



The Society of Professional Journalists  
and  
Baker & Hostetler LLP  
present

The 2001 Pulliam Kilgore Report

**WEIRD TORTS: COMING TO A  
COURTROOM NEAR YOU**

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## INTRODUCTION<sup>1</sup>

For decades, the media hid behind its First Amendment protection as if it were an impenetrable shield. Whatever was done in furtherance of its mission as the Fourth Estate and as the people's watchdog on government was protected behind that shield. And the First Amendment's right to publish information seemed to carry with it an implicit right to report, or gather, that information.

In 1972, in *Branzburg v. Hayes*, the U.S. Supreme Court gave journalists a slight bit of encouragement in that direction when it endorsed *some* newsgathering rights of the media. "Without some protection for seeking out the news, freedom of the press could be eviscerated," the Court said.<sup>2</sup>

That case hinged on whether journalists could be compelled by a grand jury to reveal the identity of a confidential source. Despite the apparent promise of protection the Supreme Court offered journalists, it held that the reporter could be ordered to testify, stating that "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."<sup>3</sup>

In the 30 years since that decision, judges have struggled with just what the Supreme Court meant when it spoke of "some" protection. In 1991, the high court gave additional direction in *Cohen v. Cowles Media Co.* In that case, the court indicated, ironically, that journalists who

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<sup>2</sup> *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

<sup>3</sup> *Id.* at 682.

break a promise of confidentiality to a source could be held liable for any injury the person suffers from the broken promise.<sup>4</sup>

Nevertheless, some journalists and media lawyers continue to argue that generally applicable laws shouldn't apply to them. Outside of the courtroom arena, journalists who sometimes employ unethical newsgathering techniques defend those actions to critics with a Machiavellian answer: the results obtained (such as a president's resignation or revelations about consumer fraud or unsanitary conditions at a grocery store) "justified" reporters and editors lying and employing other less-than-aboveboard techniques to gain access to information for the story.

When people complain that their tactics are becoming more offensive, some journalists point to the era of yellow journalism as an example of when behavior was even worse than it is now, and say difficult times called for difficult approaches. As an example of the use of such tactics to effect change, journalist Upton Sinclair worked undercover to reveal wrongdoing in the Chicago meat-packing industry, resulting in his historic book "The Jungle."

Perhaps the oldest nemesis for newsgathering is invasion of privacy. In 1890, two Boston lawyers, Samuel D. Warren and Louis D. Brandeis,<sup>5</sup> published a landmark article in the Harvard Law Review arguing for greater protections for individual privacy.<sup>6</sup> They addressed in particular recent technology that allowed surreptitious photography: "Now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation."<sup>7</sup>

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<sup>4</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

<sup>5</sup> Brandeis later served as a U.S. Supreme Court justice, from 1916 to 1939.

<sup>6</sup> Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).

<sup>7</sup> *Id.* at 211.

But just as Warren and Brandeis argued for greater protections for individual privacy 110 years ago, the two recognized that public interest can trump privacy concerns: “The right to privacy does not prohibit any publication of matter which is of public or general interest. . . . There are persons who . . . in varying degrees, have renounced the right to live their lives screened from public observation.”<sup>8</sup>

Privacy torts fall into four categories with only one of those – intrusion – affecting newsgathering operations. The other prongs of the privacy tort are publication of private facts, false light, and misappropriation. Publication of private facts, involving news content, frequently finds protection in a defense that the information is “newsworthy.” False light often sounds in libel and defamation, with similar protections. And misappropriation of likeness generally applies to commercial communications, not news.<sup>9</sup>

For years, invasion of privacy by intrusion was the most-often-used attack on journalistic newsgathering. However, in a 1993 supplement to his treatise *Libel and Privacy*, Bruce W. Sanford of Baker & Hostetler LLP<sup>10</sup> warned: “To the extent that editorial judgments exploit people, the law will find new ways to redress injury.”<sup>11</sup> In recent decades, critics of the media have found those new ways and are forcing news organizations to re-evaluate how they do their jobs. Even journalists who use accepted techniques that have gone unchallenged legally now must defend their actions.

Bill Carey, news director at WXYZ-TV in Detroit, says the public’s attitude about the media has changed significantly since he got in the business. “Right after Watergate, the press

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<sup>8</sup> *Id.* at 215.

<sup>9</sup> See Bruce W. Sanford, *Libel and Privacy* § 11.1 (2d ed. 1997 & Supp. 2001).

<sup>10</sup> Bruce W. Sanford is a senior partner at Baker & Hostetler LLP. He is widely considered to be a leading authority on the First Amendment and media law.

could do no wrong. There was an expectation that we were jumping through windows, all in the name of truth,” Carey said. “But now the pendulum has swung and we have to prove that we’re the good guys. . . . We’re in a climate that we’re guilty, not innocent, first.”<sup>12</sup>

Plaintiffs received encouragement that attacking newsgathering techniques represented an appealing alternate to attacking news content with the Supreme Court’s 1991 decision in *Cohen*. Even if news organizations win in the end, legal defenses often are costly.<sup>13</sup> Barbara W. Wall and John P. Borger wrote in *Communications Lawyer* that “broken promise” claims such as the one in *Cohen* are easy to make and expensive to defend.<sup>14</sup> That argument holds weight for other newsgathering tort claims as well.

“The sense is there’s been more of a willingness on courts to impose liability on media for traditional torts such as trespass and defamation. Whereas in the past it appeared the media got more of a blanket exemption from some of these torts,” said one news organization lawyer who has regular contact with law enforcement.

“For a long time, it was very, very difficult to bring libel actions around stations because [the media would] pretty much win all the time,” added Jerald Fritz, senior vice president at Allbritton Communications Co. “We find a lot more people willing to go ahead and invoke the

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<sup>11</sup> *Id.* at 524.

<sup>12</sup> Telephone Interview with Bill Carey, News Director, WXYZ-TV (July 30, 2001).

<sup>13</sup> Some states have adopted laws to penalize those who frivolously sue media and other critics. “SLAPPs” – or Strategic Lawsuits Against Public Participation – are intended to stifle critics through intimidation and force them to defend a libel or defamation lawsuit or a similar claim. See Tarah Grant, “SLAPP Back: How the media can take advantage of state laws to win early dismissal of meritless libel lawsuits,” 1999 Society of Professional Journalists Pulliam-Kilgore Report, October 1999. This year’s Pulliam-Kilgore Report addresses claims against newsgathering techniques, not news content, that may have some legal merit if not protected by the First Amendment.

<sup>14</sup> Barbara W. Wall and John P. Borger, “Broken Promises in the Aftermath of *Cohen*,” 13 *Communications Lawyer* 1 (Spring 1995), at 16.

procedure of the court system [with other types of claims]. In the past two or three years, people are more willing to file a lawsuit. . . . In terms of nuisance value, they'll get something."<sup>15</sup>

Among recent litigation results involving journalists in their efforts to report the news is a Supreme Court opinion that may force reporters to abandon the tried-and-true technique of riding with police to report on law enforcement action as it unfolds, and a multimillion-dollar jury verdict (eventually reduced by an appeals court to a few dollars) against a news organization whose employees misrepresented themselves to get inside a chain of grocery stores with hidden cameras and microphones.

This report examines a number of ways in which recent courts have reviewed how journalists conduct themselves in pursuit of the news: 1) intentionally deceiving sources to gain access to information; 2) using illegally obtained electronic information such as phone call interceptions or audiotapes where the media wasn't involved in the interception; 3) accompanying police officers into homes and other private places in their execution of warrants; and 4) trespassing on private or restricted property while reporting the news.

Although in many cases the news organizations involved in these legal disputes may have won their individual battles – often on very narrow grounds – wars are being lost as courts set precedents that could have repercussions for the media for decades to come.

