A Critique of an Illegal Conduct Limitation on the Reporters' Privilege Not to Testify

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Introduction

Accompanying police is a traditional way for reporters to get colorful stories about crime and law enforcement.(note 1) Police, in turn, have used the opportunity to boost their public image by having journalists witness and publish stories of their deeds.(note 2) Real-life drama television shows, featuring footage of law enforcement officers and other emergency workers on their jobs, are unsurprising extensions of this tradition. Because government agencies do not want an unfavorable appearance of secrecy,(note 3) these shows are able to pressure agencies to permit journalists to tag along.(note 4)

The reporters accompany the officers, often riding in patrol cars, running after suspects, visiting crime scenes, and going onto private property. The television shows capture on film not only the police on patrol, but also chases, searches, seizures, arrests, and questioning of witnesses, suspects, and arrestees.(note 5) Often the film includes material that could be useful in a later trial.(note 6) Due to the First Amendment, though, litigants who want the information may have a court battle against the reporters. The defendants and prosecutors must prove several elements in order to use material that is not yet broadcast or published.

Such was the case when criminal defendant Babatunde Ayeni subpoenaed CBS, requesting unbroadcast film, or "outtakes," of a May 5, 1992, Secret Service search of his apartment.(note 7) The government agents, who had a valid warrant to look for evidence of credit card fraud, permitted a CBS news crew to accompany them and film the search.(note 8) The camera crew entered with the officers, one of whom wore a wireless microphone for the benefit of the reporters,(note 9) and filmed approximately twenty minutes for the program *Street Stories*.(note 10)

The defendant was not home during the search, although his wife and young son were. The wife neither gave the

reporters permission to enter nor asked them to leave, but did repeatedly express her desire not to be photographed. According to the judge who later reviewed the film, her words and tone indicated that she assumed the camera crew was an authorized government participant in the search.(note 11)

Defendant Ayeni wanted the tape because it contained information potentially relevant to his motions to dismiss and to suppress, as well as his defense against charges of conspiring to commit and committing credit card fraud.(note 12) CBS moved to quash the subpoena on First Amendment grounds.(note 13)

In *United States v. Sanusi*, apparently a case of first impression,(note 14) Judge Jack B. Weinstein ordered CBS to provide the tape requested by defendant Ayeni, granting the motion to quash only to the extent that CBS could block out the identity of its Secret Service source.(note 15) The court held that although a qualified newsgathering privilege protected the outtakes from disclosure, the defendant met an established three-part test and overcame CBS's privilege.(note 16) By meeting the elements of the test, the defendant proved that his interests in the tape outweighed the reporters' First Amendment interests.

Rather than end the decision after deciding that the defendant had overcome CBS's privilege not to testify, the court added a new limitation to the traditional test. According to Judge Weinstein, the First Amendment privilege not to testify would operate "weakly, if at all"(note 17) because CBS had acted illegally by entering Ayeni's home without either Ayeni's consent or that of his family.(note 18)

The court's new element raises two issues: (1) whether the decision that the camera crew's behavior was in fact illegal was properly made and (2) whether illegal conduct should affect the privilege not to testify. An analysis of these two issues shows that the court's limitation on the reporters' First Amendment privilege not to testify was inappropriate.

First, it is not clear that the CBS news crew engaged in any illegal conduct, even though the judge, without the aid of a jury, decided that it did.(note 19) The question of the journalists' conduct is better answered in a separate action where the reporter can be prosecuted or sued if necessary. Second, illegal conduct during newsgathering should not bar or limit the reporters' First Amendment right not to testify. The traditional three-part test adequately protects the interests of the party requesting the information by permitting the First Amendment privilege to be overcome where necessary. The policies underlying the reporters' privilege are served, while the interests of the individual involved are given due consideration.

I. Overview of the Reporters' Privilege

Privileges come from several places, including statutes,(note 20) common law,(note 21) and constitutions.(note 22) Although federal courts have historically rejected a common law privilege protecting journalists from revealing information,(note 23) many have relatively recently recognized a qualified First Amendment privilege protecting confidential, unbroadcast, or unpublished materialsboth sources and informationfrom compelled disclosure, regardless of whether the source has consented to disclosure. The reporters' First Amendment privilege may apply in both civil and criminal cases, although not with consistent force.(note 24)

The reason for rejecting a common law privilege is that journalists, unlike doctors or attorneys, who have common law privileges, are not professionals.(note 25) Consequently, there may be less societal benefit in their having the privilege.(note 26) Although it is generally agreed that doctors and lawyers require confidential relationships in order to function,(note 27) the same theory is disputed with regard to journalists.(note 28) Testimonial privileges are also limited because of the principle that courts have "a right to every man's evidence."(note 29)

The First Amendment suggests, however, that the press as an institution may have special constitutional advantages beyond those afforded to individuals.

> It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . . By including both guarantees in the First Amendment, the Founders quite

clearly recognized the distinction between the two.(note 30)

The argument for a First Amendment reporters' privilege not to testify was first made in *Garland v. Torre*,(note 31) in which Judy Garland alleged that columnist Marie Torre defamed her. Torre, attributing the statements in question to an unnamed CBS executive, claimed that she was not required to reveal a journalistic source.(note 32) Judge (later Justice) Potter Stewart affirmed her contempt conviction, but recognized that compulsory disclosure may hinder the freedom of the press.(note 33) Because freedom of the press is not absolute, a balance was required to compare journalistic abridgement to the need for the testimony.(note 34)

The Supreme Court has not explicitly stated whether the First Amendment ever provides journalists with a privilege not to testify.(note 35) The Court, in its 1972 three-case consolidated opinion *Branzburg v. Hayes*, held that the reporters in those cases were not constitutionally protected from testifying to grand juries about their eyewitness accounts of criminal activity.(note 36) The decision was limited, however, and left open the question of whether journalists may have the privilege in other situations.

