, or the case had been otherwise resolved.

The Ninth Circuit later ruled that the federal agents had violated the Bergers' constitutional rights and could not assert qualified immunity to avoid paying damages. Although the United States Supreme Court

128. Id. at 213-214.
129. Berger v. Hanlon, 129 F.3d 505, 508 (9th Cir. 1997), withdrawn, 188 F.3d 1155 (9th Cir. 1999) (affirming the district court's decision in part, reversing in part, and remanding in part, due to the Supreme Court's opinion in Hanlon v. Berger, 526 U.S. 808 (1999)).
130. Id.
131. Id. at 509.
132. Id. at 508.
134. Berger, 129 F.3d at 510.
agreed that the agents had violated the Bergers' Fourth Amendment rights by allowing the media ride-along, it found that qualified immunity did apply. Accordingly, the Ninth Circuit initially withdrew its 1997 decision before amending the order to affirm the district court's grant of summary judgment in favor of the officers.

But the Bergers' lawsuit against CNN was ordered to trial. Although the district court originally dismissed the Bergers' claims against the news organization, a three-judge panel for the Ninth Circuit found that CNN and TBS were not entitled to summary judgment because they "participated as 'joint actors' with the federal officers." In their mop-up decision the appellate judges took care to note, "[t]he media defendants have not asserted and are not entitled to assert qualified immunity as a defense." The question that will eventually face a jury is the extent of the media's liability to the Bergers for what the Ninth Circuit labeled as state action.

B. Joint Action

1. Applied in non-media cases

The question of whether reporters become state actors in gathering news with the cooperation of police officers may be a relatively recent one. But the courts have had many opportunities to consider what constitutes state action by a private party in other situations.

For example, the Court clarified in 1980 that § 1983's liability for those acting under the color of state law is not limited to officers of the state. The Court held it is "enough that [a defendant] is a willful participant in joint action with the State or its agents." Thus "[p]rivate

135. See discussion of reasoning in companion Wilson case, supra Part III.
137. As of fall 2000, the case was still pending in federal district court in Billings, Montana.
138. Id. at 1157.
140. See Blum v. Yaretsky, 457 U.S. 991 (1982) (holding a private nursing home was not a state actor despite state regulation and support); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (declining to label a private school as a state actor despite state contract and funding); United States v. Kennedy, 81 F.Supp. 2d. 1103 (D. Kan. 2000) (finding an Internet service provider was not a state actor when it searched files of a client and notified police of images of child pornography).
142. Id.
persons, jointly engaged with state officials in the challenged action" are liable under § 1983.\textsuperscript{143}

Moreover, in 1982's landmark \textit{Lugar v. Edmondson Oil Co., Inc.} the Supreme Court decided a corporate creditor who merely sought and received pre-judgment attachment of a debtor's property had acted under color of state law and so could face a § 1983 suit.\textsuperscript{145} The Court reiterated that a party accused of conduct violating a federal right "must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."\textsuperscript{146} Interestingly, Justices Rehnquist and O'Connor joined in Justice Powell's dissent, which called the majority's decision "a disquieting example of how expansive judicial decision-making can ensnare a person who had every reason to believe he was acting in strict accordance with law."\textsuperscript{147}

More recently, the Eleventh Circuit held that a therapist involved in a child sexual abuse investigation had not become a state actor under § 1983.\textsuperscript{148} The court found that the private therapist, hired by the children's mother, had no formal role in the police investigation despite being present while officers interviewed the children.\textsuperscript{149} The Eleventh Circuit also declined to extend the state actor label to the husband of an involuntarily committed woman, his attorney, her private doctor, or a private hospital.\textsuperscript{150} The court found that none of the parties' conduct in committing the woman satisfied any of the tests for "establishing state action by what is otherwise a private person or entity: the public