## **PART I. MISREPRESENTATION AND DECEPTION**

In the past decade, high-profile lawsuits, primarily against television newsmagazines, have resulted in criticism of the news media. Unfortunately for the majority of the media community, the deceptive practices of these organizations also have reinforced the negative stereotype that

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<sup>15</sup> Telephone Interview with Jerald Fritz, Senior Vice President for Legal and Strategic Affairs, Allbritton  
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journalists will lie, cheat, and steal to get a story, boost ratings, or sell newspapers. That stereotype also calls into question not only the credibility of the organization, but also the truthfulness of what is reported, according to Russ Baker, writing in *Columbia Journalism Review*.<sup>16</sup> If the public believes that a news story was reported using untruthful or unethical methods, the public is less likely to believe in the veracity of the report's content.

In "Lying: Moral Choice in Public and Private Life," Harvard philosopher and ethicist Sissela Bok discussed the power that lies bring to a person who deceives members of the public, who then their own base decisions on this incomplete or false information. But she cautioned:

Even if the liar has no personal sense of loss of integrity from his deceitful practices, he will surely regret the damage to his credibility which their discovery brings about. Paradoxically, once his word is no longer trusted, he will be left with greatly *decreased* power....<sup>17</sup>

In addition to the ethics involved when journalists lie in the reporting of a story, they may also face legal sanctions when they lie to sources or to the target of an investigation to get information. In a case that garnered national attention, in 1997 a federal jury in North Carolina ordered Capital Cities/ABC to pay \$5.5 million to Food Lion grocery chain.<sup>18</sup> That eventually was reduced to a nominal amount of \$2 in punitive damages and \$1,400 in compensatory damages by an appeals court, but the jury's message that it was not happy with ABC came through clearly. And journalists and media lawyers worry that other plaintiffs will try to use these approaches in the future, tying up news organizations in litigation.

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Communications Co. (Aug. 7, 2001).

<sup>16</sup> "... Many journalists oppose deception because it undermines, by definition, the credibility of the journalistic mission itself: to tell the truth." Russ Baker, "Damning Undercover Tactics as 'Fraud,'" *Col. Journalism Rev.*, March/April 1997, at 28, 32.

<sup>17</sup> Sissela Bok, "Lying: Moral Choice in Public and Private Life" 25-26 (1989) (emphasis in original).

<sup>18</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4<sup>th</sup> Cir. 1999).

“There are some lawyers who have made a cottage industry out of suing the media for these kind of trash torts,” said a network lawyer who asked to be unnamed. “Johnson & Rishwain [a Los Angeles-based privacy and entertainment law firm] – all they do is sue media companies based on deceptive newsgathering techniques.” The attorney said the media has won most of those lawsuits, but defending newsgathering methods is often enough to scare journalists from future use of aggressive tactics.

In 1992, producers of ABC’s “PrimeTime Live” created fake resumes to plant journalists in the grocer’s stores to gather evidence to support reports by a food-handlers’ union of “stomach-turning food-handling practices in deli and meat departments of the grocery chain. . . .”<sup>19</sup> During the 1996 trial, the jury was not allowed to watch the broadcast because Food Lion’s claims didn’t address the content of information, but how that information was obtained. U.S. District Judge Carlton Tilley Jr. instructed the jurors to assume that the facts alleged in the broadcast were true.

Even assuming that Food Lion’s practices were threatening the health of the community and that everything ABC reported was true, the jury decided “PrimeTime Live’s” tactics in reporting the story were illegal. ABC was convicted of fraud, trespass (because the journalists were allowed in non-public areas as employees of the grocery chain) and breach of the duty of loyalty. The third claim was novel, in that it argued that the two journalists, Susan Barnett and Lynne Dale, worked at Food Lion stores while still employed by ABC, and that therefore they violated their responsibility to Food Lion as their employer.<sup>20</sup>

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<sup>19</sup> Baker, *supra* note 3, at 28.

<sup>20</sup> *Food Lion* at 515.



After ordering compensatory damages of \$1,402 in an earlier phase of the trial, the jury deliberated for six days before they returned a punitive damages verdict of \$5.5 million on the fraud verdict.<sup>21</sup> On motions after the trial, the judge decided those punitive damages were too high and ordered Food Lion to accept \$315,000 or face a completely new trial.

The U.S. Court of Appeals for the Fourth Circuit reversed the costly fraud verdict.<sup>22</sup> The only disputed element of that claim was whether Food Lion was injured by its reliance on Dale and Barnett's conduct. The appellate court applied North Carolina's at-will employment law, which states no assumptions can be made about how long an employee will stay with an employer, and said Food Lion's claim for retraining costs after Dale and Barnett quit were not recoverable.<sup>23</sup> That left the only substantial part of the verdict on which ABC won a reversal turning not on First Amendment law but on a specific state's employment law.

The result of the case was Food Lion received \$1,404, including the \$2 in compensatory damages, but ABC and the profession suffered damage to its reputation that far exceeds the payout ordered by the court. Five years after the trial and two years after the appeals court's ruling, law reviews and media industry publications are still examining the impact of the jury's verdict and its message on the media and on newsgathering in general.

The appeals court determined that applying such tort laws to the press has only an "incidental effect" on newsgathering and therefore doesn't trigger First Amendment protection: "We are convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts."<sup>24</sup> Because of that finding, many in the legal and media

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<sup>21</sup> *Id.* at 511.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 513-14.

<sup>24</sup> *Id.* at 521.

professions fear that other plaintiffs will try a similar approach with no constitutional barriers to victory.

The network lawyer said, “There’s no question that Food Lion had a chilling effect on the use of hidden cameras and also the extent to which media companies allowed misrepresentation in the news gathering. But there’s also no question that . . . there’s a kind of renewed interest in the use of hidden cameras on the part of producers.”

The lawyer said journalists are advised to proceed very cautiously with any deception or misrepresentation, but added that networks are likely “more amenable to using camera requests now [than before the Food Lion case was resolved in ABC’s favor], but only after a thorough washing.”

The case also has spawned many discussions about the ethics involved in lying to get a story, both within the media and among media critics and the viewing public who believe journalists go too far.

Privacy lawyer Neville L. Johnson, who represented a psychic in an invasion of privacy action against ABC’s “PrimeTime Live,” wrote in *Los Angeles Lawyer*:

Driven by society’s seemingly insatiable voyeuristic desires as well as fiercely competitive battle for higher ratings, the media have dramatically increased their use of hidden cameras and shotgun microphones. But at what price? Is the use of such sophisticated technology . . . just an extension of the news media’s firmly entrenched First Amendment right to a free press, or have the media gone too far?<sup>25</sup>

Sanford, who serves as legal counsel to the Society of Professional Journalists, said damages verdicts like the Food Lion jury’s \$5.5 million award might be a bellwether of change.

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<sup>25</sup> Neville L. Johnson, et al., “Caught in the Act,” *L.A. Lawyer*, available at [http://www.jandrlaw.com/Sanders\\_v\\_ABC\\_1.htm](http://www.jandrlaw.com/Sanders_v_ABC_1.htm). The psychic won a \$635,000 jury award, including \$300,000 in  
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“That’s the way the law tends to develop – people get to talk back to the media through such verdicts and say we don’t really like this unbridled use of hidden cameras,” he said. “Juries don’t like saturation coverage; they don’t like hidden cameras. They don’t like things that don’t seem fair to them or that smack of being overbearing.

“And it’s our job to explain to them why that [technique] is necessary. If you can’t justify it very well, then we don’t have a lot to talk about.”<sup>26</sup>

Melanie Henry, special projects director at KJRH-TV in Tulsa, Okla., said the public often doesn’t distinguish between tactics used by national reporters, such as those employed by ABC in the Food Lion story, and local news reporters. Henry’s station is an NBC affiliate.

