The Legal Future of Reality Cop Shows: Parker v. Boyer Dismisses 1983 Claims against Police Officers and Television Stations Jointly Engaged in Searches of Homes

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THE LEGAL FUTURE OF "REALITY" COP SHOWS: PARKER v. BOYER DISMISSES § 1983 CLAIMS AGAINST POLICE OFFICERS AND TELEVISION STATIONS JOINTLY ENGAGED IN SEARCHES OF HOMES

I. INTRODUCTION

Over the years, television viewers have maintained an appetite for police action on TV, tuning into police dramas, fact-based television movies and most recently, "reality" programs featuring actual police officers on duty. In 1992, "reality" and "reality-based" shows achieved high ratings while fictional cop shows declined in popularity. By 1995, fifteen reality or reality-based programs were

2. Some authors have used the terms "reality" and "reality-based" interchangeably to refer to shows featuring either actual footage of real police officers on duty or re-enactments of police stories. See, e.g., Kevin Goldman, CBS Is Shuffling Its TV Schedule After Three Weeks, WALL ST. J., Oct. 5, 1990, at B6 (describing "Top Cops" program, featuring police re-enactments, as "reality program" and subsequently as "reality-based" show). Other authors use the terms "reality" or "reality-based" only to refer to programs featuring actual police officers on duty. See, e.g., Howard Kurtz, Hidden Network Cameras: A Troubling Trend? Critics Complain of Deception as Dramatic Footage Yields High Ratings, WASH. POST, Nov. 30, 1992, at A1 (referring to "Street Stories" and "COPS" programs which feature actual footage of police activity as examples of "reality-based" shows). A third group of authors distinguishes the two terms, using "reality" to refer to programs featuring actual footage of real police officers, and "reality-based" to refer to programs that recreate incidents using actors rather than broadcasting video footage of actual police operations. See, e.g., Kevin E. Lunday, Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis, 65 GEO. WASH. L. REV. 278, 308 nn.3 & 5 (1997) (defining "reality" television as programs featuring actual video footage of police during performance of their duties and "reality-based" programs as programs that recreate police incidents with actors).

For purposes of this Note, the term "reality" will be used to refer to programs featuring footage of actual law enforcement officers on duty. The term "reality-based" will be reserved for programs showing recreations of police operations.

slated for broadcasting, including at least three focusing entirely on crime fighting. While most of the public watches reality programming for its entertainment value, others support reality programs like the Fox Network’s “COPS” for the positive effects the programs have on law enforcement.

Despite the overall success of reality and reality-based programs, some networks have reduced the number of reality and reality-based programs they broadcast. Faced with intense competition from other networks, a few broadcasters have chosen to cancel their reality programs. Other networks have cut their reality programs in response to public protests against violence on

one third of respondents surveyed listed local TV news and reality shows, like Fox Network’s “COPS”, as serious concerns in violence debate. Proponents of reality programming argue that the violence in reality programming serves legitimate purposes which contribute to their popularity. See George Vradenburg III, Understanding Violence on Television, 11 COMM. LAW. 9, 10 (1993) (arguing that reality programs - like “COPS” - show viewers “adverse consequences of antisocial violent behavior”). For more discussion regarding the violent content of reality programs, see infra note 8.

Notwithstanding America’s enduring interest in violence, experts have noted other reasons for the success of reality programming. Some sources believe the success of reality programming is linked to the public’s growing mistrust and lack of confidence in law enforcement officials. See Lunday, supra note 2, at 278. Others note that networks are drawn towards reality programming because the shows are cheaper to produce than other types of programming. See Richard Turner, News Corp.’s Fox Forms News Unit Headed by Chao, WALL ST. J., Mar. 17, 1992, at B8; Richard Zoglin, Goodbye to the Mass Audience: In a Fall of Failure, the Networks Struggle to Learn a New, More Competitive Game, TIME, Nov. 19, 1990, at 122. Sources also attribute the recent glut of reality programs to advances in visual recording technology which capture dramatic footage and “turn undercover work into highly rated entertainment.” Kurtz, supra note 2, at A1. Still others believe that reality programming appeals to the public’s obscure desire for shows which fall “somewhere on the spectrum between hard news and pure entertainment.” Thomas D. Yannucci, Debunking “The Big Chill” — Why Defamation Suits by Corporations are Consistent with the First Amendment, 39 ST. LOUIS U. L.J. 1187, 1190 (1995).


5. See Zoglin, supra note 1, at 62. Many police officers welcome the television exposure, believing that the programs convey their human sides and dispel their “Dirty Harry” images. See id. According to some officers, the presence of a television camera in plain sight keeps police on their best behavior. See id. In addition, police officers believe that the presence of television cameras inhibits suspects from getting violent. See id.

6. See Alan Bash, Viewers Can Get a Dose of Reality in Syndication, USA TODAY, May 30, 1995, at 3D (discussing how Fox and CBS have opted to cut and replace reality shows due to diminishing value of reality television).

7. See Pete Schulberg, You Want Shock-TV? Try Scariest Car Chases, PORTLAND OREGONIAN, Feb. 1, 1997, at C1 (noting that broadcasters have pulled some of their reality programs in response to drops in viewer interest).
television.\textsuperscript{8} Statistics have shown that viewers are more unnerved by content on reality programs and news stories than by fictional programs.\textsuperscript{9} In light of these statistics, critics are especially concerned with the number of young children tuning into reality and reality-based programs.\textsuperscript{10}

Despite the controversy behind reality programming, most networks have overcome their reservations about airing the shows.\textsuperscript{11} The public's craving for police chases is too strong to be ignored by networks.\textsuperscript{12} Reality television has remained popular because it offers viewers the unexpected.\textsuperscript{13} Networks have preserved the appeal

\textsuperscript{8} See id. In the early 1990s, a network took its program "American Detective" off the air despite favorable ratings when advertisers expressed concern about the program's content. See id. Many authors attribute the upsurge of violent crimes reported in the late 1980s and 1990s to increased violence in television programs and movies. See, e.g., James Alan Fox & Glenn Pierce, \emph{American Killers Are Getting Younger}, USA Today, Jan. 1, 1994, at 24. Opponents of violent programming claim that violent programs "glorify criminals, transforming insignificant and obscure nobodies into national celebrities." Id.

\textsuperscript{9} See Donna Gable, \emph{Reality-Based Violence Hits Harder}, USA Today, May 10, 1994, at 3D. According to a \emph{USA Today} survey, 64% of those who watch news programs say that something they saw on the news unnerved them. See id. In contrast, less than 25% of those who watch fictional programs reported being bothered by the content. See id.

\textsuperscript{10} See id. In a \emph{USA Today}/Nickelodeon survey of 503 children ages 8 to 12, more than 50% said that they enjoyed watching Fox Network's "COPS". See id. Yet almost two-thirds admit to being scared or upset by what they saw on these shows. See Gable, supra note 9, at 3D. William Abbot, president of the National Foundation to Improve Television, says that violent images on television, whether real or fictional, teach children that violent behavior is acceptable in society. See id.

In response to these arguments, several proponents of reality television insist that parents are to blame for any negative effects television has on their children. See id. In support of this contention, John Langley, the creator of "COPS," noted that parents are responsible if their children suffer aftereffects from television violence. See id. According to Langley, "COPS' was not designed for kids ages 8-12, so if a kid under 12 is watching, [it is understandable] why they're seeing is having an impact on them." Id. For a discussion of violence debate surrounding reality television, see Gutman, supra note 3, at 46 (discussing general public's opinion of violent programming like reality programs); Laura B. Schneider, \emph{Warning: Television Violence May Be Harmful to Children; But the First Amendment May Foil Congressional Attempts to Legislate Against It}, 49 U. MIAMI L. REV. 477 (1994) (discussing reality programs' impact on viewer's perceptions of world); Richard Zoglin, \emph{The Networks Run for Cover: To Avoid a Warning Label, Violent Shows Are Getting Toned Down - Or Dropped}, Time, Aug. 2, 1993, at 52 (discussing advertisers' willingness to advertise alongside programs having violence warnings).