The Court's emphasis on the importance of grand juries and investigating crime suggests that reporters may have a privilege not to testify in other contexts. Justice Powell's concurring opinion explicitly supports this idea. Justice Powell stated, "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."(note 37) Reporters, according to Justice Powell, may make a motion to quash if the grand jury investigation is not being conducted in good faith.(note 38)

Five justicesfour dissenters plus Justice Powell concurringstated that reporters may have at least a qualified privilege not to testify about their sources.(note 39) One of the dissenters, Justice Douglas, would have held that reporters have an absolute privilege.(note 40) This head-counting,(note 41) along with the limiting comments in the opinion of the Court, has permitted many jurisdictions to construe the First Amendment to provide the press with a privilege not to testify,(note 42) commonly protecting both sources and information.(note 43)

In several ways, this testimonial privilege encourages more in-depth news coverage and investigative reporting. First, not only would sources be less willing to provide information if the reporter were later compelled to identify the source publicly, but being required to testify takes time, money, and other journalistic resources from the reporters.(note 44)

> [B]ecause journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a nonparty would be widespread if not restricted. The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press.(note 45)

Second, the press would face the possible image of being an arm of law enforcement, rather than a neutral observer. If parties were routinely allowed to subpoena news information for private purposes, the media's autonomy would be jeopardized.(note 46) "There is virtual unanimity within journalism, print and electronic alike, that the primary obligation of the press in reporting about criminal activity is to serve, both in fact and in public perception, as an instrument of public information, not as an arm of law-enforcement."(note 47) The possibility of testifying later can cause reporters to forego newsgathering in order to avoid the image of the press as an arm of law enforcement.(note 48)

Although *Branzburg* discussed the First Amendment privilege not to testify about confidential information, the First Amendment is commonly interpreted to provide the press with a qualified privilege protecting any unpublished information, regardless of its confidentiality.(note 49) Compelled production of unpublished information can also significantly inhibit newsgathering and the editorial process.(note 50)

Compelled disclosure provides a disincentive to compile and preserve unpublished information.(note 51) "We discern a lurking and subtle threat to journalists and their employers if disclosure, outtakes, notes and other unused information, even if nonconfidential, becomes routinely and casually, if not cavalierly, compelled."(note 52)

The privilege is possessed by the reporter. Unlike many other testimonial privileges, such as attorney-client and doctor-patient, the source of the information is not capable of waiving the privilege.(note 53) The journalist may be able to retain the privilege not to testify even if the source of the information is the one requesting the reporter's testimony.(note 54)

Frequently journalists may be able to resist subpoenas in both criminal and civil trials.(note 55) Some courts have held that the privilege applies in either type of case because the effect on newsgathering does not change with the nature of the action;(note 56) however, in civil trials where the reporter is not a party courts may allow for a greater privilege than in criminal trials or civil actions with a media defendant.(note 57) The privilege may operate weakly or not at all in criminal trials where the defendant has a constitutional right to a fair trial,(note 58) or where the state has a compelling interest in investigating crime.(note 59)

II. The Factors for Overcoming the Privilege

The First Amendment is not the only consideration for courts; therefore, the privilege must be weighed against other constitutionally significant interests. The government, for example, has a strong interest in criminal prosecutions in order to protect public safety. Similarly, criminal defendants have a due process right to a fair trial, as well as a Sixth Amendment right to compel testimony at trial.(note 60)

The framers of the Bill of Rights did not, however, rank the First and the Sixth Amendments. Neither is given automatic priority over the other when the two conflict.(note 61) According to Justice Powell, courts must evaluate the First Amendment interests against the competing societal need for relevant testimony.(note 62) A case-by-case balance "accords with the tried and traditional way of adjudicating such questions."(note 63)

To balance the interests involved, courts have developed a three-part test that weighs the needs of the party requesting the information against the needs of the press,(note 64) making the privilege qualified rather than absolute. In *United States v. Sanusi*, Judge Weinstein added an element to the traditional test: the court must ascertain whether the reporter used illegal means to gain the information.(note 65)

A. The Traditional Three-Part Test

In many jurisdictions, the requesting party can overcome a reporter's First Amendment privilege by meeting a three-part test similar to that proposed by Justice Stewart in his *Branzburg* dissent.(note 66) Justice Stewart would require that the requesting party (the government in *Branzburg*) show (1) that there is probable cause to believe that the reporter has information that is clearly relevant, (2) that the information cannot be obtained by alternative means less destructive of First Amendment rights, and (3) that there is a compelling and overriding interest in the information.(note 67)

Applying such a test, or a variation thereof,(note 68) ensures that a journalist's information is disclosed only when necessary for a "fair judicial process."(note 69) The party requesting the information has the burden to show that the test has been met by substantial evidence.(note 70) "This demanding burden has been imposed by courts to reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment."(note 71)

Where a criminal defendant cannot prove each element of the test, the journalist will not be required to disclose the requested information. In *United States v. Lopez*,(note 72) for example, the criminal defendant's subpoena was quashed where the requester did not exhaust alternative sources and did not show how the information was material to the defense.(note 73) Similarly, a criminal defendant's right to compulsory process did not overcome the subpoenaed reporter's First Amendment qualified privilege where the requested evidence was speculative, cumulative, and hearsay.(note 74)

Many state shield laws contain similar tests for overcoming the privilege granted to reporters. New York, for example,

protects news and news sources unless the requester makes a clear and specific showing of the three elements.(note 75) The test is not applied rigidly. "Rather, the test should be flexibly employed, taking into account various factors which diminish the strength of the qualified immunity privilege. For example, `if the questions put to a reporter are narrowly limited, then subpoenaing a reporter is more acceptable.'"(note 76)

In *Sanusi*, Judge Weinstein applied an accepted test, requiring the defendant to prove three elements in order to defeat the privilege: the information must be (1) highly material and relevant to the claim, (2) necessary or critical to the maintenance of the claim, and (3) obtainable from no source other than the reporter.(note 77)

The defendant in *Sanusi* claimed he required the CBS outtakes for his motion to suppress and his motion to dismiss, as well as for his defense.(note 78) According to Judge Weinstein, an in camera review of the tape showed that it contained no material relevant to Ayeni's motions to suppress or dismiss; however, the tape would be useful to the defendant's defense because it showed that a thorough search uncovered nothing. Such potentially exculpatory evidence dramatically shown on film could greatly influence the jury.(note 79)

> By inviting CBS to accompany it on its search, the Secret Service may well have provided a basis for a finding of not guilty. The criminal may go free, not because the constable has blundered, but because the Secret Service and CBS have abused criminal process in a way the average citizen may find unacceptable.(note 80)

The court seemed to brush aside the element of the test requiring that the evidence be "necessary or critical."(note 81) Instead of discussing the element in detail, the court stated it was "reluctant in a criminal case to substitute its judgment for a defendant's on the question."(note 82) The third criterion, requiring that the material could not be obtained elsewhere, was satisfied because the tape itself was obviously not available from any source other than CBS.(note 83)

B. Sanusi's *Added RestrictionIllegal Conduct*

In *Sanusi*, Judge Weinstein added a new restriction to the settled three-part test: before a member of the press may resist a subpoena, "the court must be confident that the person asserting the privilege does not do so as a means of justifying otherwise illegal conduct."(note 84)

In support of the additional requirement, the court examined instances in which reporters tried to use the First Amendment to justify crimes and torts committed in newsgathering; for example, trespass(note 85) and intrusion.(note 86) In these cases, courts rejected the journalists' claims, prohibiting reporters accused of crimes or torts from using the First Amendment to preclude liability. "Because the press in certain circumstances may be able to resist the demands of a subpoena in some cases does not mean the press may, simply by raising the cry of `newsgathering,' exempt itself from all other legal constraints."(note 87)

The phrase "justify otherwise illegal conduct" does not, however, seem to describe accurately the application of Judge Weinstein's added criterion. Whereas "justify" suggests that the reporter is trying to defend directly against liability, the relationship between the possible illegal conduct and the First Amendment claim not to testify is more attenuated. More accurately, the court's test is that where the reporter has used illegal means to gain the information requested, the First Amendment privilege not to testify is barred or weakened. The privilege would not apply, or would not completely apply, where the reporter sought not to testify about information gained while committing a crime or a tort.