“When mistakes are made on the national level, like with Food Lion, it is going to impact us. Often [the public] can’t clearly differentiate between national or local,” Henry said.

“Our job as journalists is to be accountable about how we present the news, how we treat our sources and how we handle them. We talk about seeking the truth. That involves newsgathering, reporting and interpreting the information and we have to be mindful of that.”<sup>27</sup>

In another recent example of a broadcaster employing less-than-honest tactics in reporting a story and being taken to court to defend those tactics, NBC, one of its reporters, and a freelance producer faced a lawsuit filed by a trucking company and a long-haul trucker.<sup>28</sup>

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punitive damages. The verdict was upheld by the California Supreme Court, which ruled that workers have a “limited but legitimate” right to privacy in the workplace. *Sanders v. Amer. Broad. Cos.*, 20 Cal. 4<sup>th</sup> 907, 917 (1999).

<sup>26</sup> Personal Interview with Bruce W. Sanford, Partner, Baker & Hostetler LLP (Aug. 1, 2001).

<sup>27</sup> Telephone Interview with Melanie Henry, Special Projects Director, KJRH-TV, Tulsa, Okla. (July 31, 2001).

<sup>28</sup> *Vielleux v. National Broad. Co.*, 206 F.3d 92 (1<sup>st</sup> Cir. 2000).

The story originated when producer Alan Handel proposed a segment for “Dateline NBC” on the dangers of long-distance drivers after four teen-agers were killed in a collision with a trucker who admitted falsifying his driving hours.

A month before approaching driver Peter Kennedy for permission to accompany him on a cross-country trip, “Dateline” crews had interviewed the co-founders of a group called Parents Against Tired Truckers (“PATT”) that was lobbying for stronger trucking regulations. However, Kennedy’s boss, Raymond Veilleux, said when he specifically asked the producer whether the group would be represented in the report, Handel told him PATT had already received enough publicity and that Handel said he “wanted to show the other side of the coin.” Veilleux said he would have never agreed to participate if he had known that PATT would be included in the story. When the report was broadcast in two parts, the second part featured interviews with members of PATT. Handel disputed Veilleux’s characterization of their discussion, but the jury believed Veilleux and returned a verdict against NBC.<sup>29</sup>

The appellate court said because the claims involved the First Amendment and a mixed question of fact and law, it was required to apply an “independent review,” giving less deference to the jury verdict than is usual.<sup>30</sup> When it applied that standard, it reversed jury verdicts totaling \$375,000 against NBC on claims of invasion of privacy, defamation, and negligent infliction of emotional distress.<sup>31</sup> All those issues had been related in some way to the content of the broadcast. But the court allowed a verdict based partly on a misrepresentation claim – linked to

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<sup>29</sup> *Id.* at 102.

<sup>30</sup> *Id.* at 106-07, citing *Bose Corp v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

<sup>31</sup> *Vielleux* at 106-07.

NBC's false promises to exclude PATT from the story – and sent the case back to the district court to review the \$150,000 damages award for that claim.<sup>32</sup>

An interesting twist to Veilleux's claims against NBC indicates that courts may be more likely to protect a reporter's vague promise about the posture of a story than to protect a specific promise about the use of particular sources. Veilleux claimed NBC had broken two promises in misrepresenting itself, but the court ruled that only one of those justified legal punishment. The promise that PATT would not be included was specific enough to warrant liability, the court said. But the second promise – that the trucking industry would be shown in a “positive light” – was too vague and too subjective to be enforceable.<sup>33</sup> In discussing the specificity required for a journalist's misrepresentation or broken promise to be actionable, the court quoted from Judge Richard Posner's opinion in *Desnick v. Am. Broad. Cos., Inc.*:

Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is “fraud,” it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods.<sup>34</sup>

Posner supported First Amendment protection for some undercover reporting techniques, but, somewhat ironically, only because a reasonable person shouldn't trust a journalists' word with regard to intentions or motives. Even if the tactics are “surreptitious, confrontational, unscrupulous, and ungentlemanly,” the subject has no legal remedy unless the journalist invades an established right or defames him.<sup>35</sup> He may therefore have perpetuated the negative perception many have of journalists, and of broadcasters in particular.

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<sup>32</sup> *Id.* at 105.

<sup>33</sup> *Id.* at 122.

<sup>34</sup> 44 F.3d 1345, 1354 (7<sup>th</sup> Cir. 1995).

<sup>35</sup> *Id.* at 1355.

Broken promises relating to a “verbal contract” between reporter and source – vaulted into prominence by *Cohen* – have re-emerged recently in two high-profile situations.

The first suit, which is scheduled for a January 2002 trial at the time of this writing, was filed by George Ventura, former Chiquita lawyer, against The Cincinnati Enquirer and its parent company, Gannett Co.<sup>36</sup> Ventura, who was a confidential source for a May 1998 series about Chiquita, says he was fired and suffered “great harm” when his identity was revealed by an Enquirer reporter.<sup>37</sup>

The Enquirer fired the reporter, Michael Gallagher, after it was revealed that he had illegally accessed the voice-mail system of Chiquita in researching his story. When Gallagher was prosecuted for breaking into Chiquita’s voice mail, he avoided jail by cooperating with authorities and named Ventura as his source. Ventura then was prosecuted and pleaded no contest to four misdemeanor counts.<sup>38</sup>

Two other journalists who were involved with the stories, Cameron McWhirter and David Wells, say they have not identified any confidential sources.<sup>39</sup> In August 2001, a federal magistrate ruled they cannot be compelled to testify in Ventura’s trial against the Enquirer about his involvement as a source. The court ruled that McWhirter and Wells can invoke their protection under the Ohio shield law and that Ventura can’t waive that protection, even if his identity as a source already has been revealed.<sup>40</sup>

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<sup>36</sup> *Ventura v. Cincinnati Enquirer*, Case No. C-1-99-793.

<sup>37</sup> Ben L. Kaufman, “Former Chiquita lawyer sues paper,” *The Cincinnati Enquirer*, Sept. 28, 1999, available at [http://enquirer.com/editions/1999/09/28/loc\\_former\\_chiquita.html](http://enquirer.com/editions/1999/09/28/loc_former_chiquita.html).

<sup>38</sup> *Id.*

<sup>39</sup> John Nolan, “Cincinnati Enquirer, former Chiquita lawyer battle in court,” Associated Press, July 9, 2001, available at LEXIS, News Library, News Group File.

<sup>40</sup> Lisa Cornwell, “Judge rules in journalists’ favor,” Associated Press, Aug. 9, 2001, available at LEXIS, News Library, News Group File.

Jack Greiner, an attorney for Gannett and The Enquirer, told the AP, “We think that the court correctly ruled on the broad issue of who owns the privilege to withhold source identity. I think this ruling strengthens the idea of confidentiality.”<sup>41</sup>

In the second high-profile case, Julie Hyatt Steele sued Newsweek reporter Michael Isikoff for identifying her in 1997 and 1998 as a source in stories about Kathleen Willey’s alleged relationship with President Clinton.<sup>42</sup> Steele was a friend of Willey and had spoken to Isikoff only with the understanding that their conversation was “off the record.”

The U.S. District Court in the District of Columbia applied Virginia law to claims about his promises because Isikoff’s interviews with Steele occurred in Virginia.<sup>43</sup> Because that state does not recognize a moral obligation as creating a binding contract, the court ruled that no contract existed. Steele’s claim of “promissory estoppel,” in which she said she relied on Isikoff’s promise to her detriment, was also dismissed. Virginia does not recognize that cause of action.<sup>44</sup>

The court concluded “Steele’s suit cannot be completely dismissed on First Amendment grounds, but that each of the individual claims merits dismissal ... under the applicable state law.”<sup>45</sup>

Just this past summer, ABC News again faced potential litigation and allegations of misrepresentation when parents revoked permission for children’s interviews for a show on

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<sup>41</sup> *Id.*

<sup>42</sup> *Steele v. Isikoff*, No. 98-1471 (CKK) (D.C. Dist. filed Sept. 6, 2000).