\textsuperscript{11} See Schulberg, supra note 7, at C1. By February, 1997, reality shows were "back with a vengeance." Id. Some authors believe that networks cast away their concerns and brought back reality programs largely based on their desire for higher ratings. See id.

\textsuperscript{12} See id. (noting that television viewers are not inclined to change channel when watching actual police officers in hot pursuit of criminals).

\textsuperscript{13} See id. According to program creators like Paul Stojanovich, who created "COPS" and "American Detective," people continue to watch reality programs because of their unpredictability. See Schulberg, supra note 7, at C1.
of reality programs by limiting the number of episodes aired in a season.\textsuperscript{14} Other networks have kept reality programs alive by releasing them for syndication.\textsuperscript{15}

As reality programming became more and more popular in the 1990s, legal questions emerged with respect to media representatives who accompany police officers during searches. In 1994, the federal courts began addressing legal issues that arose when police officers permitted television crews to accompany them during the execution of search warrants in suspects’ homes.\textsuperscript{16} These issues include: (1) whether such conduct violates a suspect’s Fourth Amendment rights, (2) whether police officers who permit media to accompany them during searches are entitled to qualified immunity from civil rights actions, and (3) whether media personnel who accompany police officers during searches are subject to civil rights actions.\textsuperscript{17} Courts remain divided as to whether police officers are entitled to qualified immunity from civil rights claims, and whether media representatives who accompany police officers during searches are subject to civil rights claims.\textsuperscript{18} In \textit{Parker v. Boyer}\textsuperscript{19} (\textit{Parker II}), the United States Court of Appeals for the Eighth Circuit concluded that neither police officers nor a television news station were liable for civil rights violations when the station’s camera

\textsuperscript{14} See Bash, supra note 6, at 3D. For example, in the spring of 1997, CBS cut the reality-based program “Rescue-911” from its fall lineup. See \textit{id}. Nevertheless, CBS ordered 13 episodes for its midseason lineup. See \textit{id}. The Fox network reduced the air time of its reality program, “COPS,” from two episodes per week to one. See \textit{id}. Another reality show, “America’s Most Wanted,” was cut from 60 minutes to 30 minutes. See \textit{id}.

Despite these cutbacks, producers of the shows have responded positively, believing that the reduced number of shows produced will keep the programs fresh and ultimately increase their longevity. See Bash, supra note 6, at 3D. For instance, new episodes of “COPS” were once broadcast each week paired with older reruns. See \textit{id}. By eliminating the weekly reruns, the show’s producer, John Langley, was able to spread more episodes out over longer periods, thereby reducing the frequency of reruns. See \textit{id}.

\textsuperscript{15} See Bash, supra note 6, at 3D. Reality-based programs that moved to syndication include “Real Stories of the Highway Patrol,” “Top Cops” and “Emergency Call.” See \textit{id}.

\textsuperscript{16} See, e.g., Ayeni v. Mottola (\textit{Ayeni II}), 35 F.3d 680 (2d Cir. 1994) (discussing Fourth Amendment implications when secret service agents allow media to accompany them during searches of homes). For a detailed discussion of \textit{Ayeni II}, see \textit{infra} notes 87-94.

\textsuperscript{17} See Ayeni v. CBS (\textit{Ayeni I}), 848 F. Supp. 362, 365-67 (E.D.N.Y. 1994) (discussing whether qualified immunity should be granted to Secret Service agent and major television network for jointly engaging in search of person’s home).

\textsuperscript{18} For a discussion of the disagreement between federal courts regarding the qualified immunity issue, see \textit{infra} notes 87-103 and accompanying text. For a discussion of the disagreement between federal courts regarding the liability of media representatives, see \textit{infra} notes 129-36 and accompanying text.

\textsuperscript{19} 93 F.3d 445 (8th Cir. 1996).
crew accompanied police officers into a private home during the execution of a search warrant and videotaped the search.\textsuperscript{20}

Section II of this Note begins with a discussion of the facts surrounding \textit{Parker II}.\textsuperscript{21} Section III summarizes the development of legal issues that arise when the media accompanies police officers during the execution of a search warrant and records the search.\textsuperscript{22} Section IV examines the Eighth Circuit's analysis in \textit{Parker II}.\textsuperscript{23} Section V analyzes the Eighth Circuit's decision in light of earlier decisions by the Supreme Court and other circuit courts.\textsuperscript{24} Section VI discusses the impact that the Eighth Circuit's decision will have on qualified immunity of police officers in similar situations and media participation in police searches.\textsuperscript{25}

\section*{II. \textbf{Facts}}

In 1994, Randy Jackson, a reporter from the St. Louis television station Multi-Media KSDK, Inc. (KSDK), began developing a news story which profiled the St. Louis Police Department's efforts to eradicate illegal weapons.\textsuperscript{26} Jackson contacted the police department's mobile reserve unit and informed them that he was interested in running a news story about law enforcement efforts against the trade of illegal weapons.\textsuperscript{27} A short time later, the police contacted Jackson and informed him that he was welcome to cover a weapons investigation that was in progress.\textsuperscript{28} The investigation focused on Travis Martin, a man who resided with the plaintiffs, Sandra Parker and her sixteen year old daughter, Dana.\textsuperscript{29}

On February 9, 1994, Sergeant Simon Risk informed Officer Rodney Boyer that KSDK personnel would be accompanying him

\textsuperscript{20} See id. at 447-48.
\textsuperscript{21} For a discussion of the facts in \textit{Parker II}, see infra notes 26-38 and accompanying text.
\textsuperscript{22} For a discussion of the legal issues arising from police-media searches, see infra notes 39-136 and accompanying text.
\textsuperscript{23} For a discussion of the Eighth Circuit's analysis in \textit{Parker II}, see infra notes 137-56 and accompanying text.
\textsuperscript{24} For an analysis of the Eighth Circuit's decision, see infra notes 157-95 and accompanying text.
\textsuperscript{25} For a discussion of \textit{Parker II}'s impact on police/media searches and the legal analysis of similar cases, see infra notes 196-207 and accompanying text.
\textsuperscript{27} See id. at 641.
\textsuperscript{28} See id.
\textsuperscript{29} See \textit{Parker II}, 93 F.3d at 446. Travis Martin was a relative of the plaintiffs. See \textit{Parker I}, 905 F. Supp. at 641.
on his shift that evening. KSDK personnel joined up with Officer Boyer and Officer Dan Dell, and the group drove to Sandra Parker’s residence in a police car. After police detained Martin outside the house, seven police officers, including Boyer and Dell, executed a search warrant of the house. Jackson and Jeff McCol- lum, a camera operator from KSDK, followed the police officers into the house and filmed the execution of the search warrant. KSDK subsequently broadcast the tapes recorded at the Parker’s residence on several news programs.

The plaintiffs brought suit against the police officers that conducted the search and KSDK, asserting violations of their civil rights and state tort law. On appeal, the United States Court of

30. See Parker I, 905 F. Supp. at 641.
31. See id.
32. See id. at 446-47. The scope of the search warrant included cocaine, heroin, weapons, currency and records of drug transactions. See Parker I, 905 F. Supp. at 640. Two weapons and several substances believed to be rock cocaine and powder cocaine were seized during the search. See id. at 641. Martin was subsequently arrested for controlled substances and firearms offenses, but charges were never filed against him. See id.
33. See Parker I, 905 F. Supp. at 641. The police did not give any instructions or directions to KSDK personnel, nor did police impose any restrictions on their conduct or what they could record. See id.
34. See Parker I, 905 F. Supp. at 641. Some or all of the footage recorded by KSDK personnel was broadcast on local news programs on February 9, 10, 11, and May 6, 1994. See id.
36. See Parker II, 93 F.3d at 446. The United States District Court for the Eastern Division of Missouri granted summary judgment for the plaintiffs against Officer Boyer, Officer Dell and Sgt. Risk on the § 1983 claims based on violation of the Fourth Amendment. See Parker I, 905 F. Supp. at 644. For a discussion of 42 U.S.C. § 1983, see infra note 62 and accompanying text. According to the district court, “Boyer and Dell were the most directly involved in the determination to allow the media personnel access to the plaintiffs’ house during the execution of the search warrant.” Parker I, 905 F. Supp. at 644. The district court concluded that Sgt. Risk was liable since he was the supervisory officer who directed Boyer and Dell to allow KSDK personnel to accompany them on their shift and was present at the residence to supervise the execution of the search warrant. See id.