If, for example, a journalist had stolen the subpoenaed information, under Weinstein's test the journalist could not claim First Amendment protection. Likewise, CBS could not claim a First Amendment qualified privilege not to testify if it had committed trespass while filming the search of defendant Ayeni's apartment. The question then becomes whether the reporter engaged in illegal conduct.

III. The Existence of Illegal Behavior

Whether a journalist has behaved illegally or tortiously by gathering news on private property is subject to debate.(note 88) Courts have decided the issue both for and against the press.(note 89) Judge Weinstein, without the aid of a jury, decided that the CBS news crew did behave illegally when it entered the Ayeni home.(note 90)

In *Florida Publishing Co. v. Fletcher*, the plaintiff could not recover for trespass against the newspaper where the reporters were invited by a fire marshall and a law enforcement officer to enter a home destroyed by fire.(note 91) According to the court, the homeowners had given implied consent by custom and usage.(note 92) Similarly, reporters in New York were not liable for trespass when they accompanied the police who arrested the "Son of Sam" killer.(note 93)

However, such claims against reporters are generally not invalidated merely because the reporter, as in *Sanusi*, accompanied law enforcement officers onto a person's property.(note 94) In *Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc.*,(note 95) for example, the nonprofit corporation that operated a school raided by police was able to sue the television station that sent two employees to accompany the midnight raid. The court denied the media defendants' motion for summary judgment on the claim of malicious trespass, as well as the claims of libel and slander.

> To uphold [the broadcaster's] assertion that their entry upon [the school's] property at the time, manner, and circumstances as reflected by this record was as a *matter of law* sanctioned by `the request of and with the consent of the State Attorney' and within the `common usage and custom in Florida' could well bring to the citizenry of this state the hobnail boots of a nazi stormtrooper equipped with glaring lights invading a couple's bedroom at midnight with the wife hovering in her nightgown in an attempt to shield herself from the scanning TV camera.(note 96)

After examining constitutional principles found in the Fourth Amendment(note 97) to evaluate the importance of individual privacy, the *Sanusi* court decided that the media defendant's behavior was not protected by the First Amendment.(note 98) The Fourth Amendment, although not restricting the actions of private actors such as CBS,(note 99) reflects the right to restrict who enters an individual's home. Under the Fourth Amendment, the government cannot gain entry to a home without a valid warrant or an overriding exception to the warrant requirement(note 100) and, according to Judge Weinstein, neither should the press.(note 101)

Although CBS was engaged in newsgathering,(note 102) Judge Weinstein decided that the reporters committed an illegal act when they violated the defendant's privacy by filming the search. The opinion states that "CBS . . . trespassed upon defendant's home,"(note 103) but it does not state whether this was a tortious trespass or a criminal trespass. Nor does the opinion provide a definition of "trespass" or a list of the elements necessary for such a finding.

New York has several criminal trespass statutes.(note 104) Apparently either trespass(note 105) or criminal trespass in the second degree(note 106) could apply in this case. Both relevant trespass statutes require that a person who commits the crime "*knowingly* enter[] or remain[] unlawfully."(note 107) Judge Weinstein, however, did not consider a culpability element, but rather based the trespass finding solely on his opinion that neither the defendant nor his family consented to CBS's presence in the apartment. There is no discussion of how the Secret Service's permission affected the reporters' knowledge of unlawful behavior.

More likely Judge Weinstein considered the act a tortious trespass, although he did not state this. In New York, a tortious trespass does not require that the trespasser either intended to commit a trespass or knew that the act would constitute trespass.(note 108) According to Judge Weinstein, neither the defendant nor his family consented to the camera crew's presence in the apartment, nor was there implied consent when the defendant's wife did not ask the reporters to leave. The CBS journalists gained access "arguably, under color of official right"(note 109) without consent from the defendant or his family, who apparently did not realize they could compel the reporters to leave. According to Judge Weinstein, the reasonable person surrounded by Secret Service agents would not realize she could exclude the camera crew.(note 110) "That the woman had the presence of mind to request that she not be photographed was, under the circumstances, remarkable."(note 111)

The opinion contains no indication that CBS knew which trespass provision applied, had the opportunity to present a defense, or had the option of allowing a jury to determine elements such as culpability, if relevant, before the

constitutionally based privilege not to testify was affected. The determination of illegal or tortious behavior by the press is better left to a separate proceeding, where the issue will be argued fully and decided clearly, rather than in another person's criminal trial, where the finding of illegal behavior is vague, but the consequencelosing a constitutionally based privilegeis grave.(note 112)

IV. Analysis of the *Sanusi* Illegal Conduct Restriction

Even if the questions surrounding the legality of the media's conduct were adequately decided, other issues remain concerning the validity of the new limitation on the reporters' First Amendment testimonial privilege. Although the limitation may at first appear acceptable, a closer examination shows otherwise. The policies behind the privilege are better served without the illegal conduct restriction, despite the compelling facts in the *Sanusi* case. Other remedies for illegal or tortious conduct are available to respond to the underlying conduct without a broad restriction on the testimonial privilege.

News may receive some degree of protection even where some illegal conduct existed in its gathering. Publication, for instance, may not be punished or prohibited even though the underlying conduct used to gather the information is.(note 113) Similarly, the use of the information in testimony should be separated from the manner in which it was obtained.

At first blush, Judge Weinstein seems correct to say that before a reporter is entitled to use the First Amendment to resist a subpoena, "the court must be confident that the person asserting the privilege does not do so as a means of justifying otherwise illegal conduct."(note 114) Journalists are subject to laws generally applicable to society where enforcement has incidental effects on the press's ability to gather and report news.(note 115) "There is no threat to a free press in requiring its agents to act within the law."(note 116) Donald Galella, for example, could not claim that because he was newsgathering he was protected from crimes and torts committed against former First Lady Jacqueline Kennedy Onassis when he sought to photograph her. Galella could be liable for harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of Onassis's personality, and invasion of privacy.(note 117)

The newspersons claiming the privilege not to testify are not, however, trying to defend a direct accusation of liability for an action. Whether the reporter is liable for some underlying conduct is not the same question as whether the reporter may be required to comply with a subpoena.