<sup>43</sup> *Id.* at 13.

<sup>44</sup> *Id.* at 11.

<sup>45</sup> *Id.* at 2.

environmentalism, called “Tampering with Nature.”<sup>46</sup> The program, which aired June 29, raised questions about whether educators are unduly scaring children about environmental issues.

The network had received consent from a number of parents of children at a California school, but the parents said later that the participation of John Stossel, a controversial ABC journalist, in the project was concealed until just before the interview. They said they also learned afterwards that Stossel had been behind a 2000 ABC report about organic food safety that was criticized in the environmental community, and they questioned what seemed to be his anti-environmental bias.<sup>47</sup>

Two months after the interview was conducted, the parents, coordinated by a group of environmental activists, wrote to ABC to withdraw their consent, threatening litigation for the misrepresentation if the children or their comments were included. ABC defended the group interview and said “it was conducted in a professional and responsible manner” but agreed to cut the children from the broadcast.<sup>48</sup>

Similar to the Veilleux case, the parents had claimed that they were misled about the report’s perspective. They understood it would be a positive overview about environmentalism rather than what seemed to them to be an attack on environmental activism in which the children were “manipulated” into giving answers that supported Stossel’s view.<sup>49</sup> One father said he was

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<sup>46</sup> Elizabeth Jensen, “ABC Cuts Interview With Children,” L.A. Times, June 27, 2001, at A11.

<sup>47</sup> Steve Gorman, “Calif. Parents attack ABC News special,” Reuters (June 26, 2001), *available at* <http://news.findlaw.com/legalnews/s/20010626/mediastossel.html>.

<sup>48</sup> Jensen, *supra* note 46, quoting an unnamed ABC spokesman.

<sup>49</sup> Gorman, *supra* note 47.



“happy they don’t have to be part of this manipulation” after ABC agreed to pull the segments with the children.<sup>50</sup>

Journalists at both print and broadcast organizations say stories can and should be reported without the use of undercover tactics or dishonesty, which not only annoy the public, but also lessen the credibility of the media in general.

“There’s a lot of anger out there about our methods and the way we are considered to be fair,” said Detroit’s Carey, of WXYZ-TV, an ABC affiliate.

Carey, who also has worked at news stations in New York and Chicago, believes the Food Lion scare may have a positive effect if it causes reporters to find more up-front ways to report a story. “They were trying to find out what the practices were. Is there any way to get that besides being dishonest? . . . There are other ways to skin a cat without putting your own credibility at risk,” he said.

He added, “As journalists, as soon as you represent [that you are] somebody you’re not, you’re walking a slippery slope.”<sup>51</sup>

That slippery slope applies to ethical as well as to legal realms. Even if journalists aren’t sued for misrepresenting themselves, the breach of behavior can have repercussions. Jim Dyer, a reporter for the San Jose Mercury News, quit his job this summer after being criticized for not identifying himself while researching a story. Dyer, who is also a master’s degree candidate at University of Iowa, identified himself only as a graduate student to gain access to an archive that wasn’t open to journalists. He verified the information he received through other sources, but Mercury News Executive Editor David Yarnold said Dyer’s actions were inappropriate. “There

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<sup>50</sup> Jensen, *supra* note 46.

will be some who argue that Dyer did nothing improper or that the outcome justified the means. We disagree.”<sup>52</sup>

## PART II. WIRETAPPING AND TAPE RECORDING

The law regarding journalists recording conversations in which they participate is generally clear. Federal law requires at least one party to consent to the recording. Most states have adopted laws based on the federal statute and require only one party to consent. If a reporter is interviewing a source, then, the reporter has consented to the taping and is not required to notify the source, although many reporters do so out of ethical considerations or just “to be on the safe side” if they’re unsure of the applicable state law.

But in 12 states, all parties must agree to the taping. Those 12 states are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington state.<sup>53</sup>

All states and the federal government have laws against recording a third party’s conversation where there is a reasonable expectation of privacy, whether the conversation takes place over regular telephone lines or cellular telephones.

Occasionally, a third party will access a conversation illegally and tape-record it, then release the recording to the media. The Supreme Court this spring dealt with a case in which reporters were not involved in the initial taping of such a conversation, but were sued under the

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<sup>51</sup> Interview with Bill Carey, *supra* note 12.

<sup>52</sup> “Mercury News reporter quits after deception,” S.F. Chronicle, July 31, 2001, at A12.

<sup>53</sup> Introduction, “Can We Tape?,” Reporters Committee for the Freedom of the Press (2000), or <http://www.rcfp.org/taping/index.html>.

federal wiretapping law for disseminating the information on the recording. *Bartnicki v. Vopper*<sup>54</sup> helped delineate a media organization's responsibility regarding publication or broadcast of illegal recordings made by someone outside the news organization. Notably, it is also the first major Supreme Court decision relating to the media in about a decade – and, again, it addresses how journalists *get* their information, not the *content* of what they publish.

In the case, a radio commentator, Fred Vopper, received a recording of a cellular telephone conversation between a teachers union negotiator and the union president. The union had been involved in difficult bargaining discussions with the local school board, and the negotiations had been an issue of great controversy and discussion in the community. Vopper did not know who intercepted the conversation and made the tape; he received it from the head of a local taxpayers organization opposed to the union's demands. That man said he found the tape in his mailbox shortly after it was made.<sup>55</sup>

Among the excerpts Vopper played on his radio show were comments by the union president that if the school board didn't accede to their demands, "We're gonna have to go to their, their homes . . . to blow off their front porches. . . ."<sup>56</sup>

Bartnicki, the union negotiator, sued Vopper and other media representatives. He invoked Pennsylvania law and a federal statute, the Omnibus Crime Control and Safe Streets Act of 1968<sup>57</sup>, which prohibits the interception of wire, electronic, and oral communications and which allows civil or criminal sanctions for violations. The section of the act that related to Vopper

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<sup>54</sup> 121 S. Ct. 1753 (2001).

<sup>55</sup> *Id.* at 1756.

<sup>56</sup> *Id.* at 1757.

<sup>57</sup> Amended in 1986, 100 Stat. 1848, and 1994, 108 Stat. 4279, to include electronic transmissions and cordless phones. 121 S. Ct. at 1759.

applies to anyone who *discloses* the contents of an illegally intercepted communication if he knew or had reason to know it had been illegally intercepted.<sup>58</sup>

The trial court rejected Vopper's First Amendment defense, but the Third Circuit reversed and said the statutes infringed Vopper's free speech rights. The Supreme Court affirmed that decision, holding that although the media generally isn't free from prosecution under content-neutral laws, the specific provision of the wiretapping act posed an undue burden on free speech when publication was punished even though an unknown person actually made the illegal recording.<sup>59</sup> The court was careful to limit its holding by three criteria: 1) the media played no role in the illegal interception, 2) the media received the information lawfully, and 3) the issue was a matter of public concern.<sup>60</sup>

The Court emphasized the importance of the law's purpose, which was to protect the privacy of communications and to dissuade illegal interceptions, and said it could find no justification for punishing an innocent third party who played no role in the interception. Justice John Paul Stevens, writing for the majority, said the Court tailored its holding as narrowly as it did because the Court refuses "to answer categorically whether truthful publication may ever be punished consistent with the First Amendment."<sup>61</sup>

Sanford, of Baker & Hostetler, said the significance of the case isn't necessarily in what it did (protect a media person who was innocent in the taping) but for what it didn't do – establish a "wholesale shutting-down of the right to receive stolen property and use the fruits of stolen

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<sup>58</sup> 18 U.S.C. § 2511(1)(c).