\textsuperscript{143.} \textit{Id.} at 27-28.
\textsuperscript{144.} \textit{457 U.S.} 922 (1982).
\textsuperscript{145.} After a hearing the attachment was dismissed because the creditor "failed to establish the statutory grounds for attachment alleged in the petition." \textit{Id.} at 925. The debtor's subsequent § 1983 suit alleged a violation of the 14th Amendment in that the creditor "acted jointly with the State to deprive him of his property without due process of law." \textit{Id.} The Court found no distinction between conduct that satisfied the constitutional requirement of state action and conduct which amounted to acting under color of state law for statutory purposes. \textit{Id.} at 934-35.
\textsuperscript{146.} \textit{Id.} at 937.
\textsuperscript{147.} \textit{Id.} at 944 (Powell, J., dissenting).
\textsuperscript{148.} \textit{Lowe v. Aldridge}, 958 F.2d 1565 (11th Cir. 1992).
\textsuperscript{149.} \textit{Id.} at 1572-73. Interestingly, less than a month before the Supreme Court's \textit{Wyatt} decision blocked private actors from asserting qualified immunity, this court noted that even if the therapist had acted under color of state law "she would be entitled to qualified immunity along with [the police]" because the plaintiff had to prove such conduct "violated clearly established constitutional law" and demonstrated "a lack of good faith." \textit{Id.} at 1573.
function test, the state compulsion test, and the nexus/joint action test. The public function test is a limited one covering "only private actors performing functions 'traditionally the exclusive prerogative of the State,'" while the state compulsion test requires the government to have "coerced or at least significantly encouraged the action alleged to violate the Constitution." The nexus/joint action test requires a "symbiotic relationship [which] must involve the alleged constitutional violation" and be judged according to "the peculiar facts or circumstances present."

2. Applied in media cases

The courts also have previously considered whether various forms of media conduct rose to the level of state action, but before Berger judges tended to dismiss the suggestion. For example, in a 1979 Wisconsin case a state appeals court rejected the notion that a reporter who accompanied police investigating reports of shots being fired from a doctor's home/office had acted under color of state law. Although the reporter entered the building with police and filmed officers seizing guns and interviewing the doctor, the court held that the reporter "acted exclusively for his private employer" and the mere filming and broadcast "without more" did not make an otherwise reasonable search and seizure unreasonable. Of course, the court's permissive approach to a reporter riding along with police to a suspect's home is no longer valid in the wake of Wilson v. Layne, but its analysis

151. Id. at 1130.
152. NBC v. Communications Workers of Am., 860 F.2d 1022, 1026 (1988) (finding that a union's conduct in barring certain reporters from its convention at a publicly owned facility did not rise to the level of state action) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).
153. NBC, 860 F.2d at 1026.
154. Id. at 1027.
155. Id. at 1028 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725-26 (1961)). Other jurisdictions, such as the Ninth Circuit, view the nexus and joint action evaluations as separate tests. See Berger v. Hanlon, 129 F.3d 505, 514 (9th Cir. 1997), withdrawn, 188 F.3d 1155 (9th Cir. 1999) (affirming the district court's decision in part, reversing in part, and remanding in part, due to the Supreme Court's opinion in Hanlon v. Berger, 526 U.S. 808 (1999)).
157. Id. at 773.
158. Id. at 774.
159. Id.
of what does or does not constitute state action by the media remains compelling in its emphasis on reasonableness. The court further noted that the circumstances did not involve "intimate, offensive or vulgar aspects" and the police raid itself was not confidential since it more resembled "the charge on San Juan hill."

More recently, a Georgia federal district court decided that a television crew had not acted under color of state law by filming inside a prison for a segment called Living the Good Life. The Eighth Circuit, meanwhile, found no state action on the part of a television crew that merely videotaped police raiding a home with a search warrant, an example of the type of ride-along now banned by Wilson v. Layne. And the district court in Nichols v. Hendrix found no joint action on the part of multiple news organizations that covered a police raid, factually distinguishing it from the Berger incident.

3. Applied in Berger

In its original Berger decision, the Ninth Circuit noted that the question of whether acts of private parties rise to the level of state action is a "highly factual inquiry." It outlined the four tests available for such an inquiry, before opting for the so-called joint action test. Referring to the Supreme Court's decision in Dennis v. Sparks, the appellate panel said private parties can be considered government actors if they willingly participate in joint action with the government or its agents.

