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HOME: NO PLACE FOR “LAW ENFORCEMENT THEATRICALS”—THE OUTLAWING OF POLICE/MEDIA HOME INVASIONS IN *AYENI V. MOTTOLA*

*Elsa Y. Ransom**

I. INTRODUCTION

A few television seasons ago, one of the local newscasts in Houston regularly featured a police officer patrolling the city on camera to find and arrest criminal suspects, often in their homes. The officer was noted for his “goofball approach” to what he described as “fishing for felons” and “cruising for crooks” to get them “cuffed and stuffed” or “nailed and jailed.”¹ Scenes of law enforcement officers entering the homes of suspects have long been a fixture in television news. In recent years, with the advent of reality-based police shows, such scenes have become more revealing as the camera began to follow the police inside to give the viewer a close-up look at the search and arrest. At the 1995 meeting of the National Association of Television Program Executives, fifteen new reality-based entertainment programs were unveiled, including at least three that were exclusively devoted to fighting crime.² All indications are that the public has a voracious appetite for such programming—an appetite producers are eager to satisfy.³

But a recent interlocutory appeal ruling by the United States Court of Appeals for the Second Circuit may give pause to those interested in producing such programs either for the purpose of news or entertainment.

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1. Carol Rust, *Cruising for Crooks: Cops Nail Big Time With Capers*, HOUS. CHRON., July 23, 1993, at 6.

2. David Tobenkin, *Stations Face New Reality: Syndicators Have Host of Offerings, Including Magazine, Health, Law Enforcement Entries*, BROADCASTING & CABLE, Jan. 23, 1995, at 58.

3. *Id.*

In *Ayeni v. Mottola*,⁴ the court denied a Secret Service agent qualified immunity from suit in a civil rights action brought by a homeowner who had been subjected to a surprise government search conducted before a Columbia Broadcasting System ("CBS") video camera. The case marks the first time a federal appeals court has addressed the legal issues arising specifically from the joint enterprise of law enforcement and media to produce news or reality-based entertainment programs, in what has come to be known as "tag-along" or "sidekick" journalism.⁵ Indeed, the case marks the first time such issues have been appealed all the way to the United States Supreme Court. The Court denied review last April.⁶

As an interlocutory appeal ruling, the Second Circuit's opinion addresses only the qualified immunity issue. To date, the case has not been tried on the merits. Nevertheless, the opinion sends a clear message to police/reporter teams that it is time to exercise greater restraint in the practice of surprising unwitting television "performers" in their homes.

This Article explores the implications of the *Ayeni* case for both law enforcement and media organizations. Part II traces recent court developments surrounding the *Ayeni* case. Part III examines Fourth Amendment jurisprudence as it relates to invitations by law enforcement officers to media representatives to accompany the officers onto private property to videotape searches and seizures. Part IV examines the affirmative defense of qualified immunity for government officials, particularly as applied against Fourth Amendment claims involving the presence of third parties during searches. Part V explores the apparent ramifications of the *Ayeni* ruling for law enforcement and media entities. Part VI examines the tort liability of media engaged in sidekick journalism. Part VII argues that the joint incursions of law enforcement and media representatives inside private homes for purposes of producing news or reality-based entertainment programs poses a variety of threats to individual rights and interests. Part VIII concludes with the observation that there are profound legal risks for both the media and law enforcement participants in these joint invasions, and that the practice diminishes the value of both of these institutions to society.

4. 848 F. Supp. 362 (E.D.N.Y. 1994), *aff'd*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995).

5. See Peter Viles, *Privacy—A Murky Area in First Amendment Law*, BROADCASTING & CABLE, Jan. 17, 1994, at 70 (referring to police/media collaborative reports as "tag-along-with-the-police" stories); Kent R. Middleton, *Journalists, Trespass, and Officials: Closing the Door on Florida Publishing Co. v. Fletcher*, 16 PEPP. L. REV. 259, 260 (1989) (referring to the cooperative practices of police and media as "sidekick journalism").

6. *Mottola v. Ayeni*, 115 S. Ct. 1689 (1995).

II. RECENT DEVELOPMENTS IN FEDERAL COURTS CONCERNING POLICE/MEDIA HOME INVASIONS

A. United States v. Sanusi⁷

One evening in March 1992, United States Secret Service agents, accompanied by a CBS news camera crew and producer, entered a Brooklyn, New York, apartment to execute a search warrant for potential evidence of credit card fraud. A woman, clad in a dressing gown, and her five year old son were visibly shaken by the surprise visit.⁸ According to her account, the facts of which remain untried as of this writing, the agents pushed her, told her to "shut up," failed initially to produce the warrant despite her repeated requests that they do so, rummaged through personal belongings, and broke furniture.⁹

The CBS camera crew, on assignment for the news program "Street Stories," captured scenes of the woman and her child on videotape over her repeated objections.¹⁰ The tape contained shots of her cowering, shielding her face with a magazine, directing her child not to look at the camera, and undergoing interrogation on such matters as the whereabouts of her husband, Babatunde Ayeni, "the guy we're looking for," and the source of payment for several watches found at the scene.¹¹ The tape also contained closeup shots of family photographs and other personal belongings uncovered by the officers during their search.¹² The agent apparently in charge of the operation, equipped with a wireless microphone, gave running commentary and responses to interview questions from the CBS producer including a detailed explanation of "the modus operandi of people who commit credit card fraud and the tools of the trade."¹³ As a federal district judge noted later, "[t]he imputation of [Mr. Ayeni's] guilt [was] unmistakable."¹⁴ In the closing scenes of the videotape, the lead agent expressed "disappointment that the apartment 'looks clean'" but continued to suspect that Ayeni was involved in a credit card fraud conspiracy.¹⁵

7. 813 F. Supp. 149 (E.D.N.Y. 1992).

8. *See id.* at 152.

9. *Ayeni v. Mottola*, 35 F.3d 680, 683-84 (2d Cir. 1994).

10. *United States v. Sanusi*, 813 F. Supp. 149, 152 (E.D.N.Y. 1992).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Sanusi*, 813 F. Supp. at 152.

The government subsequently brought criminal conspiracy charges against Ayeni and nine other suspects.¹⁶ Ayeni subpoenaed CBS for production of the videotape to use in his defense. CBS resisted by filing a motion to quash the subpoena on First Amendment grounds. Federal District Judge Jack Weinstein ordered the network to turn over the tape to Ayeni with the stipulation that CBS could first block out the identity of its source.¹⁷ Judge Weinstein reasoned that the videotape was valuable to Ayeni's case and that Ayeni's constitutional right to a fair trial outweighed the qualified privilege to gather news afforded CBS under the First Amendment.¹⁸

The memorandum opinion focused, at length, on the importance of the Fourth Amendment right to be secure from unreasonable search and seizure by government officials and on the sanctity of the home as the "seat of family life."¹⁹ While acknowledging that the Fourth Amendment did not control the conduct of a private actor such as CBS,²⁰ Judge Weinstein posited that the network team may have entered the Ayeni apartment under color of official right.²¹ In statements highly critical of the actions of both the agents and the CBS crew, Judge Weinstein assessed the extent of CBS's privilege in light of its conduct:

That CBS both trespassed upon defendant's home and engaged in conduct, with the connivance of the government, directly contrary to Fourth Amendment principles . . . bears upon the court's evaluation of CBS's newsgathering privilege. The First Amendment is a shield, not a sword. Even a reporter must accept limits on how far upon another person's privacy he or she may intrude. To both approve CBS's violation of defendant's privacy and rule that he is not permitted to see the private

16. *Id.* at 151.

17. *Id.* at 161.

18. *Id.* at 159-60.

19. *Id.* at 158.

20. *Sanusi*, 813 F. Supp. at 156.

21. *Id.* at 160. In essence, Judge Weinstein suggested that CBS might be liable under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In that case, the United States Supreme Court created a cause of action for damages against federal officers who, under color of their authority, violate an individual's constitutional right. The action is similar to that available under 42 U.S.C. § 1983 for constitutional violations committed under color of state law. The Supreme Court has never extended *Bivens* liability to parties not employed by the federal government but at least three federal circuit courts have done so. See *Vector Research, Inc. v. Howard and Howard Attorneys, P.C.*, 1996 WL 60802 (6th Cir.); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987); *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984). *But see Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1995).

images that were taken from him in the course of that violation would be intolerable.²²

B. Ayeni v. Mottola²³

Mrs. Ayeni and her son subsequently brought a civil rights action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,²⁴ against CBS, its "Streets Stories" producer, and the government agents, alleging that they violated the plaintiffs' Fourth Amendment right to be secure against unreasonable searches and seizures.²⁵ The defendants filed motions to dismiss the action based on qualified governmental immunity, but United States District Judge Weinstein, whom the defendants had encountered previously in *United States v. Sanusi*,²⁶ denied the defendants' motions.²⁷ Judge Weinstein ruled that as private parties rather than government officials, CBS and the "Street Stories" producer were not entitled to immunity.²⁸ The agents were not immune from suit because the plaintiffs sufficiently alleged that they violated a clearly established constitutional right at the time of their actions.²⁹ Thus, the plaintiffs met the standard for precluding a grant of immunity to a government official.³⁰

Judge Weinstein again underscored the importance of Fourth Amendment principles, citing *Katz v. United States*,³¹ on the right to protection against unreasonable intrusions by government officials into areas where private citizens have a reasonable expectation of privacy.³² The Ayeni home search, said Weinstein, "[was] the equivalent of a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another."³³ As for CBS, the judge said:

[it] had no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the

22. *Sanusi*, 813 F. Supp. at 160.

