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# Quid Pro Quo: Piercing the Reporter's Privilege for Media Who Ride Along

Dina Hovsepian

*Loyola Law School Los Angeles*

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***QUID PRO QUO:***  
**PIERCING THE REPORTER'S PRIVILEGE FOR**  
**MEDIA WHO RIDE ALONG**

*Dina Hovsepian*\*

The reporter's privilege, also known as the reporter's shield law, exists to protect reporters from forced disclosure regarding confidential information and sources. Stemming from the First Amendment right to freedom of press, this privilege seeks to safeguard the free flow of information. However, reporters are frequently participating in media ride-alongs during which they are permitted to accompany police officers in their daily duties. As a result of these ride-alongs, reporters witness arrests, search warrant executions, and crime scene investigations. When subsequently subpoenaed to testify during the criminal trial related to those events, these reporters assert their privilege and refuse to testify. Often times, courts uphold their privilege. However, doing so infringes on the criminal defendant's Sixth Amendment right to a fair trial. An exception to the reporter's privilege should be implemented when a reporter participates in a media ride-along since testifying to their eyewitness accounts would not violate the purpose of the privilege. Mandating that the reporters testify would not disrupt the free flow of information, nor would it require disclosure of confidential information. Instead, such an exception would only require reporters to testify to information witnessed as the result of the police-permitted ride-along. Moreover, the Sixth Amendment right to a fair trial trumps the First Amendment right to freedom of press in this context, further supporting an exception to the reporter's privilege.

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\* J.D. Candidate, Loyola Law School, 2013; B.A. University of California, Los Angeles, 2009. The author would like to dedicate this Comment to her eldest brother, Patrick, for defining true strength and determination. She would also like to thank her family (her father Razmik, mother Hilda, and brother Nicholas) for their continued support and guidance through her endeavors. She would not be the person she is today without their love, humor, and inspiration. A special thank you to Laurie Levenson for her academic assistance and responsiveness to the endless e-mails and to Mark Geragos for his valuable insight. The author thanks Teo for his endless encouragement and motivating words, and Tina and Linette for lending their ears throughout the drafting and editing process. And not to be forgotten, her greatest gratitude to the talented and hardworking staff of the *Loyola of Los Angeles Entertainment Law Review* for their dedication and meticulous work in the production of this Comment.

*“Over the last several decades, the media’s role has morphed from that of watchdog against police abuse to cheerleader for the prosecution. The protections afforded the reporter to shield them as against a Defendant’s right to a fair trial have become quaint in our modern 24/7 media age. Reporters who embed themselves with the police must realize that the price for such access comes at the expense of the First Amendment not the Sixth Amendment guarantee of a defendant’s right to fair trial.”<sup>1</sup>*

## I. INTRODUCTION

### A. *The Crime Scene, the Police, and the Reporter*

Imagine it is 11:37 PM on a Tuesday night when a swarm of Los Angeles Police Department officers arrive at an underground brothel where a murder has taken place. Riding along with the police is a reporter from the *Los Angeles Times*. At the scene, the reporter documents evidence of the murder and watches the police conduct the crime scene investigation. The reporter observes an officer surreptitiously take a knife from the scene and slip it into his pocket, clearly obstructing evidence.<sup>2</sup>

Two months later, at the trial for the murder, the reporter is subpoenaed to testify. He refuses, asserting the reporter’s privilege. As a result, the jury never learns of the police officer’s obstructive actions. The criminal defendant, who might have been acquitted had the reporter testified, is found guilty of first-degree murder and sentenced to life in prison without the possibility of parole.<sup>3</sup>

A criminal defendant’s right to a fair trial is inscribed in the Sixth Amendment of the United States Constitution, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process

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1. E-mail from Mark J. Geragos, Esq., Geragos & Geragos, P.C., to author (Mar. 30, 2012, 14:29 PST) (on file with author).

2. Hypothetical created by author. *See, e.g.*, *Delaney v. Superior Court*, 789 P.2d 934 (Cal. 1990); *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992) (illustrating examples of media ride-alongs with the police).

3. Hypothetical created by author. *See, e.g.*, *Miami Herald Publ’g Co. v. Morejon*, 561 So. 2d 577 (Fla. 1990); *Delaney*, 789 P.2d 934 (illustrating examples of reporters who went on ride-alongs and subsequently refused to testify by asserting the reporter’s privilege).

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>4</sup>

The reporter's privilege, a lesser but nonetheless recognized right, now stands in the way of that constitutional right.<sup>5</sup>

### *B. A Need for an Exception to the Privilege*

Privileges, such as the attorney-client privilege, the physician-patient privilege, and the reporter's privilege are established to encourage candor within those practice areas.<sup>6</sup> However, the reporter's privilege, more than the others, infringes upon a criminal defendant's right to a fair trial.<sup>7</sup> Because police departments allow media members to ride along with them during critical events such as crime scene investigations, reporters are often exposed to evidence that is crucial for the defense.<sup>8</sup> However, those reporters frequently refuse to testify during the subsequent criminal trial.<sup>9</sup>

During a media ride-along, the police department allows a member of the media to "ride along" with them in the course of their daily activities.<sup>10</sup>

4. U.S. CONST. amend. VI.

5. *See generally* United States v. Nixon, 418 U.S. 683, 709 (1974) (stating that the judicial system "depend[s] on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."). If reporters are allowed to refuse to testify, they may be withholding critical facts. *Id.* Therefore, the privilege stands in the way of the defendant's right to a fair trial. *Id.*; *see also* Delaney, 789 P.2d at 937 ("[A] newsperson's protection under the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right.>").

6. *See* United States v. Shibley, 112 F. Supp. 734, 741 (S.D. Cal. 1953) ("The object of the [attorney-client] privilege is to protect the client against disclosure of confidential matters."); 3 BARBARA E. BERGMAN & NANCY HOLLANDER, WHART. CRIMINAL EVID. § 11:47 (15th ed. 1999) ("Moreover, the purpose of the [physician-patient] privilege is to protect the patient . . ."); 2 LEE LEVINE ET AL., NEWSGATHERING AND THE LAW 16-1 (4th ed. 2011) ("[J]ournalists and news organizations in the United States today enjoy, in many circumstances, a privilege from compelled disclosure of information . . .").

7. *See generally* Nixon, 418 U.S. at 709 (stating that the judicial system "depend[s] on full disclosure of all the facts . . ."). If reporters are allowed to refuse to testify, they may be withholding critical facts. *See generally id.* Therefore, the privilege stands in the way of the defendant's right to a fair trial. *See generally id.*

8. Delaney, 789 P.2d at 937 (stating that a reporter on a media ride-along was present during the search of defendant, and subsequently was subpoenaed to testify to whether defendant consented to the search or not).

9. *See, e.g.,* Sanusi, 813 F. Supp. 149; Delaney, 789 P.2d 934; Miami Herald Publ'g Co., 561 So. 2d 577; Jean Guccione, *Writer Must Testify in Blake Case*, L.A. TIMES, Oct. 15, 2004, at B3.

10. *See* Karen M. Markin, *An "Unholy Alliance": The Law of Media Ride-Alongs*, 12 COMMLAW CONSPPECTUS 33, 33 n.4 (2004).

Media members take footage of crime scene investigations,<sup>11</sup> photograph houses during the execution of search warrants,<sup>12</sup> participate in witness interviews,<sup>13</sup> and record detailed notes of their observations.<sup>14</sup> While some of this information is released in newspaper articles and news programs, some significant details remain secrets with the reporter.<sup>15</sup>

This Article proposes an exception to the reporter's privilege that would only apply to reporters who have participated in media ride-alongs and who have been subpoenaed to testify in a criminal case. Section II will trace the historical development of media ride-alongs and their interaction with criminal cases. Section III will explore the history of the reporter's privilege, including its development and limitations. Finally, Section IV will suggest that in order to ensure a fair trial for the criminal defendant, reporters who participate in media ride-alongs should be required to preserve and produce at trial all notes taken during media ride-alongs. Incidentally, this narrow exception would protect the underlying policy of the reporter's privilege<sup>16</sup> while simultaneously protecting the rights of criminal defendants.<sup>17</sup>

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11. See *People v. Hendrix*, 820 N.Y.S.2d 411, 414 (App. Div. 2006) (discussing that ABC Network filmed footage associated with a homicide while on a ride-along).

12. See *Sanusi*, 813 F. Supp. at 151 (explaining that a CBS cameraman filmed for twenty minutes during the execution of a search warrant).

13. Notice of Motion and Motion to Suppress Evidence at 8, *People v. Blake*, No. LA040377 (Cal. Sup. Ct. Oct. 4, 2004) (stating that reporter Miles Corwin participated in witness interviews).

14. *Miami Herald Publ'g Co.*, 561 So. 2d at 578 (stating that the reporter was present and took notes while the police arrested the defendant for trafficking in cocaine).

15. See, e.g., *Delaney*, 789 P.2d at 937, 953 (explaining that the reporter was with the police when the police allegedly touched the defendant without his consent, making the reporter one of the few people who knew exactly what happened. Although the reporter wrote an article regarding the arrest, that article did not address the issue of consent.).

16. The reporter's privilege seeks to maintain the flow of information by ensuring that confidences will not be revealed, but the defendant being subject to a search warrant has no reasonable expectation of confidentiality pertaining to the reporter at that time. *Wright v. F.B.I.*, 381 F. Supp. 2d 1114, 1116 (C.D. Cal. 2005) (stating the reporter's privilege exists to promote the "free flow of information"); see also *In re Slack*, 768 F. Supp. 2d 189, 193 (D.D.C. 2011) ("Courts have minimized impositions upon the press, particularly when burdens may have a chilling effect on a reporter's ability to investigate and gather news."). However, reporters who participate in media ride-alongs are not present for the purpose of a scheduled meeting or photo shoot. See, e.g., *Delaney*, 789 P.2d at 937 (emphasizing that the reporters were accompanying the police with the police's permission). The reporter is present as a mere observer, not a confidant. See, e.g., Notice of Motion and Motion to Suppress Evidence, *supra* note 13, at 8 (stating that reporter Miles Corwin was present to observe the investigation).