The district court granted summary judgment in favor of KSDK on the Fourth Amendment claims, finding that KSDK did not act under color of state law and therefore could not be held liable under § 1983. See id. at 643. The district court declined jurisdiction over the plaintiffs’ state law claims. See id. at 646. Pursuant to an appeal, Officers Boyer, Dell and Risk filed motions with the district court for
Appeals for the Eighth Circuit held that the police officers were entitled to qualified immunity from § 1983 claims, as their conduct did not violate clearly established Constitutional principles of which the police, at the time of the search, should have been aware.\textsuperscript{37} In addition, the Eighth Circuit held that KSDK personnel were not liable under § 1983 since they were not acting "under color of state law" when they entered the plaintiff's house and recorded the search.\textsuperscript{38}

III. BACKGROUND

The conflict in Parker II is based on the application of two legal principles: (1) the qualified immunity of police officers from civil actions, and (2) the "color of state law" requirement that plaintiffs must satisfy to prevail in § 1983 claims against private parties.\textsuperscript{39} This Section begins by tracing the legal development of qualified immunity as courts have applied it to police conduct.\textsuperscript{40} Part B of this Section discusses historical interpretations of the "color of state law" requirement, how courts have applied it to private third parties in general and how courts have applied it specifically to media personnel.\textsuperscript{41}

A. Qualified Immunity of Police Officers

While the concept of qualified immunity of police officers is hardly new, the application of qualified immunity to police conduct in the context of media ride-alongs has not been explored until recently.\textsuperscript{42} First, this Section begins with a discussion of the test for qualified immunity and how it developed over time.\textsuperscript{43} Second, this Section addresses Constitutional and statutory restrictions that define the reasonableness of police conduct during searches.\textsuperscript{44} Third,
this Section reviews federal and state court decisions which have applied qualified immunity principles to police who allowed private third parties to participate in searches of homes.\textsuperscript{45} Fourth, this Section extends its review of cases to those few that have applied qualified immunity analysis to media personnel who participated in police searches.\textsuperscript{46}

1. \textit{Qualified Immunity of Law Enforcement Officers and the "Reasonableness" Requirement}

When law enforcement officials abuse their powers in violation of an individual’s Fourth Amendment right to freedom from unreasonable searches, the individual may bring a private cause of action for relief.\textsuperscript{47} While civil suits provide individuals with a means of vindicating their Constitutional guarantees, they also pose a risk of inhibiting law enforcement officials from discharging their duties.\textsuperscript{48} Therefore, the Supreme Court has provided government officials who perform discretionary functions, like law enforcement personnel, with a qualified immunity that shields them from civil damages liability.\textsuperscript{49} This immunity is provided so long as the government actors reasonably thought that their actions did not violate a Constitutional right.\textsuperscript{50}

The most commonly cited test for qualified immunity appeared first in \textit{Harlow v. Fitzgerald},\textsuperscript{51} where the Supreme Court held that government officials are entitled to qualified immunity “if their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known.”\textsuperscript{52} In

\textsuperscript{45} \textit{See infra} notes 68-73 and accompanying text.

\textsuperscript{46} \textit{See infra} notes 74-103 and accompanying text.

\textsuperscript{47} \textit{See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971)} (holding that plaintiff was entitled to recover money damages for injuries suffered from narcotics agents’ acts that violated plaintiff’s Fourth Amendment rights.)

\textsuperscript{48} \textit{See Anderson v. Creighton, 483 U.S. 635, 638 (1987).} The lingering threat of having to pay damages may instill a fear in government officials of personal monetary liability and harassing litigation. \textit{See id.}

\textsuperscript{49} \textit{See id.} According to the Supreme Court, qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” \textit{Bills v. Asetline, 52 F.3d 596, 601 (6th Cir. 1995)} (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

\textsuperscript{50} \textit{See Anderson, 483 U.S. at 638 (1987).}

\textsuperscript{51} 457 U.S. 800 (1982).

\textsuperscript{52} \textit{Id.} at 818. According to the Court, reliance on the objective reasonableness of an official’s conduct in the context of clearly established law would avoid the disruption of government functions and dispose of insubstantial claims against government officials. \textit{See id.} In deciding what the official should have known, the
Anderson v. Creighton,\textsuperscript{53} the Supreme Court clarified the definition of a "clearly established" right.\textsuperscript{54} According to the Court, the plaintiff does not need to show applicable case law that explicitly recognizes the right asserted by the plaintiff.\textsuperscript{55} Nor must the plaintiff show case law on point which explicitly holds that conduct similar to the conduct alleged is unconstitutional.\textsuperscript{56} A right that is violated

court should determine: (1) the currently applicable law, and (2) whether the applicable law was established at the time the actions in question occurred. \textit{See id.}

In Harlow, A. Ernest Fitzgerald brought suit against senior White House aides who allegedly conspired to wrongfully discharge Fitzgerald from his position with the Department of the Air Force. \textit{See id.} at 804. According to Fitzgerald, White House aides planned to terminate his position after word spread that he planned to publicize "shoddy purchasing practices" by the Nixon Administration. \textit{See} Harlow v. Fitzgerald, 457 U.S. 800, 804 (1982).

After establishing that the aides were entitled only to qualified immunity, as opposed to absolute immunity, the Supreme Court established the criteria for granting qualified immunity to government officials. \textit{See id.} at 818. The Supreme Court stated,

\begin{quote}
[w]e . . . hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known.

. . . On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.
\end{quote}

\textit{Id.} The Supreme Court remanded the case to address whether Fitzgerald's pretrial showings were sufficient to withstand a motion for summary judgment. \textit{See id.} at 819-20.

\textsuperscript{53} 483 U.S. 635 (1987).

\textsuperscript{54} \textit{See id.} at 640. In \textit{Anderson}, FBI agents conducted a warrantless search of the Creighton family's home based on the belief that an individual suspected of robbing a bank earlier that day may have been hiding there. \textit{See id.} at 637. Robert Creighton asked FBI Agent Anderson to show him a warrant for the search. \textit{See} Creighton v. City of St. Paul, 766 F.2d 1269, 1270 (8th Cir. 1985), \textit{vacated sub nom.} Anderson v. Creighton, 483 U.S. 635 (1987). Agent Anderson replied, "[w]e don't have a search warrant [and] we don't need [one]; you watch too much T.V." \textit{See id.} The search turned out to be fruitless. \textit{See Anderson}, 483 U.S. at 637.

The Creightons subsequently filed a claim for damages against Anderson, claiming Anderson violated their Fourth Amendment rights. \textit{See id.} Anderson filed a motion for summary judgment, arguing the claim was barred by Anderson's qualified immunity. \textit{See id.} The district court granted Anderson's motion for summary judgment, finding that Anderson had probable cause to search the Creighton's home and that exigent circumstances justified his failure to obtain a warrant. \textit{See id.} The Eighth Circuit Court of Appeals reversed the district court's grant of summary judgment, finding that there were unresolved factual issues as to whether the agents had probable cause and whether exigent circumstances existed. \textit{See id.} at 637-38. The court of appeals also reversed summary judgment on qualified immunity grounds, since the Creightons' right to be protected from unreasonable searches was clearly established. \textit{See Anderson}, 483 U.S. at 638. The Supreme Court vacated the circuit court's decision and remanded the case for further proceedings to allow Agent Anderson to present facts establishing that he could have reasonably believed that the search was lawful. \textit{See id.} at 646.

\textsuperscript{55} \textit{See Anderson}, 483 U.S. at 640.