By requiring a decision on this separate question of whether the reporter has engaged in illegal activity in the course of gaining the material requested, the court is encouraging a mini- trial when a motion to quash is filed by reportersone in which a judge, rather than a jury, decides whether a journalist is guilty of an illegal act.

The desire to limit the time, effort, and money that journalists must use to respond to subpoenas is one of the underlying reasons for the privilege not to testify.(note 118) Even if a jury were the factfinder, such litigation would drain journalistic resources from newsgathering and move them into court, where they would not be spent for the benefit of informing the public.

Apparently, the party requesting the information need only allege that the reporter committed *any* crime or tort to challenge the reporter's motion to quash and compel the journalist to present a defense, forcing journalistic resources to be appropriated to expenses for litigation and testifying.

Consider that speeding is illegal. The reporter may not have been able to meet a source or obtain particular information without arriving at a particular place at a particular time, sooner than the time at which the reporter would arrive driving at a legal speedthat is, but for the illegal speeding, the reporter would not have the information. The information would not, therefore, be fully protected by the First Amendment. The result sounds absurd, yet quite possible under a test where any illegal conduct by the reporter will automatically bar or weaken the First Amendment. That a litigant need only allege some conduct similar to speeding in order to force the journalist to expend time, money, and other resources for a defense is equally ludicrous.

In addition to preventing a waste or misappropriation of journalistic resources, another purpose of the privilege not to

testify is to encourage newsgathering.(note 119) This policy too is hindered by the *Sanusi* illegal conduct restriction, even though it may at first appear otherwise. Permitting reporters to use such a privilege where they have committed an illegal action to obtain the information may initially seem to be encouraging illegal conduct when newsgathering. Instead, it allows the press to disseminate necessary information to the public, without decreasing the value of other disincentives for illegal behavior.

The 1989 Supreme Court case *Florida Star v. B.J.F.*,(note 120) in which a rape victim sued the newspaper that published her name after the newspaper had obtained it from a publicly released police report, suggests that illegal newsgathering should not be encouraged. Striking down a Florida statute making it illegal to publish rape victims' names in an instrument of mass communication, the Supreme Court held that "where a newspaper publishes truthful information *which it has lawfully obtained*, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."(note 121)

The Supreme Court did not, however, state whether "lawfully obtained" was a necessary element in the case. In fact, the Court expressly declined to decide "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."(note 122)

Judge Weinstein was able to use a very compelling set of facts to illustrate his new rule: the camera crew went into the defendant's home without the family's consent and took photos that the defendant's wife expressly requested not be taken. It may not seem fair under those circumstances that the broadcaster should be able to keep from the defendant a tape of a search of the defendant's apartment.

These same compelling facts, however, illustrate the potential importance of the reporters' newsgathering. Despite the illegal conduct, newsgathering would be discouraged if the privilege not to testify were taken away. From *Sanusi*, one can see that the benefit to society can outweigh the harm caused by the newsgathering.

The primary purpose of the Constitution's freedom of the press guarantee is to create an institution to serve as a check on the three official branches of government.(note 123) The conduct of law enforcement personnelgovernment agentsis a legitimate and necessary area of public interest.(note 124)

> If the public is to have the capacity to review police behavior and elicit the aid of powerful institutions, including media as well as courts, citizens must appreciate the potentialities and limits of police departmentsand how police officers can reasonably be expected to carry out their duties. The media can supply the information from which such knowledge grows.(note 125)

Although traditional police reporters are disappearing from the modern media,(note 126) there is a continuing need to inform society about the day-to-day functions and duties of police and other law enforcement officers. Television camera crews, as well as other types of journalists, who accompany the officers on their daily activities allow the public to understand the police more fully, regardless of whether the show is primarily for news or entertainment.(note 127) "People used to think law enforcement was like *Dirty Harry* or *Miami Vice*," according to Nick Navarro, a Florida sheriff. "Shows like *Cops* let the American people see what the police are really like."(note 128)

In the past, reporters have had problems covering police misconduct.(note 129) Tom Reddin, a former chief of the Los Angeles Police Department (LAPD) who became a television news anchor, said he hopes the flow of information will improve after the police brutality investigations following the widely publicized 1991 beating of Rodney King, which was filmed by an amateur photographer. "[LAPD Chief] Daryl [Gates] may talk about `my policemen,' but they are really the people's policemen, and the people have a right to know about how their policemen perform their duties."(note 130)

The *Sanusi* decision may very well have a contrary effect. At least one investigative reporter has said that the case may directly decrease coverage. "This is a troubling decision. . . . I think that we may see a great deal less coverage of police activity, not only of search warrants but of arrests as well."(note 131) This disincentive for gathering important news is an unwarranted and unwanted product of *Sanusi*'s new limitation on an already qualified privilege.

The *Sanusi* rule also undermines the policy that the reporters' testimonial privilege decreases the appearance of press as an arm of government. The new restriction does not limit itself to illegal conduct in which the party requesting the information was the victim. Under the broad rule that illegal conduct by the media bars or limits the First Amendment privilege, the government could also obtain the tape. It would not matter that the government permitted the reporters to accompany the searchthe reporters still engaged in illegal activity to obtain the information that was requested.

Police reporters have difficulties remaining neutralor at least being perceived as neutralwhen they work with government agencies to cover news stories. If the journalists who accompanied the police officer were suddenly compelled to supply unpublished information to the prosecutor, the image of press as law enforcement would be heightened. By testifying or supplying outtakes, journalists are no longer neutral observers, but rather an arm of the government.

The perception of press as law enforcement is more likely where the reporter has accompanied government agents than in other situations because the journalist is connected to the government for the entire episodenewsgathering and testifying. Although the argument could be made that the press was already an arm of the government when it obtained access through the law enforcement officers,(note 132) under that same reasoning journalists could become officers of the court when they are given preferential access to celebrated trials or hearings.(note 133)

Courts do not need to attempt to balance the newsgathering and the illegal activity; adequate remedies are available for behavior that the law does not permit. Reporters can be prosecuted, and the victim of tortious conduct can sue.(note 134) Both intrusion(note 135) and trespass(note 136) are available as tort claims in many jurisdictions. Neither requires that the information obtained be published before liability is incurred, rather the individuals can sue based on outtakes alone. These proceedings, separate from the issue of the reporters' First Amendment privilege not to testify, allow an individual to recover for any harm actually suffered. Courts could avoid disincentives from gathering and disseminating information about a government agency that would arise if the privilege not to testify were broadly restricted by any illegal conduct.

