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Media: Asset or Liability? An Argument in Favor of Holding the Media Liable for Invasion of Privacy

Allison L. Lampert

William Kirrane

MEDIA: ASSET OR LIABILITY? AN ARGUMENT IN FAVOR OF HOLDING THE MEDIA LIABLE FOR INVASION OF PRIVACY

INTRODUCTION

As the world grows more crowded, an individual's right to privacy becomes increasingly more valuable.[1] This right, however, constantly conflicts with the First Amendment,[2] which guarantees the freedoms of speech and press.[3] The Fourth Amendment protects "the right of people to be secure in their persons, houses, papers, and effects."[4] While the scope of the Fourth Amendment's

[1] *See* U.S. v. On Lee, 193 F.2d 306, 315-316 (1951) (Frank, J., dissenting) (stating "A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."); Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) (stating complexity of life renders some retreat from the world); *see also* Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technology Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 665 (1998) (stating scope of amendment's protection has been reduced); G. Beatco, *CULTURE WATCH: Why Reality Based Entertainment Is Bad for Reality*, NEWSDAY, May 17, 1998 at B6 (discussing increase in reality television and its effect on society).

[2] U.S. CONST. amend. I. The First Amendment states in full:

> 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.

Id; *see also* Ayeni v. Mottola, 35 F.3d 680, 683 (2d Cir. 1994) (recognized tension between public's right to information and individual's interest in privacy); Rebecca Porter, *Media 'Ride-Alongs' Violate the Constitution, Supreme Court Rules*, 35 JUL. TRIAL. 120 (1999) (stating amicus curiae brief on behalf of 24 news organizations).

[3] *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (stating guarantees of First Amendment); *see also* Kliendienst v. Mandel, 408 U.S. 753, 762-763 (1972) (acknowledging First Amendment rights); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 386-390 (1969) (discussing First Amendment); Thomas v. Collins, 323 U.S. 516, 534 (1945) (holding First Amendment protects right to speak).

[4] U.S. CONST. amend. IV. *See also* Minnesota v. Carter, 525 U.S. 83, 83 (1998) (discussing limits of Fourth Amendment); Winston v. Lee, 470 U.S. 753, 761-62 (1985) (discussing scope of Fourth Amendment's protection). *See generally* William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY. Q. 371, 400 (1980) (analyzing English tradition and American legislation).

protection is not entirely clear,[5] the Supreme Court has stated that its purpose is to protect the privacy and security of an individual from invasion by government officials.[6]

The conflict between the Fourth Amendment's right to privacy and the First Amendment's freedom of press was recently addressed by the Supreme Court in *Wilson v. Layne*.[7] In *Wilson*, the Court decided the issue of whether a media "ride-along" with police during an execution of a warrant was constitutionally permissible.[8] This issue had been addressed by several of the Circuit Courts,[9] but not resolved until *Wilson*, where the Supreme Court concluded that law enforcement officers had violated the Fourth Amendment by bringing media members into a home during the execution of a warrant.[10] The Court, however, did not resolve the issue of whether the media itself had also violated the defendant's right to privacy.[11]

Historically, one's right to protect information[12] has been weighed

[5] *See* Bills v. Aseltine, 52 F.3d 596, 602 (6th Cir. 1995) (rejecting courts holding in *Ayeni*); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 385 (1974) (acknowledging key to amendment is to determine interests it protects); Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals" - The Outlawing of Police/Media Home Invasions in* Ayeni v. Mottola, 16 LOY. L.A. ENT. L.J. 325 (1995) (discussing *Ayeni* and effect on media). *See generally* Tracey L. Mitchell, *Smile! You're on Candid Camera: Media Presence and the Execution of Warrants*; 50 S.C. L. REV. 949, 962 n.67 (1999) (stating limits on courts' decisions to recognize specific right against media intrusion).

[6] *See* South Dakota v. Opperman, 428 U.S. 364, 377 (1976) (Powell, J., concurring) (asserting central purpose of Fourth Amendment); *see also* Anderson v. Maryland, 427 U.S. 463, 482 n.11 (1976) (asserting manner in which law enforcement officers must conduct searches). *See generally* U.S. v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (discussing execution of search warrants); Camora v. Municipal Court, 387 U.S. 523, 528 (1967).

[7] 526 U.S. 603 (1999); *see also* Ronald B. Kowalczyk, *Supreme Court Slams the Door on the Press: Media "Ride-Along" Found Unconstitutional in Wilson v. Layne*, 9 J. ART & ENT. LAW 353, 353 (1999) (analyzing decision in *Wilson*). *See generally* Brad M. Johnston, *The Media's Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment*, 58 OHIO ST. L.J. 1499, 1511-1514 (1997) (discussing issues raised in *Ayeni*); Kevin E. Lunday, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following* Ayeni v. Mottola *and a Framework for Analysis*, 65 GEO. WASH. L. REV. 278, 280-81 (1997) (discussing issues presented in *Ayeni*).

[8] *See Wilson*, 526 U.S. at 608; *see also* Kowalczyk, *supra* note 7, at 353 (discussing holding in Wilson v. Layne). *See generally* Mitchell, *supra* note 5, at 962 n67 (1999) (discussing constitutional issues raised in *Wilson*).

[9] *See* Berger v. Hanlon, 129 F.3d 505, 510 (9th Cir. 1997) (holding search of residence with media violated Fourth Amendment); Parker v. Boyer, 93 F.3d 445, 446 (8th Cir. 1996) (reasoning reporters are not under color of state law when entering homes); *Bills*, 52 F.3d at 600 (supporting conclusion of Fourth Amendment violation); Ayeni v. Mottola, 35 F.3d 680, 686 (2d Cir. 1994) (finding media's presence during warrant execution violated Fourth Amendment).

[10] *See Wilson*, 526 U.S. at 613 (holding that Fourth Amendment violation had occurred specifically when media members were not aiding officers).

[11] *See Ayeni*, 35 F.3d at 683 (recognizing tension between public's right to information and individual's interest in privacy); *see also* Kowalczyk, *supra* note 7, at 353 (stating extent of Court's holding).

[12] *See* Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 654 (Cal. 1994)

against the rights afforded by the First Amendment.[13] The constitutional privilege of freedom of press, which ultimately may violate an individual's right to privacy, has not been given a great deal of attention by the Supreme Court.[14] This has resulted in confusion by the state courts in attempting to address the issue.

The Supreme Court's decision in *Wilson* raises several interesting questions: whether the Court was correct in not finding the media liable for invasion of privacy that occurs during a ride-along; whether the media's intrusion into an individual's life in general, violates the right to privacy; and to what extent the media can shield itself behind the First Amendment. Another important issue is whether the Supreme Court should define the exact boundaries of the First Amendment's freedom of the press in publishing private facts, or whether the Court should continue to allow states to utilize their own interpretations.

Part I of this Note will balance the purposes of the First and Fourth Amendments and discuss the genesis of the search warrant. Part II will analyze the *Wilson* decision and demonstrate how the Supreme Court should have held the media liable for violating an individual's privacy rights. Part III will examine media interference with the right to privacy and discuss the possibilities of establishing proper tort standards. Part IV will examine an approach state courts have used to hold the media liable, concluding that the Supreme Court should adopt a similar standard as a clear test to determine the issue of media liability for invasion of privacy.

(acknowledging right of informational privacy); *see also* White v. Davis, 13 Cal.3d 757, 774 (1975) (stating informational privacy is core value furthered by privacy initiative); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392-398 (1960) (defining informational privacy as right to control dissemination of private personal information). *See generally*, Gary Williams, *The Right of Privacy Versus the Right to Know: The War Continues*, 19 LOY. L.A. ENT. L.J. 215, 216 (1999) (stating courts have upheld right to informational privacy).

[13] *See* Warren & Brandeis, supra note 1, at 214 (stating "privacy does not prevent publishing matters of public interest while acknowledging law should protect matters of no legitimate concern from undesirable publicity"); *see also* Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir. 1940); Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 277 (1953) (weighing privacy interests); Melvin v. Reid, 112 Cal. App. 285, 290 (1931) (stating people, willingly or unwillingly, can become actor in occurrence of public interest).

[14] *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (declining to address question of whether truthful publications may be subject to civil liability consistent with First and Fourth Amendments); *see also* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (limiting constitutional protection of press to narrow holding); Time Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967) (avoiding addressing private rights issue).