23. 35 F.3d 680 (2d Cir. 1994).

24. 403 U.S. 388 (1971).

25. *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 366 (E.D.N.Y. 1994).

26. 813 F. Supp. 149 (E.D.N.Y. 1992).

27. *Ayeni v. CBS Inc.*, 848 F. Supp. at 366.

28. *Id.* at 368.

29. *Id.* at 367-68.

30. *Id.* at 368.

31. 389 U.S. 347 (1967).

32. *Id.* at 353.

33. *Ayeni v. CBS Inc.*, 848 F. Supp. at 368.

photographic record. The images, though created by the camera, are a part of the household; they could not be removed without permission or official right. . . . The television tape was a seizure of private property, information, for non-governmental purposes.³⁴

CBS reached a confidential settlement with the plaintiffs.³⁵ Lead agent James Mottola, however, pursued an interlocutory appeal to the United States Court of Appeals for the Second Circuit from Judge Weinstein's order denying Mottola's motion to dismiss the suit on qualified immunity grounds.³⁶ The Second Circuit affirmed Judge Weinstein's order,³⁷ recapitulating the Fourth Amendment sanctity-of-home theme,³⁸ and expanding the qualified immunity analysis of the earlier opinions.³⁹ The court held that (1) the Fourth Amendment prohibited Mottola from bringing the CBS team into the Ayenis' home; (2) the plaintiffs had a Fourth Amendment right, clearly established at the time of the search, to be protected from Mottola's actions in doing so; and (3) Mottola could not have believed, based on a standard of objective reasonableness, that his conduct was consistent with the Fourth Amendment.⁴⁰ "A private home," wrote Chief Judge Newman, "is not a sound stage for law enforcement theatricals."⁴¹ Agent Mottola's final attempt to gain governmental immunity failed recently when the United States Supreme Court denied certiorari.⁴²

III. THE FOURTH AMENDMENT: AN OVERVIEW

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particular-

34. *Id.*

35. *Ayeni v. Mottola*, 35 F.3d 680, 684 n.2 (2d Cir. 1994).

36. *Id.* at 684.

37. *Id.* at 686.

38. *Id.* at 685. "The home has properly been regarded as among the most highly protected zones of privacy . . . 'ordinarily afforded the most stringent Fourth Amendment protection.'" *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

39. *Ayeni v. Mottola*, 35 F.3d at 685-86.

40. *Id.* at 686.

41. *Id.*

42. *Mottola v. Ayeni*, 115 S. Ct. 1689 (1995).

ly describing the place to be searched, and the persons or things to be seized.⁴³

A. *History and Objective*

The objective of the Fourth Amendment is to restrain government incursions into the private lives of individual citizens.⁴⁴ The underlying principle is generally traced back to *Entick v. Carrington & Three Other King's Messengers*,⁴⁵ a 1765 English trespass action involving an invasion of a home. The search was authorized under general warrant originating with the Star Chamber, to search and seize items that might be used to convict the plaintiff of seditious libel. Lord Camden excoriated the exercise of general warrant authority to invade the plaintiff's dwelling-house, break open his desks and boxes, and look through his papers: "Where is the written law that gives any magistrate such a power? We can safely say, there is no law in this country to justify the defendants in what they have done; if there was it would destroy all the comforts of society."⁴⁶ William Pitt, later known as Lord Chatham, had already expressed similar sentiments in a 1763 address before the House of Commons, widely quoted by courts and commentators:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.⁴⁷

Such sentiments were also voiced against the abusive practices of the Crown in the American colonies involving the writs of assistance.⁴⁸ The colonists were outraged by the unbridled discretion these writs afforded

43. U.S. CONST. amend. IV.

44. See *Soldal v. Cook County*, 506 U.S. 56 (1992) (citing *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967)); *Winston v. Lee*, 470 U.S. 753, 758 (1985); *Jones v. United States*, 362 U.S. 257, 261 (1960).

45. 19 State Tr. 1029 (1765).

46. *Id.*

47. THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* 610 n.2 (8th ed. 1927); see also *Payton v. New York*, 445 U.S. 573, 601 n.54 (1980); *Miller v. United States*, 357 U.S. 301, 307 (1958); *United States v. Sanusi*, 813 F. Supp. 149, 158 (E.D.N.Y. 1992).

48. See NELSON LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51-78 (1937); see also *Payton v. New York*, 445 U.S. 573, 583-84 n.21, 608 (1980); *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965); *Boyd v. United States*, 116 U.S. 616, 625 (1886).

revenue officers to search homes and individuals for smuggled goods.⁴⁹ These matters could not have gone unnoticed by the Framers of the United States Constitution.⁵⁰ Whether for purposes of thwarting the potential for threats to political and religious freedom like those posed by the general warrants, or to prevent incursions in the name of trade regulation enforcement like those authorized under the writs of assistance, the decision to include the Fourth Amendment in the Bill of Rights appears to have been inevitable in light of the historical context.⁵¹

B. *The Sanctity of Home*

As one commentator has noted, “[n]o study of the scope of [F]ourth [A]mendment coverage would be complete without acknowledging that the principle of home sanctity resides securely at the core of the guarantee and motivates its restraints upon official search and seizure”⁵² Professor Tomkovicz notes that “[t]he sanctity of the home remains today probably the most unassailable fact of [F]ourth [A]mendment jurisprudence.”⁵³ “The home,” he says, “not only provides a domain in which to enjoy solitude and secrecy, it also furnishes a readily identifiable space within which people can fearlessly enjoy other entitlements of our free society.

49. In *Steagald v. United States*, 451 U.S. 204 (1981), the court observed that:

[T]he writs of assistance . . . noted only the object of the search—any uncustomed goods—and thus left customs officials completely free to search any place where they believed such goods might be The central objectionable feature of [the writs] was that they provided no judicial check on the determination of the executing officials that the evidence available justified an intrusion into any particular home.

Id. at 220.

50. “[W]hat the Framers of the Fourth Amendment most strongly opposed . . . were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority.” *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386, 2398 (1995) (O’Connor, J., dissenting) (citing W. CUDDIGY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 1402, 1499, 1555 (1990) (Ph.D. Dissertation, Claremont Graduate School); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 MEM. ST. U.L. REV. 483, 528 (1994); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 9-12 (1994); L. Levy, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION 221-46 (1988)). See also Payton v. New York, 445 U.S. 573, 583-84 (1980).

51. See *Acton*, 115 S. Ct. at 2399 (O’Connor, J., dissenting) (citing *Cuddihy*, *supra* note 50, at 1499, 1554-60).

52. James J. Tomkovicz, *Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 674 n.120 (1985) (citing COOLEY, *supra* note 47, at 610 n.2); JACOB LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, 25 (1966); LASSON, *supra* note 48, at 13, 49-50.

53. Tomkovicz, *supra* note 52, at 674 n.120.

Homes . . . furnish opportunities for free expression, free religious practice, and 'personal autonomy.'"⁵⁴

Reverence for the sacredness of the home is equally recognized by the judiciary.⁵⁵ In *Boyd v. United States*,⁵⁶ the Supreme Court's landmark Fourth Amendment decision, Justice Bradley wrote eloquently of the need to safeguard against "all invasions on the part of the government and its employ[ees] of the sanctity of a man's home and the privacies of life."⁵⁷ Supreme Court Justice Harlan once wrote that "[t]he home derives its preeminence as the seat of family life."⁵⁸

C. Search, Seizure, and Reasonableness

According to Supreme Court Justice Stevens, "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."⁵⁹ There are two types of seizures. A seizure of property occurs "when there is some meaningful interference with an individual's possessory interests in that property."⁶⁰ A seizure of a person takes place when there is "meaningful interference, however brief, with an individual's freedom of movement."⁶¹ The individual must reasonably believe that under the "totality of all the circumstances," he or she is not free to leave,⁶² or not "free to decline the officers' request or otherwise terminate the encounter."⁶³

In *Ayeni v. Mottola*, the Second Circuit found that the reasonableness requirement of search and seizure raised two issues: (1) whether the search or seizure would be reasonable if conducted at all; and (2) whether the manner and scope of the search or seizure is reasonable.⁶⁴ With respect to the first issue, all searches and seizures presumptively require a warrant

54. *Id.* at 674.

55. *See, e.g.,* *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Michigan v. Clifford*, 464 U.S. 287 (1984); *Payton v. New York*, 445 U.S. 573, 589 (1980); *Silverman v. United States*, 365 U.S. 505, 511 (1961); *Weeks v. United States*, 232 U.S. 383, 390 (1914).

56. 116 U.S. 616 (1886).