Conclusion

The traditional three-part test for overcoming the reporters' qualified First Amendment privilege provides the party requesting information with an adequate opportunity to obtain material from the reporter. That test is specifically designed to provide the requesting party with the information where a balance shows that the requester's interests outweigh the First Amendment interests of the subpoenaed reporter.

Prosecutions or tort actions, on the other hand, are designed to punish or compensate for journalists' misbehavior. Such a separation will better protect the press, while recognizing the rights of individuals. It will also allow the press to retain the benefits of the privilege without being forced to use newsgathering resources for defending allegations of any illegal conduct.

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Notes

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1. Lyle Denniston, *Reporters with Cops Compelled to Testify*, Wash. Journalism Rev., July/Aug. 1990, at 40, 40. Return to text

2. *See* Jon Katz, *Covering the Cops*, Colum. Journalism Rev., Jan./Feb. 1993, at 25, 26-27. Some police departments do not allow camera crews to accompany their officers. Richard Zoglin, *The Cops and the Cameras*, Time, Apr. 6, 1992, at 62, 62. Return to text

3. Jane Hall, *Judge Says `Reality' TV Can't Join Raids*, L.A. Times, Nov. 23, 1992, at F1, F12 (statement of Martin Garbus, First Amendment lawyer). Return to text

4. Jane Hall, *Ruling May Affect Taping of Searches*, L.A. Times, Nov. 28, 1992, at F1, F11. Return to text

5. *See* Katz, *supra* note 2, at 26. Return to text

6. *See, e.g.*, *Network Must Give Grand Jury* 48 Hours *Outtakes of Arrest*, News Media & L., Summer 1991, at 13. Return to text

7. United States v. Sanusi, 813 F. Supp. 149 (E.D.N.Y. 1992). Return to text

8. *Id.* at 151. Return to text

9. *Id.* at 152. Return to text

10. Hall, *Judge Says `Reality' TV Can't Join Raids*, *supra* note 3, at F1. Return to text

11. *Sanusi*, 813 F. Supp. at 152. Return to text

12. *Id.* at 151. Return to text

13. *Id.* Return to text

14. Hall, *Judge Says `Reality' TV Can't Join Raids*, *supra* note 3, at F12 (statement of Henry Rossbacher, attorney for defendant Ayeni). Return to text

15. *Sanusi*, 813 F. Supp. at 151. CBS said it would comply with the decision to produce the tapes. Hall, *Judge Says `Reality' TV Can't Join Raids*, *supra* note 3, at F12. Return to text

16. *Sanusi*, 813 F. Supp. at 159-60. The test required that the tape be "(1) highly material and relevant; (2) necessary or critical to the maintenance of the [defendant's] claim; and (3) not obtainable from other sources." *Id.* at 154. Return to text

17. *Id.* at 160. Return to text

18. *Id.* The court also criticized the Secret Service for permitting the reporters to be a part of the search. "While not rising to the level of misconduct required to dismiss an indictment, such behavior cannot be tolerated. Agents of the executive branch must understand the gravity of their role when a judicial officer authorizes their presence in a private person's home." *Id.* at 161. Judge Weinstein directed the United States Attorney to bring the case to the attention of the highest authority in the United States Secret Service. *Id.* Return to text

19. *Id.* at 160. Return to text

20. *See* McCormick on Evidence sec. 76.2 (John W. Strong ed., 4th ed. 1992) (e.g., clergy-penitent). The Supreme Court has invited legislatures to pass shield laws, which would give statutory protection to journalists who have been subpoenaed. Branzburg v. Hayes, 408 U.S. 665, 706 (1972). A majority of states have done so. *See, e.g.*, Ala. Code sec. 12-21-142 (1986); Alaska Stat. sec.sec. 09.25.150-.220 (1983); Ariz. Rev. Stat. Ann. sec.sec. 12-2214, -2237 (1982 & Supp. 1993); Ark. Code Ann. sec. 16-85-510 (Michie 1987); Cal. Evid. Code sec. 1070 (West Supp. 1994); Colo. Rev. Stat. Ann. sec.sec. 13-90-119, 24-72.5-101 to -106 (West Supp. 1993); Del. Code Ann. tit. 10, sec. 4320-4326 (1974); D.C. Code Ann. sec.sec. 16-4701 to -4704 (Supp. 1993); Ga. Code Ann. sec. 24-9-30 (Michie Supp. 1993); Ind. Code sec. 34-3-5-1 (1983); Ky. Rev. Stat. Ann. sec. 421.100 (Michie/Bobbs-Merrill 1992); La. Rev. Stat. Ann. sec.sec. 45:1451-1458 (West 1982 & Supp. 1993); Md. Code Ann., Cts. & Jud. Proc. sec. 9-112 (1989); Mich. Comp. Laws sec. 767.5a (Supp. 1993); Minn. Stat. Ann. sec.sec. 595.021-.025 (West 1988 & Supp. 1994); Mont. Code Ann. sec.sec. 26-1-901 to -903 (1993); Neb. Rev. Stat. sec.sec. 20-144 to -147 (1991); Nev. Rev. Stat. Ann. sec. 49.275 (Michie 1986); N.J. Stat. Ann. sec.sec.

2A:84A-21 to -21.9, -29 (West 1976 & Supp. 1993); N.M. Stat. Ann. sec. 11-514 (Michie 1976); N.Y. Civ. Rights Law sec. 79-h (McKinney 1992); N.D. Cent. Code sec. 31-01-06.2 (1976); Ohio Rev. Code Ann. sec.sec. 2739.04, 2739.12 (Anderson 1992); Okla. Stat. Ann. tit. 12, sec. 2506 (West 1993); Or. Rev. Stat. sec.sec. 44.510-.540 (1988); 42 Pa. Cons. Stat. Ann. sec. 5942 (1982); R.I. Gen. Laws sec.sec. 9-19.1-1 to -3 (1985); Tenn. Code Ann. sec. 24-1-208 (Supp. 1993).

Although similar proposals have been made in Congress, the federal government has not passed a law shielding journalists from compelled testimony. *See, e.g.*, H.R. 215, 94th Cong., 1st Sess. (1975); H.R. 2015, 93d Cong., 1st Sess. (1973); H.R. 837, 92d Cong., 1st Sess. (1971). The first federal shield bill was introduced in 1929. Harvey L. Zuckman et al., Mass Communications Law in a Nutshell 294 (3d ed. 1988).