17. See U.S. CONST. amend. VI.

## II. A NEW PHENOMENON: THE MEDIA RIDE-ALONG

Generally, the reporter's privilege allows reporters to refuse to testify about confidential sources and specific information obtained in the news-gathering process.<sup>18</sup> The development of this privilege stems from a combination of the First Amendment, state statutes, and case law.<sup>19</sup>

The media has become increasingly intertwined with the judicial system.<sup>20</sup> In light of the public's insatiable appetite for news regarding the criminal justice system,<sup>21</sup> police departments are now frequently allowing media members to go on a "ride"<sup>22</sup>—and the "ride" referred to is not just a tour of the streets.<sup>23</sup> Instead, members of the media are exposed to arrests, executions of warrants, accident reports, and abuse incidents.<sup>24</sup> During this "ride," reporters are allowed to take notes and film footage for use in subsequent articles and television clips.<sup>25</sup>

However, it is not mandatory for the reporters to produce the material obtained during the ride-along upon demand—the reporter's privilege allows them to refuse any request for disclosure of confidential sources or

18. LEVINE ET AL., *supra* note 6, at 16-1 (“[J]ournalists and news organizations in the United States today enjoy, in many circumstances, a privilege from compelled disclosure of information . . .”).

19. *See* U.S. CONST. amend. I; *see also* N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1990); CAL. CONST. art. I, § 2(b); 735 ILL. COMP. STAT. 5/8-901-09 (1991); *Wilson v. Layne*, 526 U.S. 603 (1999); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958); *Delaney v. Superior Court*, 789 P.2d 934 (Cal. 1990).

20. RICHARD L. FOX ET AL., *TABLOID JUSTICE: CRIM. JUSTICE IN AN AGE OF MEDIA FRENZY* 1 (2d ed. 2007), *available at* <https://www.rienner.com/uploads/47d9507ee3854.pdf> (“Starting around 1990, Americans began to repeatedly focus on lengthy, high-profile, often celebrity-centered criminal and civil trials and investigations. Many of these cases at times resembled something like national obsessions and were associated with extraordinary levels of mass media coverage.”).

21. *See id.* at 2–5.

22. Markin, *supra* note 10, at 33 n.4.

23. *See, e.g., United States v. Sanusi*, 813 F. Supp. 149, 151 (E.D.N.Y. 1992) (explaining that the CBS news crew was invited to attend the execution of a search warrant); *Miami Herald Publ'g Co. v. Morejon*, 561 So. 2d 577, 578 (Fla. 1990) (stating that the journalist was allowed to accompany the police to the airport).

24. *See, e.g., Sanusi*, 813 F. Supp. at 151 (explaining that the CBS news crew was invited to attend the execution of a search warrant); *Miami Herald Publ'g Co.*, 561 So. 2d at 578 (stating that the journalist was allowed to accompany the police to the airport).

25. *See, e.g., Miami Herald Publ'g Co.*, 561 So. 2d at 578 (discussing that the journalist produced an article after witnessing an arrest at the airport while on a ride-along); *Delaney*, 789 P.2d at 937 (stating that the reporter published an article on an incident observed while on a ride-along at the Long Beach Mall).

private information.<sup>26</sup> This refusal is allowed despite the fact that the reporter is exposed to an enormous amount of information during the ride-along, and that producing that information would further the defendant's Sixth Amendment right to a fair trial.<sup>27</sup> Therefore, in light of the criminal defendant's constitutional rights at stake, it should be mandatory that reporters on ride-alongs produce their notes and footage when subpoenaed in order to ensure a fair trial for the criminal defendant.<sup>28</sup>

*A. A Brief History of the Media Ride-along and  
Its Relationship with the Reporter's Privilege*

In an effort to educate community members regarding police officers' daily duties, police departments allow "ride-alongs."<sup>29</sup> These ride-alongs are not only available to the general public, but to the media as well.<sup>30</sup> It is quite simple to apply for the opportunity.<sup>31</sup> For example, the Los Angeles City Police Department only requires applicants to complete and submit a one-page form titled "Ride-Along Agreement Assuming Risk of Injury or Damage Waiver, Indemnity and Release of Claims."<sup>32</sup> The agreement requires standard contact information—such as name, address, and phone number—and a signature releasing the City of Los Angeles and the Police Department from liability in the event of an injury or resulting damage.<sup>33</sup>

Other municipalities have more onerous requirements.<sup>34</sup> For example, the City of New York Police Department requires the applicant to release the City of New York from potential lawsuits and to abide by certain

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26. See U.S. Commodity Futures Trading Comm'n v. McGraw-Hill Cos., Inc., 390 F. Supp. 2d 27, 31 (D.D.C. 2005); see also LEVINE ET AL., *supra* note 6, at 16-1 ("[J]ournalists and news organizations in the United States today enjoy, in many circumstances, a privilege from compelled disclosure of information . . .").

27. *Delaney*, 789 P.2d at 937 ("[A] newsperson's protection under the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right.").

28. See *id.*

29. See *Ride-Along*, MANASSAS PARK POLICE, <http://manassasparkpolice.com/ride-along.htm> (last modified Sept. 4, 2011).

30. See Los Angeles City Police Department, *Ride-Along Agreement Assuming Risk of Injury or Damage Waiver, Indemnity and Release of Claims* (on file with author).

31. *Id.*

32. *Id.*

33. *Id.*

34. See, e.g., *Community Affairs | Community Participation Programs*, NYPD, [http://www.nyc.gov/html/nypd/html/community\\_affairs/community\\_participation\\_programs.shtml](http://www.nyc.gov/html/nypd/html/community_affairs/community_participation_programs.shtml) (last visited Dec. 7, 2012) (referencing *Ride Along Program* portion of website).

rules of conduct.<sup>35</sup> The application provides that “the use of cameras, recording devices and cell phones *are prohibited*.”<sup>36</sup> In addition, the application requires that “[m]embers of the Media . . . must state, on a separate sheet, the reason(s) for participating in the Ride Along [sic].”<sup>37</sup> Additional requirements, such as a separate explanation of the reason for a ride-along, are required in some departments, and suggest that some police departments are aware of the negative implications of the media ride-along.<sup>38</sup>

Indeed, unforeseen consequences have led to lawsuits that clarify the legal scope of ride-alongs.<sup>39</sup> For instance, on April 16, 1992, the United States Marshals Service invited a Washington Post reporter and photographer to witness the execution of a search warrant against Dominic Wilson.<sup>40</sup> After realizing that Wilson was not in the house, the Marshals left with the media crew, but not before the reporter investigated the house and the photographer took a few pictures.<sup>41</sup> The United States Supreme Court found that although the media’s presence sufficed as a violation of Wilson’s Fourth Amendment rights,<sup>42</sup> the Court had not previously made clear that such a presence would constitute a violation, and, therefore did not hold the police liable.<sup>43</sup> However, the Court did discuss the media’s presence at length and concluded that the reasons provided by the police for the media ride-along in that case were not justified.<sup>44</sup> *Wilson* was not the first, nor will it be the last civil case to stem from a media ride-along.<sup>45</sup>

Criminal defendants have also taken issue with the presence of the media in their homes or during arrests.<sup>46</sup> In *Miami Herald Publishing Co. v. Morejon*, a *Miami Herald* journalist witnessed an arrest for possession of

35. *Id.*

36. *Id.* (emphasis added).

37. *Id.*

38. *Id.*

39. See, e.g., *Wilson*, 526 U.S. 603; *Branzburg*, 408 U.S. 665; *Sanusi*, 813 F. Supp. 149; *Delaney*, 789 P.2d 934; *Miami Herald Publ’g Co.*, 561 So. 2d 577.

40. *Wilson*, 526 U.S. at 607.

41. *Id.* at 607–08 (confirming that photographs were taken while on the ride-along, but never published).

42. *Id.* at 614.

43. *Id.* at 617–18.

44. *Id.* at 611–14.

45. See, e.g., *Miami Herald Publ’g Co.*, 561 So. 2d at 577–78 (discussing a criminal defendant bringing civil suit against a reporter to compel testimony regarding notes taken while on a ride-along).

46. See, e.g., *id.*; *Sanusi*, 813 F. Supp. 149.



cocaine during a media ride-along.<sup>47</sup> The Florida Supreme Court affirmed the district court's denial of a reporter's privilege assertion, but noted Justice White's distinction in *Branzburg v. Hayes* that the restriction only applied to "grand jury investigations conducted in good faith."<sup>48</sup> More specifically, the court cited Justice Powell's concurring opinion, which stated that on a case-by-case basis, the "privilege should be judged on its facts by striking the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."<sup>49</sup>

Robert Blake's 2005 murder trial further addressed the new phenomenon of media ride-alongs.<sup>50</sup> Former *Los Angeles Times* reporter Miles Corwin spent a year shadowing the Los Angeles Police Department while doing research for his book.<sup>51</sup> As a result, Corwin was present during the homicide investigation of Robert Blake for the murder of his wife in 2001.<sup>52</sup> Subsequently, Corwin was subpoenaed to testify in the Blake trial.<sup>53</sup> Corwin attempted to raise the reporter's privilege as his shield, but the court de-

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47. *Miami Herald Publ'g Co.*, 561 So. 2d at 578. The journalist was given permission to accompany the Metro-Dade police officers while on duty at the Miami International Airport. *Id.* The officers arrested Morejon for trafficking in four kilos of cocaine. *Id.* The journalist took notes while the arrest occurred and later published an article in the *Miami Herald Sunday Tropic Magazine* containing some information that was inconsistent with what the police officers had reported. *Id.* During his trial, Morejon learned of the journalist's eyewitness account and subpoenaed him to appear for a deposition. *Id.* Although the journalist filed a motion to quash the subpoena, the judge denied the motion and demanded he testify. *Id.* The journalist petitioned the district court for a writ of certiorari, but the district court denied the motion, holding that the "reporter's qualified privilege simply 'has utterly no application to information learned by a journalist as a result of being an eyewitness to a relevant event in a subsequent court proceeding' such as the police search and arrest of Morejon." *Miami Herald Publ'g Co.*, 561 So. 2d at 578.