<sup>59</sup> *Bartnicki* at 1766.

<sup>60</sup> *Id.* at 1760.

<sup>61</sup> *Id.* at 1762.

property in newsgathering.”<sup>62</sup> He added that he believes *Bartnicki* won’t stand as a significant precedent because its holding is confined closely to the facts of the case and said he expects the case will become a “quaint curiosity of constitutional law – a dinosaur case.”<sup>63</sup>

The *Bartnicki* dissent, written by Chief Justice William Rehnquist with Justices Antonin Scalia and Clarence Thomas joining, argued that the interest in protecting cell phone and electronic privacy is greater than the interest of the media in disseminating information to the public. They said the ruling actually diminished the First Amendment because it chilled “free speech” between individuals who use electronic technology, while protecting journalists’ rights to publish truthful information about an issue of public interest that they obtained lawfully.

Despite its narrow holding, the Court’s decision in *Bartnicki* may provide guidance in two pending cases. In *Boehner v. McDermott*<sup>64</sup>, news organizations received copies of an intercepted conference call among leading Republican members of Congress regarding an investigation of former Speaker of the House Newt Gingrich. The call had been recorded by a Florida couple with a police scanner when one of the parties in the conversation, Rep. John Boehner, R-Ohio, was driving through Florida. The couple met with a Democratic congresswoman who suggested they give the tape to Rep. James McDermott, D-Wash., who served on the House Ethics Committee that was investigating Gingrich. McDermott then distributed the tapes to news organizations.<sup>65</sup>

The news organization that had received the tapes – Atlanta Journal-Constitution, Roll Call, and The New York Times – were not charged with criminal wiretapping or sued civilly.

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<sup>62</sup> Interview with Sanford, *supra* note 26.

<sup>63</sup> *Id.*

<sup>64</sup> *Boehner v. McDermott*, 191 F.3d 463 (D.C. Circuit 1999), *vacated by* 121 S. Ct. 2190 (2001).

<sup>65</sup> *Id.* at 464.

But the couple who recorded the conversation pleaded guilty to criminal charges and were each fined \$500.<sup>66</sup> Boehner filed a civil suit against McDermott for disclosing the intercepted information under the same wiretapping act that Vopper was alleged to have violated in the teachers' union dispute. McDermott raised a First Amendment defense, claiming that his distribution to the news organizations amounted to "publishing" and was protected by freedom of speech.

Stating that the statute is not content-specific and imposes only an incidental burden on speech, the U.S. Court of Appeals for the D.C. Circuit espoused in 1999 the same viewpoint that turned up two years later in the Rehnquist dissent in *Bartnicki*. Judge Randolph wrote the statute "promotes the freedom of speech" because "eavesdroppers destroy the privacy of conversations. The greater the threat of intrusion, the greater inhibition on candid exchanges."<sup>67</sup>

The Supreme Court, which had granted certiorari in *Boehner* to consider the question of whether the wiretapping statute violated the First Amendment, sent that case back to the appellate court to reconsider in light of its decision in *Bartnicki*.<sup>68</sup> It is possible that McDermott's lack of involvement in the recording of Gingrich's conversation will ultimately convince the D.C. Circuit that he cannot be held civilly liable, especially given the high degree of public interest in the topic.

In the second pending case related to illegal wiretapping, a news organization, WFAA-TV in Dallas, was much more involved than either Vopper or McDermott in the illegal interception;

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<sup>66</sup> *Id.* at 465.

<sup>67</sup> *Id.* at 468.

<sup>68</sup> 121 S. Ct. at 2190.

it knew that telephone conversations were being recorded and advised the person who was doing the recording on how to go about it.<sup>69</sup>

Cordless telephone conversations of Carter Dan Peavy, who served as trustee to the Dallas Independent School District, were picked up on a scanner by his neighbors, Charles and Wilma Harman. The relationship between the Harmans and the Peavys had been contentious, and when the Harmans heard what they believed to be evidence of corruption by Peavy, they contacted WFAA-TV. Robert Riggs, a reporter at the station, went to their home and, after hearing one of the tapes, told the Harmans he was interested in the information. He advised them not to turn the tape recorder on or off or to edit the tapes so their authenticity couldn't be challenged.<sup>70</sup>

Eventually, Charles Harman gave Riggs 18 tapes with 188 telephone conversations between the Peavys and others. After Riggs learned that the criminal wiretapping statute had been amended and that his actions could be illegal, he returned all his tapes and transcripts of the conversations to Harman.<sup>71</sup> As a result of additional reporting and without using the illegally obtained tape recordings, Riggs broadcast stories of alleged wrongdoing by Peavy, who eventually was tried and acquitted of bribery.

The U.S. Court of Appeals for the Fifth Circuit held that the First Amendment did not preclude liability by the media defendants and focused the role that Riggs and WFAA had in Harman's creation of the tapes. The court phrased the issue as "whether . . . the First Amendment is violated by the federal and Texas acts, as applied to the use and disclosure of illegally intercepted communications by persons who . . . did not themselves make the interceptions; but

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<sup>69</sup> *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5<sup>th</sup> Cir. 2000), *cert. denied*, 121 S. Ct. 2191 (2001).

<sup>70</sup> *Id.* at 164.

<sup>71</sup> *Id.* at 165-66.

who did have *undisputed participation* concerning the interceptions to the extent defendants did.”<sup>72</sup>

The court held that the federal and state laws that banned using or disclosing illegally intercepted communications did not impinge free speech unnecessarily. Judge Rhesa Hawkins Barksdale wrote that the “incidental burdens on free expression are no greater than is essential to the furtherance” of “substantial governmental interests in protecting the confidentiality of private communications.”<sup>73</sup>

As the Supreme Court refused to review the finding, that case also has been sent back to the trial court to be reviewed in light of Judge Barksdale’s opinion and the holding in *Bartnicki*.<sup>74</sup>

The *Boehner* court explained in a footnote that the connection between the couple and McDermott was direct, as was the connection between Harman and Riggs in *Peavy*. The D.C. Circuit declined to address whether “someone further down the chain” could successfully claim immunity from illegal activity at the beginning of the chain.<sup>75</sup>

These three cases – *Bartnicki*, *Boehner* and *Peavy* – represent a spectrum on which the involvement of the person claiming First Amendment protection varies. In *Bartnicki*, the tape was made completely independently of the radio station and was given to Vopper without his solicitation. In *Boehner*, McDermott did not advise the owners of the tape, but distributed it himself after it was made. In *Peavy*, WFAA and Riggs advised Harman about how to record the information and then took possession of it. Although *Boehner* and *Peavy* remain unresolved, it

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<sup>72</sup> *Id.* at 180, emphasis added.

<sup>73</sup> *Id.* at 192-93.

<sup>74</sup> 121 S. Ct. at 2191.

<sup>75</sup> *Boehner* at 469.



seems clear that the closer journalists get to the end of the spectrum representing involvement in the illegal recording, the more likely they won't be protected by the reasoning in *Bartnicki*.

It is important to note that both *Bartnicki* and *Boehner* emphasize that a news organization or a source can be prosecuted for engaging in illegal activity such as stealing documents or illegal wiretapping. If the guilty party in the *Bartnicki* case were identified, nothing in the Supreme Court's decision would preclude that person from facing charges. Also, the Martins, who intercepted Boehner's cell phone conversation in Florida, were prosecuted and fined for illegal wiretapping.

What does this mean for journalists who receive information from sources without knowing the origin of the material and without being involved in the illegal activity? If *Bartnicki* were to have wider applicability, it would seem to indicate that liability will not be imposed – as long as the news organization is blameless in the intercept and as long as the subject matter is of great public interest.