I. OVERVIEW OF THE FIRST AND FOURTH AMENDMENTS

A. The First Amendment's "Right to Know"

The First Amendment includes a public right of access to court documents and other types of information.[15] This right stems from the idea that it is necessary to a self-governing democracy for the public to have access to such information.[16] In *Grosjean v. American Press Co.*,[17] the Supreme Court recognized this right to information, describing it as "the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests."[18] The Court emphasized the importance of the press and its dissemination of information to the public for use against "misgovernment."[19]

B. Scope of Fourth Amendment Protection

An individual's right to privacy has long been revered as a fundamental right. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free

[15] *See* Peter G. Blumberg, *Sunshine and Ill Will: The Forecast for Public Access to Sealed Search Warrants*, 41 DEPAUL L. REV. 431, 434 (1992) (discussing rights conveyed under First Amendment). *See generally* Michael Dicke, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1558-59 (1989) (discussing roles of media); Charles C. Scheim, *Trash Tort or Trash TV? Food Lion, Inc. v. ABC, Inc., and Tort Liability of the Media for Newsgathering*, 72 ST. JOHN'S L. REV. 185, 193 (1998) (discussing protection given to media).

[16] See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-05 (1982) (discussing that public right of access "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (stating that abridging freedoms of press and speech "impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government"); Blumberg, *supra* note 15, at 435 (analyzing right of access); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579-80 (1980) (holding public has constitutional right to attend criminal trial); Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Proceedings, Information and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1, 18-19 (2000) (discussing media right of access to certain information).

[17] 297 U.S. 233 (1936).

[18] *Grosjean*, 297 U.S. at 243; *see also Globe Newspaper*, 457 U.S. at 604-05 (discussing importance of public right of access to information); Thornhill v. Alabama, 310 U.S. at 95 (stating that freedoms of press and speech are "essential").

[19] *See Grosjean*, 297 U.S. at 250 (stating "informed public opinion is the most potent of all restraints upon misgovernment" and press is "vital source of public information"); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. at 604-05 (discussing that public right of access ensures effective participation in government); *Thornhill*, 310 U.S. at 95 (emphasizing importance of freedoms of press and speech in correcting government error).

from all restraint or interference of others, unless by clear and unquestionable authority of law."[20]

Although the United States Constitution does not specifically enumerate a privacy right, the Supreme Court has acknowledged that it grants a general right to privacy, which is found by examining several of the amendments.[21] Under the Fourth Amendment, for instance, an individual's right to privacy is protected by limiting governmental searches and seizures "to prevent arbitrary and oppressive interference by enforcement officials."[22]

Not all searches and seizures are prohibited by the Fourth Amendment.[23] The Amendment limits its protection to preventing searches and seizures that are unreasonable.[24] A search that takes place without a warrant is not automatically deemed unreasonable because a warrant is not always necessary to conduct a search. If the existence of probable cause can be established, a search that takes place without a warrant is considered reasonable.[25]

Probable cause has been defined by Justice Washington as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the Party is guilty of the offense with which he is charged."[26] This definition led the Supreme Court, in *Stacey v. Emery*,[27] to adopt language that describes when probable cause exists: "[i]f the facts and circumstances before the officer are such as

20 Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891); Warren & Brandeis, *supra* note 1, at 196 (arguing for privacy right). *But see* Minnesota v. Carter, 525 U.S. at 83 (discussing limits of Fourth Amendment).

21 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (describing right to privacy as "penumbral" and discussing "zone of privacy" found in various Constitutional amendments).

22 *See* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976); United States v. Brignoni-Ponce, 42. U.S. at 878; United States v. Ortiz, 422 U.S. 891, 895 (1975); Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

23 *See* Carroll v. United States, 267 U.S. 132, 147 (1925).

24 *See* Skinner v. Railway, 489 U.S. 602, 619 (1989); United States v. Sharpe, 470 U.S. 675, 682 (1985); Schmerber v. California, 384 U.S. 757, 786 (1966); Carroll, 267 U.S. at 147.

25 *See* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1722 (1996) (discussing reasonableness of probable searches); *see also Carroll*, 267 U.S. at 147; Deborah F. Barfield, *DNA Fingerprinting - Justifying the Special Need for the Fourth Amendment's Intrusion into the Zone of Privacy*, 6 RICH J.L. & TECH. 27, 27 (2000) (stating search and seizure conducted with probable cause is "unquestionably reasonable").

26 *See* Stacey v. Emery, 97 U.S. 642, 645 (1878) (citing Munn, 3 Wash. 37); *see also* Texas v. Brown, 460 U.S. 730, 742 (1983) (defining probable cause standard); Jillian Grossman, *The Fourth Amendment: Relaxing the Rule in Child Abuse Investigations*, 27 FORDHAM URB. L.J. 1303, 1333-34 (2000) (stating that mere subjective belief will not suffice for reasonable suspicion).

27 97 U.S. 642 (1878).

to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient."[28]

The existence of probable cause is often used as a justification to search without a warrant when the delay caused by obtaining a warrant would allow the escape of a suspect, destruction of evidence or endangerment of the public.[29] Allowing the search of an automobile without a warrant is an example of one such exception to the warrant requirement.[30]

To determine whether a search is reasonable, the Supreme Court has developed a balancing test.[31] A search is "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[32]

C. Historical Background of the Search Warrant

Use of the search warrant began in England in the sixteenth century.[33] British monarchs used what was known as a general warrant to search a person's property.[34] These warrants eventually became regarded as "overbroad and oppressive"[35] because the authority that they granted was abused.

During colonial times in America, British rulers used writs of assistance which allowed searches of property for the duration of the ruler's lifetime plus an additional six months.[36] The writs

[28] *See Stacey*, 97 U.S. at 645; *see also Brown*, 460 U.S. at 742 (defining probable cause standard); *Carroll*, 267 U.S. at 147 (stating same).

[29] *See* Cloud, *supra* note 25, at 1722; *see also* Warden v. Hayden, 387 U.S. 294, 198-99 (1967) (holding entry into home justified); Grossman, *supra* note 26, at 1332 (discussing when warrantless search allowed).

[30] *See* Cloud, *supra* note 25, at 1722; *see also* Warden v. Hayden, 387 U.S. at 198-99; Grossman, *supra* note 26, at 1332 (discussing when warrantless search allowed).

[31] *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979); Cloud, supra note 25, at 1722; see also Texas v. Brown, 460 U.S. at 742 (defining probable cause standard); Skinner, 489 U.S. at 619; Martinez-Fuerte, 428 U.S. at 554-56.

[32] *See Delaware v. Prouse*, 440 U.S. at 654; *Skinner*, 489 U.S. at 619; *Martinez-Fuerte*, 428 U.S. at 554-56; *see also* Blumberg, *supra* note 15, at 447.

[33] *See* Blumberg, *supra* note 15, at 447; *see also* Donald L. Beli, *Fidelity to the Warrant Clause, Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U.L. REV. 291, 301 (1996) (explaining writs and warrants during colonial times); Cloud, *supra* note 25, at 1725 (discussing searches under early English law).

[34] *See* Beli, *supra* note 33, at 301; Blumberg, *supra* note 15, at 447; Cloud, *supra* note 25, at 1725.

[35] *See* Beli, *supra* note 33, at 301; Blumberg, *supra* note 15, at 447; Cloud, *supra* note 25, at 1725.

[36] *See* Beli, *supra* note 33, at 301; Blumberg, *supra* note 15, at 447; Cloud, *supra* note 25, at 1725.

generally were used to protect against smuggling.[37] Customs officials could search any areas they believed to be used for hiding smuggled goods, which gave the officials immense power to search with little justification.[38] The writs, unlike search warrants today, did not identify the subject, location, or items to be searched.[39] Not surprisingly, Americans opposed this early form of search warrant.[40] Many state constitutions later included warrant clauses restricting searches and seizures.[41] These clauses became the foundation for the Fourth Amendment of the United States Constitution.[42]

II. WILSON V. LAYNE

There has been a growing trend to allow the media to accompany police during the execution of a warrant.[43] In the recent decision of *Wilson v. Layne*,[44] the Supreme Court held that a media ride-along violates the Fourth Amendment.

In *Wilson*, three warrants were issued for the arrest of Dominic Wilson. The warrants cautioned that he was likely to be armed, to

37 *See* Beli, *supra* note 33, at 301; Blumberg, *supra* note 15, at 447; Cloud, *supra* note 25, at 1725.