57. *Id.* at 630.

58. *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting).

59. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

60. *Id.*

61. *Id.* at 113 n.5.

62. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). *Compare* *Florida v. Royer*, 460 U.S. 491, 501 (1983) with *INS v. Delgado*, 466 U.S. 210, 218-19 (1984).

63. *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

64. 35 F.3d 680, 684 (2d Cir. 1994) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)).

in order to be reasonable.⁶⁵ In the absence of a warrant, a search by a law enforcement officer must be supported by probable cause in order to satisfy the reasonableness standard.⁶⁶ Reasonableness as to manner and scope may require, among other things, that the officer knock and announce,⁶⁷ not destroy property,⁶⁸ confine the search to areas that could reasonably contain the items specified in the warrant,⁶⁹ and not remain on the premises for an unreasonable length of time after the search is complete.⁷⁰ Failure to adhere to the reasonableness standard will, as a violation of the Fourth Amendment, result in the suppression of any evidence discovered.⁷¹

D. Third-Party Presence During Search and Seizure

The central Fourth Amendment issue arising out of the joint incursions of police and reporters inside private homes during searches and seizures, is whether the presence of the media at the scene, invited by law enforcement officers, renders the search or seizure unreasonable. The more fundamental question involved is whether the presence of any non-government third party, invited by officers, renders the search or seizure unreasonable.

65. *Payton v. New York*, 445 U.S. 573, 586 (1980); *Katz v. United States*, 389 U.S. 347, 357 (1967).

66. *Carroll v. United States*, 267 U.S. 132, 155-56 (1925).

67. *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995). The court held that the common law "knock and announce" principle forms a part of the Fourth Amendment reasonableness inquiry. *Id.* at 1916. It allowed, however, that under certain circumstances, an unannounced entry may be reasonable. *Id.* at 1919.

68. *See, e.g., United States v. Becker*, 929 F.2d 442, 446 (9th Cir.), *cert. denied*, 502 U.S. 862 (1991); *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982).

69. *See, e.g., United States v. Ross*, 456 U.S. 798 (1982). *But see California v. Acevedo*, 500 U.S. 565, 573 (1991) (holding that police need not obtain a warrant to open a container in a movable vehicle simply because they lack probable cause to search the entire vehicle so long as they have probable cause to believe the container holds contraband or evidence); *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that a warrantless search of the passenger compartment of a vehicle, as well as containers in it, is permissible when conducted contemporaneously with a custodial arrest).

70. *See, e.g., United States v. Corrado*, 803 F. Supp. 1280, 1285 (M.D. Tenn. 1992). *See also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.10(d) (2d ed. 1987).

71. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *Weeks v. United States*, 232 U.S. 383, 398 (1914).

1. Section 3105

Congress has spoken in 18 U.S.C. § 3105 regarding third-party presence during searches:

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his [or her] requiring it, he [or she] being present and acting in its execution.⁷²

Section 3105 is not controlling authority on the issue of the scope of the Fourth Amendment. Several courts have looked to it for guidance, however, in determining the boundaries of constitutional "reasonableness" as applied to searches where non-government third parties were present. In *United States v. Clouston*,⁷³ for example, the presence of telephone company employees on the premises to aid officers in a search did not, in light of the statute, render the search unreasonable. In *United States v. Gambino*,⁷⁴ a similar result was reached in line with the statute, in a case involving the presence of a confidential informant who assisted officers, and the presence of a computer expert to assist in a search did not violate section 3105 in *United States v. Schwimmer*.⁷⁵

If the scope of reasonableness under the Fourth Amendment were to be determined unequivocally by section 3105, then most joint incursions by police and media into private homes would render the searches unreasonable and, therefore, in violation of the amendment since rarely would a camera crew accompany law enforcement officers on such a mission for the purpose of assisting them, rather than for the purpose of covering the event. The Second Circuit relied substantially on section 3105 for guidance to conclude that the search of the Ayenis' apartment was constitutionally unreasonable, noting that the defendant never contended that CBS assisted the officers; rather, it was the officers who were assisting CBS in producing a television show.⁷⁶

72. 18 U.S.C. § 3105 (1995). While the statute specifies those who may "serve" a search warrant, it has been construed to determine those who may "execute" a warrant. See also *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *United States v. Clouston*, 623 F.2d 485, 486 (6th Cir. 1980); *United States v. Gervato*, 474 F.2d 40, 45 (3d Cir.), cert. denied, 414 U.S. 864 (1973).

73. 623 F.2d 485, 486-87 (6th Cir. 1980).

74. 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990).

75. 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988).

76. *Ayeni v. Mottola*, 35 F.3d 680, 687 (2d Cir. 1994).

2. Manner and Scope

Section 3105 is not the only basis for the Second Circuit's conclusion that the Ayeni home search was unreasonable. The court also considered the manner and scope of the search.⁷⁷ According to the court, the Fourth Amendment required the agents "to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties."⁷⁸ It required them to limit their actions to the express terms of the warrant or, under implied authority, to reasonable law enforcement actions related to the execution of the warrant.⁷⁹ In examining the warrant, the court found that it authorized no one other than federal officers to enter the Ayeni home.⁸⁰ Agent Mottola neither requested the presence of a television camera crew, nor indicated any need for one in his warrant application.⁸¹ Furthermore, Mottola made no implied authority claim that the CBS crew served any legitimate law enforcement purpose inside the Ayenis' home.⁸² The court reasoned, therefore, that the manner in which Mottola conducted the search was unnecessarily intrusive because it did not preserve the Ayenis' privacy to the maximum extent possible under the circumstances. The scope of the search overshot the terms of the warrant and could not be justified on implied authority grounds since CBS served no law enforcement function at the scene. As Chief Justice Newman concluded:

[Mottola's conduct] was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect—the right of privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right of privacy.⁸³

77. The Second Circuit's consideration of the manner and scope of the search as factors in determining reasonableness is in accord with the Supreme Court opinions holding that the manner in which searches and seizures are conducted affects reasonableness. See *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (searches); *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989) (seizures).

78. *Id.* at 686.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994).

83. *Id.*

3. *Bills v. Aseltine*

In recent months, the United States Court of Appeals for the Sixth Circuit rendered a decision in a case pertinent to this discussion because it involves a police search of a home during which a third party was present for purposes not authorized under the search warrant. In *Bills v. Aseltine*,⁸⁴ a police sergeant, acting on an informant's tip, invited a private security guard at General Motors Corporation ("GM") to accompany him when, with other officers, he searched a private residence for stolen property. According to the tip, the residence contained items stolen from GM. The sergeant knew that GM had been investigating the homeowner but did not seek a search warrant for the GM property because he did not believe he had sufficient probable cause. The warrant issued was specific as to which participants and what conduct it authorized: law enforcement officers were permitted to search the home, garage and adjoining shed and to seize a generator. Those restrictions notwithstanding, the security guard arrived armed with a camera, and took more than two hundred photographs of GM parts and equipment as he accompanied the officers through the premises. The next day, the guard obtained a search warrant for the GM property. The homeowner brought a civil rights action against all police officers involved, claiming her Fourth Amendment rights, as well as other constitutional rights, had been violated.⁸⁵

The case was before the Sixth Circuit on two separate occasions. In *Bills I*,⁸⁶ the court reversed a summary judgment for the defendants, which was based on qualified immunity, "because genuine issues of material fact exist concerning the reasonableness of the conduct of the police in inviting a private citizen into the dwelling of another for purposes unrelated to the execution of the search warrant."⁸⁷ On remand, the federal district court ruled that, as a matter of law, the attending officers, as mere subordinates of the sergeant, met the test for qualified immunity since there was no evidence that they knew of the guard's purpose for being in the Bills' home.⁸⁸ As for the sergeant, however, the court submitted to a jury the issue of whether he had "unreasonably exceeded the scope of the warrant" by inviting "a private person to tour plaintiff's home with a camera for

84. 52 F.3d 596 (6th Cir. 1995).

85. See *Bills v. Aseltine*, 958 F.2d 697, 701 (6th Cir. 1992) [hereinafter "*Bills I*"].

86. *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992).

87. *Id.* at 709.

88. *Bills v. Aseltine*, 52 F.3d 596, 600 (6th Cir. 1995) [hereinafter "*Bills II*"].

purposes utterly unconnected with the search warrant."⁸⁹ The jury returned a verdict for the sergeant.⁹⁰ The plaintiff unsuccessfully moved for a directed verdict at the end of the trial.⁹¹

In *Bills II*, the plaintiff appealed the grant of qualified immunity to the attending officers and the denial of her motion for a directed verdict.⁹² With respect to the immunity question, the Sixth Circuit ruled that the plaintiff was collaterally estopped from raising the issue of the reasonableness of the attending officers' conduct by the jury's finding that the sergeant in charge of the operation acted reasonably.⁹³ As for the second question, the court reasoned that a directed verdict against the police was not warranted by the mere contention that the security guard's conduct may have been unlawful.⁹⁴ "[W]hile perhaps constituting a trespass, [the guard's conduct did] not offend the Fourth Amendment."⁹⁵

Taking *Bills* and *Ayeni* together, one must ask why law enforcement officers executing a search warrant do not violate the Fourth Amendment when they invite an unauthorized third party to come along and photograph property not specified in the warrant for purposes of a separate and private investigation, but do violate the Fourth Amendment when they invite an unauthorized third party to videotape a network news program segment. Several factors may have contributed to this discrepancy. First, courts are split on the role of the judge and jury in resolving the immunity issue. In *Hunter v. Bryant*,⁹⁶ the Supreme Court declared that "immunity ordinarily should be decided by the court."⁹⁷ Accordingly, it is widely held that courts should not instruct juries to determine the issue of immunity.⁹⁸ But sometimes courts determine that certain factual issues must be resolved before they can decide the question of law.⁹⁹ In such cases, courts may ask juries to render a special verdict, consisting of a list of interrogatories

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 604.