48. *Id.* at 579, 582.

49. *Id.* at 579 (emphasis omitted) (quoting *Branzburg*, 408 U.S. at 709–10 (Powell, J., concurring)); see also *Sanusi*, 813 F. Supp. at 149. The United States Secret Service allowed a CBS crew to accompany it during the execution of a search warrant. *Id.* at 151. Although the defendant Ayeni was not home at the time of invasion, CBS captured footage of his wife and son despite their request otherwise. *Id.* at 151–52. Ayeni requested the CBS footage, believing the evidence would help in his motion to dismiss the indictment, but CBS refused, claiming a reporter's privilege under New York Civil Rights Law Section 79-h. *Id.* at 151. Recognizing that the privilege is not absolute and can be overcome if the three-pronged test discussed later in this article is satisfied, the court held that the requested videotapes were not obtainable elsewhere and were necessary and thus must be produced, but allowed CBS to obscure the identity of any confidential sources it had agreed to protect. *Id.* at 154, 160–61.

50. Guccione, *supra* note 9; see also Notice of Motion and Motion to Suppress Evidence, *supra* note 13, at 8 (discussing that reporter Miles Corwin, participating in a ride-along, was present during the investigation of Robert Blake's home for evidence relating to the murder of his wife. Corwin asserted his reporter's privilege when asked to testify regarding the events of the investigation.).

51. Guccione, *supra* note 9.

52. Notice of Motion and Motion to Suppress Evidence, *supra* note 13, at 8.

53. See Guccione, *supra* note 9.

nied him the privilege.<sup>54</sup> The court ruled that “Corwin had waived his shield law rights” because of a signed agreement between Corwin and the Los Angeles Police Department explaining “that his work product may be subject to subpoena and production in either criminal and/or civil litigation.”<sup>55</sup>

If the reporter’s privilege exists to maintain the flow of truthful information to the public,<sup>56</sup> then the truth should also be communicated during the criminal defendant’s trial.<sup>57</sup> As in the case of Miles Corwin,<sup>58</sup> courts must require reporters to continue this flow of information where necessary.<sup>59</sup> Therefore, it is vital to appreciate why this privilege exists and to understand that the reasons to expose the information obtained during a media ride-along outweigh the policy justifications behind the privilege.

*B. A Philosophical Interjection:  
Why Are Reporters Even Allowed on Ride-alongs?*

If the reasons for concealing information outweighed the benefits, then one might understand why the reporter’s privilege would be upheld in a criminal case.<sup>60</sup> However, they do not.<sup>61</sup> The *Wilson v. Layne* opinion illuminates the reasoning behind the media ride-along.<sup>62</sup> Similarly, other possible justifications for the media ride-along are thoroughly analyzed in the article, “An ‘Unholy Alliance’: The Law of Media Ride-Alongs.”<sup>63</sup> While *Wilson* and “An ‘Unholy Alliance’” take different approaches, they ultimately conclude that there is no legitimate justification for a media ride-along.<sup>64</sup>

54. *Id.*

55. *See id.* (explaining that according to the agreement Corwin signed with the police department, “[he] understood ‘that his work product may be subject to subpoena and production in either criminal and/or civil litigation’ and acknowledged that, ‘by his involvement in homicide investigations, [he] becomes an ‘agent’ of the Police Department.’” In accordance with this finding, a reporter should understand that he or she waives his or her reporter’s privilege when participating in a media ride-along.)

56. *See Wright v. F.B.I.*, 381 F. Supp. 2d 1114, 1116 (C.D. Cal. 2005).

57. *See Guccione*, *supra* note 9.

58. *Id.*

59. *See Branzburg*, 408 U.S. at 680 (“[A] reporter should not be forced either to appear or testify before a grand jury or at trial until and unless sufficient grounds are shown . . .”).

60. *See id.* (“[A] reporter should not be forced either to appear or testify before a grand jury or at trial until and unless sufficient grounds are shown . . .”).

61. *See generally Branzburg*, 408 U.S. 665.

62. *See Wilson*, 526 U.S. at 611–13.

63. Markin, *supra* note 10.

64. *See Wilson*, 526 U.S. at 611–14; Markin, *supra* note 10, at 37.

1. *Wilson v. Layne*: The United States Supreme Court's Opinion on the Justifications for Media Ride-Alongs

In *Wilson v. Layne*, the United States Supreme Court considered the justifications for allowing media ride-alongs during the execution of a search warrant.<sup>65</sup> The Court rejected the police department's argument that "officers should be able to exercise reasonable discretion about when [the ride-alongs] would 'further their law enforcement mission . . . in executing a warrant.'"<sup>66</sup> The Court held that allowing media to enter the homes of suspects would defeat the underlying purpose of the Fourth Amendment and the protection it provides for private homes.<sup>67</sup>

The Court also rejected the police department's argument that because the reporter's privilege stems from the First Amendment and seeks to encourage a flow of information to the public, the "presence of third parties could serve the law enforcement purpose of publicizing the government's efforts to combat crime, and facilitate accurate reporting on law enforcement activities."<sup>68</sup> The Court held that when balancing the First Amendment right with the Fourth Amendment right at stake, the Fourth Amendment right must take precedence.<sup>69</sup> Although "the need for accurate reporting on police issues" is important, this interest "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."<sup>70</sup>

The Court also pointed out that the search warrant did not permit the media's presence inside the house.<sup>71</sup> As the Court explained, the Fourth Amendment is a representation of respect—a "centur[y]-old principle"—that is deemed necessary to protect the private home.<sup>72</sup> Although the police in *Wilson* had obtained a valid search warrant, the Court found that the presence of the media members did not further the objectives that allowed the police into the private home pursuant to that warrant.<sup>73</sup> For this reason,

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65. *See Wilson*, 526 U.S. at 611–13.

66. *Id.* at 612.

67. *Id.*

68. *Id.*

69. *Id.* at 613 ("Fourth Amendment also protects a very important right, and in the present case it is in terms of that right that the media ride-alongs must be judged.")

70. *Id.*

71. *Wilson*, 526 U.S. at 611.

72. *Id.* at 610.

73. *Id.* at 611.

the media's presence was not in congruence with the intentions of the respected and superior Fourth Amendment.<sup>74</sup>

Finally, the police department argued that the "presence of third parties could serve . . . to minimize police abuses and protect suspects, and also to protect the safety of the officers."<sup>75</sup> Since the police did not limit this argument to instances where the media entered a suspect's home with the police, this policy could extend beyond media ride-alongs during search warrants to arrests that occur outside of the home.<sup>76</sup> Although the Court found this to be a plausible interest, it nonetheless rejected the police department's argument because it did not believe the police department had allowed the media to videotape for "quality control."<sup>77</sup> Instead, the Court found the ride-along was for the benefit of the media company.<sup>78</sup>

## 2. A Categorical Approach to the Policy Behind Media Ride-Alongs

In *An "Unholy Alliance": The Law of Media Ride-Alongs*, Karen Markin discusses two theories to justify media ride-alongs.<sup>79</sup> She purports that "ride-alongs [might serve as a] . . . check on government, a press function that flows from libertarian theory . . . [and might] satisfy the public's right to know, a press function that flows from the social responsibility theory."<sup>80</sup> The libertarian theory values the "free and open exchange of ideas as the best means of achieving truth,"<sup>81</sup> while the social responsibility theory is based on "the need of a self-governing people to be informed."<sup>82</sup> Nonetheless, when analyzed under the First Amendment, neither theory justifies the media ride-along.<sup>83</sup>

There is insufficient evidence to support the media's claim that it is acting as a "watchdog" during these ride-alongs.<sup>84</sup> Rather, the media is

74. *Id.* at 614.

75. *Id.* at 613.

76. The use of suspect protection and monitoring of police actions as a justification for media ride-alongs is not only applicable to search warrants; the media's presence during any arrest or investigation may lead to suspect protection. *See generally id.*

77. *Wilson*, 526 U.S. at 613.

78. *Id.*

79. Markin, *supra* note 10, at 34.

80. *Id.*

81. *Id.* (quoting Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 10 (1982)).

82. *Id.* at 35 (quoting Helle, *supra* note 81).

83. *Id.* at 36.

84. *Id.*

“colluding with the government when it rides along.”<sup>85</sup> This is contrary to the libertarian theory that requires the media to serve as a check on the government.<sup>86</sup> Similarly, the social responsibility theory does not support ride-alongs, as there is no real promotion of democracy with the accompanying of media.<sup>87</sup> In fact, instead of guarding the rights of suspects during police intrusion, the reporter’s presence serves only to benefit the reporter’s own financial and entertainment purposes.<sup>88</sup>

In conclusion, neither the United States Supreme Court, nor Markin could find a sufficient justification for media ride-alongs.<sup>89</sup> Media ride-alongs are mainly a benefit to the reporter.<sup>90</sup>

### III. THE DEVELOPMENT OF THE REPORTER’S PRIVILEGE

#### A. *What Is the Reporter’s Privilege and Why Does It Exist?*

The First Amendment’s right to freedom of the press is at the core of the reporter’s privilege.<sup>91</sup> If journalists and reporters were required to disclose their sources of confidential information, people would be reluctant to give them such information.<sup>92</sup> This would have a chilling effect on a reporter’s work product.<sup>93</sup> As a result, the reporter’s privilege exists to protect journalists and reporters from being forced to disclose sources and in-

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85. Markin, *supra* note 10, at 36.

86. *Id.*

87. *Id.* at 36–37.

88. *Id.*

89. *See generally* Wilson, 526 U.S. 603; *see also* Markin, *supra* note 10, at 60.

90. Markin, *supra* note 10, at 60 (concluding that the ride-along is not justified under the libertarian theory or the social responsibility theory. Instead, it serves the media’s interests.).

91. *See* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”) (emphasis added); *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972); *Wright v. FBI*, 381 F. Supp. 2d 1114, 1116 (C.D. Cal. 2005); *see also* U.S. Commodity Futures Trading Comm’n v. McGraw-Hill Cos., 390 F. Supp. 2d 27, 31 (D.D.C. 2005).