\textsuperscript{56} \textit{See id.}
by an official's act will be deemed "clearly established" if the unlaw-
fulness of the official's act is apparent to a reasonable person in
light of pre-existing law. In Anderson, the Supreme Court empha-
sized that the right which the plaintiff alleges is violated must be a
specific right rather than a general principle expressed in the Con-
stitution. Therefore, the plaintiff must assert a violation of a spe-
cific right that is concrete enough to enable a reasonable official to
understand that his actions are violating that right.

2. Constitutional Background and Statutory Development

Americans have placed great value on the inviolability of the
home, providing for its protection in the Fourth Amendment of the
Constitution. From this core principle, our laws have grown to
treat warrantless entry into a home as unreasonable per se and
therefore unconstitutional (assuming no exigent circumstances).
Congress has provided a private cause of action for violations of

57. See id.
58. See id. at 640-41. Justice Scalia stated that although a general Fourth
Amendment right to be free from warrantless searches is clearly established, it
does not follow that Agent Anderson's search without a warrant was unreasonable.
See id. at 641. Justice Scalia noted that it is easy for officers to mistakenly determine
that there is probable cause in a given situation. See Anderson, 483 U.S. at 641.
Therefore, the reasonableness of an agent's conduct will not stem from a general
Fourth Amendment principle, but rather from specific facts pertaining to what
information was available to the agent. See id. Absent a clearly established specific
right asserted by the Creightons, the Court refused to create an exception to the
general rule of qualified immunity for situations where agents conduct warrantless
searches believing that there is sufficient probable cause and exigent circum-
stances. See id.
59. See David Rudovsky, The Qualified Immunity Doctrine in the Supreme Court:
Judicial Activism and the Restriction of Constitutional Rights, 138 U. PA. L. REV. 23, 48
interpretation to Parker II, the Parkers would have the burden of showing that the
St. Louis Police Department violated their Constitutional right to be free from
criminal searches in which parties other than legitimate law enforcement officials are
invited to watch and record.
60. See Antonio Yanez, Jr., Ayeni v. Mottola and the Implications of Characterizing
Videotaping as a Fourth Amendment Seizure, 61 BROOK. L. REV. 507, 531 (1995). The
Fourth Amendment provides, "[t]he right of the people to be secure in their . . .
houses . . . against unreasonable searches and seizures, shall not be violated . . ."
U.S. CONST. amend. IV. "[T]he right of a man to retreat into his own home" has,
in fact, been deemed to stand 'at the very core of the Fourth Amendment.'
Yanez, supra, at 532 (quoting Soldal v. Cook County, 506 U.S. 56, 61 (1992)); see
also United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976)(noting that right to
privacy in dwellings is "ordinarily afforded the most stringent Fourth Amendment
protection").
61. See Yanez, supra note 60, at 532.
any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or
§ 1983 to deter government officials from violating individuals’ Constitutional rights.63 Section 1983 is also a compensatory remedy which attempts to make whole victims of wrongful government conduct.64

With regard to search warrants, Congress enacted legislation to limit who may serve a search warrant.65 Although not expressly stated in the statute, many courts have construed 18 U.S.C. § 3105 as determining who may “execute” a warrant.66 While § 1983 is not controlling authority which limits the scope of the Fourth Amendment, courts have used it when assessing the “reasonableness” of police officers’ conduct under the Fourth Amendment in permitting private third parties to be present during the execution of search warrants.67

3. Lawfulness of Private Third Party Involvement in Police Searches

Several circuit courts have addressed the lawfulness of police officers inviting private parties to participate in, or witness the execution of, a search warrant in a private home. In Buonocore v. Harris,68 the Fourth Circuit held that the Fourth Amendment prohibits

causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . . .” Id.


64. See id. at 757. Section 1983 provides a make-whole remedy “without chilling the discretion necessary to the conduct of well-intentioned, vigorous government actors.” Id.

65. See 18 U.S.C. § 3105 (1997). According to the statute, “[a] search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.” Id.

66. See Ayeni v. Mottola, 35 F.3d 680, 687 (2d Cir. 1994) (noting that § 3105 identifies who may serve and who may execute search warrants); United States v. Wright, 667 F.2d 793, 797 (9th Cir. 1982) (noting that § 3105 authorizes officers to utilize assistance of other law enforcement officers in execution of search warrants); United States v. Clouston, 623 F.2d 485, 486 (6th Cir. 1980) (holding that § 3105 allows telephone company employees to assist in execution of search warrant); United States v. Gervato, 474 F.2d 40, 45 (3d Cir. 1973) (noting that § 3105 restricts the execution of search warrants to certain law enforcement officers).

67. See Ransom, supra note 4, at 335. In United States v. Clouston, the Sixth Circuit held that it was not unreasonable under the Fourth Amendment for law enforcement officers to have telephone company employees present during the search to aid the officers. 623 F.2d 485, 486-87 (6th Cir. 1980). Similarly, in United States v. Gambino, the district court held that the presence and assistance of a confidential informant during a search executed by police officers was not unreasonable under the Fourth Amendment. 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990).

68. 65 F.3d 347 (4th Cir. 1995).
government agents from using search warrants to allow private individuals to conduct their own independent search of a suspect's home for items unrelated to those specified in the warrant.69 Conversely, in Bills v. Aseltine,70 the Sixth Circuit affirmed a holding in favor of a police officer who invited a private party into a suspect's home to conduct an independent search during the execution of a search warrant.71

In United States v. Wright,72 the Ninth Circuit held that a search warrant may not be executed by individuals, except those who specifically aid the officer and are authorized to conduct the search.73

69. See id. at 356. In Buonocore, a police officer received information about illegal and unregistered firearms at an individual's address. See id. at 350. The officer was also told that the suspect possessed equipment stolen from a telephone company who employed the suspect. See id. In addition to obtaining a search warrant for the firearms, the police officer invited a corporate security officer from the suspect's employer to accompany him during the execution of the search warrant and to conduct his own independent search for stolen company property. See id. The search warrant did not authorize any security officer to be present during the search, and the search warrant did not authorize any search for company property. See Buonocore, 65 F.3d at 350.

70. 52 F.3d 596 (6th Cir. 1995).

71. Id. at 599. In a case very similar to Buonocore, a police officer allowed a security officer from General Motors Corporation (GM) to conduct his own search for stolen GM property in the plaintiff's house during the execution of a search warrant for unrelated items. See id. The police officer obtained a search warrant for the items unrelated to the GM property, but did not seek a search warrant for the GM property because he felt he lacked sufficient probable cause. See id. Therefore, the police officer invited the GM security officer to identify and photograph GM property in order to obtain the requisite probable cause for a second warrant to seize the GM property. See id. Unlike the court in Buonocore, the district court in Bills submitted the issue to a jury as to whether the officer's conduct violated clearly established law. See Bills, 52 F.3d at 600. The jury concluded that the officer's action in allowing the GM security officer to tour the plaintiff's home with a camera for purposes unconnected with search warrant did not unreasonably exceed the scope of the search warrant. See id.

72. 667 F.2d 795 (9th Cir. 1982).

73. See id. at 797. In Wright, an agent from the Federal Bureau of Alcohol, Tobacco and Firearms (ATF) requested that an agent from the California Bureau of Narcotics Enforcement accompany him during the execution of a search warrant which authorized the seizure of a driver's license to be used as evidence of alleged firearm violations. See id. at 795. The ATF agent invited the narcotics officer because the suspect had a reputation of being a major narcotics dealer, and the narcotics agent could provide expertise in narcotics-related matters. See id. The Ninth Circuit held that the ATF's conduct in bringing the state narcotics officer into the search was authorized by 18 U.S.C. § 3105, since the narcotics officer acted "in aid of the officer on his requiring it, he being present and acting in [the search's] execution." Id. at 797 (quoting 18 U.S.C. § 3105).
4. Lawfulness of Media Involvement in Police Searches

The First Amendment\(^74\) protects the media from restrictions that interfere with their freedom to gather and report news.\(^75\) As a result, Congress and state legislatures have traditionally favored the media's interests in free speech over the interests of private individuals.\(^76\) The Supreme Court has placed limits on freedom of speech, however, so that media representatives who exercise this right must do so without interfering with other competing interests.\(^77\)

Until recently, courts never addressed the legal issues that arise when representatives of the media and television industries accompany police officers during searches of homes. As a growing number of media representatives have used invasive techniques in gathering their news, lawsuits against the media have steadily grown.\(^78\) Recent proliferation of news and information programs has bred intense competition among television producers, and reporters have become more aggressive in their news gathering.\(^79\) Driven by economic pressures to produce programs and stories that sell, many media representatives have increased their output of sensationalized programming.\(^80\) Recent technological advances have

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74. The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I (emphasis added).