93. *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995) [*Bills I*].

94. *Id.* at 605-06.

95. *Id.* at 606 (citing *Bills v. Aseltine*, 958 F.2d 697, 704) (6th Cir. 1992) [*Bills I*].

96. 502 U.S. 224 (1991).

97. *Id.* at 228.

98. See Kathryn R. Urbonia, *Qualified Immunity from Damages*, SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEY'S FEES 1994, at 8-37 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5201, 1994). See, e.g., *Stone v. Peacock*, 968 F.2d 1163, 1166 (11th Cir. 1992).

99. See, e.g., *Mahoney v. Kesery*, 976 F.2d 1054, 1058 (7th Cir. 1992); *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990), cert. denied, 498 U.S. 967 (1990). See Urbonia, *supra* note 98, at 8-36.

that call for findings of fact.¹⁰⁰ The Federal Rules of Civil Procedure also permit the jury to answer special interrogatories before reaching a general verdict, thus answering factual issues and then applying the facts to the law.¹⁰¹

In *Bills II*, the trial court submitted special interrogatories to the jury on the question of whether the lead police sergeant acted unreasonably when he invited and permitted the presence of the security guard at the scene of the search.¹⁰² The jury decided that the conduct was reasonable and therefore lawful.¹⁰³ In *Ayeni*, by contrast, lawfulness of similar law enforcement conduct was never cast as a factual issue for a jury to resolve. The Second Circuit determined that the act of inviting and permitting the presence of CBS during the Ayeni home search was unlawful and should have been recognized as such by Mottola based on the objective reasonableness standard used in qualified immunity cases.¹⁰⁴

Furthermore, in *Bills*, a question on the defendant's good faith¹⁰⁵ was submitted to the jury despite the fact that good faith is no longer a recognized standard for qualified immunity.¹⁰⁶ Also, the plaintiff based her motion for a directed verdict on the argument that the third-party—a security guard—trespassed on her property, a claim the court deemed neither relevant nor dispositive in her civil rights action against the defendant.¹⁰⁷ All of this yields a troubling result. In a case where there is virtually no dispute that the presence and conduct of a third party exceeded the scope of both the search warrant and the exigent circumstances that would justify such presence and conduct, the officer responsible is held immune from liability. In consideration of the procedural factors noted above, however, *Bills* is clearly distinguishable from *Ayeni*.

E. Videotaping as Seizure

A seizure of property, as discussed earlier, occurs “when there is some meaningful interference with an individual's possessory interests in that

100. See *Urbonia*, *supra* note 98, at 8-37. See also FED. R. CIV. P. 49(a).

101. FED. R. CIV. P. 49(b).

102. *Bills v. Aseltine*, 52 F.3d 596, 605 (6th Cir. 1995) [*Bills II*].

103. *Id.* at 600.

104. *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994).

105. *Bills II*, 52 F.3d at 605.

106. For the current standard for qualified immunity, see *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

107. *Bills II*, 52 F.3d at 605-06. The plaintiff further argued that the defendant was required to present some constitutional justification for the security guard's intrusion. The court found no legal basis for this contention, however. *Id.*

property.”¹⁰⁸ But suppose the property in question is intangible—information, for example. Judge Weinstein observed that taking photographs is a seizure of information similar to wiretapping¹⁰⁹ but that photography of areas within “plain view” is constitutional.¹¹⁰ The Second Circuit, relying on *Katz v. United States*,¹¹¹ and *Silverman v. United States*,¹¹² found that video and sound recordings constitute seizures within the meaning of the Fourth Amendment,¹¹³ but the types of seizures in *Katz* and *Silverman* were more analogous to the situation in which law enforcement officers operate their own videotaping equipment for purposes of producing public broadcasts. In its expanded notion of what constitutes an unreasonable seizure, *Ayeni* requires a departure from the rule that Fourth Amendment prohibitions do not apply to private actors.¹¹⁴ On the other hand, where law enforcement officers operate their own videotaping equipment for purposes of producing public broadcasts, the notion that videotaping constitutes Fourth Amendment seizure would be more plausible.

IV. QUALIFIED IMMUNITY

The affirmative defense of qualified immunity applies to government officials where it is necessary to preserve their ability to serve the public good or to “ensure that talented candidates not be deterred by the threat of damages suits from entering public service.”¹¹⁵ Under qualified immunity, “government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not

108. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); see *Soldal v. Cook County*, 506 U.S. 56 (1992); *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987).

109. *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 367 (citing *United States v. Villegas*, 899 F.2d 1324 (2d Cir.), cert. denied, 498 U.S. 991 (1990)). See also *Berger v. State of New York*, 388 U.S. 41 (1967) (holding that the use of electronic devices to capture a conversation is a “search” within the meaning of the Fourth Amendment). *Id.* at 51.

110. *Id.* at 367 (citing *Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992) [*Bills I*]; *United States v. Espinoza*, 641 F.2d 153, 166 (4th Cir.), cert. denied, 454 U.S. 841 (1981)).

111. 389 U.S. 347 (1967).

112. 365 U.S. 505 (1961).

113. *Ayeni v. Mottola*, 35 F.3d 680, 688 (2d Cir. 1994).

114. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Private parties serving as federal actors may be subject to liability for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Vector Research, Inc. v. Howard and Howard Attorneys, P.C.*, 1996 WL 60802 (6th Cir.); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987); *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984). But see *Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1995).

115. *Wyatt v. Cole*, 504 U.S. 158, 159 (1992).

violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹¹⁶ Officials can escape civil liability by showing that they neither knew nor should have known of the right in question, even when it was clearly established.¹¹⁷ "The contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right."¹¹⁸ The unlawfulness of the official's actions must be apparent in light of pre-existing law.¹¹⁹ The procedural effect of qualified immunity is that it may render the defendant immune from suit, or operate as a defense to liability.¹²⁰

In order to defeat a claim of qualified immunity, one must show that "in light of pre-existing law, the unlawfulness of the government official's conduct is apparent."¹²¹ The question of how to apply qualified immunity remains a source of considerable confusion, however,¹²² as evidenced by the divergent views in the Second and Sixth Circuits on whether it is a violation of a clearly established right for a law enforcement officer to invite a private actor/third party to the scene of the execution of a search warrant. In *Ayeni*, the Second Circuit answered in the affirmative after determining that Mottola had failed to meet either of the alternative requirements for claim dismissal, namely, that the right claimed by the plaintiff to have been violated was not 'clearly established' as of the time of the search, or, that it was 'objectively reasonable' for the officer to believe that his acts did not violate the clearly established right.¹²³ The court found that the *Ayenis* had a clearly established right at the time of the search to Fourth Amendment protection "from an agent's bringing into their home persons not expressly nor impliedly authorized to be there . . . Mottola could not with objective reasonableness have believed that his action was consistent with the Fourth Amendment."¹²⁴ In *Bills II*, the Sixth Circuit distinguished *Ayeni*, criticizing the Second Circuit's failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms as a Fourth

116. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

117. *Id.* at 819.

118. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

119. *Id.*

120. *Mitchell v. Forsyth*, 472 U.S. 511, 518 n.4 (1985).

121. *Anderson*, 483 U.S. 640.

122. See *Urbonia*, *supra* note 98, at 8-36, 8-37.

123. *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994); see *Soares v. Connecticut*, 8 F.3d 917, 920 (2d Cir. 1993); *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990).

124. *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994).

Amendment right to privacy. . . . It is hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his [or her] conduct under such a vague standard.¹²⁵

The Sixth Circuit cited its own requirement that "the district court must decide the purely legal question of whether the law at the time of the alleged action was clearly established in favor of the plaintiff."¹²⁶

As noted earlier, *Bills* is distinguishable by its procedural idiosyncracies.¹²⁷ Its conflict with *Ayeni* underscores the current confusion over the procedural aspects of the qualified immunity defense. In *Hunter v. Bryant*,¹²⁸ the Supreme Court declared that qualified "[i]mmunity ordinarily should be decided by the court . . ."¹²⁹ It is widely held that courts should not instruct juries to determine the issue of immunity.¹³⁰ But sometimes courts determine that certain factual issues must be resolved before the question of law can be decided.¹³¹ In such cases, courts may ask juries to render a special verdict, consisting of a list of interrogatories that call for findings of fact,¹³² or answer special interrogatories before reaching a general verdict, thus answering factual issues and then applying the facts to the law.¹³³

In the past, the Second Circuit has recognized the need for such jury participation through special interrogatories,¹³⁴ but clearly did not recognize such a need in *Ayeni*. This is evidenced by the fact that the Second Circuit determined, as a matter of law, that Agent Mottola's conduct was unreasonable and therefore unlawful and that an objectively reasonable officer would have recognized it as such.¹³⁵ In *Bills I*, on the other hand, the Sixth Circuit reversed the district court's finding of

125. *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) [*Bills II*].