But who decides what is an issue of public interest? A jury? A judge? A news organization? In the invasion of privacy context, the question of whether an issue passes the public interest threshold is usually a matter of law. The California Supreme Court, in *Shulman v. Group W Productions, Inc.*, for example, lists a number of factors to determine “newsworthiness” for purposes of defending against the tort of invasion of privacy by publication of private facts: “social value of the facts published, depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position

of public notoriety.”<sup>76</sup> The court added that “a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it.”<sup>77</sup>

The *Shulman* court also grants “considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest.”<sup>78</sup> Therefore, in a somewhat circular analysis, if a news organization is interested in distributing information on a topic to the public, then it’s generally considered a topic of public interest.

For those media critics who object to what they see as “voyeurism” or intrusiveness of the media, that answer often is unsatisfactory. “No constitutional precedent or principle of which we are aware gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast,” said the California Supreme Court in *Shulman*.<sup>79</sup>

This seems to raise the possible specter of a court regulating news content. But generally, content of the material at issue is not within the court’s realm, with very rare exceptions.<sup>80</sup>

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<sup>76</sup> *Shulman v. Group W Prods., Inc.*, 18 Cal. 4<sup>th</sup> 200, 220 (1998), citing *Kapellas v. Koffman*, 1 Cal. 3d 20, 36 (1969).

<sup>77</sup> *Shulman* at 225.

<sup>78</sup> *Id.* at 224-25.

<sup>79</sup> *Id.* at 242.

<sup>80</sup> There are four areas which are not protected by the First Amendment: 1) Obscenity; 2) libel, slander, misrepresentation, perjury, false advertising and similar torts; 3) speech or writing used as an integral part of conduct in violation of a valid criminal statute; 4) and speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action. The fourth exception has recently been an issue in one highly publicized case, *Rice v. Paladin Enter. Inc.*, 128 F.3d 233 (4<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998), in which relatives of two women and a young boy who were slain by a contract killer sued the publisher of “Hit Man: A Technical Manual for Independent Contractors.” They claimed the killer carried out the murders by following the instructions in “Hit Man.” Judge J. Michael Luttig of the Fourth Circuit cited *Brandenburg v. Ohio*, 395 U.S. 444 (1969), for the principle that specific speech that constitutes “criminal aiding and abetting” is not protected. *Rice* at 242. *Paladin* settled the case for an undisclosed sum of money and agreed to pull all unsold copies

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Sanford of Baker & Hostetler says the fear of courts trying to extend those content borders within which it may act is likely to be unrealized.

“The courts have traditionally defined public interest very broadly,” he said. “Even in cases where you might be tempted to say that’s gossip or salacious, usually our worst fears are not realized.” He cautioned, however, that that does not give blanket assurances to the media that “public interest” will be defined in their favor in the event of some case in which the media steps far beyond the bounds of intrusiveness.

Sanford advocates an open dialogue among media, policymakers and the legal community about how to define the zone of privacy. “We have to decide whether technology increases the zone of privacy or shrinks it,” he said, cautioning that the privacy debate in the political arena has pandered to what may be unreasonable fear fed by activists who lobby Congress with tales of horrid examples.<sup>81</sup>

### PART III. RIDE-ALONGS AND PRIVACY

Ten years ago, both police and journalists saw nothing wrong with “ride-alongs,” a newsgathering technique where reporters and photographers accompanied law enforcement

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of the book. Brenda J. Buote, “Publisher agrees to pay kin of 3 slain; Murder manual used in ’93 contract killings,” *The Balt. Sun*, May 22, 1999, at 1B.

In another high-profile case, filmmaker Oliver Stone, producers, and distributors were sued on behalf of a convenience store clerk who was fatally injured by a young couple during a “murderous rampage” in Mississippi and Louisiana. The killer and her accomplice said they patterned themselves after characters in Stone’s 1994 film “Natural Born Killers.” Because of the procedural posture of the case, the Louisiana appellate court accepted the allegation that the defendants “intended to incite viewers of the film to begin ... crime sprees.” *Byers* at 690 (emphasis in original). With that assumption in place, the court rejected the First Amendment defense, ruling that the speech involved in the movie fell outside the First Amendment’s protection as speech which is “directed at inciting or producing imminent lawless action.” *Byers* at 689. Later, on summary judgment, the Louisiana judge ruled there was no evidence that Stone intended to incite violence and dismissed the case. “Judge throws out lawsuit claiming movie caused shooting,” *Associated Press*, March 12, 2001, available at LEXIS, News Library, News Group File.

<sup>81</sup> Interview with Sanford, *supra* note 26.

officers as they patrolled their beats, served warrants, or staked out suspected criminals. Few police reporters have missed the ride-along experience, whether its purpose was to show a rookie reporter what the mean streets are really like or to generate publicity for a police organization's actions.<sup>82</sup> Some reporters, who had developed a relationship with the police, were allowed to ride along so they could get the "scoop" on the story, ahead of the competition. The historic antagonism that has often plagued the journalist-police relationship was ameliorated at times by ride-alongs.

But two years ago, the Supreme Court said police who bring reporters along when they execute warrants violate the Fourth Amendment rights of homeowners. In *Wilson v. Layne*, the news organization involved, The Washington Post, was not sued.<sup>83</sup> However, in *Hanlon v. Berger*, a companion case, CNN was named as a defendant and just this summer settled with the plaintiffs.<sup>84</sup>

The CNN case involved a 1993 raid by Fish and Wildlife officers on Paul Berger's ranch in search of evidence that eagles were being poisoned illegally. The CNN crew had worked closely with the federal agents as the raid was set up. They also received permission from an assistant U.S. attorney to ride along on the raid.<sup>85</sup> The news organization argued that agents and media had no reason to believe their actions infringed on constitutional rights.<sup>86</sup>

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<sup>82</sup> See *Wilson v. Layne*, 526 U.S. 603, 626 (1999) (Stevens, J., concurring in part, dissenting in part). Justice Stevens appended sections from the U.S. Marshal's Service public relations handbook about media ride-alongs in his opinion. In that document, deputy marshals were informed that media ride-alongs "are one effective method to promote an accurate picture of Deputy Marshals at work."

<sup>83</sup> *Id.*

<sup>84</sup> *Hanlon v. Berger*, 129 F.3d 505 (9<sup>th</sup> Cir. 1997), *vacated by* 526 U.S. 808 (1999). See also "CNN, federal government settle suit with Montana rancher, seven years after raid," Associated Press, June 5, 2001, *available at* LEXIS, News Library, News Group File.

<sup>85</sup> "CNN, federal government settle suit with Montana rancher, seven years after raid," *supra* note 84.

<sup>86</sup> *Id.*

After the raid, Berger was charged with poisoning bald eagles. A jury acquitted him of nearly all charges, but convicted him of a misdemeanor of improper use of a pesticide.<sup>87</sup>

In the Washington Post case, the target of the raid was Dominic Wilson, who was wanted by federal authorities on a probation violation from a felony conviction and who was believed to be armed.<sup>88</sup> The marshals and county deputies got an arrest warrant for a home in Maryland where they believed Wilson lived. They entered the home early in the morning with a Washington Post reporter and photographer, catching Wilson's parents still in bed. Wilson's father ran into the living room in his briefs when he heard people in the house. Police believed he was the suspect and pinned him to the floor while the photographer shot pictures and the reporter took notes. Wilson's mother also ran into the room, wearing only a nightgown. She, too, was photographed.<sup>89</sup> After they learned Dominic Wilson was not in the house, the officers and journalists left.

Although the pictures were never published, the Wilsons claimed that the mere presence in their home of people who were not authorized by the search warrant violated their constitutional rights.<sup>90</sup>

Melanie Henry, the special projects director at KJRH, said the willingness of the courts to find a violation even though the Wilsons' pictures were not published is a reminder to news organizations. "Lots of times, the attitude is do it first and ask questions later. The instance

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<sup>87</sup> "Lawyer says U.S. Supreme Court decisions curb media-police ride-alongs," Associated Press, June 7, 2001, available at LEXIS, News Library, News Group File.