75. See Yannucci, supra note 3, at 1187. Amidst all the civil liberties which Americans enjoy, freedom of speech and the press lies at the core of American freedoms. See id.

76. See id. Americans are willing to put aside private interests to preserve public debate. See id. For a discussion of the current vitality of the media fostered by the First Amendment, see infra note 79.

77. See Yannucci, supra note 3, at 1187. Issues of public safety, national security and the right to protect one's reputation are all interests that compete with and limit the exercise of free speech. See id.

78. See Maura Dolan, When the Camera is Too Candid — Legal Battles are Focusing on Tabloid TV, L.A. Times, Aug. 1, 1997, at A1 (discussing evolving body of law pitting rights of individuals against techniques employed in areas like tabloid television and investigative journalism).

79. See Yannucci, supra note 3, at 1192. The current vitality of the media is reflected by the ever increasing number of media outlets, which have grown to the point of oversaturation. See id. at 1189. Television viewers have access to several "news magazine" programs like "60 Minutes," "Dateline NBC" and "20/20." See id. In addition, there are an endless number of television talk shows, including "Larry King Live" and "Geraldo." See id. A number of networks focus exclusively on news, information and "infotainment." See id. at 1190.

80. See Yanucci, supra note 3, at 1190-91. The growth of sensationalized programming is most notable in today's talk shows. See id. at 1191. The Phil Donahue Show, for example, once covered issues in politics with reputable guests. See id. By 1995, however, the show found itself immersed in the battle for ratings with tabloid television, and topics quickly became more sensationalized. See id. Phil Donahue announced his retirement later that year, citing concern for the increased competition from tabloid television. See id.
fostered competition even more, providing programmers with faster and more creative ways to broadcast the news.\textsuperscript{81} For the first time, television producers have both the means and the market for taping the private lives of ordinary people.\textsuperscript{82} Many members of the media have responded to the competitive market by resorting to questionable tactics in gathering their news.\textsuperscript{83} As a result, victims of media exposure have filed various lawsuits against the media, including claims based on defamation,\textsuperscript{84} privacy\textsuperscript{85} and violations of the Fourth Amendment.\textsuperscript{86}

In Ayeni v. Mottola\textsuperscript{87} (Ayeni II), federal courts explored the Constitutional issues surrounding police officers who permit the presence of media participants during searches.\textsuperscript{88} On appeal, the

\textsuperscript{81} See Yanucci, supra note 3, at 1190. A video camera can now be made small enough to fit into a button. See Maura Dolan, The Right to Know vs. The Right to Privacy — with Cameras Following Cops and Accident Scenes Being Broadcast on TV, the Law Is Struggling to Keep up As Tabloid Shows Get More Aggressive, L.A. TIMES, Aug. 1, 1997, at A1. Modern sound equipment can capture whispers, amplify them and broadcast them to millions of television viewers. See id.

\textsuperscript{82} See Gail Diane Cox, Privacy’s Frontiers at Issue - Unwilling Subjects of Tabloid TV Are Suing, NAT’L L.J., Dec. 27, 1993, at 1 (noting that technological advancements in videotaping have arrived as expanding cable industry demands cheaper footage).

\textsuperscript{83} See Yanucci, supra note 3, at 1188. While the First Amendment entitles the media to broadcast matters of public concern, members of the media have engaged in increasingly intrusive tactics in gathering their news. See Dolan, supra note 81, at A1. Camera crews have followed paramedics into the bedrooms of heart attack victims and followed police officers into homes in response to domestic violence calls. See id. In addition to overt camera work, the media has employed concealed techniques, like creative editing and hidden cameras to gather news material. See Yanucci, supra note 3, at 1191. For example, Mike Wallace of the program “60 Minutes” confessed to videotaping an interview with an individual who asked not to be taped. See id.


\textsuperscript{85} See Ransom, supra note 4, at 346-47 (discussing intrusion claims against media representatives who physically trespass on private property without plaintiff's consent).

\textsuperscript{86} See infra notes 87-94 and accompanying text.

\textsuperscript{87} 35 F.3d 680 (2d Cir. 1994).

\textsuperscript{88} See id. In Ayeni II, a Secret Service agent brought three members of a CBS television crew into a suspect’s home while the agent executed the search warrant. See id. at 683. The CBS crew, who were engaged in a weekly news magazine program called “Street Stories,” followed the agents during the search and recorded events using a video camera and sound recording devices. See id. Mrs. Ayeni, the suspect’s wife, and her young son were home alone when agents forced their way into the apartment. See id. Dressed only in a night gown, Mrs. Ayeni objected to the crew’s videotaping of her and her son. See Ayeni II, 35 F.3d at 683. According to the record, Mrs. Ayeni tried to avoid the camera by covering her and her son’s face with a magazine. See id. The agent grabbed the magazine out of her hand,
Second Circuit held that clearly established Constitutional principles prohibit law enforcement officials from permitting media personnel to enter a home during the execution of a search warrant.\footnote{89} To support its conclusion, the court relied on 18 U.S.C. § 3105, which identifies who may serve a search warrant.\footnote{90} According to the Second Circuit, § 3105 forbids private third parties from participating in the execution of search warrants, unless they are specifically present to aid the police officers.\footnote{91} Since the CBS camera crew was not assisting the Secret Service agents in any way, the Sec-

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... threw it on the floor, and told the plaintiffs to “shut up.” \textit{See id.} The defendant then directed the camera crew to videotape Mrs. Ayeni's face. \textit{See id.} The camera crew also filmed the agents searching the home, capturing many of the Ayeni’s personal effects such as books, photographs, financial statements and personal letters on videotape. \textit{See id.} at 685. CBS videotaped the search for approximately 20 minutes but never broadcast any of the footage. \textit{See Ayeni II}, 35 F.3d at 684.

The Ayenis brought § 1983 actions against Agent Mottola, other agents and CBS, claiming violations of their Fourth Amendment rights. \textit{See id.} The district court concluded that CBS had violated the Ayenis' Fourth Amendment rights and denied CBS qualified immunity. \textit{See Ayeni v. CBS Inc.}, 848 F. Supp. at 367-68. CBS negotiated a confidential settlement with the Ayenis, and Agent Mottola was the sole defendant on appeal. \textit{See Ayeni II}, 35 F.3d at 684 n.2. For further discussion of the Ayenis' suit against CBS, see \textit{infra} notes 129-31 and accompanying text.

\footnote{89} \textit{See Ayeni II}, 35 F.3d at 686. According to the Second Circuit, the plain language of the Fourth Amendment clearly prohibits unreasonable searches, including when a court or magistrate has issued a warrant. \textit{See id.} The conduct of law enforcement officers who execute search warrants is limited to either: (1) those actions expressly authorized in the warrant; or (2) additional actions that are so closely related to accomplishing the search that their authorization is implicit in the warrant. \textit{See id.} at 685. The Second Circuit found that the CBS news crew was not expressly authorized to assist in carrying out the search warrant. \textit{See id.} In addition, the Second Circuit found that the CBS news crew did not serve any legitimate law enforcement purpose which the search warrant implicitly authorized. \textit{See id.}

After establishing that Agent Mottola violated the Fourth Amendment, the Second Circuit went on to hold that the Fourth Amendment rights that Agent Mottola violated were clearly established principles that he should have known. \textit{See Ayeni II}, 35 F.3d at 685. In arriving at its conclusion, the majority noted that Fourth Amendment's objective of preserving the right to privacy to the maximum extent was “long established.” \textit{Id.}

\footnote{90} \textit{See id.} at 687.