126. *Id.* at 602 (quoting *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987)).

127. *See supra* text accompanying notes 102-07.

128. 502 U.S. 224 (1991).

129. *Id.* at 228.

130. *See, e.g.*, *Henderson v. DeRobertis*, 940 F.2d 1055 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1578 (1992); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991). *See generally* *Urbonia, supra* note 98, at 8-37.

131. *See Urbonia, supra* note 98, at 8-36. *See, e.g.*, *Mahoney v. Kesery*, 976 F.2d 1054, 1058 (7th Cir. 1992); *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir.), *cert. denied*, 498 U.S. 967 (1990).

132. *See supra* notes 98 and 131 and accompanying text. *See also* FED. R. CIV. P. 49(a).

133. *See* FED. R. CIV. P. 49(b).

134. *See Warren*, 906 F.2d at 76.

135. *Ayeni v. Mottola*, 35 F.3d 680, 685-86 (2d Cir. 1994).

qualified immunity "because genuine issues of material fact exist[ed] concerning the reasonableness of the conduct of the police in inviting a private citizen into the dwelling of another for purposes unrelated to the execution of the search warrant."¹³⁶ Characterization of the reasonableness of the officers' conduct as an issue of fact ultimately necessitated jury participation. The trial court submitted special interrogatories to the jury on the question of whether the supervising police sergeant conducted himself unreasonably when he invited and permitted the presence of the security guard at the scene of the search.¹³⁷ The jury decided that the conduct was reasonable and therefore lawful.¹³⁸ As discussed earlier, the plaintiff's ultimate defeat implicated several adverse procedural factors.¹³⁹

While on the subject of procedure, an explanation is in order as to how and why the immunity issue in *Ayeni* was presented to the Second Circuit as an interlocutory appeal. In *Mitchell v. Forsyth*,¹⁴⁰ the Supreme Court explained that a federal appellate court has jurisdiction under the "collateral order" doctrine to review an interlocutory appeal of a district court order that "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that the appellate consideration be deferred until the whole case is adjudicated."¹⁴¹ The issue of qualified immunity is collateral to the merits of a case; it does not require a court determination of whether the defendant's conduct is, in fact, unlawful.¹⁴² The scope of appellate jurisdiction with respect to the qualified immunity issue, then, is actually rather narrow, as the Supreme Court explained:

An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district

136. *Bills v. Aseltine*, 958 F.2d 697, 709 (6th Cir. 1992).

137. *Bills v. Aseltine*, 52 F.3d 596, 605 (6th Cir. 1995) [*Bills II*].

138. *Id.* at 600.

139. See *supra* text accompanying notes 105-07.

140. 472 U.S. 511 (1985).

141. *Id.* at 524-25 (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

142. *Id.* at 529 n.10.

court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the action the defendant claims he [or she] took.¹⁴³

V. RAMIFICATIONS OF THE AYENI DECISION

The effect of the interlocutory appeal in *Ayeni v. Mottola*¹⁴⁴ was to resolve the issue of the qualified immunity defense against agent Mottola. As the Supreme Court explained in *Mitchell*¹⁴⁵, the issue of qualified immunity is collateral to the merits of the case; the court does not decide whether "the defendant's actions were in fact unlawful."¹⁴⁶ A jury must now decide whether Mottola played a role in permitting the CBS news crew to be present at the Ayeni apartment search.¹⁴⁷ In any event, the Second Circuit decision marks a significant victory for all who oppose police/media encroachments because it imposes regulations having constitutional dimensions on an increasingly common practice that has not often been challenged.

To be sure, some aspects of the court's opinion raise questions, such as whether videotaping by the media constitutes a "seizure" by the law enforcement officers who invite the media to accompany them and to what extent 18 U.S.C. § 3105 should guide the interpretation of reasonableness within the meaning of the Fourth Amendment. Nevertheless, as the FBI has concluded, *Ayeni* sends a clear signal that the practice, for law enforcement officers, entails considerable legal risk. The Second Circuit ruling prompted the FBI to issue a warning in its bulletin to law enforcement agencies nationwide that "[m]edia participation in enforcement activities that occur in private areas should be specifically prohibited, unless the media obtains [sic] consent from individuals occupying those areas."¹⁴⁸

The *Ayeni* case appears to be equally ominous for media entities. Since CBS reached a confidential settlement with the plaintiffs prior to the

143. *Id.* at 528.

144. 35 F.3d 680 (2nd Cir. 1994).

145. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

146. *Id.* at 529 n.10.

147. *Ayeni*, 35 F.3d at 689 n.11.

148. Larry Neumeister, *Feds Pull Plug On TV Shows Taping Suspects in Police Raids*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Sept. 23, 1994, at A18 (quoting FBI LAW ENFORCEMENT BULL.). A CBS spokesman said the network would stop the practice of sending camera crews into private homes without the homeowner's permission. *Id.*

interlocutory appeal, issues surrounding the liability of media organizations whose employees follow law enforcement officers into private homes will not be decided in this case. Still, given the success of plaintiffs in bringing tort actions against the media in recent years as a result of incursions on private property, it appears that liability looms large for the media in such incursions as well as for law enforcement officers.

VI. TORT LAW AND TAG-ALONG MEDIA

A. Trespass

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.¹⁴⁹

These words of Lord Camden appear in the landmark Fourth Amendment decision by the United States Supreme Court, *Boyd v. United States*,¹⁵⁰ and illustrate the obvious kinship between trespass and Fourth Amendment principles. They protect similar interests in property, personal solitude and individual autonomy from outside encroachment. The *Restatement (Second) of Torts* illustrates that, as of the latter half of the twentieth century, the common law rule of trespass remains as Lord Camden described it:

One is subject to liability to another for trespass, irrespective of whether he [or she] thereby causes harm to any legally protected interest of the other, if he [or she] intentionally

(a) enters land in the possession of the other, or causes a thing or a third person to do so¹⁵¹

During the latter half of the Twentieth Century, in particular, trespass and intrusion have proven to be formidable weapons against press incursions into private areas. This development is especially remarkable in light of the fact that during this same period, press freedoms have otherwise

149. *Boyd v. United States*, 116 U.S. 616, 627 (1886) (quoting *Entick v. Carrington & Three Other King's Messengers*, 19 State Tr. 1029 (1765)).

150. 116 U.S. 616 (1886).

151. RESTATEMENT (SECOND) OF TORTS § 158 (1977).

expanded considerably with the emergence of constitutional privilege¹⁵² and with the increasing scrutiny and criticism leveled against privacy tort.¹⁵³

B. *Intrusion: A Surviving Privacy Tort*

The genesis of invasion of privacy as a tort is generally identified in a *Harvard Law Review* article written by Samuel Warren and Louis Brandeis published 105 years ago.¹⁵⁴ The authors, prompted by what they regarded as excesses of the press in "overstepping in every direction the obvious bounds of propriety and of decency,"¹⁵⁵ proposed a new cause of action for infringing on one's right "to be let alone."¹⁵⁶ The tort doctrine developed slowly and rather amorphously over the ensuing years until 1960 when William Prosser brought some sense of order to the law by declaring that privacy consisted not of one tort but of four: publicity which places one in a false light publicly; intrusion upon the seclusion, solitude, or private affairs of another (hereinafter "intrusion"); public disclosure of embarrassing private facts about another; and appropriation for one's own advantage of the name and likeness of another.¹⁵⁷ The *Restatement (Second) of Torts* subsequently adopted Prosser's scheme.¹⁵⁸

According to the *Restatement*, "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his [or her] private affairs or concerns, is subject to liability to the other for invasion of his [or her] privacy, if the intrusion would be highly offensive to a reasonable person."¹⁵⁹ Intrusion claims, unlike other privacy claims, may arise even in the absence of publication.¹⁶⁰ Intrusion claims against

152. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *New York Times v. Sullivan*, 376 U.S. 254 (1964). See also *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980).

153. See Harvey L. Zuckman, *Invasion of Privacy—Some Communicative Torts Whose Time Has Gone*, 47 WASH. & LEE L. REV. 253 (1990); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291 (1983); Harry Kalven, Jr., *Privacy In Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966).

154. Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

155. *Id.* at 196.

156. *Id.* at 205.

157. William Prosser, *Privacy*, 48 CAL. L. REV. 383, 389-407 (1960).

158. RESTATEMENT (SECOND) OF TORTS § 652A-E (1977).

159. *Id.* at § 652B.