38 *See* Beli, *supra* note 33, at 301; Blumberg, *supra* note 15, at 447; Cloud, *supra* note 25, at 1725.

39 See Robert J. Brantman & Scott K. Martinsen, *Constitutional Law-Times* Mirror Co. v. United States *and a Qualified First Amendment Right of Public Access to Search Warrant Proceedings and Supporting Affidavits*, 65 NOTRE DAME L. REV. 781, 788 n.63 (1990) (defining writs of assistance); see also Blumberg, supra note 15, at 447; Ramsey Ramerman; *Shut the Blinds and Lock the Doors - Is That Enough?: The Scope of Fourth Amendment Protection Outside Your Own Home*, 75 WASH. L. REV. 281, 291 (2000) (noting that writs of assistance allowed "broad discretion" to search).

40 *See* Blumberg, *supra* note 15, at 447; Ramerman, *supra* note 39, at 291 (discussing rejection of writs of assistance); *see also* U.S. v. Chadwick, 433 U.S. 1, 8 (1977) (stating that searches "deeply concerned the colonists"); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 994-95 (1999) (stating that there was "increasing hostility to sweeping general searches").

41 *See* Thompson, *supra* note 40, at 994-95 (discussing trend to restrict searches in state constitutions); *see also* Blumberg, *supra* note 15, at 448. *See generally* Ramerman *supra* note 39, at 291 (discussing Fourth Amendment development).

42 *See* Blumberg, *supra* note 15, at 448; *see also Chadwick*, 433 U.S. at 7-8 (stating that Fourth Amendment protection developed "in large measure out of the colonists' experience with the writs of assistance"); Ramerman, *supra* note 39, at 291 (stating Fourth Amendment developed from rejection of writs of assistance).

43 *See* Stack v. Killian, 96 F.3d 159, 163 (1996) (holding television crew presence during execution of warrant was constitutional); Florida Publ'g Co. v. Fletcher, 340 So.2d 914, 918 (1976), *cert. denied*, 431 U.S. 930 (1977) (holding no recovery under "false-light" doctrine of invasion of privacy); *see also* Ransom, *supra* note 5, at 325 (1995).

44 526 U.S. 603 (1999).

resist arrest, and to assault police.[45] During the early morning hours of April 16, 1992, in an attempt to execute the warrants, police officers and two members of the media mistakenly entered the home of Dominic's parents, Charles and Geraldine Wilson. Charles Wilson entered his living room wearing only his briefs to find the officers in plain clothes carrying guns. He demanded to know why the men were there. Geraldine Wilson then entered to witness her husband being subdued by the officers. One of the media representatives snapped photographs during the entire incident.[46]

In its decision, the Supreme Court held that law enforcement officers can no longer allow members of the media or other third parties to be present during an execution of a warrant, specifically when the third parties are not aiding the officers.[47] The Court held this to be a violation of the Fourth Amendment.[48]

The Fourth Amendment was designed to protect the sanctity of the home and an individual's privacy rights therein.[49] The police officers in *Wilson* were authorized to enter the home because they had arrest warrants and a reasonable belief that the subject of the warrants was inside.[50] The officers were not, however, permitted to invite members of the media to witness and photograph the incident merely for their own commercial use.[51]

45 *See Wilson*, 526 U.S. at 606.

46 *See Wilson*, 526 U.S. at 606-07.

47 *See Wilson*, 526 U.S. at 614; *see also* Horne v. Coughlin, 191 F.3d 244, 249-50 (1999) (explaining holding in *Wilson*); Berger v. Hanlon, 129 F.3d 505, 510 (9th Cir. 1997) (following holding in *Wilson*).

48 *See Wilson*, 526 U.S. at 614; *see also Horne*, 191 F.3d at 249-50 (explaining holding in *Wilson*); *Berger*, 129 F.3d at 510 (following holding in *Wilson*).

49 *See Wilson*, 526 U.S. at 610 (stating that Fourth Amendment embodies centuries-old principle of respect for privacy of home); Soldal v. Cook County, 506 U.S. 56, 64 (1992) (noting limits of Fourth Amendment); Winston v. Lee, 470 U.S. 753, 758 (1985); I.N.S. v. Delgado, 466 U.S. 210, 215 (1984) (addressing individuals' expectation); Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (discussing standard Fourth Amendment proscribes); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (acknowledging protection extends to private dwellings); United States v. United States District Court, 407 U.S. 297, 313 (1972) (emphasizing importance of protecting the home); Katz v. United States, 389 U.S. 347, 353 (1967) (stating Fourth Amendment's protection); Warden v. Hayden, 387 U.S. 294, 301 (discussing purpose of Fourth Amendment); Jones v. United States, 357 U.S. 493, 498 (1958) (discussing requirements of Fourth Amendment); *see also* Rossbacher, Young, & Nishimura, *An Invasion of Privacy: The Media's Involvement in Law Enforcement Activities*, 19 LOY. L.A. ENT. L.J. 313, 313-14 (1999) (discussing main objective of Fourth Amendment).

50 *See Wilson*, 526 U.S. at 610; *see also* Payton v. New York, 445 U.S. 573, 603-604 (1980) (holding that officers are authorized to enter dwelling with warrant and reasonable belief that suspect is inside); Mitchell, *supra* note 5, at 949 (recognizing objectives behind authorized search warrants). *See generally* Agnello v. U.S., 269 U.S. 20, 33 (1925) (stating probable cause alone does not justify search of dwelling without warrant).

51 *See Wilson*, 526 U.S. at 614; *see also Horne*, 191 F.3d at 249-50 (explaining holding in

The scope of a search must not exceed the terms of its search warrant.[52] The Court stated in *Wilson* that the Fourth Amendment requires that police actions during the execution of a warrant be related to the objectives of the authorized intrusion.[53] Since the media members were not involved with the execution of the warrants, their presence was a violation of the Fourth Amendment.[54]

A. First Amendment Concerns

First Amendment arguments were also addressed by the Supreme Court in *Wilson*. The presence of the media during a warrant execution may be useful in preserving evidence, minimizing abuse by the police, or protecting officers against claims.[55] The media's freedom of press, however, more commonly serves to inform the public of law enforcement activities and procedures.[56] It is essential under the First Amendment that the media have this freedom to provide useful and newsworthy information to the public. [57] These are concerns that the First Amendment was designed to protect.[58]

Wilson); *Berger*, 129 F.3d at 510 (following holding in *Wilson*).

52 *See* Horton v. California, 496 U.S. 128, 140 (1990) (holding that seizure is unconstitutional if scope of search exceeds warrant); Christopher D. Comeau, *Investigation and Police Practice: The Warrant Requirement*, 86 GEO. L.J. 1198, 1212 (1998) (explaining excess evidence is suppressed); Mary Brandt Jensen, *The Scope of Warrantless Searches Under the Automobile Exception:* United States v. Ross, 43 LA. L. REV. 1561, 1568 (1983) (explaining Court's role in searches); *see also* Dale v. Bartels, 732 F.2d 278, 284 (2d Cir. 1984) (noting only property in warrant may be taken).

53 *See Wilson*, 526 U.S. at 612; Kowalczyk, *supra* note 7, at 353 (discussing connection of *Wilson* to television shows); Mitchell, *supra* note 5, at 953 (discussing implications of *Wilson*); *see also* Arizona v. Hicks, 480 U.S. 321, 325 (1987); Maryland v. Garrison, 480 U.S. 79 (1987) (stating that purpose of search strictly limits extent of search); Johnston, *supra* note 7, at 1527 (noting media presence cannot be implied).

54 *See Wilson*, 526 U.S. at 613.

55 *See Wilson* 526 U.S. at 614; Ohio v. Robinette, 519 U.S. 33, 35 (1996); *see also* Johnston, *supra* note 7, at 1528 (stating reasons why media does not belong on searches); Eve Klindera, *Qualified Immunity for Cops (and Other Public Officials) with Cameras: Let Common Law Remedies Ensure Press Responsibility*, 67 GEO. WASH. L. REV. 399, 429 (1999) (arguing media presence may increase police responsibility); Ransom, *supra* note 5, at 356 (1995) (stating media access decreases effectiveness of officials).

56 *See Wilson*, 526 U.S. at 614; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980); *Cox Broad. Corp. v. Cohn*, 420 U.S. at 491-92; *see also* Dicke, *supra* note 15, at 1558-59 (discussing media's roles). *See generally* Scheim, *supra* note 15, at 193 (discussing protection given to media).