92. *See* *Garland v. Torre*, 259 F.2d 545, 547–48 (2d Cir. 1958) (referring to defendant Torre’s claim that requiring her to testify would “impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public”); *see also* *In re Slack*, 768 F. Supp. 2d 189, 193 (D.D.C. 2011) (“Courts have minimized impositions upon the press, particularly when burdens may have a chilling effect on a reporter’s ability to investigate and gather news.”).

93. *See* *In re Slack*, 768 F. Supp. 2d at 193 (“Courts have minimized impositions upon the press, particularly when burdens may have a chilling effect on a reporter’s ability to investigate and gather news.”).

formation in an effort to prevent “disrupting the ‘free flow of information protected by the First Amendment.’”<sup>94</sup>

While there is no federal statute that recognizes the reporter’s privilege,<sup>95</sup> forty states and the District of Columbia have enacted statutes establishing a reporter’s privilege, also known as shield laws.<sup>96</sup> Subsequently, case law has defined the privilege so that both reporters and those who are in need of the reporters’ testimony understand the privilege and the ways around it.<sup>97</sup> Case law has established that the privilege is protected by the Constitution, and has recognized “that society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.”<sup>98</sup> Despite the occasional need for such sacrifice, “[c]ourts have rigorously protected reporters asserting [this] privilege.”<sup>99</sup>

Among the cases recognizing the reporter’s privilege is a 1958 decision regarding famed actress/singer Judy Garland.<sup>100</sup> Garland brought suit against CBS after learning that a CBS executive’s comments about her had been published in an article written by Marie Torre of the *New York Herald Tribune*.<sup>101</sup> Torre was imprisoned because she refused to disclose the identity of the executive who had made the comments.<sup>102</sup> On appeal, Torre raised the Constitutional defense of the First Amendment’s freedom of speech.<sup>103</sup> This was the first time a reporter had raised this defense.<sup>104</sup> Torre argued that requiring her to testify would “impose an important practical restraint on the flow of news from news sources to news media and would

94. *McGraw-Hill Cos.*, 390 F. Supp. 2d at 31.

95. LEVINE ET AL., *supra* note 6, at 16–1.

96. *Number of States with Shield Law Climbs to 40*, REPS. COMMITTEE FOR FREEDOM PRESS, <http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-law-summer-2011/number-states-shield-law-climbs> (last visited Dec. 8, 2012).

97. *See, e.g., Branzburg*, 408 U.S. 665; *Garland*, 259 F.2d 545; *Hatfill v. Gonzales*, 505 F. Supp. 2d 33 (D.D.C. 2007); *In re Slack*, 768 F. Supp. 2d 189; *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992); *Delaney v. Superior Court*, 789 P.2d 934 (Cal. 1990); *Miami Herald Publ’g Co. v. Morejon*, 561 So. 2d 577 (Fla. 1990); *Guccione*, *supra* note 9.

98. *Wright*, 381 F. Supp. 2d at 1116 (quotation marks omitted).

99. *In re Slack*, 768 F. Supp. 2d at 193.

100. *Garland*, 259 F.2d 545.

101. *Id.* at 547.

102. *Id.*

103. *Id.*; LEVINE ET AL., *supra* note 6, at 16-5, 16-6. *Garland* was the first case to raise a constitutional reporter’s privilege. *Id.* Torre raised the defense because states were hesitant in acknowledging a credible privilege, even though such privilege had been generally codified. *Id.* at 16-5.

104. LEVINE ET AL., *supra* note 6, at 16-5.

thus diminish *pro tanto* the flow of news to the public.”<sup>105</sup> The Second Circuit unanimously acknowledged that while the privilege stemmed from the freedom of press, since the information sought was at the heart of the case and there were no alternative sources for the information, “the Constitution conferred no right to refuse an answer.”<sup>106</sup>

It would not be until 1972 that the United States Supreme Court would issue an opinion on the constitutionality of this issue.<sup>107</sup> In the case of *Branzburg v. Hayes*, the Supreme Court clarified the privilege.<sup>108</sup> *Branzburg* consolidated four separate cases<sup>109</sup> that stemmed “from the repeated clashes of the period between government, on the one hand, and allegedly violent, politically dissident groups and the so-called ‘drug culture,’ on the other.”<sup>110</sup> The cases concerned the groups that had confided in reporters about specific information pertaining to themselves in exchange for the reporters’ promise that their names would remain confidential.<sup>111</sup> In an effort to prosecute these groups, the government asked the courts to compel the reporters to testify as to the sources of information regarding the groups’ illegal and violent habits despite their claim to a reporter’s privilege.<sup>112</sup>

The United States Supreme Court concluded that reporters qualify for some First Amendment protection, but that the protection is not absolute.<sup>113</sup> The Court explained that reporters are subject to a privilege to avoid a violation of their freedom of press and to minimize eliminating the flow of information to the public.<sup>114</sup> However, the Court refused to find a First Amendment defense applicable in this particular case since the burden of testifying did not outweigh the need for law enforcement and effective grand jury proceedings.<sup>115</sup> The Court stated:

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105. *Garland*, 259 F.2d at 547–48.

106. *Id.* at 550.

107. *Branzburg*, 408 U.S. at 667.

108. *Branzburg*, 408 U.S. 665.

109. *Id.* at 667–72 (the four consolidated cases were *United States v. Caldwell*, 434 F.2d 1081 (9th Cir. 1970), *In re Papas*, 266 N.E.2d 297 (Mass. 1971), *Branzburg v. Pount*, 461 S.W.2d 345 (Ky. Ct. App. 1970), and *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. Ct. App. 1971)).

110. *LEVINE ET AL.*, *supra* note 6, at 16–9.

111. *Id.*

112. *Id.* at 16–9, 16–10.

113. *Branzburg*, 408 U.S. at 681 (“We do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”).

114. *See id.* at 681–82.

115. *Id.* at 685 (“It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.”).

[A] reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.<sup>116</sup>

Despite this conclusion, the United States Supreme Court made clear that construction of the privilege would be at the discretion of state legislatures, but with limited restrictions.<sup>117</sup> Following the *Branzburg* opinion, many state and federal courts have addressed the scope of the reporter's privilege.<sup>118</sup> As Justice White anticipated, "[s]ooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege."<sup>119</sup> This Article addresses Justice White's suggestion and argues that reporters who participate in media ride-alongs and are later asked to testify in a criminal trial should be prevented from seeking the protection of the reporter's privilege.

*B. The Scope of Enforcement:  
When and Why Has the Privilege Been Enforced?*

Reporters and journalists have not been hesitant in asserting the reporter's privilege.<sup>120</sup> The privilege has been raised in cases ranging from defamation suits,<sup>121</sup> to First Amendment violations,<sup>122</sup> and criminal proceedings.<sup>123</sup>

116. *Id.* at 680.

117. *Id.* at 706 ("There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards . . .").

118. *See, e.g., Sanusi*, 813 F. Supp. 149; *Delaney*, 789 P.2d 934; *Miami Herald Publ'g Co.*, 561 So. 2d 577; Guccione, *supra* note 9.

119. *Branzburg*, 408 U.S. at 704.

120. *See, e.g., Branzburg*, 408 U.S. 665; *Garland*, 259 F.2d 545; *Sanusi*, 813 F. Supp. 149; *In re Slack*, 768 F. Supp. 2d 189; *Hatfill*, 505 F. Supp. 2d 33. The plaintiff in *Hatfill* sought the identities of sources from the Federal Bureau of Investigation and the Department of Justice who had spoken with the media regarding his alleged involvement with the anthrax letters. *Id.* at 36. Several media companies, including *The New York Times* and the *Associated Press*, were asked to reveal their source for information regarding the plaintiff's affiliation with anthrax. *Id.* at 48. Their motion to quash the subpoena was granted since although their knowledge was at the heart of the case, the plaintiff had alternative means to acquire that information. *Id.* at 49; *Delaney*, 789 P.2d 934; *Miami Herald Publ'g Co.*, 561 So. 2d 577.

121. *See, e.g., Garland*, 259 F.2d 545.

122. *See, e.g., In re Slack*, 768 F. Supp. 2d 189. A street performer requested the deposition of a newspaper reporter, Donovan Slack, who had written an article regarding Boston's re-



Compelling a reporter to testify is not uncommon, especially in a criminal case where the reporter was an eyewitness.<sup>124</sup> In *Delaney v. Superior Court, Los Angeles Times* reporter Roxana Kopetman and photographer Roberto Santiago Bertero accompanied the Long Beach Police Department during their daily duties.<sup>125</sup> While on duty at the Long Beach Plaza Mall, the police officers arrested Sean Patrick Delaney for misdemeanor possession of brass knuckles.<sup>126</sup> Kopetman and Bertero were later subpoenaed to testify regarding Delaney's consent to the search, but refused, asserting their reporter's privilege.<sup>127</sup> The Supreme Court of California compelled the reporter and photographer to testify, and after applying the balancing test, held that the factors were overwhelmingly in favor of the defendant.<sup>128</sup>

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restrictions on street performers for *The Boston Globe*. *Id.* at 190–91. The plaintiff requested the testimony to help prove that the city had violated his Constitutional right to free speech by restricting the areas. *Id.* at 196. Slack was subpoenaed but refused to comply, asserting his reporter's privilege. *Id.* at 192. The court held that in applying a balancing test, which will later be discussed in this article, Slack had correctly asserted his privilege and therefore was not forced to comply. *Id.* at 198. Although the information Slack had and could testify to was critical in the case, there were alternative means to obtain the same information such as asking local business owners or residents. *Id.* at 197–98. Therefore, the reporter's privilege was upheld. *Id.* at 198.

123. *See, e.g.*, *Miller v. Superior Court*, 986 P.2d 170 (Cal. 1999); *Delaney*, 789 P.2d 934; *People v. Vasco*, 131 Cal. App. 4th 137 (2005).

124. JOEL M. GORA, *THE RIGHTS OF REPORTERS: THE BASIC ACLU GUIDE TO A REPORTER'S RIGHTS* 50 (Norman Dorsen & Aryeh Neier eds., 1974) (“Where a reporter is an eyewitness to criminal activity or is told about it directly, courts have been unwilling to interpret the shield laws to allow protection.”).