In federal courts state-created privileges, such as reporters' shield laws, apply only in civil actions and proceedings where the rule of decision of an element of a claim or defense is supplied by state law; otherwise, federal privileges apply. Fed. R. Evid. 501. Where a civil action in federal court contains both federal and state claims or defenses, privileges should be evaluated under both state and federal law. Lipinski v. Skinner, 781 F. Supp. 131, 135 (N.D.N.Y. 1991) (citing Los Angeles Memorial Coliseum Comm'n v. National Football League, 89 F.R.D. 489, 492 (C.D. Cal. 1981)). Return to text

21. *See* McCormick on Evidence, *supra* note 20, sec. 75 (e.g., attorney-client or doctor- patient). Return to text

22. *E.g.*, U.S. Const. amend. V (guaranteeing right not to testify against oneself); *see also* McCormick on Evidence, *supra* note 20, sec.sec. 114-143.

    California has adopted a shield law provision in its constitution, Cal. Const. art. I, sec. 2(b), in addition to its shield statute, Cal. Evid. Code sec. 1070 (West Supp. 1994). Return to text

23. *See* Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Mo. L. Rev. 1, 18 (1986). Return to text

24. *See* Continental Cablevision, Inc. v. Storer Brdcst. Co., 583 F. Supp. 427, 433 (E.D. Mo. 1984). Return to text

25. William M. Bulger, *Reporter's Privilege by Rule of Court: New Approach Fails . . . Or Does It?*, 19 Suffolk U. L. Rev. 513, 535 (1985).

    > [Doctors and lawyers] are bound by canons of ethics far more demanding than the civil and criminal law, and can lose their right to practice if they violate those codes. There is no comparable ethical discipline governing the conduct of journalists, no coercive supervision which binds them to universal standards.

    Id. Return to text

26. *See* Zuckman et al., *supra* note 20, at 293. Return to text

27. Jack Colldeweih & Samuel Pleasants, *Confidential SourcesThe Reporter's Privilege Muddle*, Comm. & L., Dec. 1991, at 3, 3. Return to text

28. *Compare* Bulger, *supra* note 25, at 534 ("[T]hrough most of our existence as a nation we needed no testimonial privilege to have the freest and most aggressive press in the world. The privilege is sought to meet a nonexistent problem.") *with* Monk, *supra* note 23, at 4 ("If . . . we seek a media that presents facts or occurrences not so generally availablethe product of investigative reporting like that exemplified by publication of the Pentagon papers and the Watergate exposethen the privilege is important to a full and satisfactory exercise of the profession."). Return to text

29. United States v. Bryan, 339 U.S. 323, 331 (1950); *see also* Zuckman et al., *supra* note 20, at 293. Return to text

30. Potter Stewart, *"Or of the Press"*, 26 Hastings L.J. 631, 633-34 (1975) (emphasis in original). *But see* Anthony Lewis, *A Preferred Position for Journalism?*, 7 Hofstra L. Rev. 595, 605 (1979) ("No Supreme Court decision has held or intimated that journalism has a preferred constitutional position."). Return to text

31. *Garland*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *see also* Zuckman et al., *supra* note 20, at 295. Return to text

32. *Garland*, 259 F.2d at 547. Return to text

33. *Id.* at 548. Return to text

34. *Id.* ("What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom."). Return to text

35. *See, e.g.*, Colldeweih & Pleasants, *supra* note 27, at 3. Return to text

36. *Branzburg*, 408 U.S. 665, 708 (1972). Return to text

37. *Id.* at 709 (Powell, J., concurring). Return to text

38. *Id.* Return to text

39. *Id.* at 710 (Powell, J., concurring), 712 (Douglas, J., dissenting), 743 (Stewart, J., dissenting). Return to text

40. *Id.* at 712 (Douglas, J., dissenting). Return to text

41. The decision has also been characterized as "four and a half to four and a half." Stewart, *supra* note 30, at 635. Return to text

42. *See, e.g.*, United States v. LaRouche Campaign, 841 F.2d 1176, 1181 (1st Cir. 1988); LaRouche v. NBC, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *In re* Selcraig, 705 F.2d 789, 792 (5th Cir. 1983); United States v. Burke, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977); Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *see also* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 Stan. L. Rev. 927, 929 (1992).

    But see In re Grand Jury Proceedings, 810 F.2d 580, 584 (6th Cir. 1987) (*Branzburg* did not recognize reporters' privilege although many courts have interpreted it as extending a qualified privilege); *In re* Farber, 394 A.2d 330, 334 (N.J.) (no privilege in criminal cases), *cert. denied*, 439 U.S. 997 (1978). Return to text

43. *See, e.g.*, *LaRouche Campaign*, 841 F.2d 1176; *Burke*, 700 F.2d 70. Return to text

44. *LaRouche Campaign*, 841 F.2d at 1182. Return to text

45. O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 279 (N.Y. 1988). A 1991 survey by the Reporters Committee for Freedom of the Press found that of 1010 media institutions who answered the survey, 34.2% of the print media respondents and 68.9% of the broadcast respondents said they were served at least one subpoena that year. Ruth Piller, *Subpoenas a Drain on the Press; Process Takes Resources from News-gathering, Report Finds*, Houston Chron., Feb. 11, 1993, at A10. Television stations averaged 7.41 subpoenas each in 1991. Comm. Daily, Mar. 11, 1993, at 8. A little more than half of all the subpoenas were connected to criminal cases. Piller, *supra*, at A10.

    > What we keep finding . . . is that it's a tremendously expensive proposition for journalists to fight these subpoenas, both in terms of money and in terms of staff time. I wish we could be more persuasive, to communicate to the judges the impact that (subpoenas have) on doing what reporters

are supposed to be doingthat is, gathering news.