\footnote{91} \textit{See id.} The express language of § 3105 limits who may serve a search warrant. 18 U.S.C. § 3105 (1997). For a discussion of the language of § 3105, see \textit{supra} note 65 and accompanying text. According to the Second Circuit, 18 U.S.C. § 3105 also may be construed to limit those who may participate in the execution of a search warrant. \textit{See Ayeni II}, 35 F.3d at 687. Following the Second Circuit, many courts have construed the reach of the Fourth Amendment “reasonableness requirement” in light of § 3105 and held that the presence of a third party during a search is unreasonable under the Fourth Amendment “reasonableness requirement,” unless the third party is assisting the police officers in their search. \textit{See id.} (citing United States v. Clouston, 623 F.2d 485 (6th Cir. 1980) and United States v. Gambino, 734 F. Supp. 1084 (S.D.N.Y. 1990)).
ond Circuit concluded that the officers clearly violated § 3105.\textsuperscript{92} According to the court, § 3105 provides guidance on the Constitutional issue of unreasonableness under the Fourth Amendment.\textsuperscript{93} Since the Secret Service agents violated § 3105, the Court viewed the agents’ conduct during the search as unreasonable under the Fourth Amendment.\textsuperscript{94}

In \textit{Stack v. Killian},\textsuperscript{95} the Sixth Circuit held that police officers’ conduct in permitting the presence of a news reporter and television cameras during a search was not unconstitutional.\textsuperscript{96} Unlike the facts in \textit{Ayeni II}, the search warrant in \textit{Stack} explicitly authorized videotaping and photographing.\textsuperscript{97} The Sixth Circuit did not indicate whether such action would be unconstitutional or whether qualified immunity would apply to the officers’ conduct if the warrant had not authorized videotaping and photographing.\textsuperscript{98}

\textsuperscript{92} See \textit{Ayeni II}, 35 F.3d at 687. According to Chief Judge Newman, the CBS news crew did not assist the secret service agents for any legitimate law enforcement purpose. See \textit{id}. Judge Newman believed the opposite to be true; that is, he concluded that the officers assisted the CBS camera crew in producing a television show. See \textit{id}.

\textsuperscript{93} See \textit{id}.

\textsuperscript{94} See \textit{id}.

\textsuperscript{95} 96 F.3d 159 (6th Cir. 1996).

\textsuperscript{96} See \textit{id}. at 163. In \textit{Stack}, a veterinarian with the Michigan Department of Agriculture obtained a search warrant for the plaintiff’s premises. See \textit{id}. at 161. The plaintiff, Stack, operated a non-profit animal shelter on the property where she resided, housing approximately 300 dogs and cats. See \textit{id}. The search warrant was executed under the supervision of three county sheriff’s deputies who were named as defendants. See \textit{id}. A news reporter and a television camera crew were also present during the search. See \textit{Stack}, 96 F.3d at 161. After being arrested and charged with animal cruelty, Stack pleaded nolo contendre to one count of animal cruelty and was found guilty on counts of improper burial of animals. See \textit{id}. The plaintiff and animal shelter subsequently filed a § 1983 action against the deputies, the veterinarian and an employee of the Michigan Anti-Cruelty Society who were all present during the search. See \textit{id}. The district court granted the police officers’ motions for summary judgment based on the qualified immunity defense. See \textit{id}. The appellate court found that summary judgment was improper since there was a genuine issue of fact as to whether the police officers’ conduct unreasonably exceeded the scope of the warrant. See \textit{id}. at 162.

\textsuperscript{97} See \textit{Stack}, 96 F.3d at 163. Since the search warrant expressly authorized videotaping and photographing during the execution of the search warrant, the court of appeals found that the police officers’ conduct in allowing the television crew to accompany the search was justified and therefore Constitutional. See \textit{id}. Interestingly, the warrant did not say anything about a television crew; rather, it only authorized videotaping and photographing during the search. See \textit{id}. Therefore, the court did not give reasons for concluding that the news reporter and television crew were authorized to execute the search warrant. See \textit{id}.

\textsuperscript{98} See \textit{id}.
District courts have yielded contrasting holdings in light of the aforementioned circuit court decisions. In *Hagler v. Philadelphia Newspapers, Inc.*, the district court for the Eastern District of Pennsylvania adopted the Second Circuit’s analysis in *Ayeni II* and denied qualified immunity to two police officers who invited newspaper reporters and a photographer into a home during the execution of a search warrant. In contrast, a district court in *Berger v. Hanlon* (Hanlon I) rejected the Second Circuit’s analysis, dismissing § 1983 claims against federal agents who permitted a camera crew from the Cable News Network (CNN) to accompany a search of the plaintiff’s land.


101. See id. at *3. In *Hagler*, two officers from the Philadelphia Police Department executed a search warrant for narcotics. See id. at *1. Sandi Hagler and her two young children were in the house at the time the police executed the warrant. See id. Two newspaper reporters and a photographer from the Philadelphia Daily News (Daily News) accompanied the officers during the search. See id. Several photographs of the children appeared in the Daily News, including some showing the children clothed only in underwear. See *Hagler*, 1996 WL 408605, at *1. Among other claims, the plaintiffs filed a claim against the police officers for violation of 42 U.S.C. § 1983. See id.

The court concluded that the officers should have known that a warrant issued only in the name of the officers for the limited search of narcotics did not authorize them to allow members of the media to enter the home. See id. at *2. According to the court, “[a] reasonable person would know that the purpose of a warrant is to facilitate proper law enforcement, not to provide a ‘photo opportunity.’ A search warrant is simply not a press pass.” Id. In denying the officers’ motion to dismiss the § 1983 claim, the court noted that “[the officer] exceeded well established principles when he brought into the [plaintiff’s] home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.” Id. at *3 (quoting *Ayeni II*, 95 F.3d 680, 686 (2d Cir. 1994)).


103. See id. at *6. In *Hanlon I*, the United States Department of Interior’s Fish and Wildlife Service (FWS) investigated Berger, after receiving reports that he was using poisons to kill predators on his ranch, including a protected species of eagles. See id. at *1. The FWS obtained a search warrant for Berger’s ranch, and FWS agents executed the warrant. See id. Prior to execution of the warrant, the government gave permission to the Cable News Network (CNN) to accompany federal and state agents during the execution of the search warrant. See id. On March 24, 1993, the CNN crew accompanied the officers during the search and filmed the execution of the search warrant. See *Hanlon I*, 1996 WL 376364, at *1. CNN subsequently broadcast the tapes from the investigation on a news story about ranchers killing predators. See id.

Among other claims, Berger filed a § 1983 action against federal agents Rodney Hanlon, Joel Scrafford, Richard C. Branzell, Robert Priekat and Assistant United States Attorney Kris A. McLean. See id. The district court rejected the Second Circuit’s analysis in *Ayeni II*, finding that the Second Circuit erred in their analysis of qualified immunity. See id. at *4. According to the court, the Second Circuit failed to follow the Supreme Court’s instructions in *Anderson* by basing
B. "Color of State Law"

This Section discusses the "color of state law" requirement which must be satisfied in order to impose § 1983 liability on private individuals. Over the years, federal courts have interpreted the "color of state law" requirement inconsistently. Such inconsistency has spread to recent cases involving § 1983 claims against media personnel. Consequently, the few courts that have addressed § 1983 claims against the media are split on whether television crews are acting "under color of state law" when they follow police officers inside homes during the execution of search warrants.

their decision on abstract Fourth Amendment principles rather than a violation of a specific right. See id. For a discussion of the Supreme Court's test for determining whether a right is clearly established for qualified immunity purposes, see supra notes 57-59 and accompanying text. The district court also rejected the Ayeni II decision because it was rendered after the search in Hanlon I. See Hanlon I, 1996 WL 376364 at *4.