57 *See Wilson*, 526 U.S. at 614; *Richmond Newspapers*, 448 U.S. at 572-73; *Cox Broad. Corp. v. Cohn*, 420 U.S. at 491-92; Scheim, *supra* note 15, at 193 (stating courts grant great protection to media); *see also* Dicke, *supra* note 15, at 1558-59 (discussing roles of media).

58 *See* Dicke, *supra* note 15, at 1559 (discussing First Amendment protection for newsgathering); *see also* Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 152 (1997) (discussing type of speech protected). *See generally* D. Scott Gurney,

Although making information available to the public regarding police or other governmental activity is an important goal of the First Amendment's freedom of the press, the *Wilson* Court stated that "the possibility of good public relations for the police is simply not enough [. . .] to justify the ride-along intrusion into a private home."[59] Officers, or third parties designated by the officers, are authorized to film or photograph the execution of a warrant for the purposes of preserving evidence or ensuring the safety of those involved.[60] When the media is present for reasons unrelated to the warrant execution, this exceeds the scope of the warrant, and there is a violation of the individual's Fourth Amendment rights.[61]

The issue which had previously divided the circuit courts[62] has now been settled. Officers that allow an unauthorized member of the media to enter an individual's home during a warrant execution will be held liable.[63] The question that remains is whether the media will also be held liable for the actions it takes to invade an individual's privacy.

B. Liability

Wilson did not address the issue of media liability. An argument should have been made in favor of holding the media responsible for its actions based on the claims of invasion of privacy and trespass.[64]

Celebrities and the First Amendment: Broader Protection Against the Unauthorized Publication of Photographs, 61 IND. L.J. 697, 698 (1986) (stating First Amendment protection of public interest matters); Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 J. ART. & ENT. LAW 35 (1998) (arguing for freedom of speech).

59 *See Wilson*, 526 U.S. at 612.

60 *See Wilson* 526 U.S. at 614; Ohio v. Robinette, 519 U.S. 33, 35 (1996); *see also* Johnston, *supra* note 7, at 1528 (1997) (stating reasons why media does not belong on searches); Klindera, *supra* note 55 at 429 (arguing media presence may increase police responsibility); Ransom, *supra* note 5, 356 (1995) (stating media access decreases effectiveness of officials).

61 *See Wilson*, 526 U.S. at 610-11; *see also* Johnston, *supra* note 7, at 1533 (stating media presence exceeding warrant as unreasonable); Kowalczyk, *supra* note 7, at 353 (discussing Court's holding in *Wilson*).

62 *See, e.g.*, Berger v. Hanlon, 129 F.3d 505, 505 (1997); Parker v. Boyer, 93 F.3d 445, 445; Ayeni v. Mottola, 35 F.3d 680, 680 (2d Cir. 1994); *see also* Johnston, *supra* note 7, at 1499 (noting conflicts between Second and Eighth Circuits).

63 *See Wilson*, 526 U.S. at 614.

64 *See Berger*, 188 F.3d at 1155; *see also* Eduardo W. Gonzalez, *"Get that Camera Out of My Face!" An Examination of the Viability of Suing "Tabloid Television" for Invasion of Privacy*, 51 U. MIAMI L. REV. 935, 939 (1997) (discussing liability for trespass); Klindera, *supra* note 55, at 429; John J. Walsh, Steven J. Selby & Jodie L. Schaffer, *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL OF RTS. J. 1111, 1111 (1996) (stating media intrusiveness is rising).

Where information is already available to the public, there is no invasion of privacy. [65] Such information is afforded protection pursuant to the First Amendment.[66] In *Wilson*, the information gathered by the media was not previously available to the public. Additionally, the media representatives were not exercising rights under the authority of state law to record the warrant execution.[67] Instead, they were acting for the sole benefit of their employer, *The Washington Post*.[68] Since the media did not obtain the consent of the Wilsons to enter their home, they should have been held liable for trespass.[69]

Protection under the First Amendment is generally not a defense to trespass claims.[70] In such situations, the media is not shielded under the pretense of freedom of the press.[71] If there is an invasion of privacy, members of the media are not allowed to disregard state or federal law simply because they believe they are acting within the interests of the First Amendment.[72]

65 *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 494-495 (1975) (refusing to uphold rule that would create liability when information is already public); *see also Edniston v. Time, Inc.*, 257 F. Supp. 22 (S.D.N.Y. 1966); *Frith v. Assoc. Press*, 176 F. Supp. 671 (E.D.S.C. 1959).

66 *See Cox Broad.*, 420 U.S. at 469; Linda N. Deitch, *Breaking News: Proposing a Pooling Requirement for Media Coverage of Live Hostage Situations*, 47 LOY. L.A. L. REV. 243, 258 (1999) (stating media coverage of situations may benefit public); Mark Weidemaier, *Balancing, Press Immunity, and the Compatibility of Tort Law with the First Amendment*, 82 MINN. L. REV. 1695, 1702 (1998) (stating media has same rights as general public).

67 *See Wilson*, 526 U.S. at 612; John W. Webber, III, *Parker v. Boyer: Disrupting the Balance Between Fourth Amendment Protections and the Limits of Law Enforcement Powers During a Search*, 25 S.U.L. REV. 157, 165 (1997) (discussing media entry during search in *Parker*); *see also* Christopher A. Rothe, *The Legal Future of Future "Reality" Cop Shows: Parker v. Boyer Dismisses Section 1983 Claims Against Police Officers and Television Stations Jointly Engaged in Searches of Homes*, 5 VILL. SPORTS & ENT. L. FORUM 481 (1998) (questioning qualified immunity for officers bringing media to search).

68 *See Wilson* 526 U.S. at 607; *see also* Jason P. Isralowitz, *The Reporter as Citizen: Newspaper Ethics and Constitutional Values*, 141 U.PA. L. REV. 221, 232 (1992) (discussing conduct of reporters); Johnston, *supra* note 7, at 1527 (arguing media's presence as per se violation of Fourth Amendment); Ransom, *supra* note 5, at 350-51.

69 *See* Klindera, *supra* note 55, at 416; Walsh, Selby, & Schaffer, *supra* note 64, at 1111 (noting balance between First Amendment and media misconduct); *see also* Lori Keeton, *What Is Really Rotten in the Food Lion Case: Chilling the Media's Unethical Newsgathering Techniques*, 49 FLA. L. REV. 111, 122 (1997) (explaining trespass cause of action). *See generally* Desnick v. Capital Cities/ABC Inc., 851 F. Supp. 303 (N.D. Ill. 1994).

70 *See* Klindera, *supra* note 55, at 417; *see also* Keeton, *supra* note 69, at 128 (stating media has limited rights); Walsh, Selby, & Schaffer, *supra* note 64, at 1113 (arguing material obtained illegally is not protected).

71 *See* Klindera, *supra* note 55, at 417; *see also* Keeton, *supra* note 69, at 128 (discussing limited rights of media); Walsh, Selby, & Schaffer, *supra* note 64, at 1113 (arguing material obtained illegally is not protected).

72 *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669-70 (1991); Branzburg v. Hayes, 408 U.S. 665, 680-95 (1972); *see also* Pell v. Procunier, 417 U.S. 817, 832-35 (1974); Gregory F. Monday, *Cohen v. Cowles Media is Not a Promising Decision*, 1992 WIS. L. REV. 1243, 1255 (1992) (stating state's interest may exceed First Amendment concerns).

The government officials directly involved in *Wilson* were safeguarded from liability pursuant to the doctrine of qualified immunity.[73] In the words of the Court, the immunity was "granted to the officers because they were performing discretionary functions and their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[74] The officers were awarded qualified immunity because the state of the law was unclear at the time the police allowed the media to enter the Wilson's home.[75]

Holding the officers liable in this case would only serve to restrict future information from being freely disseminated to the public.[76] For fear of liability, government officials might refrain from allowing the media to be present during any governmental activity, even when it is not clearly established whether media presence would be a violation of privacy. [77] This, in turn, would prevent information from reaching the public and inhibit several First Amendment aims.[78] Qualified immunity, however, helps to serve the purposes of the First Amendment.[79] Under such an immunity, officers more readily allow media members to observe governmental activities, and the media is not prevented from informing the public about such events.[80]

[73] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Graham v. Connor, 490 U.S. 386, 394 (1989); Malley v. Briggs, 475 U.S. 335, 340 (1986); David J. Ingall, *Make Sense of Qualified Immunity: Summary Judgement and Issues for the Trier of Fact*, 30 CAL. W. L. REV. 201, 208 (1994) (explaining qualified immunity).