<sup>88</sup> *Wilson* at 606.

<sup>89</sup> *Id.* at 607.

<sup>90</sup> *Id.* at 608.

where the newspaper shot the pictures and didn't even use them [means] you have to be careful and very aware of what you're doing.”<sup>91</sup>

In both *Wilson* and *Hanlon*, the Supreme Court granted the law enforcement officers qualified immunity from the lawsuits, holding that the law was not clearly established in April 1992 (the Wilson raid) or in March 1993 (the Berger raid). Because the state of the law was unclear, the officers could not know they were violating the homeowners' Fourth Amendment rights against unreasonable search and seizure.<sup>92</sup> The high court let stand a determination by the U.S. Court of Appeals for the Ninth Circuit that CNN participated in the raid as a “joint actor” with the federal officers.<sup>93</sup> Because qualified immunity is not available to non-state actors, it left the news organization liable for violating the homeowner's rights. This was so despite CNN's claims that it was acting in good faith when the reporters and photographers accompanied U.S. Fish and Wildlife officers in the raid, especially since it had received approval of a government attorney.<sup>94</sup>

Floyd Abrams, a First Amendment partner in New York's Cahill Gordon & Reindel law firm, told Jonathan Ringel of the Fulton County Daily Report that CNN's case was very strong, especially because the government attorney had a written agreement with the network.

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<sup>91</sup> Interview with Melanie Henry, *supra* note 27.

<sup>92</sup> The U.S. Marshal's Service handbook mentioned in note 83 does urge deputy marshals to set ground rules, and specifically mentions privacy restrictions. Justice Stevens argued that the law regarding the Fourth Amendment and warrants was firmly established. He wrote that the majority's reliance on the deputy marshal's handbook as intimating that ride-alongs into private residences were acceptable was misplaced because the handbook obviously was not a legal document and did not purport to represent the state of the law. *Wilson* at 624 (opinion of Stevens, J., dissenting as to qualified immunity).

<sup>93</sup> *CNN v. Berger*, 526 U.S. 1154 (1999), *cert. denied*.

<sup>94</sup> Jonathan Ringel, “High Court Tunes Out CNN Ride-Along Appeal,” *Fulton County Daily Report*, June 2, 1999, available at <http://www.law.com>.

Nevertheless, after nearly two years of negotiations, the network settled the case for undisclosed terms in May 2001.<sup>95</sup>

Although CNN cited the cooperation it received from the government and the U.S. Marshal's Service as a defense that was acting in good faith, that level of cooperation actually might have contributed to CNN's classification by the court as a joint actor. A U.S. District Court in Georgia ruled in a similar ride-along case that certain media representatives were not state actors, distinguishing the CNN case from the Georgia incident.<sup>96</sup> In his analysis, Judge William C. O'Kelley evaluated the Ninth Circuit's *Hanlon* opinion on the joint actor issue and the factors that led that court to conclude CNN was acting in conjunction with the government officers. He said those factors include:

The media and government officers had a written contractual commitment to engage in the execution of the search warrant; the government officers shared confidential information with the media; pre-search meetings were conducted; the media attached cameras to government vehicles and wired a law enforcement agent with a microphone.<sup>97</sup>

In other cases where the media was not considered a joint actor, the journalists and police worked independently from each other and the police had no control over the "production, editing or content of the media defendants' work."<sup>98</sup> Judge O'Kelley wrote, "The fact that the media defendants were invited to accompany the officers and to film the raid is not enough to turn the defendants into state actors."<sup>99</sup>

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<sup>95</sup> "CNN, federal government settle suit with Montana rancher, seven years after raid," *supra* at note 84.

<sup>96</sup> *Nichols v. Swartz-Morris Media, Inc.*, No. 2:98-CV-161-WCO (N.D. Ga. filed Feb. 1, 1999).

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.* at 4.

<sup>99</sup> *Id.* at 5-6.

If no joint action occurs during the raid in which the media appear to be influenced or to influence the police activity, case law seems to indicate the media organization will generally not be held accountable to federal laws related to constitutional violations by someone acting under “color of state law.”

In the wake of *Wilson* and *Hanlon*, police are likely to limit the degree of cooperation with media. Now that the Supreme Court has said emphatically that police serving a warrant may not be accompanied by anyone who is not involved in a law enforcement function, the officers are put on notice. If they do allow others into a private residence, and a resident files suit, the police officer may be held liable.

The media lawyer who has regular contact with law enforcement said, “It seems that some of the police departments are a bit more concerned about possible liability in media ride-alongs, especially with cameras involved. It seems there may be more of an awareness on the part of plaintiff’s lawyers that courts have been taking a less tolerant view of First Amendment rights when the press is accompanying law enforcement.”

Veteran broadcast journalists said they aren’t seeing the type of shots – what one broadcaster called the “money shot” – that used to be possible when the cameras followed right along with the raid.

But the media lawyer with law enforcement contact added, “We often shoot officers going into a home or questioning a suspect or witness from an angle to the entrance of the home so as not to depict the interior of the home or the suspect or the witness.”

Other shots that don’t invade the homeowners’ zone of privacy include officers bringing the handcuffed suspect out of a home (sometimes called a “perp walk”) or pictures afterward of



piles of money or drugs. Ride-alongs that take place on public property generally pose no Fourth Amendment issues for journalists or law enforcement to confront.

The Pulitzer Prize-winning photograph by Associated Press photographer Alan Diaz of the April 22, 2000, seizure of Elian Gonzalez is a memorable “money shot” – a powerful image that a photographer can capture when the camera is literally in the middle of an explosive situation. In that situation, however, Diaz had spent time with the Gonzalez family and was invited by the family to be in the house. The law enforcement officers in the situation – Immigration and Naturalization Service agents and federal marshals – anticipated but did not invite Diaz’s presence in the home, according to an unnamed source who spoke to *The Washington Post* soon after the raid.<sup>100</sup> The decision by the attorney general’s office not to obstruct media in that situation may have backfired on federal officials as the picture of an officer pointing a machine gun at a frightened little boy generated claims that the government used excessive force in the seizure.<sup>101</sup>

In the wake of the *Hanlon* decision, it’s even possible that other law enforcement activities to which journalists at times have had limited access – such as routine patrols or “sting” operations – will now be closed. Television shows for which such cooperation is key, such as “Cops,” work closely with law enforcement, masking or otherwise distorting the faces of those who object to the presence of the TV crews with police officers. Since the purpose of those shows is to show the police at work, the identity of those arrested is not as important as the officers’ narratives and actions. But for local television or newspaper photographers, often the police target is the focus of the story, as it was in the raid on the Berger ranch.

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<sup>100</sup> David A. Vise, “Reno Allowed Photos During Elian Siege,” *The Washington Post*, April 25, 2000, at A9.

The results in these cases bring up two different impediments to newsgathering. The first is related to qualified immunity granted to the law enforcement officers. In the wake of the Court's 1999 ruling, law enforcement is likely to be much less willing to take journalists along.

As an example, ride-along guidelines distributed to media organizations from the Long Beach (Calif.) Police Department categorically state, in capital letters and underlined, that the department "does not allow media and/or camera crews in any areas not accessible to the public without prior consent from the person whose reasonable expectation of privacy exists."<sup>102</sup>

But even if a law enforcement agency allows the ride-along, CNN's classification as a "joint actor" in the Berger raid raises the second impediment – that of the media's own legal responsibility for the constitutional invasion. Now that the door of liability is ajar, it is still unclear how wide it will open. Cautious news organizations are likely to choose not to tempt the courts in the wake of the CNN decision and subsequent settlement.