The district court also distinguished United States v. Wright, on the basis that Wright involved third parties who aided police officers during the search, while CNN merely observed the search activities in Hanlon I. See id. In addition, the district court distinguished Buonocore v. Harris, mainly because Buonocore involved third parties who conducted their own private search of a home, while CNN was a passive observer on land. See id. at *5. Finally, the district court in Hanlon I found that 18 U.S.C. § 3105 does not clearly establish a Fourth Amendment violation when police allow a television news crew to accompany them on a search, since the statute only applies to third parties who help serve and execute a search warrant, not television crews which observe and record the search. See id. at *6. Based on these distinctions, the district court concluded that the law as of 1993, prohibiting police officers from allowing a news crew to film the execution of a search warrant, was not clearly established. See id.

In a noteworthy decision rendered after Parker II, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision in Hanlon I. Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997) (Hanlon II). According to the Ninth Circuit, the CNN representatives actively participated in a "planned activity that transformed the execution of a search warrant into television entertainment." Id. at 512. Relying on the Second Circuit's decision in Ayeni II and the Fourth Circuit's decision in Buonocore, the Ninth Circuit held that a residential search taped with video cameras is unreasonable under the Fourth Amendment, and law enforcement officers who permit such taping are not protected by qualified immunity. See id. Many interpret the Hanlon II decision as holding, in no uncertain terms, that officers who allow media to videotape the execution of a search warrant for entertainment purposes violate the Fourth Amendment and are not entitled to qualified immunity. See Max Frankel, The Private Home As a Sound Stage for Cop Theatrics, SACRAMENTO BEE, Dec. 28, 1997, at F6 (noting that Ninth Circuit's decision in Hanlon II reiterated Ayeni II's condemnation of media participation in police searches).

104. See infra notes 112-14 and accompanying text.
105. See infra notes 115-28 and accompanying text.
106. See infra notes 129-36 and accompanying text.
107. See id.
1. Private Parties Subject to § 1983 Claims

The Constitution protects people's rights from government infringement, but it does not protect against infringement by private parties.\(^{108}\) As applied to state conduct, the Fourteenth Amendment protects against infringement by state action but fails to do the same when private parties take equivalent actions.\(^{109}\) This limitation upon the cause of action under the Fourteenth Amendment is known as the "state action" requirement.\(^{110}\) Since the Fourteenth Amendment does not apply to actions by individuals, a private party ordinarily cannot be held liable in an action brought under § 1983.\(^{111}\)

An exception to this exists when the private party acts under color of state law, as specified in § 1983.\(^ {112}\) Although interpreted differently by courts, the "color of state law" requirement is generally characterized as any conduct in which private parties conspire with state officials acting under state authority.\(^ {113}\) In such cases, a private conspirator may be held liable under § 1983 even if the state official is found to be immune.\(^ {114}\)

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108. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (explaining that most rights provided by Constitution are only protected from government infringement); Shelley v. Kraemer, 334 U.S. 1, 13 (1947) (noting that Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful").

109. See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states, No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws. Id. (emphasis added).

110. See Lugar, 457 U.S. at 937. In its most generic terms, the "state action" requirement refers to conduct which can be "fairly attributable to the State." Id. The Supreme Court has recognized important purposes for the "state action" requirement in § 1983 actions. See id. According to the Court, the requirement provides an area of individual freedom by restricting the reach of federal law and federal judicial power exerted on private parties. See id. The "state action" requirement also protects states and state agencies from being held responsible for conduct for which the state or state agency, out of fairness, should not be blamed. See id.


112. See id.

113. See id. The "state action" requirement and "color of state law" requirement involve separate inquiries but do interrelate. See Lugar, 457 U.S. at 935 n.18. Conduct which satisfies the "state action" requirement satisfies the "color of state law" requirement, although the converse is not necessarily true. See id.

114. See Dennis v. Sparks, 449 U.S. 24, 28 (1980) (affirming decision that private parties who conspired with judge through bribery to obtain injunction acted under color of state law and were liable under § 1983, despite fact that judge was found absolutely immune).
2. Judicial Interpretations of the "Color of State Law" Requirement in § 1983

Judicial interpretations of the "color of state law" requirement of § 1983 are inconsistent, resulting in confusion and lack of guidance for analyzing § 1983 claims against private third parties. The Supreme Court has articulated at least two interpretations of the "color of state law" requirement. In a 1941 case, United States v. Classic, the Supreme Court introduced a narrow interpretation, stating that action under color of state law requires "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."  


117. 313 U.S. 299 (1941).  

118. Id. at 326. In Classic, commissioners in charge of a Louisiana election were indicted for altering ballots and falsely certifying votes cast for the nomination of a Democratic representative for Congress. See id. at 308. According to allegations, the commissioners altered 83 ballots cast for one candidate and 14 cast for another in order to count them for a third candidate. See id. The commissioners falsely certified the number of votes cast for each candidate to the Committee Chairman. See id. The commissioners were charged with conspiring with each other to deprive citizens of their Constitutional rights, namely: (1) the voters' rights to have their ballots counted for the candidate they selected, and (2) the candidates' rights to run for office of Congressman and to have the votes in their favor counted as they were cast by the voters. See Classic, 313 U.S. at 308.

The indictment also charged the commissioners with violating Section 20 of the Criminal Code, 18 U.S.C. § 52, which stated,  

"Whoever, under color of any law, statute ordinance, regulation, or custom, willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . shall be fined not more than $1,000, or imprisoned not more than one year, or both."


In concluding that the commissioners had acted under color of state law as required by the criminal code, the Court noted that the commissioners had acted in the course of their duties under the Louisiana statute requiring them to count the ballots, record the result of the count and certify the result of the election. See Classic, 313 U.S at 325-26. In this sense, "under color of state law" was used to refer to acts expressly authorized by state law. See id. at 326.

In West v. Atkins, the Supreme Court applied this view, often called the traditional view, and held that a private physician under contract with the state of North Carolina to provide medical services to inmates at a state-prison hospital acted under color of state law. West v. Atkins, 487 U.S. 42, 54-55 (1988). In West, the state of North Carolina was required under its own laws to provide medical care to inmates in its prison system. See id. To comply with this law, the state prison authorized and employed a private physician, Dr. Atkins, to treat prison inmates. See id. at 55. Quincy West, an inmate at the prison, tore his left Achilles tendon while playing volleyball at the prison. See id. at 43. West was taken to the prison-hospital where Dr. Atkins allegedly treated him over a period of several months and con-
In a broader interpretation, the Supreme Court in *Adickes v. S.H. Kress & Co.* held that acting under color of state law requires only that the private party is a "willful participant in joint activity with the State or its agents." Since the *Adickes* decision, the Supreme Court has applied this broad view in other contexts to find that

ccluded that surgery would be necessary. See id. at 44. Despite his observations of West's leg, Dr. Atkins allegedly refused to schedule the surgery and discharged West while his ankle was still swollen and his movement was still impeded. See *West*, 487 U.S. at 44. West was not permitted to employ or elect a different physician of his own choosing since he was a prisoner under close custody. See id. Pursuant to 42 U.S.C. § 1983, West commenced an action against Dr. Atkins for violation of his Eighth Amendment right to be free from cruel and unusual punishment, claiming that Dr. Atkins was "deliberately indifferent" to his serious medical needs. See id. at 45. Since Dr. Atkins' authorization and employment to treat prison inmates was derived from state law, the Court concluded that Atkins was "clothed with the authority of state law." See id. at 55 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). In concluding that Dr. Atkins acted under color of state law, the Court emphasized that Atkins' function within the state system and his relationship with the state established him as a state actor. See id. at 55-56. Similar to its analysis in *Classic*, the Court focused narrowly on the existence of state law which gave rise to the conduct in question. See *West*, 487 U.S. at 55-56.


120. Id. at 152. In *Adickes*, the plaintiff was a white volunteer teacher who taught at a school for black children in Mississippi in 1964. Id. at 149. On August 14, 1964, the plaintiff took six of her students to the public library where the librarian and a local policeman ordered them to leave. See id. The plaintiff and her students then proceeded to a store owned by S. H. Kress Company (Kress) to eat lunch. See id. After the group sat down to eat, a policeman came into the Kress store and observed the plaintiff with the black students. See *Adickes*, 398 U.S. at 149. A waitress approached and took the order of the black students but refused to serve the plaintiff because she was a white person "in the company of Negroes." See id. After this refusal of service, the plaintiff and her students left the Kress store. See id. Upon reaching the sidewalk outside of the store, the policeman who had entered the store earlier arrested the plaintiff on a groundless charge of vagrancy and took her into custody. See id.