125. *Delaney*, 789 P.2d at 937. Police approached Sean Patrick Delaney after seeing a type of plastic bag in his possession commonly used to store drugs. *Id.* After questioning Delaney, the officers requested that he provide them with his identification. *Id.* As Delaney reached for his belongings, the officers searched his jacket and found a set of brass knuckles. *Id.* A few days later, the *Los Angeles Times* published an article addressing the arrest. *Id.* Although the published article did not touch on the issue of consent, it did discuss the interaction between Delaney and the officers. *Id.* The court also held that despite the fact that Article I of the California Constitution states that a “newsperson shall not be adjudged in contempt for ‘refusing to disclose any unpublished information[.]’” a balancing test may provide cause for a court to compel a reporter to testify. *Delaney*, 789 P.2d at 941, 947–52. Factors in the balancing test include whether the unpublished information is confidential or sensitive, the interests of the reporter, the importance of the information to the criminal defendant, and whether alternative sources are available (but the court explained that “[i]n light of a defendant’s constitutional right to a fair trial, however, *Mitchell [v. Superior Court]*, 37 Cal.3d 268 (1984), a civil case, does not mandate a rigid alternative-source requirement in criminal proceedings.”). *Id.* at 949–51. A threshold showing of whether the issue is at the heart of the case is *not* required. *Id.* at 948 (emphasis added).

126. *Id.* at 937.

127. *Id.*

128. *Id.* at 953 (explaining that the information sought was not confidential, revealing the information would not impinge on the reporter’s newsgathering ability, the information was important for Delaney, and that despite not needing to show an absolute lack of alternative sources, there were no alternative sources for the information available to Delaney).

If all other courts were to follow the conclusion of the Supreme Court of California, the exception to the reporter's privilege would not be at issue.<sup>129</sup> However, since states are allowed to develop their own standards for the reporter's privilege,<sup>130</sup> there is no promise that they will follow California's lead. In fact, there is a wide range of both civil and criminal cases that have addressed the reporter's privilege nationwide.<sup>131</sup> In some instances, the privilege has been denied, while in others, the courts have respected the reporter's privilege.<sup>132</sup> In order to maintain consistency, most courts have adopted a three-pronged test to help determine whether the reporter's privilege trumps the subpoena.<sup>133</sup>

### C. *Compelling a Reporter to Testify*

The reporter's privilege, commonly asserted by reporters who refuse to testify about sources and other confidential materials, is subject to a three-pronged test that pre-dates *Branzburg v. Hayes*.<sup>134</sup> This test has been solidified through decades of case law and legislation.<sup>135</sup>

To compel a reporter to testify, there must be a "clear and specific" showing of each element of the test.<sup>136</sup> First, the information must be highly

129. See *Delaney*, 789 P.2d at 953 (ordering the reporter who had participated in a ride-along to testify, but only based on the reporter's own observation—it is not a hard and fast rule that reporters who attended ride-alongs must testify during subsequent criminal proceedings if asked to do so).

130. *Branzburg*, 408 U.S. at 706 ("There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards . . .").

131. See, e.g., *Wilson v. Layne*, 526 U.S. 603 (1999); *In re Slack*, 768 F. Supp. 2d 189; *Miller*, 986 P.2d 170; *Delaney*, 789 P.2d 934; *Knight-Ridder Broad., Inc. v. Greenberg*, 511 N.E.2d 1116, 1117–21 (N.Y. 1987) (confirming, when a television station moved to quash a subpoena to produce videotapes of an interview with a homicide suspect, that there is "a strong desire to safeguard the free channels of news communication . . ." With this understanding, the court held that since "the taped interview presumably contain[ed] relevant information necessary to the Grand Jury investigation and [the information was] unavailable from other sources," the reporter's privilege would not protect the television station.).

132. Compare *Delaney*, 789 P.2d 934 (holding that journalists must testify despite assertion of reporter's privilege), with *People v. Slover*, 753 N.E.2d 554 (Ill. App. Ct. 2001) (holding that the photographer did not have to produce photos because privilege was properly asserted).

133. James C. Goodale et al., *Reporter's Privilege*, 987 PLI/PAT 135, 160 (2009); see also 735 ILL. COMP. STAT. 5/8-906 (1991); N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 1990); *Branzburg*, 408 U.S. at 743; *Delaney*, 789 P.2d at 947.

134. Goodale et al., *supra* note 133, at 160; see also *Branzburg*, 408 U.S. at 743.

135. Goodale et al., *supra* note 133, at 160; see also 735 ILL. COMP. STAT. 5/8-906; N.Y. CIV. RIGHTS LAW § 79-h(c); *Branzburg*, 408 U.S. at 743; *Delaney*, 789 P.2d at 947.

136. *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982).

material and relevant to the underlying claim,<sup>137</sup> the information cannot be “merely cumulative,”<sup>138</sup> nor can it be “vague and wholly unsupported.”<sup>139</sup> Second, the information must be necessary or critical to the maintenance of the party’s claim.<sup>140</sup> In other words, the information must be at the “heart of the case.”<sup>141</sup> In *Delaney*, however, the Supreme Court of California lowered this standard for criminal cases so that “a criminal defendant must show a *reasonable possibility* the information will materially assist his defense,”<sup>142</sup> not that the information affected the heart of his case.<sup>143</sup> Lastly, the party compelling disclosure must have exhausted all other alternative sources of obtaining the information.<sup>144</sup> However, the court in *Delaney* lowered this standard as well, concluding “a universal and inflexible alternative-source requirement is inappropriate in a criminal proceeding.”<sup>145</sup>

Furthermore, most states have adopted some variation of the reporter’s privilege, and, in doing so, have given depth to the scope of the privilege.<sup>146</sup> However, reporter’s privilege statutes in California, Illinois, and

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137. *Id.*; see also *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); *Delaney*, 789 P.2d at 947; Goodale et al., *supra* note 133, at 160.

138. *United States ex rel. Vuitton Et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667, 670 (S.D.N.Y. 1985).

139. *In re Application of Behar*, 779 F. Supp. 273, 275 (S.D.N.Y. 1991).

140. See *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d at 7; see also *Zerilli*, 656 F.2d at 713; *Delaney*, 789 P.2d at 947; Goodale et al., *supra* note 133, at 160.

141. See *Miller v. Mecklenburg Cnty.*, 602 F. Supp. 675, 676–81 (W.D.N.C. 1985) (explaining that parties to the case requested a reporter to disclose the source of information relating to a death. Since this information was at the core of the plaintiff’s theory, the court found that “names of the confidential source and witness not only go to the heart of plaintiff’s case, they very well may be the heart of the case.”); see also *Zerilli*, 656 F.2d at 713; Goodale et al., *supra* note 133, at 160.

142. *Delaney*, 789 P.2d at 948.

143. *Id.*

144. See *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d at 7; see also *Zerilli*, 656 F.2d at 713; Goodale et al., *supra* note 133, at 160; *In re Slack*, 768 F. Supp. 2d at 197 (holding that the plaintiff had not exhausted all alternative sources for information regarding street performance conditions because he had not sought the information from residents, local business owners, or other street vendors); *In re Ramaekers*, 33 F. Supp. 2d 312, 316 (S.D.N.Y. 1999) (indicating the movants requested *Reuters News Services* to produce all tapes and documents relating to an interview made for a securities litigation inquiry. Since there was no other available source for this information, the court found that the movant had exhausted all possible alternatives in an attempt to obtain the necessary information.); *Miller*, 602 F. Supp. at 680 (holding that the requirement of exhausting all alternative sources had been satisfied when plaintiff had deposed all possible witnesses before trial and had reviewed results from other investigations).

145. *Delaney*, 789 P.2d at 951.

146. LEVINE ET AL., *supra* note 6, at 16-4, 16-5.

New York, demonstrate that variations exist between the states.<sup>147</sup> For example, New York draws clear distinctions between an absolute protection for confidential information,<sup>148</sup> and a qualified protection for non-confidential information,<sup>149</sup> while California adopts a more general protection for all information.<sup>150</sup> Moreover, Illinois has separated the reporter's privilege among nine different statutes, each of which expands upon a specific type of information.<sup>151</sup> Despite their differences, most states have been faced with criminal cases in which reporters who participated in media ride-alongs witnessed an arrest and refused to testify.<sup>152</sup>

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147. See CAL. CONST. art. I, § 2(b); 735 ILL. COMP. STAT. 5/8-901; N.Y. CIV. RIGHTS LAW § 79-h.

148. N.Y. CIV. RIGHTS LAW § 79-h(b) ("Exemption of professional journalists and newscasters from contempt: Absolute protection for confidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist . . . shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published . . .").

149. N.Y. CIV. RIGHTS LAW § 79-h(c) ("Exemption of professional journalists and newscasters from contempt: Qualified protection for nonconfidential news. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster . . . shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in confidence . . .").

150. CAL. CONST. art. I, § 2(b) ("A publisher, editor, reporter . . . shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information . . . or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.").

151. See 735 ILL. COMP. STAT. 5/8-901 ("Source of Information"); 735 ILL. COMP. STAT. 5/8-902 ("Definitions"); 735 ILL. COMP. STAT. 5/8-903 ("Application to Court"); 735 ILL. COMP. STAT. 5/8-904 ("Contents of Applications"); 735 ILL. COMP. STAT. 5/8-905 ("Civil Proceeding"); 735 ILL. COMP. STAT. 5/8-906 ("Consideration by Court"); 735 ILL. COMP. STAT. 5/8-907 ("Court's Findings"); 735 ILL. COMP. STAT. 5/8-908 ("Privilege Continues During Pendency of Appeal"); 735 ILL. COMP. STAT. 5/8-909 ("Contempt").