[74] Wilson v. Layne,526 U.S. 603, 607 (1999).

[75] *See Wilson*, 526 U.S. at 615; *Hanlon v. Berger*, 526 U.S. 808, 808 (1999); *see also Graham*, 490 U.S. at 394; *Malley*, 475 U.S. at 340; *Harlow*, 457 U.S. at 818.

[76] *See* Klindera, *supra* note 55, at 403; *see also* James L. Ahlstrom, McKnight v. Rees: *Delineating the Qualified Immunity "Haves" and "Have-nots" Among Private Parties*, 1997 B.Y.U.L. REV. 385, 389-90 (1997) (describing test court uses to apply qualified immunity); Ingall, *supra* note 73, at 205 (discussing reasons for qualified immunity).

[77] *See Harlow*, 457 U.S. at 818-19 (holding that qualified immunity is issue of law to be resolved by judge); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (reaffirming holding in *Harlow*). *See generally* Ahlstrom, *supra* note 76, at 389-90 (describing test court uses in determining qualified immunity).

[78] *See* Jonathon B. Becker, *The First Amendment Goes Tactical: News Media Negligence and Ongoing Criminal Incidents*, 15 LOY. L.A. ENT. L.J. 625, 627 (1995) (stating media access leads to increased public knowledge); John P. Cronon, *Subjecting the Fourth Amendment to Intermediate Scrutiny: The Reasonableness of Media Ride-Alongs*, 17 YALE L. & POL'Y REV. 949 (1999) (discussing problems involved in ride-alongs); Klindera, *supra* note 55, at 403.

[79] *See* Ingall, *supra* note 73, at 205 (discussing reasons for qualified immunity); *see also* Saxbe v. Washington Post Co., 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting) (discussing function of First Amendment). *See generally* Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (stating that function of press is to remedy abuses of power).

[80] *See* Klindera, *supra* note 55, at 403; *see also Saxbe*, 417 U.S. at 862-63 (discussing function of First Amendment). *See generally Mills*, 384 U.S. at 218-19 (stating that function of press is to

The Supreme Court has held that members of the media are not entitled to the protection afforded by the doctrine of qualified immunity.[81] The media therefore, could have been held liable for a trespass claim in the *Wilson* case.[82] Trespass has been defined as an unlawful interference with one's person, property or rights.[83] Since the media was not acting under color of state law when it entered the premises of Charles and Geraldine Wilson, its interference was unlawful.[84]

When a claim of trespass is asserted, quite often a media defendant will argue express or implied consent as a defense.[85] It is clear that in *Wilson* express consent was not given by the homeowners. In light of the Supreme Court's decision against media invasion into private homes during a warrant execution, implied consent based upon customary proceedings was also lacking.[86] The Court's holding may result in liability of the media in similar future situations.

III. THE MEDIA'S INVASION OF PRIVACY

A. Historical Roots of Privacy Rights

The genesis of the right to privacy can be traced back to an article

remedy abuses of power).

81 *See* Wyatt v. Cole, 504 U.S. 158, 168-69 (1992) (stating that qualified immunity "acts to safeguard government, and thereby to protect the public at large, not to benefit its agents"); Berger v. Hanlon, 188 F.3d 1155, 155 (9th Cir. 1999) (holding that media "are not entitled to assert qualified immunity as a defense"); *see also* Kimes v. Stone, 84 F.3d 1121, 1128 (9th Cir. 1996). *See generally* Malley v. Briggs, 475 U.S. 335, 335 (1986) (discussing distinction between public and private party claiming qualified immunity).

82 *See* RESTATEMENT (SECOND) OF TORTS § 158 (1976), which provides "To prove a claim for trespass, a plaintiff must demonstrate an intentional entry upon land that he possesses."

83 Black's Law Dictionary (6th Ed. 1990).

84 *See* West v. Addams, 487 U.S. 42, 49 (1998) (discussing what constitutes what is under color of state law); *see also* United States v. Classic, 313 U.S. 219, 326 (1941) (stating color of state law is where wrongdoer has authority of state).

85 *See* Klindera, *supra* note 55, at 416; *see also* Berger v. Hanlon, 129 F.3d 505, 516-517 (9th Cir. 1997) (discussing consent claim by media defendants); Florida Publ'g Co. v. Fletcher, 340 So.2d 914, 916 (1976) (discussing defense of consent); Anderson v. WROC-TV, 441 N.Y.S.2d 220, 223 (N.Y. Sup. Ct. 1981) (discussing media's claims of consent).

86 *See* Klindera, *supra* note 55, at 419; *see also* Branzburg v. Hayes, 408 U.S. 665, 684-85 (discussing media's liability for trespass); Prahl v. Brosamle, 116 Wis.2d 694 (1983) (stating that to determine whether there is implied consent, "the questions are whether the intruder ought reasonably to expect on the basis of custom that the landowner will not object to entry and whether there are other facts tending to show an objection"); RESTATEMENT (SECOND) OF TORTS § 330 (1976).

written by Samuel Warren and Louis Brandeis in 1890,[87] which articulated the need for recognition of such protection.[88] When the Warren & Brandeis article was written, the general concern was that inventions of the time would cause private matters that were once "whispered in the closets" to be "proclaimed from the roof tops."[89] These concerns led to the development of the tort of invasion of privacy. [90] Eventually, this tort protection evolved into court recognition of a right to informational privacy,[91] which has been defined as the right to control the dissemination of private and personal information.[92] This right inevitably conflicts with the public's right to information, which is protected by the First Amendment.[93] It has been over one hundred years since Warren and Brandeis voiced concern over the threat of technology interfering with our private lives. [94] With technology advancing more rapidly than ever, privacy concerns are arguably greater now than they were in 1890.[95]

[87] *See* Warren & Brandeis, *supra* note 1, at 193 (calling for right to privacy); *see also* Ken Gromley, *One Hundred Years of Privacy*, 1992 W.S. L. REV. 1335, 1335 (1992) (discussing Warren and Brandeis article).

[88] *See* Warren & Brandeis, *supra* note 1, at 193-196; *see also* Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (stating that privacy right is sacred); Barfield, *supra* note 25, at 27-28 (noting that there is "deep-rooted expectation of privacy").

[89] *See* Warren & Brandeis, supra note 1, at 195; *see also* Williams, *supra* note 12, at 216 (quoting Brandeis). *See generally Union Pacific R. Co.*, 141 U.S. at 251 (describing importance of privacy right).

[90] *See* James W. Hilliard, *A Familiar Tort That May Not Exist in Illinois: The Unreasonable Intrusion on Another's Seclusion*, 30 LOY. U. CHI. L.J. 601, 607 (1999) (stating that "courts conceived the independent tort of invasion of privacy around 1890" but that its current formulation did not develop until after 1960); *see also* Prosser, *supra* note 12, at 383 (examining tort of invasion of privacy); Warren & Brandeis, *supra* note 1, at 195 (calling for right to privacy).

[91] *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (recognizing limited right to informational privacy); Hill v. National Collegiate Athletic Ass'n, 865 P.2d 633, 654 (Cal. 1994) (defining right of informational privacy); *see also* N.Y. PENAL LAW 250.00-250.35 (McKinney 1999) (prohibiting various invasions of privacy).

[92] *See Whalen*, 429 U.S. at 599-600 (stating that there is interest in avoiding disclosure of certain personal matters); *Hill*, 865 P.2d at 654 (defining informational privacy); *see also* Williams, *supra* note 12, at 216 (discussing informational privacy).

[93] *See* Klindera, *supra* note 55, at 403 n.40 (discussing press and First Amendment); Williams, *supra* note 12, at 215-216 (recognizing conflict between right of privacy and First Amendment); *see also* Virginia State Board of Pharmacy v. Virgina Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (discussing right to receive information); Mills v. Alabama, 384 U.S. 214, 218-19 (1966) (discussing role of press as antidote to abuses of power).

[94] *See* Warren & Brandeis, *supra* note 1, at 193 (calling for right to privacy); *see also* Gromley, *supra* note 87, at 1335 (discussing Warren and Brandeis article). *See generally* Berger v. Hanlon, 129 F.3d 505, 507-509 (9th Cir. 1997) (discussing use of technology in claim of invasion of privacy); Ayeni v. CBS, Inc., 848 F. Supp. 362, 364-65 (E.D.N.Y. 1994) (discussing camera interviews despite objections).