The Ninth Circuit held that CNN had become a joint actor with the federal agents (meaning the news organization acted "'under color' of law for purposes of [Bivens] actions") by virtue of the verbal and

161. Prahl, 295 N.W.2d at 774.
162. Id.
164. Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996) (finding that the media outlet and police did not aid each other in their separate tasks).
167. Berger v. Hanlon, 129 F.3d 505, 514 (9th Cir. 1997), withdrawn, 188 F.3d 1155 (9th Cir. 1999) (affirming the district court's decision in part, reversing in part, and remanding in part, due to the Supreme Court's opinion in Hanlon v. Berger, 526 U.S. 808 (1999)).
168. Id.
170. Berger, 129 F.3d at 514.
171. Id. (quoting Dennis, 449 U.S. at 27-28) (brackets in original).
written agreements, sharing of confidential information, and the federal agents' attention to enhancing the search’s "entertainment, rather than its law enforcement value." 172

Although CNN sought U.S. Supreme Court review of this aspect of the Bergers' lawsuit, the Court declined.173 And after an en banc review of the case, the Ninth Circuit noted the Supreme Court had affirmed its "holding that a violation of the Fourth Amendment occurred in this case."174 CNN and media observers now await the expected trial that will determine the media organization's liability under the joint actor designation.

V. ASSESSING MEDIA LIABILITY

A. Distinguishing Berger

The Bergers' suit against CNN no doubt will be watched closely by media outlets and other media observers. The idea that reporters may be held personally liable for constitutional torts alleged to have occurred in the traditional process of covering police and crime is likely to concern print and broadcast journalists. (Ironically, the reality-based entertainment shows are likely to keep rolling, given industry reaction to the Wilson decision.)175 But perhaps the media would be wise to avoid indulging in too much hand wringing just yet.

Even assuming that CNN's extraordinary cooperation with the federal agents did rise to the level of state action, the long-term effect of the Ninth Circuit's ruling remains murky. It seems unlikely that courts across the country will be jumping at the chance to label news organizations as having acted under color of state law—mostly because CNN's extreme level of involvement is rare in the world of real journalism.176

It illustrates the danger posed by news organizations eager to be
first with a report and willing to do whatever that goal requires.\textsuperscript{177} Yet, that is not the outlook of all journalists. It is much more common for a news organization to join police on routine patrols of public streets than to collaborate on raiding a private residence.\textsuperscript{178}

Thus, future courts considering whether media acts constitute public acts, will be hard-pressed to cite Berger as precedent for making such calls. Berger is far too fact-specific: Representatives of a news program with a decidedly environmental spin urged police to strike a deal allowing exclusive coverage of a raid in exchange for the news organization's promise to delay publication essentially until authorities signal approval.\textsuperscript{179} As part of the act, federal agents don hidden microphones and take pains to draw soundbite-worthy conversation from suspects.\textsuperscript{180}

News coverage, even of police activities, simply does not occur in such a manner on a regular basis. Even the U.S. attorney in Montana at the time of the Berger raid later noted she had tried to keep her assistant, who signed the deal with CNN, from carrying out the plan because she feared it would violate the Berger's privacy.\textsuperscript{181} The newly retired official saw a difference between media ride-alongs that result in "showing the public a cocaine operation and 'a rancher who had eagles bothering his sheep.'"\textsuperscript{182} This view reflects a level of reasonableness that balances societal interests with privacy concerns; it is one that should factor more prominently in the conduct of the media, police, and courts.

For example, a court deciding whether a media organization was a joint actor in law enforcement activity should realize that the Dennis\textsuperscript{183} standard of willful participation in a conspiracy with state officials will rarely be met. As even the Ninth Circuit noted in distinguishing Berger from cases that found no joint action between the media and police for

\textsuperscript{177} "As the Berger case reveals, it is all too tempting for a competitive press to sacrifice its long-run interests in independence in order to achieve short-run advantages." Randall P. Bezanson, Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press, 47 EMORY L. J. 895, 913 (1998).