Many times, however, even with unfettered access to the action, the picture simply doesn't tell a thousands words. Jack Kresnak, an award-winning veteran reporter at the Detroit Free Press and president of the Detroit Professional Chapter of the Society of Professional Journalists, said pictures or video are often shot to give news reports an extra visual punch, but that punch is minimal.

He said a television station in Detroit recently broadcast footage of a home that was involved in a child neglect case. "It was nothing – just a dirty house. I don't know what the value

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<sup>101</sup> Karen DeYoung, "Elian Case Antagonists Argue over Miami Raid," The Washington Post, April 24, 2000, at A1.

<sup>102</sup> Long Beach Police Department Media Ride-Along Guidelines (dated Aug. 1999) (on file with author).

is. I don't think it's right for journalists to be going into people's private homes without their permission."<sup>103</sup>

The media lawyer who has regular contact with law enforcement said, "People need to have an awareness of the potential for liability, then evaluate their methods by comparing the value of what would be obtained with the potential liability."

Kresnak added, "One of the easiest ways to commit journalism is to follow the coattails of the police. But we just have to rise to the challenge of doing it better."

#### IV. TRESPASS

While media ride-alongs on private property can raise Fourth Amendment issues, newsgatherers who venture on private property without permission of the property owner also can face sanctions from criminal or civil trespass laws.

Last summer, eight journalists were arrested after they followed a group protesting U.S. war games and bomb testing on the Puerto Rican island of Vieques.<sup>104</sup> The protesters had broken into a restricted area of the Camp Garcia Naval Installation and the journalists followed them. The protest on Vieques was one of many that have taken place over the past two years since a civilian security guard was killed in 1999 by a stray bomb.<sup>105</sup>

The court held that the journalists were subject to criminal charges for trespassing, especially since journalists had been arrested during a protest a month earlier and released with

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<sup>103</sup> Telephone Interview with Jack Kresnak, Reporter, Detroit Free Press (July 31, 2001).

<sup>104</sup> *U.S. v. Maldonado-Norat*, 122 F. Supp. 2d 264, 265 (D.P.R. 2000).

<sup>105</sup> "Kennedy Gets 30 Days in Vieques Trespass Case," Reuters, July 6, 2001, available at <http://news.findlaw.com/news/s/20010706/armsviequeskennedydc.html>.

the understanding that they would not enter the restricted area again.<sup>106</sup> The Puerto Rican reporters argued that the First Amendment exempted them from prosecution because they were on the naval property solely as journalists and not as protesters. They claimed a constitutional right of access to information even if that information isn't available to the general public. They also argued that "special circumstances" required the court grant them immunity from prosecution.<sup>107</sup> The Puerto Rico District Court rejected the arguments, citing *Branzburg* for the proposition that journalists are not entitled to access to information beyond that of the general public.<sup>108</sup> The court also referred in a footnote to the 1999 ride-along case *Wilson v. Layne* as holding that freedom of the press has limits in the newsgathering context.<sup>109</sup>

In a deal with the government, charges against four of the Puerto Rican journalists, who had pleaded not guilty, were dropped in exchange for a guilty plea by their employer, El Nuevo Día, and a nominal fine.<sup>110</sup>

The decision to impose liability on the journalists in Vieques reflects well-established law dating to *Branzburg* and establishing that the application of general laws, such as trespass laws, to journalists does not violate the First Amendment, even when the journalists are merely performing a newsgathering function.

In a similar case to Vieques, for example, several journalists who followed a group of protesters on the land of a proposed nuclear power plant in Oklahoma raised a defense that they lacked the criminal intent to trespass because they entered the property to gather news. The

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<sup>106</sup> Don Bohning, "Federal agents remove protesters from Vieques bombing range," *The Miami Herald*, May 5, 2000.

<sup>107</sup> *Maldonado-Norat* at 265.

<sup>108</sup> *Id.*

<sup>109</sup> See *supra* Section III, Ride-alongs and Privacy.

appellate court held that the statute under which they were convicted required only a willingness to enter land after being forbidden to do so.<sup>111</sup>

Plaintiffs whose primary claim against media is misrepresentation or deception to gain access frequently include trespass allegations in their claim. In *La Luna Enterprises Inc. v. CBS Corp.*,<sup>112</sup> news crews got permission to film the interior of a restaurant and nightclub. CBS told La Luna that background footage of the club's cabaret would be used in a broadcast about tourism in Miami Beach. Instead, CBS used the footage in a story about the Russian mob in Miami. La Luna claimed fraud, defamation and trespass in its suit. The court allowed the trespass claim to go forward because CBS's crew entered the restaurant "wrongfully and without legal right," and because Florida law allows a plaintiff to collect nominal damages even if no physical damage occurred.<sup>113</sup>

In *Desnick*,<sup>114</sup> trespass was among Desnick's allegations, which also included defamation and fraud. ABC got authorization to film in some of Desnick's eye clinics, allegedly for a story about cataract surgery. ABC also sent undercover "patients" into clinics to get additional material for the story. Because the "patients" got into the clinics under false pretenses, Desnick said they trespassed. In rejecting that claim, Judge Posner wrote, "consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him . . . to revoke his consent."<sup>115</sup> He added that the invasion of the clinics

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(continued)

<sup>110</sup> E-mail from Edgardo Rivera Rivera, attorney for four of the defendants, Rivera & Fernández-Reboredo, P.S.C., San Juan, Puerto Rico (Aug. 4, 2001, 2:36 EDT) (on file with the author).

<sup>111</sup> *Stahl v. Oklahoma*, 665 P.2d 839 (Okla. Crim. App.), cert. denied, 464 U.S. 1069 (1983).

<sup>112</sup> 74 F. Supp 2d 384 (S.D.N.Y. 1999).

<sup>113</sup> *Id.* at 393.

<sup>114</sup> See *supra* note 35.

<sup>115</sup> *Id.* at 1351.

was “not an interference with the ownership or possession of land” and therefore did not infringe upon the interest that trespass laws are designed to protect.<sup>116</sup>

These cases illustrate that the success or failure of trespass claims often turns on the specific law of the state in which the trespass occurred. In both *Vieques* and *Oklahoma*, the journalists were prosecuted under laws that require a person to “knowingly” trespass and to have had “notice of the prohibition of entry.” Had the journalists been able to claim that they did not know that the areas were restricted, the charges likely would have been dismissed. Similarly, in a state that doesn’t allow nominal damages for a trespass claim, the *La Luna* claims likely would have been dismissed.

## CONCLUSION

Whatever direction the Supreme Court and others take regarding First Amendment defenses and challenges to press freedom, it’s clear that plaintiff’s lawyers will continue to find ways to impose liability on journalists who violate standards about what is acceptable.

Some of those tactics, such as the ride-along, position the media’s First Amendment protection directly in opposition to other constitutional protections, such as the Fourth Amendment. “If we’re really here to serve the public trust and honor the First Amendment, you’ve got to honor the amendments that come after that,” said Detroit’s Carey. “You don’t need to be so above it all that you don’t consider whether the ramifications and the story-gathering technique invades rights of citizens.”<sup>117</sup>

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<sup>116</sup> *Id.* at 1353.

<sup>117</sup> Interview with Carey, *supra* note 12.

Even if the courts afford First Amendment protection to journalists and the media win in the end, the cost of defending news practices before a jury will toll financially as well as in public support for the news profession.

“When plaintiff’s lawyers plead cases, they plead everything. And to that extent they can get by the First Amendment by using weird torts,” said Fritz of Allbritton Communications Co. “Clever plaintiff’s lawyers read the Supreme Court.”<sup>118</sup>

Unless journalists find and employ legal and ethical methods to report the news, the entire profession is likely to suffer from these “weird torts.”

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<sup>118</sup> Interview with Fritz, *supra* note 15.