[95] *See* Williams, *supra* note 12, at 216-217; *see also Berger*, 129 F.3d at 505 (discussing use of wires and concerted microphones); *Ayeni*, 848 F. Supp. at 364-65 (discussing camera

B. Current Concerns

The media's role in society is clearly beneficial.[96] The primary goal of most media members is to uncover truthful information and deliver it to others.[97] Ultimately, the question arises of how deeply the media can investigate individuals' private lives to achieve this goal. Today's media members have a variety of intrusive tools available to them, which include adopting false identities, using hidden cameras, and accompanying or following ambulances to and from accident scenes.[98] These are common media practices and have given rise to much litigation.[99] Yet the overwhelming majority of cases that have involved threats to individual privacy, were resolved in favor of the media.[100] Although the media is not shielded from all tort liability, the standards which support tort claims are vague and ambiguous.[101]

The media's invasion into individuals' private lives has caused much debate.[102] While this controversy has not always involved the

interviews despite objections).

96 *See* Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978) (stating that '[b]eyond question, the role of the media is important; acting as the "eyes and ears" of the public'); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (discussing importance of freedoms of press and speech); *Grosjean*, 297 U.S. at 250 (emphasizing importance of informed public opinion against misgovernment).

97 *See* Khawar v. Globe Int'l, Inc., 54 Cal. Rptr.2d 92, 107 (Cal. Ct. App. 1996) (quoting Professional Journalists' Code of Ethics). *See generally* Edward N. Cavanaugh, *Journalists as Professionals: Rethinking the Professional Exception Under the Fair Labor Standards Act*, 16 LOY. L.A. ENT. L.J. 227, 227 (1995) (discussing journalists' responsibility to public to tell truth).

98 *See* Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 175 (1998) (listing intrusive tools available to media); *see also* Victor A. Kovner & Harriette K. Dorsen, *Recent Developments in Intrusion, Private Facts, False Light and Commercialization Claims*, 3 COMM. LAW 775, 783 (1990) (stating examples of common media intrusion claims); Susan Paterno, *The Lying Game*, 1997 AM. JOURNALISM REV. 40 (1997) (discussing tools journalists use to pry, spy and lie).

99 *See* Wolfson v. Lewis, 924 F. Supp. 1413, 1432 (E.D. Pa. 1996) (holding jury could find reporters intruded into lives of family to coerce interview from health care executive); *see also* Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (involving reporters obtrusively pursuing target).

100 *See* Lidsky, *supra* note 98, at 173 (stating courts concurrently resolve issues in media's favor); *see also* Nicholson v. McClatchy Newspapers, 223 Cal. Rptr. 58, 64 (1986) (discussing media's privileges).

101 *Compare Deteresa v. ABC*, 121 F.3d 460, 466 (9th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998) (holding that plaintiff's privacy rights were not violated by covert audio-taping and videotaping of interview by news media even though plaintiff expressly refused to be interviewed on camera), *with Sanders v. ABC*, 978 P.2d 67, 72 (Cal. 1999) (holding that plaintiff's reasonable expectation of privacy was violated by covert audio-taping by reporter, even though plaintiff's conversation occurred in presence of co-workers). *See generally Nicholson v. McClatchy*, 223 Cal. Rptr. at 64 (discussing extent of media privilege in newsgathering); Lidsky, *supra* note 98, at 190-93 (discussing confusion caused by courts differing interpretation and application of privilege for newsgathering techniques).

102 *See* Lidsky *supra* note 98, at 173 (noting that newsgathering techniques have created

law's deficiencies in offering protection of privacy, more and more individuals are finding it necessary to seek this protection.[103] With a growing number of television programs airing that broadcast actual footage of events, the competition for newsgathering techniques has escalated.[104]

The methods used to quickly gather desirable information have given rise to an increasing number of lawsuits.[105] The media ride-along, now banned by the Supreme Court when there is an intrusion into a private home, has been one such technique.[106] A traditional tort remedy is needed for those individuals whose privacy is violated by the media in other contexts.[107]

The jurisdictions that have dealt with this issue and have sided

more lawsuits); Scheim, *supra* note 15, at 185 (recognizing scrutiny of media for intrusive newsgathering); *see also* Howard Kurtz, *Public to Press: Just Play it Fair; They're Peeved by Intrusiveness and Deception. But Are New Laws the Answer?*, WASH. POST, Sept. 15, 1997, at B4 (listing events involving right to privacy that has held media's attention).

[103] *See* Bernard W. Bell, *Secrets and Lies: News Media and Law Enforcement Use of Deception as an Investigative Tool*, 60 U. PITT. L. REV. 745, 793-95 (1999) (discussing under-protection of privacy by courts); Lidsky, *supra* note 98, at 182 (noting that 1996 poll by Center for Media & Public Affairs showed that 80% of respondents felt media invaded privacy); Ethan E. Litwin, *The Investigative Reporter's Freedom and Responsibility: Reconciling Freedom of the Press with Privacy Rights*, 86 GEO. L.J. 1093, 1097-98 (1998) (discussing "shocking paucity" of cases upholding invasion of privacy claims against media defendants); David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious News Gathering*, 83 IOWA L. REV. 161, 161, n.12 (1997) (arguing that immunity from tort liability for newsgathering should be rejected). *But see* John H. Fuson, *Protecting the Press From Privacy*, 148 U. PA. L. REV. 629, 663-69 (1999) (claiming that pendulum has swung too far toward protecting individual privacy rights at expense of media's need to gather news).

[104] *See* Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering By the Press*, 47 EMORY L.J. 895, 919-20 (1998) (noting that television is "experiencing dramatic competition from other media"); Lidsky, *supra* note 98, at 175 (discussing intrusive tools available to media because of market pressures); *see also* Paterno, *supra* note 98, at 40 (discussing tools journalists use to gather news).

[105] *See* Fuson, *supra* note 103, at 663 (discussing recent California cases that expand privacy right); Lidsky, *supra* note 98, at 173 (reasoning intrusive newsgathering techniques have given rise to more lawsuits); *see also* Scheim, *supra* note 15, at 185 (recognizing scrutiny media has recently endured for intrusive tabloid journalism); Stephen M. Stern, *Witch Hunt or Protected Speech: Striking a First Amendment Balance Between Newsgathering and General Laws*, 37 WASHBURN L.J. 115, 116 (1997) (discussing new breed of competing interests which posed great threat to press and important speech).

[106] *See* Lidsky, *supra* note 98, at 175 (discussing how media trails police into individual homes); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1104 (1999) (describing ride-along as partnership between press and law enforcement); *see also* Paterno, *supra* note 98, at 40 (discussing tools journalists use to gather news).

[107] *See* Logan, *supra* note 103, at 161, n.12 (arguing that media should not be immune from tort liability for newsgathering); *see also* Bell, *supra* note 103, at 793-95 (discussing under-protection of privacy by courts); Litwin, *supra* note 103, at 1097-98 (discussing cases upholding invasion of privacy claims against media). *See generally* Lidsky, *supra* note 98, at 182 (discussing public opinion that media invades privacy). *But see* Fuson, *supra* note 103, at 663-69 (claiming there is too much protection of individual privacy rights at expense of need for newsgathering).

with the media based their decisions on the RESTATEMENT (SECOND) OF TORTS, which in part provides that, "when the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy."[108] If courts want to avoid privacy concerns, the news at issue may simply be deemed a matter of public interest.[109] Whether information is newsworthy, however, is not always easy to determine.[110]

One of the key elements in creating a "newsworthiness" standard is to determine which of two competing theories, normative or descriptive, should be applied.[111] Under the normative theory, the information is only required to be of some contribution to society or

108 *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1976); *see also* Faloona v. Hustler Magazine, 799 F.2d 1000, 1006 (5th Cir. 1986) (citing Restatement, and holding that republication of photographs already in public domain was not actionable as invasion of privacy); Morgan v. Calender, 780 F. Supp. 307, 309 (W.D. Pa. 1992) (noting Restatement provides that newsworthy items are in scope of public concern); Sipple v. Chronicle Pub. Co., 201 Cal. Rptr. 665, 668-70 (Cal. App. 1984) (citing Restatement); Montesano v. Donrey Media Grp., 668 P.2d 1081, 1084, 1086, 1088-89 (Nev. 1983) (citing Restatement); Cape Publ'ns Inc. v. Bridges, 423 So. 2d 426, 427 (Fla. App. 1982) (citing Restatement in decision); Howard v. Des Moines Register, 283 N.W.2d 289, 298-302 (Iowa 1979) (explaining Restatement and its application). *But see* Wolfson v. Lewis, 924 F. Supp. 1413, 1418 (E.D. Pa. 1996) (citing Restatement as persuasive authority, but allowing injunction to stand against news organization for harassing family members of public figure); McCabe v. Village Voice Inc., 550 F. Supp. 525, 529 (E.D. Pa. 1982) (acknowledging that Restatement was adopted in Pennsylvania, but holding that nude photograph of plaintiff was neither newsworthy nor matter of public concern). *See generally* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494 (1975) (describing Restatement and its application to different theories for claims of invasion of privacy).