Id. (statement of Jane E. Kirtley, Executive Director of the Reporters Committee for Freedom of the Press). Return to text

46. *O'Neill*, 523 N.E.2d at 279. Return to text

47. National News Council, Covering Crime: How Much Press-Police Cooperation? How Little? 7 (1981). Return to text

48. *See id.* at 15 (21 of 49 surveyed news executives would reject opportunity to accompany law enforcement if asked for quid pro quo regardless of the potential story's quality). Return to text

49. *See, e.g.*, United States v. Cuthbertson, 630 F.2d 139, 146-47 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); United States *ex rel.* Vuitton et Fils S.A. v. Karen Bags, Inc., 600 F. Supp. 667, 669-71 (S.D.N.Y. 1985) (applying privilege in case involving outtakes); *O'Neill*, 523 N.E.2d at 277-78 (First Amendment provides qualified privilege protecting nonconfidential photographs from compelled disclosure). Return to text

50. *Cuthbertson*, 630 F.2d at 146. Return to text

51. United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988) ("To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be key to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment."); *cf.* Bill Kirtz, *Media Lawyer: Saving Notes Can Hurt You*, Editor & Publisher, Jan. 25, 1992, at 16 (media lawyer advising reporters that keeping notes can be harmful because the notes can be used against the reporters in libel actions). Return to text

52. *LaRouche Campaign*, 841 F.2d at 1182. Return to text

53. *E.g.*, McCormick on Evidence, *supra* note 20, sec. 76.2; Bulger, *supra* note 25, at 535. Return to text

54. *See, e.g.*, United States v. Lopez, 14 Media L. Rep. (BNA) 2203 (N.D. Ill. 1987); *cf.* Delaney v. Superior Court (Kopetman), 789 P.2d 934 (Cal. 1990) (California constitution's shield provision can be invoked by journalist where criminal defendant requested journalist's testimony about defendant's prior statement). Return to text

55. *See, e.g.*, United States v. Burke, 700 F.2d 70, 77 (2d Cir.) (privilege applies equally to civil or criminal cases and each uses same analysis in order to encourage press to investigate and expose criminal activity), *cert. denied*, 464 U.S. 816 (1983); United States v. Hubbard, 493 F. Supp. 202, 205 (D.D.C. 1979). *But see In re* Farber, 394 A.2d 330 (N.J.) (privilege does not apply in criminal case), *cert. denied*, 439 U.S. 997 (1978). Return to text

56. *E.g.*, United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) ("CBS's interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal."), *cert. denied*, 449 U.S. 1126 (1981). Return to text

57. *See* Continental Cablevision, Inc. v. Storer Brdcst. Co., 583 F. Supp. 427, 433 (E.D. Mo. 1984). Return to text

58. *Farber*, 394 A.2d 330. Return to text

59. *See, e.g.*, Karem v. Priest, 744 F. Supp. 136, 137 (W.D. Tex. 1990). Return to text

60. The Sixth Amendment states in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. Return to text

61. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561, *quoted in* United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). Return to text

62. Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring). Return to text

63. *Id.* Return to text

64. *See* Zuckman et al., *supra* note 20, at 299. Return to text

65. *See* United States v. Sanusi, 813 F. Supp. 149, 156 (E.D.N.Y. 1992). Return to text

66. Zuckman et al., *supra* note 20, at 299. Return to text

67. *Branzburg*, 408 U.S. at 743 (1972) (Stewart, J., dissenting). Return to text

68. For example, under the California shield law provisions, criminal defendants must make a threshold showing that there is a reasonable likelihood that a reporter's information will be helpful. The court then balances the conflicting interests by considering (1) whether the information is confidential or sensitive, (2) the interests the shield law protects, (3) the criminal defendant's need for the information, and (4) whether there is an alternative source. Delaney v. Superior Court (Kopetman), 789 P.2d 934, 947-51 (Cal. 1990). Return to text

69. *Sanusi*, 813 F. Supp. at 155. Return to text

70. *In re* Selcraig, 705 F.2d 789, 792 (5th Cir. 1983). Return to text

71. United States v. Burke, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983). Return to text

72. *Lopez*, 14 Media L. Rep. (BNA) 2203 (N.D. Ill. 1987). Return to text

73. *Id.* at 2205-06. Return to text

74. Campbell v. Klevenhagen, 760 F. Supp. 1206, 1215-16 (S.D. Tex. 1991). Return to text

75. N.Y. Civ. Rights Law sec. 79-h(c) (McKinney 1992). Return to text

76. Lipinski v. Skinner, 781 F. Supp. 131, 136 (N.D.N.Y. 1991) (citations omitted). Return to text

77. United States v. Sanusi, 813 F. Supp. 149, 154 (E.D.N.Y. 1992). Return to text

78. *Id.* at 159. Return to text

79. *Id.* Return to text

80. *Id.* at 160. Return to text

81. *See id.* Return to text

82. *Id.* Return to text

83. *Id.* Return to text

84. *Id.* at 156. Return to text

85. *Id.* at 155 (citing Anderson v. WROC-TV, 441 N.Y.S.2d 220 (Sup. Ct. 1981) (reporters accompanied county humane society investigators executing search warrant)). Return to text

86. *Id.* at 156 (citing Dietemann v. Time, 449 F.2d 245 (9th Cir. 1971) (reporters used subterfuge to gain consent to enter defendant's home where they surreptitiously photographed and recorded him)). Return to text

87. *Id.* at 155. Return to text

88. *Compare* Kent R. Middleton, *Journalists, Trespass, and Officials: Closing the Door on* Florida Publishing Co. v. Fletcher, 16 Pepp. L. Rev. 259, 294 (1989) ("Despite the newsworthiness of journalists' coverage of official activities in private homes, journalists should have no privilege to enter private homes with officials.") *with* David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 84 Colum. L. Rev. 1298, 1342 (1984) ("[C]ourts can and should strike a balance in newsgathering trespass cases between the press's newsgathering interests and . . . competing values."). Return to text

89. *Compare* Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. 1976) (precluding recovery for trespass against journalists who accompanied fire marshall), *cert. denied*, 431 U.S. 930 (1977) *with* Green Valley Sch., Inc. v. Cowles Fla. Brdcst., Inc., 327 So.2d 810 (Fla. Dist. Ct. App. 1976) (denying newspaper defendant's motion for summary judgment on claim of malicious trespass). Return to text

90. *Sanusi*, 813 F. Supp. at 160. Return to text

91. *Fletcher*, 340 So.2d at 916. Return to text

92. *Id.* Return to text

93. People v. Berliner, 3 Media L. Rep. (BNA) 1942 (N.Y. Yonkers City Ct. 1978). Return to text

94. Dyk, *supra* note 42, at 930 n.22. Return to text

95. *Green Valley Sch.*, 327 So.2d 810 (Fla. Dist. Ct. App. 1976). Return to text

96. *Id.* at 819 (emphasis in original). Return to text

97. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). Return to text

98. United States v. Sanusi, 813 F. Supp. 149, 156 (E.D.N.Y. 1992). Return to text

99. *Id.* Reporters have been found to have acted so closely in connection with the government that the journalists became government agents. *See, e.g.*, United States v. Chen, *discussed in* Michael Isikoff, *Justice Dept. Subpoenas Unaired NBC Tapes of Drug Seizure*, Wash. Post, Jan. 18, 1992, at A3 (requiring prosecutor to subpoena outtakes from NBC where NBC worked so closely with Customs Service during drug surveillance and raid that an agency relationship was formed).