152. See, e.g., *Vasco*, 31 Cal. Rptr. at 658 (holding that because the defendant did not reasonably show that the information would materially assist her defense, the reporter's privilege was upheld); *Slover*, 753 N.E.2d 554 (noting that a newspaper was asked to submit unpublished photographs associated with a murder but refused to do so, claiming a reporter's privilege. The lower court held that the reporter's privilege did not apply in such matters. On appeal, the Appellate Court of Illinois concluded that photographers were analogous to reporters in that photographs were a source of information, and thus the lower court erred in its ruling. The information

Despite the variety between state statutes, none of the statutes create an absolute exemption from the privilege for media ride-along participants.<sup>153</sup> Some cases, like *Delaney*, have indirectly asserted this exception by lowering the standards of the three-pronged test, thus compelling reporters to testify.<sup>154</sup> However, a more concrete exemption is necessary. The media ride-along has helped further the free flow of information; in return for this benefit, reporters who participate in media ride-alongs should waive their right to assert the reporter's privilege.

#### IV. HOW TO ADJUST TO THE PHENOMENON OF RIDE-ALONGS

Media ride-alongs have had a significant impact on the judicial system.<sup>155</sup> As with all other rapidly evolving forms of communication, such as e-mail, and social media, such as Facebook and Twitter,<sup>156</sup> the Supreme Court or Congress must adjust to the prevalence of media ride-alongs. They should mandate that reporters who are allowed to go on media ride-alongs be exempt from the reporter's privilege and be required to maintain any notes and information gathered during these ride-alongs to provide a fair trial for criminal defendants.<sup>157</sup> This proposed exception will not only protect a criminal defendant's Sixth Amendment right to a fair trial but will also maintain the freedom of press firmly established by the First Amendment.<sup>158</sup>

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was in fact protected by the reporter's privilege.); *People v. Henderson*, 847 P.2d 239 (Colo. App. 1993) (mentioning that the police requested helicopter media coverage of marijuana bust).

153. *Delaney*, 789 P.2d at 947; *see, e.g.*, 735 ILL. COMP. STAT. 5/8-906; N.Y. CIV. RIGHTS LAW § 79-h(c).

154. *See Delaney*, 789 P.2d at 953.

155. Guccione, *supra* note 9; *see, e.g.*, *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992); *Delaney v. Superior Court*, 789 P.2d 934 (Cal. 1990); *Miami Herald Publ'g Co. v. Morejon*, 561 So. 2d 577 (Fla. 1990); *People v. Vasco*, 31 Cal. Rptr. 3d 643 (Ct. App. 2005); *People v. Slover*, 753 N.E.2d 554 (Ill. App. Ct. 2001); *People v. Henderson*, 847 P.2d 239 (Colo. App. 1993).

156. Darren Waters, *Social Networks "Are New E-mail"*, BBC (Mar. 15, 2009), <http://news.bbc.co.uk/2/hi/technology/7942304.stm>.

157. The reporter's privilege seeks to maintain the flow of information by ensuring that confidences will not be revealed, but a defendant being subjected to a search warrant has no reasonable expectation of confidentiality pertaining to the reporter at that time. *See Wright v. F.B.I.*, 381 F. Supp. 2d 1114, 1116 (C.D. Cal. 2005) (stating the reporter's privilege exists to promote the "free flow of information"); *see also In re Slack*, 768 F. Supp. 2d 189, 193 (D.D.C. 2011) ("Courts have minimized impositions upon the press, particularly when burdens may have a chilling effect on a reporter's ability to investigate and gather news."). However, reporters who participate in media ride-alongs are not present for the purpose of a scheduled meeting or photo shoot. *See, e.g., Delaney*, 789 P.2d at 937 (emphasizing that the reporters were accompanying the police with the police's permission). The reporter is present as a mere observer, not a confidant. *See, e.g.*, Notice of Motion and Motion to Suppress Evidence, *supra* note 13, at 8 (stating that reporter Miles Corwin was present to observe the investigation).

158. *See* U.S. CONST. amend. VI; U.S. CONST. amend. I.

*A. Reporters on Ride-Alongs Lose Their Privilege and Enter the Class of "Police"*

Members of the media become constructive members of the police force when they partake in ride-alongs. When police officers arrest someone, they write an incident report.<sup>159</sup> If the prosecution files a case against the individual who was arrested, the police officers may be subpoenaed to testify to the events of that arrest.<sup>160</sup> This procedure exists as part of the defendant's right to a fair trial.<sup>161</sup> Reporters or journalists should be subject to the same rule. The notes they take during these media ride-alongs are just like the incident reports that the police officers write.<sup>162</sup> During the ride-along, the reporters and journalists record every incident that may later lead to a criminal arrest.<sup>163</sup> Just like police incident reports, these recorded initial incidents can become crucial facts in a criminal proceeding.<sup>164</sup>

Moreover, some police departments acknowledge that a person on a ride-along becomes a member of the police force.<sup>165</sup> For example, before *Los Angeles Times* reporter Miles Corwin could accompany the Los Angeles Police Department for a year, he was required to sign an agreement.<sup>166</sup> Specifically, the agreement stated that "by his involvement in homicide investigations, [he] becomes an 'agent' of the Police Department."<sup>167</sup>

Finally, any media member who accompanies police officers should be thought of as an agent of the police department because the police de-

159. *Sworn Police Officer Class Titles and Job Descriptions: Police Officer*, LAPD, [http://www.lapdonline.org/join\\_the\\_team/content\\_basic\\_view/9127#Police%20Officer](http://www.lapdonline.org/join_the_team/content_basic_view/9127#Police%20Officer) (last visited Dec. 10, 2012).

160. *See Sworn Police Officer Class Titles and Job Descriptions: Police Officer*, *supra* note 159; *FAQ*, NYPD, <http://www.nypdrecruit.com/faq> (last visited Dec. 10, 2012).

161. If the judicial system "depend[s] on full disclosure of all the facts," then police testimony of facts helps ensure that all facts are disclosed. *See generally* *United States v. Nixon*, 418 U.S. 683, 709 (1974).

162. *Compare Sworn Police Officer Class Titles and Job Descriptions: Police Officer*, *supra* note 159 (stating that the duties of police officers include conducting investigations, preparing investigative reports, and writing crime reports), *with* Notice of Motion and Motion to Suppress Evidence, *supra* note 13, at 24 (citing to Miles Corwin's commentary regarding the interior of Robert Blake's house).

163. *See, e.g., Sanusi*, 813 F. Supp. at 151 (CBS cameraman filmed for twenty minutes during a search warrant).

164. *See, e.g., Delaney*, 789 P.2d at 937 (stating that a reporter on a media ride-along that was present during the search of defendant was later subpoenaed to testify to whether defendant consented to the search).

165. Guccione, *supra* note 9.

166. *Id.*

167. *Id.*

partment's resources allow the reporter to obtain his or her information.<sup>168</sup> For example, search warrants allow reporters to enter the homes of private residents.<sup>169</sup> The police department's communication system also leads reporters to locations where crimes may occur.<sup>170</sup> Additionally, the tips from police department insiders result in drug busts.<sup>171</sup> Without the approval and insight of the police department, members of the media who go on ride-alongs with the police would not have access to such information.<sup>172</sup> For this reason, upon entering the police car, members of the media should step out of their role as reporters and into the class of the police.

### B. *The Exception Satisfies the Three-Pronged Test*

The party seeking the "privileged" information must prove that (1) the information is highly material and relevant, (2) the information is necessary or critical to the maintenance of the party's claim, and (3) all alternative sources of the information have been exhausted.<sup>173</sup> As demonstrated below, there is no question that any time a criminal defendant requests the notes or coverage of an eyewitness reporter present during a media ride-along, all three prongs are satisfied.

First, the information reporters gather during media ride-alongs is highly material and relevant; otherwise, the criminal defendant would not be requesting the material.<sup>174</sup> The criminal defendant has a right under the Sixth Amendment to call witnesses in his favor and to question those against him.<sup>175</sup> A criminal defendant would not request that the jury hear the testimony of a reporter unless it was in the defendant's fa-

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168. *See, e.g.,* *Wilson v. Layne*, 526 U.S. 603, 607 (1999); *Sanusi*, 813 F. Supp. at 151–52 (illustrating that the camera crew entered the house along with the police pursuant to a search warrant).

169. *See, e.g.,* *Wilson*, 526 U.S. at 607; *Sanusi*, 813 F. Supp. at 151–52.

170. *See generally* *Miami Herald Publ'g Co.*, 561 So. 2d at 579.

171. *See, e.g.,* *Henderson*, 847 P.2d at 240 (explaining that the police requested helicopter media coverage of marijuana bust).

172. *See, e.g.,* *Miami Herald Publ'g Co.*, 561 So. 2d at 578 (explaining that the journalist, participating on a media ride-along, took notes while the police arrested the defendant for trafficking in cocaine and later published an article in the *Miami Herald Sunday Tropic Magazine*).

173. *See* N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 1990); *see also* 735 ILL. COMP. STAT. 5/8-906 (1991).

174. *See, e.g.,* *Delaney*, 789 P.2d at 953 (noting that the reporter was with the police when the police allegedly touched the defendant without his consent, making the reporter one of the few people who knew exactly what happened).

175. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

vor.<sup>176</sup> Even if that were not the case, requesting information by an objective party about the events leading up to the defendant's arrest, by its own terms, renders the information highly material.<sup>177</sup> A reporter's notes taken during ride-alongs can help determine what exactly happened, what the circumstances were, and how the events of the accident, arrest, or search took place, which is highly material information during a criminal trial.<sup>178</sup>

For similar reasons, the second prong is also satisfied.<sup>179</sup> The exposure of this material is highly critical and necessary if a criminal defendant is requesting it.<sup>180</sup> This is true if only for the mere fact that it allows the defendant to exercise his constitutional right to subpoena evidence he believes will be in his favor.<sup>181</sup> In a criminal case, all admissible and relevant evidence is needed to ensure a verdict is returned in the fairest manner to the defendant—whether it helps prove or disprove guilt beyond a reasonable doubt.<sup>182</sup> The standard for this prong may be even lower if the holding in *Delaney v. Superior Court* is adopted.<sup>183</sup> There, the court held that “a

176. See, e.g., *Delaney*, 789 P.2d at 953 (noting that the reporter was with the police when the police allegedly touched the defendant without his consent, making the reporter one of the few people who knew exactly what happened). See generally *Rock*, 483 U.S. at 52.

177. *Rock*, 483 U.S. at 51 (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, at a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.”) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)) (emphasis omitted).