\textsuperscript{178} This is most likely due to the "guarded nature" of the police, which requires reporters on the police beat to develop "inside sources." MELVIN MENCHER, NEWS REPORTING AND WRITING 435 (7th ed. 1997).

\textsuperscript{179} See supra Part IV.A.

\textsuperscript{180} See id.

\textsuperscript{181} Jonathan Ringel, A New Wrinkle in CNN Case; Days Before High Court Showdown, Former U.S. Attorney Speaks Out, FULTON COUNTY DAILY REPORT, March 19, 1999.

\textsuperscript{182} Id.

\textsuperscript{183} Dennis v. Sparks, 449 U.S. 24, 28 (1980).
purposes of civil rights liability, the "highly factual inquiry"\textsuperscript{184} required for such a determination also must include an examination of the state's conduct.\textsuperscript{185} In other words, it can be argued that merely bringing news crews along during a raid on a public business or clinic reasonably is not enough to trigger joint action,\textsuperscript{186} but recreating a suspect's arrival at a police station for the media's benefit reasonably is enough.\textsuperscript{187}

Reporters and police officers likewise should consider what the public would label as reasonable\textsuperscript{188} in the pursuit of newsgathering that furthers the societal aim of watching over the state. Avoiding Berger-style agreements, for example, is an obvious initial goal.

\textbf{B. Beyond Wilson}

Because the Supreme Court said nothing specifically about the media continuing to ride along during routine police shifts or gathering news in public places such as streets, the media certainly will not be completely frozen out of covering police and crime news by the home ride-along ban.\textsuperscript{189}

There may be a chilling effect, however, on newsgathering, especially when coupled with "lawsuits that target surreptitious news-

\textsuperscript{184} Berger v. Hanlon, 129 F.3d 505, 514 (9th Cir. 1997), withdrawn, 188 F.3d 1155 (9th Cir. 1999) (affirming the district court's decision in part, reversing in part, and remanding in part, due to the Supreme Court's opinion in \textit{Hanlon v. Berger}, 526 U.S. 808 (1999)).

\textsuperscript{185} Id. at 515-16 (finding "nothing passive about the government's involvement with the media in this case").

\textsuperscript{186} See Swate v. Taylor, 12 F.Supp. 2d 591, 596-97 (S.D. Texas 1998) (holding a federal drug enforcement officer infringed the Constitution by "giving news crews access" to four methadone clinics during records searches); Ohio v. Covey, No. L-98-1173, 2000 WL 638951 (Ohio App. 2000) (finding no constitutional violation when a humane society allowed media coverage of a raid on a business but did not specifically invite reporters along).

\textsuperscript{187} See Lauro v. Charles, 219 F.3d 202, 213 (2d Cir. 2000) (holding the "staged recreation" "lacked any legitimate enforcement purpose, and hence was unreasonable").

\textsuperscript{188} University of Virginia Law Professor Robert M. O'Neil argues that although the question of whether media cameras invade privacy should continue to turn on the reasonable expectation of privacy in a given place, "rapidly changing technology and novel means of gathering information" are blurring the distinction. Robert M. O'Neil, \textit{Ride-Alongs, Paparazzi, and Other Media Threats to Privacy}, 33 U. RICH. L. REV. 1167, 1183 (2000).