109 *See* Lucy Noble Inman, *Hall v. Post: North Carolina Rejects Claim of Invasion of Privacy by Truthful Publication of Embarrassing Facts*, 67 N.C. L. REV. 1474, 1477 (1989) (discussing Restatement requirement that plaintiff prove matter is of public concern); *see also* Robin L. Blume, *Court of Appeals Leaves False Light Invasion of Privacy Issue Unresolved in Libel and Invasion of Privacy Case*, 47 S.C. L. REV. 151, 152 (1995) (noting dispositive issue in such cases involves defining matter as public concern, and matters of public concern demand heightened judicial scrutiny); Williams, *supra* note 12, at 216 (stating that courts "dance" around First Amendment issues).

110 *See The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 725-26 (1963) [hereinafter *Comment*] (discussing differing interpretations of newsworthiness); *see also* Gary L. Bostwick, *The Newsworthiness Element: Shulman v. Group W Prods., Inc. Muddies the Waters*, 19 LOY. L.A. ENT. L.J. 225, 225-26 (1999) (noting what constitutes "newsworthy" is unclear); Dendy, *supra* note 58, at 148-49 (stating courts provide broad newsworthiness defense); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 1007 (1989) (noting common law is confused about applying newsworthiness standard).

111 *See* Shulman v. Group W Productions, 955 P.2d 469, 481 (Cal. 1998) (acknowledging different interpretations of newsworthiness); *see also* Comment, *supra* note 110, at 725-26 (describing different interpretations); Gary Williams, *"On the QT and Very Hush Hush": A Proposal to Extend California's Constitutional Right to Privacy to Protect Public Figures From Publication of Confidential Personal Information*, 19 LOY. L.A. ENT. L.J. 337, 344-46 (1999) (discussing standards to determine newsworthiness); Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 196-97, 200-202 (1978) (discussing newsworthiness standards).

of general public interest to be considered newsworthy.[112] This standard would give the media considerable leeway in determining newsworthiness.[113] If the descriptive standard is applied, then the material would have to be of widespread public interest, which would result in sales and television ratings determining whether the information is newsworthy.[114] In seeking a middle ground between the descriptive and normative theories, courts within each jurisdiction have varied considerably.[115]

The Supreme Court has recognized that freedom of the press extends beyond simple accounts of public proceedings.[116] The Court acknowledged that exposure "to others in varying degrees is a concomitant of life [. . .] The risk of this exposure is an essential incident of life in a society which places a primary value on freedom

112 *See Shulman*, 955 P.2d at 481 (acknowledging different interpretations of newsworthiness); Anthony J. DeGirolano, *The Tort Invasion of Privacy in Ohio: Videotape Invasion and the Negligence Standard*, 52 OHIO ST. L.J. 1599, 1607 (1991) (discussing normative approach); *see also* Comment, *supra* note 110, at 725-26 (describing different interpretations); Joseph Elford, *Trafficking in Stolen Information: A "Hierarchy of Rights" Approach to the Private Facts Tort*, 105 YALE L.J. 727, 728 (1995) (discussing newsworthiness criterion which gauges contribution of speech to public debate); Williams, *supra* note 111, at 344-46 (discussing standards to determine newsworthiness); Woito and McNulty, *supra* note 111, at 196-97, 200-202 (discussing newsworthiness standards).

113 *See Shulman*, 955 P.2d at 481 (discussing different standards); *see also* Comment, *supra* note 110, at 725-26; DeGirolano, *supra* note 112, at 1607 (discussing normative approach); Elford, *supra* note 112, at 728 (discussing newsworthiness criterion which gauges contribution of speech to public debate).

114 *See* Woito and McNulty, *supra* note 111, at 196-97 (discussing difficulty in deciding if "newsworthy" means more than widespread public interest); *see also* DeGirolano, *supra* note 112, at 1607 (discussing descriptive standard); Peter Gielniak, *Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment*, 39 SANTA CLARA L. REV. 1217, 1222 (1999) (discussing balance between right of privacy and public right to know). *See generally* Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 289-92 (1999) (noting ratings blur distinctions between news and entertainment).

115 *See* Gonzalez, *supra* note 64, at 948 (stating newsworthiness standard is hard for judges to impose). *Compare* Gill v. Hearst Pub. Co., 253 P.2d 441, 443 (Cal. 1953) (holding no action for invasion of privacy would lie solely for publishing photograph of plaintiffs embracing) *with* Gill v. Curtis Pub. Co., 38 Cal. 2d 273, 277 (1953) (holding public interest did not require publishing photograph of plaintiffs embracing). *Compare* Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940) (holding that publication of stories in New Yorker magazine describing present life of former child prodigy who had fallen into obscurity was matter of public concern and widespread interest, and therefore, not invasion of privacy) *with* Melvin v. Reid, 112 Cal. App. 285, 287 (1931) (holding use of plaintiffs true name in motion picture about her former life as prostitute was unnecessary and therefore actionable as invasion of privacy).

116 *See* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967); *see also* Watters v. TSR, Inc., 715 F. Supp. 819, 821 (W.D. Ky. 1989) (citing *Time* decision as precedent in holding that publishing and distributing of game board "Dungeons & Dragons" was protected under First Amendment); Farnsworth v. Tribune Co., 253 N.E.2d 408, 411 (Ill. 1969) (relying on Court's decision in *Time* to uphold lower court's decision that truthful publication of questionable medical practices of physician was not libelous); All Diet Food Dist., Inc. v. Time, Inc., 290 N.Y.S.2d 445, 447 (N.Y. Sup. Ct. 1967) (citing *Time* decision in holding that picture of plaintiff's store in which trade name was identifiable and caption read "FOOD FADS AND FRAUDS" was not libelous).

of speech and of press."[117] Yet the Supreme Court has rarely dealt directly with the issue of whether the press has a constitutional privilege to publish private facts.[118]

In *Cox Broadcasting Corp. v. Cohn*,[119] an action was brought against a television reporter who published the name of a rape victim that had been acquired from a court proceeding.[120] The Supreme Court held that because the reporter had published facts that were already available to the public, he could not be held liable, and to do so would hinder the dissemination of other necessary information.[121] This holding has been reiterated by the Court in later decisions.[122] Most jurisdictions agree, however, that the *Cox* decision does not establish a test for newsworthiness or provide useful guidelines for establishing such a test.[123]

With no clear standard to assist in determining the extent of the media's liability with regard to invasion of privacy, and no sufficient guidance from the Supreme Court, many jurisdictions have been looking for alternate ways to hold the media liable for

117 *Time*, 385 U.S. at 388; *see also* Gielniak, *supra* note 114, at 1222 (discussing balance between Fourth and First amendments); Warren & Brandeis, *supra* note 1, at 196 (arguing for privacy right).

118 *See* Florida Star v. B.J.F., 491 U.S. 524, 536 (1989) (holding publication constitutional when obtained from government record); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 698 (1996) (noting *Florida Star* decision has been narrowly construed). *But see* Lidsky, *supra* note 98, at 176 (stating that "newsgathering, unlike news dissemination, receives only limited constitutional protection").

119 420 U.S. 469 (1975).

120 *See* Cox Broad. v. Cohn, 420 U.S. 469, 473 (1975).

121 *See Ibid.* at 492 (indicating importance of allowing media to publish information, so public may vote intelligently, form opinions concerning administration of government and scrutinize administration of justice).