160. See *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 718-19 (4th Cir.), cert. denied, 501 U.S. 1212 (1991). In fact, the cause of action for intrusion does not require that the defendant obtain any information from the plaintiff. See *Hamberger v. Eastman*, 206 A.2d 239

journalists and/or mass media organizations typically target the use of hidden cameras and microphones or other surveillance devices,¹⁶¹ physical trespass,¹⁶² or other invasive conduct that exceeds the scope of the plaintiff's consent.¹⁶³

While many such claims are related to trespass,¹⁶⁴ not all intrusions constitute trespass and vice versa. Recovery under the common law tort of trespass merely requires an interference with the possessory interests of another in property without regard to whether the possessor's solitude or seclusion is affected.¹⁶⁵ Furthermore, under common law trespass, an unauthorized entry onto property of another need not offend a reasonable person in order to be actionable.¹⁶⁶ Conversely, tortious intrusions do not necessarily entail entry onto private property belonging to another.¹⁶⁷ Trespass law, as the United States Supreme Court has noted, protects property rights rather than privacy rights.¹⁶⁸

Intrusion, on the other hand, protects human dignity and what one commentator describes as the integrity of one's individual personality.¹⁶⁹ Such notions, Professor Robert Post observes, are fundamental to much

(N.H. 1964).

161. See *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

162. See *Green Valley Sch., Inc. v. Cowles Fla. Broadcasting, Inc.*, 327 So. 2d 810 (Fla. Dist. Ct. App. 1976).

163. See *Barber v. Time, Inc.*, 159 S.W.2d 291 (Mo. 1942) (holding that intrusion was actionable where plaintiff consented to be interviewed but did not consent to the subsequent use of her name or photograph). *But see* *Baugh v. CBS, Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993) (holding that a trespass claim is not available when consent is given, albeit induced through fraud, but that a claim for fraud or intentional misrepresentation may be available).

164. See *Desnick v. Capital Cities/ABC Inc.*, 851 F. Supp. 303 (N.D. Ill. 1994) for an overview of the various theories, including trespass and underlying intrusion claims. See also Zuckman, *supra* note 153, at 254 ("Intrusion represents little more than the extension of the ancient torts of trespass to real property and chattels to cover invasions of private spaces such as homes, offices, and automobiles through the employment of photographic and electronic devices not requiring apparent physical incursion.").

165. The requirements for recovery under the common law action of trespass did not include a showing of harm. See W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 67 (5th ed. 1984). See also RESTATEMENT (SECOND) OF TORTS § 158 (1977).

166. See generally KEETON ET AL, *supra* note 165, § 13, at 67-84.

167. See, e.g., *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (illustrating that paparazzi-style photographing of the plaintiff in public places constituted intrusion); *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964) (upholding intrusion claim by a plaintiff who was photographed in a public place with her dress blown up).

168. *Oliver v. United States*, 466 U.S. 170, 183 n.15 (1984). Some lower courts have been steadfast in maintaining the distinction between trespass and intrusion. See also *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106 (Or. App. 1990).

169. See generally Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

sociological thought.¹⁷⁰ Intrusion, he argues, is a safeguard of "civility rules," his term for social norms, and of the "chain of ceremony" in social interactions that results from observance of these rules.¹⁷¹ By adhering to a code of conduct, under which individuals observe rules of deference and demeanor,¹⁷² they "not only confirm the social order in which they live, but they also establish and affirm 'ritual and sacred' aspects of their own and others' identities."¹⁷³ "Violation of these rules can . . . damage a person by discrediting his identity and injuring his personality. Breaking the 'chain of ceremony' can deny an individual the capacity to become 'a complete man' and hence 'disconform' his very 'self.'"¹⁷⁴ Privacy tort, intrusion in particular, redresses such injury.¹⁷⁵

In recent years, invasion of privacy torts have come under increasing scrutiny by courts and commentators.¹⁷⁶ One privacy advocate notes that although courts in most states claim to recognize privacy torts, there is a "disturbingly widespread" pattern of summary judgments and dismissals of privacy claims.¹⁷⁷ The two privacy tort claims that have suffered most are public disclosure of embarrassing private facts and false light publicity.¹⁷⁸ A number of factors have contributed to their undoing: (1) the Supreme Court's severe, if not complete limitation, on state regulation of the publication of information that is both truthful and lawfully obtained;¹⁷⁹ (2) the newsworthiness exception, often described as the

170. *Id.* at 968.

171. *Id.*

172. See Erving Goffman, *The Nature of Deference and Demeanor*, in INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR 47 (1967).

173. Post, *supra* note 169, at 962 (quoting Goffman, *supra* note 172, at 91).

174. *Id.* at 963 (quoting Goffman, *supra* note 172, at 51).

175. *Id.*

176. See *supra* note 157. For a recent discussion of the decline of privacy tort in American courts, see Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 999 (1995) ("[W]hile courts in most states purport to recognize the four privacy torts, they do not receive them favorably. Indeed, a review of court decisions involving privacy claims raises doubts as to whether there really is a tort remedy for invasion of privacy.")

177. McClurg, *supra* note 176, at 999.

178. Courts in several states, including Texas, North Carolina, Missouri, Ohio, New York, and Washington have rejected the common law tort of false light invasion of privacy. See Dupree v. Iliff, 860 F.2d 300 (8th Cir. 1988); Angelotta v. American Broadcasting Corp., 820 F.2d 806 (6th Cir. 1987); Howell v. New York Post, 581 N.Y.S.2d 330 (1992), *aff'd in part*, 619 N.E.2d 650 (N.Y. 1993); Renwick v. News and Observer, 312 S.E.2d 405 (N.C. 1984); Cain v. Hearst, 878 S.W.2d 577 (Tex. 1994); Eastwood v. Cascade Broadcasting Co., 722 P.2d 1295 (Wash. 1986).

179. See Florida Star v. B.J.F., 491 U.S. 524 (1989); Globe Newspapers v. Superior Court, 457 U.S. 596 (1982); Smith v. Daily Mail, 443 U.S. 97 (1979); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

exception that swallows up the private facts tort;¹⁸⁰ (3) the common, although not uniform, practice of applying the stringent actual malice standard, germane to defamation law, to false light claims;¹⁸¹ and (4) the failure of many false light claims to satisfy the "offensiveness" requirement.¹⁸²

One of the reasons why intrusion as a theory of liability succeeds where other privacy torts appear to be failing, is that intrusion regulates non-publication conduct. In so doing, it manages to escape the powerful First Amendment privileges that shield the media from other tort liabilities.¹⁸³ A second reason for its success is that intrusion resembles trespass, a cornerstone of western jurisprudence. Intrusion, furthermore, represents the priority that society, confronted by increasingly invasive technology, affords values of human dignity, integrity, and individual personality, irrespective of any association they may have with property interests.¹⁸⁴ As one commentator noted, "[i]f the intrusive tort did not already exist, it would have to be invented for a society obsessed with snooping and facilitating devices capable of capturing and recording the slightest movements and faintest whispers at considerable distances even behind solid barriers."¹⁸⁵

C. Privileges and Defenses

1. Consent

"It is a fundamental principle of the common law that *volenti non fit injuria*—to one who is willing, no wrong is done."¹⁸⁶ Intrusion claims against news media fail where there is a trespass element of the plaintiff's

180. See Harry Kalven, Jr., *Privacy In Tort Law—Were Warren and Brandeis Wrong?*, LAW & CONTEMP. PROBS. 326 (1966). See, e.g., *Cinel v. Connick*, 15 F.3d 1338 (5th Cir.), cert. denied, 115 S. Ct. 189 (1994).

181. See *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). See also *Colbert v. World Publishing Co.*, 747 P.2d 286 (Okla. 1987); *Ashby v. Hustler*, 802 F.2d 856 (6th Cir. 1986); *Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840 (Ark. 1979), cert. denied, 444 U.S. 1076 (1980).

182. See *Machleder v. Diaz*, 801 F.2d 46, 58 (2d Cir. 1986), cert. denied, 479 U.S. 1088 (1987) ("In order to avoid a head-on collision with First Amendment rights, courts have narrowly construed the highly offensive standard.")

183. Zuckman, *supra* note 153, at 254. See also Jonathan B. Becker, Comment, *The First Amendment Goes Tactical: News Media Negligence and Ongoing Criminal Incidents*, 15 LOY. L.A. ENT. L.J. 625 (1995).