\textsuperscript{189} The lawyer who represented the police officers in both \textit{Wilson} and \textit{Berger} believes the Court meant to indicate the media could observe police activities "as long as journalists stay outside when officers enter private homes." Laurie Asseo, \textit{Court Bars Press Entry in Homes with Police}, MILWAUKEE J. SENTINEL, May 25, 1999, at A12. See also Deleith Duke Gossett, \textit{Constitutional Law and Criminal Procedure—Media Ride-Alongs into the Home: Can They Survive a Head-on Collision Between First and Fourth Amendment rights?} Wilson v. Layne, 22 U. ARK. LITTLE ROCK L. REV. 679,708 (2000) (noting the media "may still trail officers on the street and from the curb, and obtain footage there, if the law enforcement officers wish to continue the practice").
gathering techniques, even when the story has a compelling public interest."\(^{190}\) Police, for example, may become wary of reporters being present at any law enforcement activity. The result could be a reduced "watchdog" role for the press, meaning reporters will have less access to "monitor abuse of government power 'by observing and recording first hand the activities of government officials charged with enforcing the law.'"\(^{191}\)

Coupled with the wariness which courts have recently exhibited in approaching media cases,\(^{192}\) \textit{Wilson} may prove to curb more media conduct than even the Supreme Court intended.\(^{193}\)

\textit{C. Under Tort Law}

The media's liability for torts committed in the process of newsgathering is unlikely to be affected by \textit{Wilson} and \textit{Berger}. There simply is no absolute privilege for newsgathering.\(^{194}\) And as the Supreme Court noted in 1991, "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."\(^{195}\)

Newsgathering tort cases in recent years have alleged trespass, fraud, misrepresentation, theft, conversion, and assault and battery, as well as invasion of privacy, intrusion, and harassment.\(^{196}\) Such actions have been found not to infringe the First Amendment because they allege a harm


191. Rebecca Porter, \textit{Media 'Ride-Alongs' Violate the Constitution, Supreme Court Rules}, TRIAL, July 1999 at 120 (quoting the amicus curiae brief filed in \textit{Wilson} on behalf of news organizations). The attorney who filed the brief predicted \textit{Wilson} would have "an unfortunate effect on news reporting." Id.


193. 526 U.S. 603, 613 (1999) (noting "[n]o one could gainsay . . . the importance of the First Amendment in protecting press freedom from abridgment by the government").

194. See PEMBER, supra note 48, at 365 (discussing \textit{Branzburg v. Hayes}, 408 U.S. 665 (1972) (finding no privilege protecting reporters from being forced to reveal confidential sources to a grand jury)).


from the newsgathering itself, not the publication of news.197

Thus, reporters and photographers need to continue to be aware of
crossing the line from legal to illegal acts in the gathering of news. Of
course, the line may be easy to spot when the media contemplates, for
example, entering someone's back yard. But it may be more difficult to
determine what is reasonable under state tort laws when reporters are
gathering news at a place of business.

For example, the California Supreme Court recently ruled that
ABC's *Prime Time Live* violated the privacy of a psychic hotline
employee by using a hidden camera to record conversations in the
workplace.198 The opinion found that the reasonable expectation of
privacy in a place of employment depends on the "identity of the
claimed intruder and the means of intrusion."199 Thus, despite no
reasonable expectation of complete privacy in workplace conversations,
ABC stepped over the line.200

VI. CONCLUSION

Even the Supreme Court admits there may be a level of legitimate
government interest inherent in encouraging certain forms of media
ride-alongs.201 Thus the tension between an individual's right to privacy
and the public's right to know cannot be resolved in the arena of police
coverage by means of a ban on all ride-alongs. Existing working
relationships between reporters and police should continue to the extent
that the Fourth Amendment concerns of *Wilson* are not implicated.

The media, meanwhile, should not panic over the prospect of being
declared an agent of the state anytime reporters seek to cover the
activity of law enforcement agencies. The facts of *Berger v. CNN* simply
are too narrow for widespread use of a Ninth Circuit-style application of
the joint actor test. And even in cases arising from incidents prior to
*Wilson*, media organizations such as CNN may properly and successfully
assert a good faith defense to a § 1983 or *Bivens* suit.

But overall, media organizations and reporters need to put

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197. Id.
200. See id.
themselves in a reasonable person's shoes in considering what would be an appropriate newsgathering technique. Such minimal self-restraint, mimicking the statutory and judicial approach to privacy issues, is the best way to guarantee a continued balance between society's dual interests in protecting privacy and staying informed.

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