    According to Henry Rossbacher, Ayeni's attorney, CBS did voluntarily become an agent of the government. Hall, *Judge Says `Reality' TV Can't Join Raids*, *supra* note 3, at F12. Return to text

100. *Sanusi*, 813 F. Supp. at 158. "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frailits roof may shakethe wind may blow through itthe storm may enterthe rain may enterbut the King of England cannot enter!" *Id.* (quoting Anderson v. WROC-TV, 441 N.Y.S.2d 220, 226 (Sup. Ct. 1981) (quoting William Pitt)). Return to text

101. *Id.* "If the news media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were found so odious to the American colonists." *Id.* (quoting *Anderson*, 441 N.Y.S.2d at 226). Return to text

102. *Id.* at 159. Return to text

103. *Id.* at 160. Return to text

104. *See* N.Y. Penal Law sec.sec. 140.05-.17 (McKinney 1988). Return to text

105. N.Y. Penal Law sec. 140.05 (McKinney 1988) ("A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises. Trespass is a violation."). Return to text

106. N.Y. Penal Law sec. 140.15 (McKinney 1988) ("A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling. Criminal trespass in the second degree is a class A misdemeanor."). Return to text

107. N.Y. Penal Law sec.sec. 140.05, 140.15 (McKinney 1988) (emphasis added). Return to text

108. Socony-Vacuum Oil Co. v. Bailey, 109 N.Y.S.2d 799 (Sup. Ct. 1952). Return to text

109. United States v. Sanusi, 813 F. Supp. 149, 160 (E.D.N.Y. 1992). Return to text

110. *Id.* Return to text

111. *Id.* Return to text

112. Babatunde Ayeni's wife and son, who were in the apartment while the CBS camera crew filmed the search, did bring a civil action against the network, the Secret Service, and postal agents. Ayeni v. CBS Inc., 22 Media L. Rep. (BNA) 1466 (E.D.N.Y. 1994). Tawa and Kayode Ayeni alleged emotional distress and violation of privacy and the right to be free from unreasonable searches and seizures. *New York: Judge Allows Suit over Videotaped Search*, Liability Wk., Mar. 28, 1994, *available in* LEXIS, News Library, Wires File. An out-of-court settlement between the plaintiffs and CBS was reached in March 1994, although the settlement's terms were not disclosed. Joseph P. Fried, *CBS Reaches a Settlement on Videotaped Search*, N.Y Times, Mar. 20, 1994, sec. 1, at 17. According to a CBS spokesperson, the settlement was "not an admission" that the network had violated the Ayenis' rights. *Id.* Return to text

113. *See, e.g.*, Nicholson v. McClatchy Newspapers, 223 Cal. Rptr. 58, 62 (Ct. App. 1986) ("[T]he First Amendment protects the ordinary news-gathering techniques of reporters and those techniques cannot be stripped of their constitutional shield by calling them tortious."). Return to text

114. *Sanusi*, 813 F. Supp. at 156. Return to text

115. Cohen v. Cowles Media Co., 111 S. Ct. 2513, 2518 (1991) ("[E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."). Return to text

116. Galella v. Onassis, 487 F.2d 986, 995-96 (2d Cir. 1973), *quoted in Sanusi*, 813 F. Supp. at 155. Return to text

117. *Id.* at 994. Return to text

118. United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988). Return to text

119. United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981). Return to text

120. *Florida Star*, 491 U.S. 524 (1989). Return to text

121. *Id.* at 541 (emphasis added). Return to text

122. *Id.* at 535 n.8 (emphasis in original). Return to text

123. Stewart, *supra* note 30, at 634. Return to text

124. *See, e.g.*, Cassidy v. ABC, 377 N.E.2d 126, 132 (Ill. App. Ct. 1978) (allowing summary judgment for defendant broadcasting company where police officer sued for invasion of privacy after broadcaster filmed undercover police investigation of lingerie show). Return to text

125. Jerome H. Skolnick & Candace McCoy, *Police Accountability and the Media*, 1984 Am. B. Found. Res. J. 521, 527. Return to text

126. Katz, *supra* note 2, at 25. Return to text

127. The co-producer and creator of Fox's *Cops* series claims that program should not be grouped with other reality shows. The show features unnarrated footage of police at work, without re-creations, music, slow motion, or retakes. *Cops*, which he says is "TV's only reality police series," is "primarily entertainment programming, not exclusively news with its accompanying umbrella of protection." Malcolm Barbour, *Counterpunch: Please Don't Lump `Cops' with Those `Reality' Shows*, L.A. Times, Dec. 14, 1992, at F3. Return to text

128. Zoglin, *supra* note 2, at 62; *see also* David Johnston, *Shooting Down TV's Cop Shows*, TV Guide, Apr. 9-15, 1983, at 47, 50, *reprinted in* Police and the Media 121, 124 (Patricia A. Kelly ed., 1987) (quoting Los Angeles Deputy Chief Jesse Brewer, technical advisor to *Hill Street Blues*) ("[M]any people assume what they are seeing [on police dramas] is proper and accepted police behavior."). Return to text

129. Lew Irwin, *Cops and Cameras*, Colum. Journalism Rev., Sept./Oct. 1991, at 15, 15. The media need to maintain good relationships with both their audience and the police, which can be difficult when the media present a story critical of an agency perceived as good. *Id.*; *see also* National News Council, *supra* note 47, at 13 (describing audience criticisms of broadcast footage of police kneeing a handcuffed, passive suspect). Pieces showing gratuitous police brutality have been discarded so that future reporting would not be jeopardized. Irwin, *supra*, at 16. Return to text

130. Irwin, *supra* note 129, at 17 (second alteration in original). Return to text

131. Hall, *Ruling May Affect Taping of Searches*, *supra* note 4, at F1 (statement of Brian Ross, an NBC award-winning investigative reporter). Return to text

132. *See, e.g.*, *supra* note 99. Return to text

133. Preferential seating may be given to media representatives when courtroom capacity is limited. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980). In the 1993 trial of Detroit police officers accused of fatally beating Malice Green, no courtroom seats were made available to the publichalf were reserved for the families of the victim and the accused and half were reserved for the press. Ann Sweeney, *Judge Hopes to Avoid `Circus' in Detroit Police Beating Case*, Gannett News Service, May 14, 1993, *available in* LEXIS, News Library, Wires File. Return to text

134. Where a defendant's rights have been severely violated, appellate courts may also be able to overturn a conviction. *See* Ascher v. Commissioner of Pub. Safety, 505 N.W.2d 362 (Minn. App. 1993), *review granted*, No. C3-93-364, 1993 Minn. LEXIS 754 (Oct. 28, 1993). Return to text

135. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts sec. 652B (1977). Return to text

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

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

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

Id. sec. 158. Return to text