184. *Id.*

185. *Id.*

186. KEETON, ET AL, *supra* note 165, §18, at 112.

case that is defeated by the plaintiff's consent.¹⁸⁷ Consent must be freely given; it may not be obtained through coercion.¹⁸⁸ However, consent may be express or implied.¹⁸⁹ It is the latter category that is more fertile for litigation purposes because it requires the interpretation of conduct or inaction in the absence of overt verbal consent and can impose on the plaintiff a state of mind to which he or she does not literally subscribe.

a. Implied Consent: The Traditional Doctrine

The existence of implied consent normally rests on the test of objective manifestation: whether or not a reasonable person would understand the plaintiff's conduct, inaction, or silence to manifest consent in the absence of words expressing the plaintiff's acquiescence or willingness to permit the defendant's conduct.¹⁹⁰ Another basis upon which defendants have been permitted to infer consent is common usage or custom, as, for example, during times when trespassing on undeveloped land was generally acceptable in the community.¹⁹¹ Historically, courts have permitted unauthorized entry onto private, unfenced lands by such persons as livestock owners seeking a place to graze their cattle¹⁹² and others interested in hunting and fishing.¹⁹³ As one commentator notes, such cases illustrate that custom and usage have traditionally created consent when the social purpose of the trespass outweighed the plaintiff's individual possessory interests in the property.¹⁹⁴

b. The Implied Consent Theory of Sidekick Journalists

On some occasions, news media defendants have attempted to use the common usage and custom prong of implied consent to escape liability for

187. See *Lal v. CBS, Inc.*, 551 F. Supp. 356, 357-64 (E.D. Pa. 1982), *aff'd*, 726 F.2d 97 (3d Cir. 1984); *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982), *aff'd in relevant part*, 801 F.2d 46 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987). *But see* *Magenis v. Fisher Broadcasting Co.*, 798 P.2d 1106 (Or. 1990) (rejecting the converse notion that a finding of trespass is sufficient to sustain an intrusion claim).

188. See RESTATEMENT (SECOND) OF TORTS § 58 (1964). See also KEETON, ET AL, *supra* note 165, § 18, at 114.

189. KEETON, ET AL, *supra* note 165, § 18, at 113.

190. See RESTATEMENT (SECOND) OF TORTS § 50 (1964). See also KEETON ET AL, *supra* note 165, at 113.

191. See *McKee v. Gratz*, 260 U.S. 127 (1922).

192. See *Buford v. Houtz*, 133 U.S. 320 (1890).

193. See, e.g., *Marsh v. Colby*, 39 Mich. 626 (1878).

194. *Middleton*, *supra* note 5, at 268.

trespass in sidekick journalism cases. In Florida during the 1970s, there were two such attempts of note that yielded opposite results. In *Green Valley School v. Cowles Florida Broadcasting*,¹⁹⁵ television news personnel accepted an invitation from the state attorney's office to accompany law enforcement officers on a midnight raid of a private school where felonies, including false imprisonment, child abuse, and lewd behavior, were alleged to have taken place. According to various affidavits and depositions of teachers and students who resided on the campus, the officers swarmed through their private living quarters, awakening many of them and ransacking their personal belongings, while deliberately creating a scene of disarray for the benefit of rolling cameras.¹⁹⁶ The defendant broadcaster argued that entry by its employees on the school's property was, as a matter of law, sanctioned by the state attorney's invitation and within the privilege of implied consent based on common usage and custom.¹⁹⁷ Unconvinced, the court ruled that to uphold such an assertion "could well bring to the citizenry of this state the hobnail boots of a Nazi stormtrooper equipped with glaring lights invading a couple's bedroom at midnight with the wife hovering in her nightgown in an attempt to shield herself from the scanning TV camera."¹⁹⁸

Within just a few months of the *Green Valley School* decision, however, the Florida Supreme Court cast the common usage and custom theory of implied consent in an entirely different light, one favoring sidekick journalists. In *Florida Publishing Co. v. Fletcher*,¹⁹⁹ news media representatives entered a house that had been the scene of a fatal fire after receiving an invitation and consent, not from the homeowner, but from police and fire officials. The homeowner, in fact, was out of town at the time of the blaze and was unaware that it had claimed the life of her daughter. At the request of one official at the scene, a photographer, employed by the defendant newspaper, took a picture of the "silhouette" left on the floor after the removal of the victim's body. The photographer gave the officials one copy of the picture to use in their investigation of the incident and submitted the remaining copies to the newspaper for publication. The homeowner first learned of the facts surrounding the tragedy when she read the account and saw the photograph published by the defendant. She sued the newspaper for punitive damages based on

195. 327 So. 2d 810 (Fla. Dist. Ct. App. 1976).

196. *Id.* at 813-16.

197. *Id.* at 819.

198. *Id.*

199. 340 So. 2d 914 (Fla. 1976).

trespass, invasion of privacy, and intentional infliction of emotional distress theories.²⁰⁰

The Florida Supreme Court upheld the trial court's ruling granting summary judgment in favor of the newspaper publisher on the trespass claim.²⁰¹ The state's high court held that the homeowner could not recover under the trespass theory because the newspaper photographer had an implied consent, based on common usage, custom, and practice, to enter her home.²⁰² The court noted the numerous affidavits that had been filed in the case by Florida law enforcement officials and news editors from across the state and nation supporting the conclusion that "it has been a longstanding custom and practice throughout the country for representatives of the news media to enter upon private property where disaster of great public interest has occurred"²⁰³ The only conditions imposed on news personnel under such circumstances, according to the court, were that they enter at the invitation of investigating officers, peacefully, without causing physical damage.²⁰⁴ The fact that the defendant's photographer went inside a private residence without the owner's permission did not concern the court: "[I]f an entry is or is not a trespass, its character would not change depending upon whether or not the place of the tragedy is a burned out home (as here), an office or other building or place."²⁰⁵ Instead, the court cited the fact that "there was not only no objection to the entry, but *there was an invitation to enter by the officers investigating the fire.*"²⁰⁶

The reception of the *Fletcher*-style defense has generally been less than enthusiastic. In 1980, the Wisconsin Court of Appeals refused to imply consent as a matter of law to protect a news reporter who entered the plaintiff's private property without permission and filmed him as he was being interrogated by Special Weapons and Tactics ("SWAT") team officers.²⁰⁷ In *Prahl v. Brosamle*,²⁰⁸ the Wisconsin court distinguished

200. *Fletcher v. Florida Publishing Co.*, 319 So. 2d 100, 103 (Fla. Dist. Ct. App. 1975).

201. *Florida Publishing Co.*, 340 So. 2d at 919. The trial court dismissed the invasion of privacy claim and granted summary judgment in favor of the publisher on the emotional distress claim. See *Fletcher v. Florida Publishing Co.* 319 So. 2d 100, 103 (Fla. Dist. Ct. App. 1975). Only the trespass claim, however, was reversed by the District Court of Appeal. *Id.* at 111-13.

202. *Florida Publishing Co.*, 340 So. 2d at 917-18.

203. *Id.* at 918 (quoting with approval *Fletcher v. Florida Publishing Co.*, 319 So. 2d 100, 113 (Fla. 1975) (McCord, J., dissenting)).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980).

208. *Id.*

Fletcher since, in the Florida case, the law enforcement officers requested assistance from the photographer.²⁰⁹ A New York county court dismissed a *Fletcher*-style implied consent defense in *Anderson v. WROC-TV*,²¹⁰ a trespass case against the employers of several television news people who accompanied a humane society investigator on a home search at his invitation. The judge granted summary judgment for the plaintiffs, declaring the defense a result of "self-created custom and practice" and a "bootstrap argument which does not eliminate the trespassory conduct of the defendants It is hornbook law that consent as a defense to an action in trespass must be given by the owner or possessor of the premises."²¹¹

2. The First Amendment Privilege to Gather News

It is also "hornbook law" that media operating in the latter half of the twentieth century have enjoyed broad freedom to report and publish information with impunity, or nearly so, thanks to the enormous body of First Amendment jurisprudence handed down by the United States Supreme Court.²¹² Interestingly enough, the Court, however, has never created a constitutionally protected right of access for news media to the scenes of news events in general. In *Branzburg v. Hayes*,²¹³ the Court stated that "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded. . . ."²¹⁴ Yet, the Court has recognized the right of news media to attend criminal trials,²¹⁵ and has approved of newsgathering where it was done lawfully.²¹⁶

Lower courts have refused to grant the press immunity from tort liability arising from newsgathering conduct.²¹⁷ In *Dietemann v. Time*,

209. *Id.* at 773.

210. 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981).

211. *Id.* at 223 (citing 61 N.Y. JUR. TRESPASS §31).

212. *See* *New York Times v. Sullivan*, 376 U.S. 254 (1964); *see also* *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

213. 408 U.S. 665 (1972).

214. *Id.* at 684.

215. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 557 (1980).

216. *See* *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

217. *See* *Green Valley Sch., Inc. v. Cowles Fla. Broadcasting, Inc.*, 327 So. 2d 810 (Fla. Dist. Ct. App. 1976); *Anderson v. WROC*, 441 N.Y.S.2d 220, 224 (N.Y. Sup. Ct. 1981) ("News people have no special First Amendment immunity or special privilege to invade the rights and liberties of others."). *Id.* *Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973) ("Crimes and

Inc.,²¹⁸ an opinion widely regarded as authoritative in the area of intrusion liability in newsgathering, the United States Court of Appeals for the Ninth Circuit examined the newsgathering practices of investigative reporters in light of the First Amendment:

Investigative reporting is an ancient art; its successful practice long antecedes the invention of miniature cameras and electronic devices. The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.²¹⁹

3. Safer Grounds for Media Defendants

While neither the *Fletcher*-style implied consent defense nor the First Amendment show much promise in immunizing sidekick journalists from liability for trespass and/or intrusion when they enter private property without proper authorization, a glance through past newsgathering entry cases provides some clear indication of what is required to escape liability. There is no liability, for example, where the media defendant did not participate in the physical invasion.²²⁰ Similarly, there is no liability for trespass where the media defendant obtained information while situated on public property.²²¹ Entry by the media on private property is lawful where consent is given by the owner or rightful possessor,²²² even when

torts committed in news gathering are not protected. . . . There is no threat to a free press in requiring its agents to act within the law." *Id.*

218. 449 F.2d 245 (9th Cir. 1971).