122 *See Florida Star*, 491 U.S. at 536 (holding publication constitutional when obtained from government record). *But see* Coplin v. Fairfield Pub. Access Television Comm., 111 F.3d 1395, 1404 (8th Cir. 1997) (stating that "only in the 'extreme case' is it constitutionally permissible for a governmental entity to regulate the public disclosure of facts about private individuals" and citing Gilbert v. Medical Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981)); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993) (broadening interpretation of *Cox Broadcasting*, stating, "The Court must believe that the First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal"). *See generally* Scott, *supra* note 118, at 698 (noting *Florida Star* decision has been narrowly construed).

123 *See* Erwin Chemerinsky, *The Right to Privacy One Hundred Years Later: In the Defense of Truth*, 41 CASE W. RES. L. REV. 745, 756 (1991) (noting problems exist in defining newsworthiness); *see also* Bob Rowland, *Diana's Law: Would It Survive Constitutional Scrutiny?*, 27 CAP. U. L. REV. 191, 208-10 (1998) (discussing various standards of newsworthiness); Justin W. Wertman, *The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern*, 65 FORDHAM L. REV. 789, 790 (1996) (arguing newsworthiness requirement is too broad); Woito & McNulty, *supra* note 111, at 196-97, 200-202 (discussing newsworthiness standards).

privacy invasion.[124]

IV. AN APPROACH TO HOLDING THE MEDIA LIABLE

In *Wilson v. Lane*,[125] the Supreme Court found that police officers should be held liable for Fourth Amendment violations that occur during a ride-along, but did not impose liability on media members.[126] The media, however, could have been held liable for intrusion into seclusion,[127] as it was in the California case, *Shulman v. Group W Productions*.[128]

The facts of *Shulman* centered on a "reality show" that videotaped and broadcast the medical treatment of an accident victim.[129] Specifically, the plaintiffs were involved in a serious car accident and were pinned in their car. A cameraman filmed the plaintiff's extrication from the car and transport to the hospital in a helicopter. The footage was then broadcast on the September 29, 1990 episode of *On Scene: Emergency Response*.[130] The plaintiffs, who never consented to the filming or the broadcast, filed a complaint which included two causes of action for invasion of privacy, one based upon public disclosure of private facts and the other upon intrusion.[131] The California Supreme Court concluded that First Amendment protection of the media outweighed the right to informational privacy, reasoning that the "broadcast was of legitimate public concern" and the public disclosure of private facts "[bore] a logical relationship to the newsworthy subject of the broadcast and [was] not intrusive in great disproportion to their

124 *See* Shulman v. Group W Productions, 955 P.2d 469, 469 (Cal. 1998); *see also* Bostwick, *supra* note 110, at 225-26 (stating that *Shulman* decision failed to clarify what constitutes newsworthy); Gielniak, *supra* note 114, at 1243 (discussing new precedent developed in *Shulman*); Klindera, *supra* note 55, at 423-24 (discussing implications of *Shulman*); Williams, *supra* note 12, at 217 (discussing court's holding in *Shulman*).

125 526 U.S. 603 (1999).

126 *See Wilson*, 526 U.S. at 614; *see also* Horne v. Coughlin, 191 F.3d 244, 249-50 (1999) (explaining holding in *Wilson*); Berger v. Hanlon, 129 F.3d 505, 510 (following holding in *Wilson*).

127 *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977); *see also* Miller v. NBC, 232 Cal. Rptr. 668, 678 (Cal. Dist. Ct. App. 1986) (demonstrating courts willingness to adopt restatement).

128 955 P.2d 469 (Cal. 1998).

129 *See Shulman*, 955 P.2d at 475-477 (stating facts); *see also* Calvert, *supra* note 114, at 275 (discussing facts of *Shulman*); Fuson, *supra* note 103, at 638-39 (explaining specific facts of *Shulman*).

130 *See Shulman*, 955 P.2d at 475-477; *see also* Calvert, *supra* note 114, at 275; Fuson, *supra* note 103, at 638-39.

131 *See Shulman*, 955 P.2d at 475-477.

relevance."[132] Although the media prevailed on the public disclosure claim, the court sustained the cause of action for the claim based on intrusion, stating that the analysis for intrusion is far less "deferential" to the First Amendment.[133] The court reasoned that an intrusion into a private place, conversation, or other matter would not be justified by the hope of getting a news story.[134] One year later, California reaffirmed this holding in *Sanders v. American Broadcasting Co.*,[135] when an investigative reporter intruded upon an individual's privacy through the use of a hidden camera and microphone.

Privacy is highly valued in our society.[136] A great deal of importance is also placed on the functions of the media.[137] The Supreme Court, however, has been reluctant to define a clear standard for "newsworthiness."[138] In our media-driven society, with technology advancing rapidly, the Court must protect the privacy of individuals by regulating newsgathering techniques.[139] The First Amendment should always be carefully considered, but the Court must establish a decisive standard for holding the media liable for invasion of privacy. The media needs guidance to determine when its activities will be protected, and when it is merely promoting

132 *See Shulman*, 955 P.2d at 478; *see also* Fuson, *supra* note 103, at 653-58 (discussing holding of *Shulman*); Williams, *supra* note 12, at 217 (discussing court's holding in *Shulman*).

133 *See Shulman*, 955 P.2d at 497-98.

134 *See Shulman*, 955 P.2d at 497-98; *see also* Bostwick, *supra* note 110, at 225-26 (stating that *Shulman* decision failed to clarify what constitutes newsworthy); Gielniak, *supra* note 114, at 1243 (discussing new precedent developed in *Shulman*); Klindera, *supra* note 55, at 423-24 (discussing implications of *Shulman*); Williams, *supra* note 12, at 217-18 (discussing court's holding in *Shulman*).

135 978 P.2d 67 (Cal. 1999).

136 *See* Fuson, *supra* note 103, at 635 (discussing privacy); *see also* Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (finding photographers breached right to privacy); Randell Boese, *Redefining Privacy? Anti-Paparazzi Legislation and Freedom of the Press*, 17 COMM. LAW. 1, 3 (1999) (discussing claims against reporters).

137 *See* Houchins v. KQED, Inc., 438 U.S. 1, 8 (1978) (describing media as "'eyes and ears" of the public'); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (discussing importance of freedoms of press and speech); *Grosjean*, 297 U.S. at 250 (emphasizing importance of informed public opinion against misgovernment). *But see* Michael Emery & Edwin Emery, *The Press of America: An Interpretive History of the Mass-Media*, 284-89 (8th ed. 1996) (analyzing sensational journalism); Fuson, *supra* note 103, at 645-45 (discussing sensationalism); Adam Goodheart, *Sleaze Journalism? Its an Old Story*, N.Y. TIMES, Feb. 20, 1998 at A7 (discussing history of sensationalism).

138 *See Comment*, *supra* note 110, at 725-26 (discussing differing interpretations of newsworthiness); *see also* Bostwick, *supra* note 110, at 225-26 (noting what constitutes "newsworthy" is unclear); Dendy, *supra* note 58, at 148-49 (stating courts provide broad newsworthiness defense); Post, *supra* note 110, at 1007 (noting common law is confused about applying newsworthiness standard).

139 *See* Fuson, *supra* note 103, at 663 (stating California's approach focuses on newsgathering techniques).

voyeurism.[140] By adopting the standard set in *Shulman*, and allowing the media to be held liable based on a tort claim of intrusion, the Court will achieve these goals.[141]

Conclusion

It is essential that the media have freedom of the press in order to provide useful and newsworthy information to the public. The First Amendment is designed to protect these interests without hindering the media in its newsgathering techniques.

The right to privacy should ensure that a person in the sanctity of his or her home is free from invasion either by the government or the media. Individuals have a reasonable expectation of privacy in this regard and a legitimate interest in protecting this right. If the media is allowed to have free range into private homes without the consent of the homeowner, constitutional protections are considerably weakened. The long-awaited decision in *Wilson* now prevents newsgathering techniques that invade an individual's home in this way.

Still, the Supreme Court must decide the issue of media liability in other contexts. The media's ability to make information available to the public is an important and legitimate function. The constitutional right to privacy, however, must be measured against the freedom of the press so that information will be made accessible to the public, while privacy rights are maintained. Valid tort claims are available and some circuit courts have relied on them to hold the media liable. The Supreme Court should establish a clear standard that will fairly balance the competing interests and allow greater liability of the media for invasion of privacy.

Allison L. Lampert & William Kirrane

140 *See* Calvert, *supra* note 114, at 296 (comparing voyeurism with mass-media).

141 *See* Shulman v. Group W, 955 P.2d 469, 497-98 (Cal. 1998).