178. See, e.g., *Miami Herald Publ’g Co.*, 561 So. 2d at 578 (noting that the reporter was present when police first encountered the defendant at the airport and arrested him for trafficking in cocaine); *Delaney*, 789 P.2d at 953 (discussing that the reporter was with the police when the police allegedly touched the defendant without his consent, making the reporter one of the few other people who knew exactly what happened).

179. The information requested must be necessary or critical to the maintenance of the party’s claim. See *Delaney*, 789 P.2d at 947; 735 ILL. COMP. STAT. 5/8-906; N.Y. CIV. RIGHTS LAW § 79-h(c).

180. See generally *Rock*, 483 U.S. at 52 (discussing the defendant’s compulsory right to subpoena information in his or her favor).

181. See *id.* at 52.

182. See generally *Delaney*, 789 P.2d at 948 (“A criminal defendant’s constitutional right to compulsory process was intended to permit him to request governmental assistance in obtaining likely helpful evidence, not just evidence that he can show beforehand will go to the heart of his case. The need to develop *all relevant facts* in the adversary system is both fundamental and comprehensive.”) (quotation marks omitted).

183. *Id.* (“[T]o overcome a prima facie showing by a newsperson that he is entitled to withhold information under the shield law, a criminal defendant must show a *reasonable possibility* the information will materially assist his defense. A criminal defendant is not required to show that the information goes to the heart of his case.”); see also Notice of Motion and Motion to Suppress Evidence, *supra* note 13, at 24 (“Mr. Blake need *not* show a reasonable possibility the information will lead to his exoneration: he need only show, rather, a reasonable possibility the



criminal defendant must show a *reasonable possibility* the information will materially assist his defense.<sup>184</sup> Since the higher standard is satisfied, the lower standard will be fulfilled as well.<sup>185</sup>

Finally, the information reporters observe during media ride-alongs is unique, and no alternative source is available for that same information.<sup>186</sup> If the standard to be applied is like the one discussed in *Delaney*,<sup>187</sup> it is clear that this prong is satisfied. In *Delaney*, the court found that the “universal and inflexible alternative-source requirement is inappropriate in a criminal proceeding.”<sup>188</sup> With a more lax standard, it will be easier to conclude that the few people permitted to be present during an arrest or police encounter, the privileged reporter being one of them, greatly limits the number of potential sources of information.<sup>189</sup>

However, the prong is still satisfied even if a higher standard is applied.<sup>190</sup> There are only a few people who will have observed an accident, arrest, and/or search—the parties to the case, the police officers, and the media.<sup>191</sup> The police officers will write their incident reports and the reporters will take down their notes.<sup>192</sup> While it may be argued that the incident reports are an alternative means to gather information observed by the reporter, the bias present in the incident reports will presumably be absent in

information will materially assist his defense,” and that “balancing the various factors in this case weighs no less ‘overwhelmingly’ in favor of requiring Mr. Corwin to testify than in *Delaney*.”).

184. *Delaney*, 789 P.2d at 948.

185. The higher standard requires that the information be highly critical and necessary while the lower standard simply mandates that there is a reasonable possibility that the information will help the defendant’s case. *See id.* at 948–49. If evidence is so necessary as to be needed by the defendant, it is without question that the material is necessary because it will help the defendant’s case. *See generally id.* For this reason, if the higher standard is satisfied, the information will automatically satisfy the lower standard as well. *See generally id.*

186. *See* 735 ILL. COMP. STAT. 5/8-906; N.Y. CIV. RIGHTS LAW § 79-h(c).

187. *Delaney*, 789 P.2d at 951.

188. *Id.*

189. *See, e.g., Miami Herald Publ’g Co.*, 561 So. 2d at 578 (explaining that the journalist took notes while the police arrested the defendant for trafficking in cocaine and later published an article in the *Miami Herald Sunday Tropic Magazine* containing some information that was inconsistent with what the police officers had reported. The journalist was compelled to testify despite assertion of the reporter’s privilege. The journalist, police, and defendant were the only people involved, which limited the sources of evidence.).

190. *See Delaney*, 789 P.2d at 947; 735 ILL. COMP. STAT. 5/8-906; N.Y. CIV. RIGHTS LAW § 79-h(c) (no alternative source is available for the information sought).

191. *See Sworn Police Officer Class Titles and Job Descriptions: Police Officer*, *supra* note 159.

192. *Id.*; *see also Miami Herald Publ’g Co.*, 561 So. 2d at 578 (mentioning that the reporter was present and took notes while the police arrested the defendant for trafficking in cocaine).

the reporter's notes.<sup>193</sup> Reporters have a duty to inform the public of the truth and their notes are often what reflect that truth.<sup>194</sup> Unlike the police, they do not have a stake in the arrest or incident.<sup>195</sup> Therefore, it is clear that a reporter's eyewitness account is highly material, necessary, and unique.

### *C. Other Privileges Have Also Been Subject to Similar Exceptions*

The federal government has not codified any privileges.<sup>196</sup> However, states have acted independently and created numerous privileges among which are the attorney-client privilege,<sup>197</sup> the physician-patient privilege,<sup>198</sup> the psychotherapist-patient privilege,<sup>199</sup> and the reporter's privilege.<sup>200</sup> In California, most privileges include a codified exception where harm to another will follow if the privileged information is not divulged.<sup>201</sup>

California Evidence Code section 956.5 permits an attorney to reveal confidential information violating the attorney-client confidentiality privilege, "to prevent a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual."<sup>202</sup> Further, in California, the psychotherapist-patient privilege, which ordinarily protects communications between a therapist and patient during treatment,<sup>203</sup> must be violated if the therapist "has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous

193. *See* State v. Riley, 381 So. 2d 1359, 1360 (Fla. 1980) (questioning whether a police officer knowingly falsified police reports); *see also* Miami Herald Publ'g Co., 561 So. 2d at 578 (explaining that the journalist was present and took notes while the police arrested the defendant for trafficking in cocaine and later published an article in the *Miami Herald Sunday Tropic Magazine* containing some information that was inconsistent with what police officers had reported. The journalist was compelled to testify despite assertion of the reporter's privilege.).

194. *See* Wright, 381 F. Supp. 2d at 1116.

195. *See id.* (discussing that reporters have a duty to inform the public). Police officers, on the other hand, have the duty to keep communities safe, and deciding whether to arrest a suspect is in furtherance of that duty. *See generally* Sworn Police Officer Class Titles and Job Descriptions: Police Officer, *supra* note 159.

196. *See generally* FED. R. EVID. 501.

197. *See, e.g.*, CAL. EVID. CODE §§ 950–62 (West 2011).

198. *See, e.g., id.* §§ 990–1007 (West 2011).

199. *See, e.g., id.* §§ 1010–28 (West 2011).

200. *See, e.g.*, CAL. CONST. art. I, § 2(b).

201. *See, e.g.*, CAL. EVID. CODE § 956.5 (discussing the attorney-client privilege); *id.* § 1024 (discussing the psychotherapist-patient privilege); *id.* § 998 (discussing the physician-patient privilege).

202. *Id.* § 956.5.

203. *Id.* §§ 1010, 1012.

to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.”<sup>204</sup>

The physician-patient privilege is also subject to exceptions.<sup>205</sup> Despite the fact California has not codified a specific exception to the privilege, California Evidence Code section 998 nonetheless applies and generally states “there is no privilege in this article in a criminal proceeding.”<sup>206</sup> This means that if a physician were subpoenaed for a criminal case involving a patient, he or she would not be able to assert the physician-patient privilege and refuse to testify.<sup>207</sup>

An exception to the reporter’s privilege requiring media who participate in ride-alongs to testify in criminal cases would constitute a similar exception to those established in the attorney-client privilege, the physician-patient privilege, and the psychotherapist-patient privilege.<sup>208</sup> The exception is needed to protect a defendant’s right to a fair trial.<sup>209</sup> In doing so, the reporter would ultimately be preventing substantial harm to another—a false or unfair conviction of the defendant in question.<sup>210</sup> For this reason, exceptions have been made to other privileges, and now the reporter’s privilege demands a similar exception.

*D. A Criminal Defendant’s Sixth Amendment Right to a Fair Trial Trumps a Reporter’s First Amendment Right to Freedom of Press when that Reporter Participates in a Media Ride-Along*

The reporter’s privilege stems from the First Amendment of the United States Constitution.<sup>211</sup> The right to a fair trial is inscribed in the Sixth Amendment of the United States Constitution.<sup>212</sup> The exception proposed

204. *Id.* § 1024.

205. CAL. EVID. CODE § 998 (falling under the physician-patient privilege section of the Code.).

206. *Id.*

207. *People v. Ditson*, 369 P.2d 714, 733 (Cal. 1962) (“There is, of course, no doctor-patient privilege in criminal cases.”).

208. *See, e.g.*, CAL. EVID. CODE § 956.5 (discussing the attorney-client privilege); *id.* § 1024 (discussing the psychotherapist-patient privilege); *id.* § 998 (discussing the physician-patient privilege).

209. *See* U.S. CONST. amend. VI.

210. *See* Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1304 (2010) (“The Sixth Amendment right to counsel protects the innocent from wrongful conviction, incarceration, and execution. The Sixth Amendment right to confrontation encourages truth finding to protect the innocent from wrongful conviction, incarceration, and execution.”).

211. U.S. CONST. amend. I. *See generally* *Branzburg v. Hayes*, 408 U.S. 665 (1972).

212. U.S. CONST. amend. VI.

in this Article benefits the criminal defendant and impinges upon the First Amendment right of the reporter. Thus, this Comment urges that in this narrow area, the Sixth Amendment right to a fair trial should trump the First Amendment right to freedom of press.