219. *Id.* at 249.

220. See *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 718-19 (4th Cir. 1991) (finding that the plaintiff cannot recover under the intrusion theory since the defendant did not commit a "positive act" of encroachment).

221. See *Wehling v. CBS, Inc.*, 721 F.2d 506 (5th Cir. 1983); *Dempsey v. National Enquirer*, 702 F. Supp. 927 (D. Me. 1988); *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982), *aff'd in relevant part*, 801 F.2d 46 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987); *Colorado v. Henderson*, 847 P.2d 239 (Colo. 1993); *Cox Communications, Inc. v. Lowe*, 328 S.E.2d 384 (Ga. Ct. App. 1985), *cert. denied*, 474 U.S. 982 (1985); *Stessman v. American Black Hawk Broadcasting*, 416 N.W.2d 685 (Iowa 1987); *People for the Ethical Treatment of Animals v. Berosini*, 867 P.2d 1121 (Nev. 1994); *Bishee v. Conover*, 452 A.2d 689 (N.J. 1982); *Le Mistral, Inc. v. CBS*, 402 N.Y.S.2d 491 (N.Y. App. Div. 1978); *Mark v. King Broadcasting Co.*, 618 P.2d 512 (Wash. 1980), *aff'd*, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982).

222. See *Machleder v. Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982); *Lal v. CBS*, 551 F. Supp. 356 (E.D. Pa. 1982), *aff'd*, 726 F.2d 97 (3d Cir. 1984).

such consent was fraudulently induced.²²³ And in a recent case, the court found no liability for intrusion where no harm resulted from it.²²⁴

VII. HOME IS NO PLACE FOR "LAW ENFORCEMENT THEATRICALS"

To appreciate the privacy and property concerns raised by sidekick journalism, one need only recall what has become a familiar television scenario depicting people caught off-guard in their homes. They are often in various stages of undress, sometimes cowering in corners or closets, and invariably shielding their faces from the glare of camera lights as they are handcuffed and led away by police. The property and privacy rights of such individuals do not vanish the moment they become subjects of a warrant. Indeed, the Fourth Amendment requires that such rights not be obliterated during searches and seizures, but preserved to the maximum extent consistent with the public's interest in community safety and crime control. What makes televised home searches unreasonable under the Fourth Amendment is not only that they fail to satisfy this requirement, but also that they involve police authorization of unlawful conduct by third parties.

The press has a First Amendment right of access not only to criminal trials²²⁵ but also, under *Press-Enterprise Co. v. Superior Court*,²²⁶ to preliminary proceedings in criminal cases. Such proceedings are open to the press, provided there has been a tradition of public access to them and that public access plays an essential role in the proper functioning of the criminal justice system.²²⁷ This right of access does not necessarily extend back in time to the point of arrest, however, particularly when the arrest takes place inside a private residence. There is no tradition of public access to the interior of a private dwelling and no essential role played by such access in the proper functioning of the criminal justice system that would justify press invasion of a private home.

One might be tempted to view police/media invasions of private property as serving the same kinds of constitutional interests that United States Supreme Court Justice Burger cited in *Richmond Newspapers, Inc.*

223. See *Baugh v. CBS, Inc.*, 828 F. Supp. 745 (N.D. Cal. 1993).

224. See *Desnick v. Capital Cities/ABC, Inc.*, 851 F. Supp. 303 (N.D. Ill. 1994).

225. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

226. 478 U.S. 1 (1986).

227. See *Globe Newspaper Co.*, 457 U.S. at 606; *Richmond Newspapers, Inc.*, 448 U.S. at 582-84 (Stevens, J., concurring) and 584-98 (Brennan & Marshall, JJ., concurring).

*v. Virginia*²²⁸ to justify public and media access to the processes of the criminal justice system. Chief Justice Burger states that media access to the processes of the criminal justice system is warranted by the media's role as a surrogate for the public and that such access to the behind-the-scene activities of the system promotes free discussion of governmental affairs by giving the public a greater understanding of the system and how it works.²²⁹ But, media access to private property during search warrant executions could come at the expense of the government's effectiveness. The unauthorized presence of cameras could result in the suppression of evidence and thus compromise the efforts of law enforcement to function effectively. The result would be to confound, rather than to enhance, the public's understanding of the criminal justice system.

Chief Justice Burger also states that access ensures fairness in the government's conduct.²³⁰ When the press acts as the public's surrogate, such fairness presupposes press objectivity; however, close collaboration between media and law enforcement may compromise press objectivity. Since videotaping of law enforcement activity may be prearranged, and law enforcement personnel may retain editorial control over the scenes ultimately broadcast, candor in the government conduct depicted may become a serious issue.

The Court further states that access permits public scrutiny of government conduct, thereby guarding against corruption and encouraging government actors to perform their roles more responsibly.²³¹ As previously noted, however, in the context of sidekick journalism, the effectiveness of the media in scrutinizing the conduct of law enforcement personnel may be greatly compromised given the potentially collusive and non-spontaneous nature of the joint enterprise.

Response from the media to the *Ayeni* decision has been critical, as evidenced by one comment that "[j]udges have no business impounding videotapes and telling people how to cover stories. . . ."²³² When reporters cover stories in a manner asserted to be unlawful, prompting civil lawsuits, however, the courts necessarily become involved. When the release of videotapes is essential to a defendant's ability to obtain a fair trial, the First Amendment protection afforded the press must yield.

228. 448 U.S. 555 (1980).

229. *Id.* at 571-73, 577 n.12.

230. *Id.* at 569-70.

231. *Id.* at 569.

232. Jane Hall, *Ruling May Affect Taping of Searches*, L.A. TIMES, Nov. 28, 1992, at F11 (quoting David Bartlett, Director of the Radio and Television News Directors Association).

At least one media representative has expressed the opinion that a signed release from the suspects captured on camera serves as protection against a lawsuit by them.²³³ As noted earlier, however, consent must be freely given.²³⁴ To be effective, it must be given voluntarily;²³⁵ it cannot be obtained through coercion.²³⁶ In the words of Henry Rossbacher, plaintiffs' attorney in *Ayeni v. Mottola*, "After you've thrown the guy on the floor . . . [a signed release is] not only morally reprehensible, but legally insignificant In these circumstances, any consent is coerced and is void legally."²³⁷

Finally, police/media invasions raise ethical concerns. Too much collaboration of this sort raises issues of press objectivity and self interest on the part of government officials.²³⁸ Rossbacher explains the concern this way:

The serving of a search warrant is not a supermarket opening, but, with the new "reality" shows, you have all kinds of government agencies taking TV news crews along. What business does CBS have making deals with Secret Service agents for coverage? This relationship demeans both law enforcement and journalism.²³⁹

VIII. CONCLUSION

To the extent that it invades private homes, the joint enterprise between media and police in producing news and reality-based entertainment programs is in trouble with the law. Law enforcement agencies that have not already done so would be well advised to heed the recent FBI warning to cease practices that involve taking media onto private property without the consent of the property owner or possessor. Media or-

233. Hall, *supra* note 232, at F11 ("John Langley, co-executive producer of the Fox series 'Cops,' said that he did not believe his show would be affected by the [*Ayeni v. CBS Inc.*] ruling. 'We don't claim to be journalists operating under the aegis of the news—we're considered entertainment,' Langley said. 'We are there by invitation of the participating law-enforcement agencies, and we don't disclose someone's identity without their permission.'"). *Id.*

234. *See supra* note 187.

235. *See id.*

236. *See id.*

237. Neumeister, *supra* note 148, at A18 (quoting Henry Rossbacher, attorney for plaintiffs in *Ayeni v. Mottola*).

238. *See* Jon Katz, *Covering the Cops: A TV Show Moves in Where Journalists Fear to Tread*, COLUM. JOURNALISM REV., Jan.-Feb. 1993, at 25; Lew Irwin, *Cops and Cameras: Why TV Is Slow to Cover Police Brutality*, COLUM. JOURNALISM REV., Sept.-Oct. 1991, at 15.

239. Hall, *supra* note 232, at F11 (quoting Henry Rossbacher, attorney for plaintiffs in *Ayeni v. Mottola*).

ganizations should be aware that First Amendment and implied consent arguments are largely ineffective in defeating trespass and intrusion claims. Aside from the legal risks, the practice risks tarnishing the integrity of both law enforcement and journalism and, in so doing, diminishes their value to society. The time has come for police/reporter teams to exercise restraint when making house calls, recognizing that “[a] private home is not a soundstage for law enforcement theatricals.”²⁴⁰

240. *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994).