A reporter's right to freedom of press, embedded in the First Amendment, does not overcome the Sixth Amendment right to a fair trial.<sup>213</sup> A criminal defendant's due process depends on receiving a fair trial; without a fair trial, a criminal defendant is deprived of the right to due process.<sup>214</sup> A fair trial is the defendant's only chance at freedom from conviction and the subsequent "social stigma of being labeled as [a] criminal[]" for the rest of his or her life.<sup>215</sup> As a result, "a newsperson's protection under the shield law must yield to a criminal defendant's constitutional right to a fair trial when the newsperson's refusal to disclose information would unduly infringe on that right."<sup>216</sup> This "constitutional right to compulsory process was intended to permit [the defendant] to request governmental assistance in obtaining likely *helpful* evidence, not just evidence that [the defendant] can show beforehand will go to the *heart of his case*."<sup>217</sup> Compulsory process requires that the defendant be entitled to expose all relevant information to ensure the defendant's right to a fair trial.<sup>218</sup>

In *United States v. Nixon*, the United States Supreme Court established and clearly expressed

[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.<sup>219</sup>

Professor Laurie Levenson of Loyola Law School stated

[t]he media plays an important role as a watchdog. When they are at the scene, then the information that they have might be im-

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213. *Id.* at amends. I, VI. See generally *Branzburg*, 408 U.S. 665.

214. See *Rock*, 483 U.S. 51–52.

215. *Ingraham v. Wright*, 430 U.S. 651, 689 (1977) (White, J., dissenting).

216. *Delaney*, 789 P.2d at 937.

217. *Id.* at 948 (emphasis added).

218. *People v. Hendrix*, 820 N.Y.S.2d 411, 417 (App. Div. 2006); see also *Nixon*, 418 U.S. at 709 ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.")

219. *Nixon*, 418 U.S. at 709.

portant enough to outweigh their general privilege not to testify. In the end, no matter how important we think the First Amendment is, it is not more important than the right to a fair trial.<sup>220</sup>

In furthering this opinion, M. Gerald Schwartzbach, counsel for Robert Blake during his murder trial in 2005, commented,

[t]hough freedom of the press is essential to any democracy, a reporter who voluntarily elects to become a witness to a criminal investigation should not be permitted to remain silent when he or she possesses relevant information. To conclude otherwise would be to allow him or her to remain silent in the face of police error or misconduct and thus deny an accused the right to a fair trial.<sup>221</sup>

Although there is arguably a need for balance between the First and Sixth Amendments, a First Amendment claim is not substantial enough to justify superiority over the Sixth Amendment.<sup>222</sup> For this reason, the Sixth Amendment's guarantee of a fair trial, with access to all evidence pursuant to compulsory process, trumps the First Amendment right to freedom of press.<sup>223</sup>

#### *E. Public Policy Favors the Exception*

This Article prescribes an absolute and codified exception to the reporter's privilege. Imposing the exception can be made feasible by requiring police departments to include a waiver clause in their ride-along agreements for media members.<sup>224</sup> However, because the reporter's privilege exists to promote the freedom of press and an informed public,<sup>225</sup> there is a concern that the proposed exception might have a chilling effect on reporters.<sup>226</sup>

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220. Interview with Laurie Levenson, Professor at Law, Loyola Law School, in Los Angeles, California (Nov. 21, 2011).

221. E-mail from M. Gerald Schwartzbach, Attorney for Robert Blake, Law Offices of M. Gerald Schwartzbach, P.C., to author (Nov. 21, 2011, 5:46 PM) (on file with author).

222. George Blum et al., *Protection in Criminal Proceedings*, 31A CAL. JUR. 3D 599 (2012); see *Vasco*, 31 Cal. Rptr. 3d at 654–55.

223. Interview with Levenson, *supra* note 220 (“The media plays an important role as a watchdog. When they are at the scene, then the information that they have might be important enough to outweigh their general privilege not to testify. In the end, no matter how important we think the First Amendment is, it is not more important than the right to a fair trial.”).

224. Guccione, *supra* note 9. The court believed that Corwin had waived his shield law privilege. *Id.* If police departments always include a waiver stating that the media member waives his or her reporter's privilege, the reporter becomes an “agent” of the police department, and “that [his or her] work product may be subject to subpoena and production in either criminal and/or civil litigation,” the exception will be imposed with little effort. *Id.*

225. *Wright*, 381 F. Supp. 2d at 1116.

226. See *In re Slack*, 768 F. Supp. 2d at 193 (“Courts have minimized impositions upon the press, particularly when burdens may have a chilling effect on a reporter's ability to investigate and gather news.”).

Nonetheless, this exception to the reporter's privilege would not have a chilling effect because it would not violate any privileges of the reporters. Forcing the reporter to testify "involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources."<sup>227</sup> In fact, "[t]he reporters are not being asked to breach a confidence or to disclose sensitive information that would in any way even remotely restrict their news-gathering ability. All that is being required of them is that they accept the civic responsibility imposed on all persons who witness alleged criminal conduct."<sup>228</sup> Thus, the proposed exception to the reporter's privilege, effectuated through a waiver, will serve as the consideration for the right to participate in a media ride-along.

This exception is not proposed to hinder the free flow of information or to halt reporters' investigations.<sup>229</sup> On the contrary, requiring the reporters on these ride-alongs to testify only promotes the free flow of information; specifically, this exception will lead to the reporting of truthful and accurate accounts of investigations and arrests by an objective and neutral party.<sup>230</sup>

## V. CONCLUSION

The influx of cases challenging the reporter's privilege illustrates the need to clarify its scope.<sup>231</sup> Undoubtedly, the new phenomenon of media ride-alongs has left reporters with a benefit—an opportunity to be an eyewitness.<sup>232</sup> Additionally, reporters are given a privilege that exempts them from having to testify at criminal trials.<sup>233</sup> Recent cases have shown that this reporter's privilege occasionally conflicts with a criminal defendant's right to a fair trial.<sup>234</sup> Judges grant motions made by criminal defendants

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227. *Branzburg*, 408 U.S. at 691.

228. *Delaney*, 789 P.2d at 953.

229. *Wright*, 381 F. Supp. 2d at 1116 (stating that the purpose of the reporter's privilege is to "ensur[e] the free flow of information").

230. *See generally Delaney*, 789 P.2d at 953 (noting that the reporter was with the police when the police allegedly touched the defendant without his consent, making the reporter one of the few people who knew exactly what happened).

231. *See, e.g., Wilson v. Layne*, 526 U.S. 603 (1999).

232. *See, e.g., Delaney v. Superior Court*, 789 P.2d 934, 937 (Cal. 1990) (noting that the reporter was present during the arrest therefore had direct knowledge of whether or not the defendant consented to the police touching his jacket); *Miami Herald Publ'g Co. v. Morejon*, 561 So. 2d 577, 579 (Fla. 1990) (discussing the presence of the reporter when the police encountered the defendant at the airport and arrested him for trafficking in cocaine).

233. *See, e.g., CAL. CONST. art. I, § 2(b)*; 735 ILL. COMP. STAT. 5/8-901 (1991); N.Y. CIV. RIGHTS LAW §79-h (McKinney 1990).

234. *See, e.g., Miller v. Superior Court*, 986 P.2d 170 (Cal. 1999); *Delaney*, 789 P.2d 934; *People v. Vasco*, 31 Cal. Rptr. 3d 643 (2005).

and order reporters to testify to eyewitness accounts despite the reporter's assertion of this privilege.<sup>235</sup> In light of the privilege received by reporters, the Latin saying of *quid pro quo* should be remembered.<sup>236</sup>

By allowing reporters and journalists to act as constructive police officers, thereby entitling them to some of the privileges that officers maintain, such as being present during an arrest when initial actions are taken and decisions made, it is only fair that reporters give up a privilege of their own, namely, the reporter's privilege.<sup>237</sup> This Article does not suggest terminating the reporter's privilege in its entirety, nor does it propose a violation of the First Amendment of the United States Constitution.<sup>238</sup> For the sole purpose of providing a fair trial for criminal defendants, this Article recommends a narrow exception to the well established privilege for those reporters who participate in media ride-alongs—an exception that does not intrude upon the underlying purpose of the reporter's privilege.<sup>239</sup> Not only would such an exception satisfy the three-pronged test adopted by most jurisdictions for violating the privilege, but such an exception to the reporter's privilege would also be consistent with the trend of courts to compel reporters who participated in a ride-along to testify.<sup>240</sup>

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235. See, e.g., Guccione, *supra* note 9; Delaney, 789 P.2d 934; *Miami Herald Publ'g Co.*, 561 So. 2d 577; *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992).

236. *Quid pro quo*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/quid%2Bpro%2Bquo?region=us&q=quid+pro+quo> (last visited Dec. 10, 2012) (“a favor or advantage granted or expected in return for something”).

237. See Notice of Motion and Motion to Suppress Evidence, *supra* note 13, at 8 (stating that reporter Miles Corwin participated in witness interviews); see also *Miami Herald Publ'g Co.*, 561 So. 2d at 578 (noting that the reporter was present and took notes while the police arrested the defendant for trafficking in cocaine); Delaney, 789 P.2d at 937 (discussing that the reporter on a media ride-along was present when police searched the defendant and found him in possession of brass knuckles).

238. U.S. CONST. amend. I.

239. The reporter's privilege seeks to maintain the flow of information by ensuring that confidences will not be revealed, but the defendant being subject to a search warrant has no reasonable expectation of confidentiality pertaining to the reporter at that time. *Wright v. F.B.I.*, 381 F. Supp. 2d 1114, 1116 (C.D. Cal. 2005) (stating the reporter's privilege exists to promote the “free flow of information”) (internal citation omitted); see also *In re Slack*, 768 F. Supp. 2d 189, 193 (D.D.C. 2011) (“Courts have minimized impositions upon the press, particularly when burdens may have a chilling effect on a reporter's ability to investigate and gather news.”). However, reporters who participate in media ride-alongs are not present for the purpose of a scheduled meeting or photo shoot. See, e.g., Delaney, 789 P.2d at 937 (emphasizing that the reporters were accompanying the police with police permission). The reporter is present as a mere observer, not a confidant. See, e.g., Notice of Motion and Motion to Suppress Evidence, *supra* note 13, at 8 (stating that reporter Miles Corwin was present to observe the investigation).

240. See, e.g., Delaney, 789 P.2d 934; Guccione, *supra* note 9; *Miami Herald Publ'g Co.*, 561 So. 2d 577; *Sanusi*, 813 F. Supp. 149.