The plaintiff commenced a § 1983 action against the Kress store, claiming that Kress and the local police had conspired to (1) deprive her of her right to enjoy equal treatment and service in a place of public accommodation, and (2) to cause her arrest "on the false charge of vagrancy." See id. at 149-50. By depriving her of her right to enjoy equal treatment and service in the store, the plaintiff alleged that she was discriminated against because of race in violation of the Constitution and of 42 U.S.C. § 1983. See *Adickes*, 398 U.S. at 150 n.5. In describing the test to determine whether Kress was acting under color of state law in its conspiracy with the police officer, the court noted that a private party involved in such a conspiracy could be liable under § 1983 even though not an official of the State. See id. at 152. According to the Court, "to act 'under color of state law' does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." Id. (quoting United States v. Price, 383 U.S. 787, 794 (1966)). Applying this test, the Court concluded that a private party who discriminates on the basis of race pursuant to a state-enforced custom requiring such discrimination is a participant in joint activity with the state and can therefore be held liable under § 1983. See id. at 174 n.44. The Court concluded that the lower court's dismissal of the case was in error, and the petitioner was entitled to a new trial to establish a § 1983 claim. See id.
private parties who conspire with public officials act under color of state law.  

In Lugar v. Edmondson Oil Co., the Supreme Court expressed concern over inconsistent interpretations of the "color of state law" requirement and granted certiorari in order to formulate a clear test. The Supreme Court concluded that its previous decisions reflected a two-part test for determining whether a private individual acted under color of state law. The first prong requires that the claimed deprivation result from the exercise of a right or privilege having its source in state authority. The second prong requires that the party charged be a "state actor." Many courts

121. See, e.g., Tower v. Glover, 467 U.S. 914, 923 (1984) (appointed counsel is not state actor during normal course of work but becomes state actor any time he conspires with state officials to convict his own client in violation of client's Constitutional rights); Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (private parties in conspiracy with judge in violation of individual's civil rights are actors under color of state law).


123. See id. at 926.

124. See id. at 937. In Lugar, the petitioner operated a truck stop in Virginia and was indebted to the respondent, Edmondson Oil Co. (Edmondson), who was his supplier. See id. at 924. After commencing suit on the debt in Virginia state court, Edmondson sought a prejudgment attachment on the petitioner's property. See id. To obtain a prejudgment attachment, Virginia procedure only required that Edmondson allege, in an ex parte petition, a belief that the petitioner was disposing of or might dispose of his property in order to avoid satisfying the debt to Edmondson. See Lugar, 457 U.S. at 924. A clerk of the state court approved the petition and issued a writ of attachment which effectively sequestered the petitioner's property, although the petitioner was allowed to maintain possession. See id. at 924-25. After a hearing on the attachment and levy, a state trial judge dismissed the attachment because Edmondson failed to show grounds required by statute for attachment. See id. at 925. As a result of the attachment, the petitioner brought a § 1983 action against Edmondson, alleging that Edmondson had acted jointly with the state to deprive him of his property without due process of law. See id. Finding no state action on the part of Edmondson, the district court dismissed the claim. See id. The court of appeals rejected the district court's approach, but still found that Edmondson had not acted under color of state law since there was no "usurpation [of power] or corruption of official power by [Edmondson] or a surrender of judicial power to [Edmondson]" in such a way as to significantly compromise the clerk's impartiality. See Lugar, 457 U.S. at 926. The Supreme Court granted certiorari, finding that the circuit court's construction of "color of state law" was inconsistent with the Supreme Court's prior decisions. See id. After reviewing its prior decisions involving the "color of state law" requirement, the Supreme Court concluded that a deprivation of a federal right must be "fairly attributable to the state" to be actionable. See id. at 937. This requirement is manifested in a two-part test. See id.

125. See Lugar, 457 U.S. at 937. Specifically, the first prong requires that the deprivation be caused by "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." Lugar, 457 U.S. at 937.

126. See id. According to the Court, a state actor could be any of the following: (1) a state official; (2) a party "acting together with or who has obtained signif-
have applied the "state actor" requirement by using the test set forth in Adickes.\textsuperscript{127} In Lugar, the Supreme Court applied this two-prong test and confirmed that a plaintiff could establish a claim under § 1983 against a private party defendant.\textsuperscript{128}

3. Legal Characterization of Television Crews Engaged in Police Searches

Very few courts have analyzed whether television crews who accompany police officers on searches are acting under color of state law. In Ayeni v. CBS Inc.\textsuperscript{129} (Ayeni I), the United States District Court for the Eastern District of New York considered whether the Central Broadcasting Service (CBS) was entitled to qualified immunity from a § 1983 claim that was filed after a CBS camera crew accompanied federal agents and filmed the execution of a federal search warrant.\textsuperscript{130} Without discussing whether CBS acted under color of state law, the district court concluded that CBS violated a significant aid from state officials"; or (3) a party whose conduct is "otherwise chargeable to the state." Id.

\textsuperscript{127} See, e.g., Parker I, 905 F. Supp. at 642. A common standard used in applying the second prong of the Lugar test is whether the private party willfully participated in joint activity with the state or state agents - the same standard used in Adickes. See id. For a discussion of Adickes, see supra notes 119-20 and accompanying text.

\textsuperscript{128} See Lugar, 457 U.S. at 942. As for the first prong, the Court concluded that since the attachment procedure was authorized by a Virginia statute, the attachment procedure was an exercise of rights having their source in state authority, meaning the requirements of the first prong. See id. at 941. As for the second prong, the Court concluded that Edmondson's use of the court to execute the attachment procedures was "joint activity" as referred to in Adickes, making Edmondson a "state actor." See id.


\textsuperscript{130} See Ayeni I, 848 F. Supp. at 367-68. In this precursor to Ayeni II, the plaintiff filed a § 1983 claim against CBS for filming the execution of a search warrant in their apartment and broadcasting the tapes on a weekly television news program called "Street Stories." See id. at 364-65. The Ayenis contended that CBS formed an agreement with the Secret Service and entered the Ayenis' apartment with implied permission and consent of the Secret Service. See id. at 365. The plaintiffs' complaint stated in part: "CBS also claims to have accompanied the Secret Service furthering the execution of the search of the plaintiffs' apartment under the imprimatur of the official warrant and through the auspices of its 'confidential informant,' one of the Unknown Special Agents [sic] who participated in the search of the Ayeni apartment." Id. While these allegations support a claim that CBS acted under color of state law, it is not clear whether the district court concluded that CBS acted under color of state law or whether they even considered it necessary to make such a determination. For a complete discussion of the facts in Ayeni I, see supra note 88 and accompanying text.
clearly established Fourth Amendment right and denied CBS qualified immunity since it was not a government official.\textsuperscript{131}

In \textit{Berger v. Cable News Network, Inc.},\textsuperscript{132} the United States District Court of Montana, Billings Division, considered whether CNN was liable under § 1983 for accompanying federal agents during the search of the plaintiffs' ranch and later broadcasting a news story featuring footage from the search.\textsuperscript{133} The district court dismissed the Fourth Amendment claim against CNN, finding that the issue was previously litigated in the criminal case against Berger,\textsuperscript{134} and that CNN was not acting under color of state law.\textsuperscript{135} According to the district court, a private party such as CNN does not act under color of state law when the party is present during a search for its own purposes.\textsuperscript{136}

\section*{IV. Narrative Analysis}

\subsection*{A. Qualified Immunity of Police Officers}

In \textit{Parker II}, the Eighth Circuit considered the relevant law that existed at the time the St. Louis police officers executed their search of the Parkers' residence.\textsuperscript{137} The majority observed that

\begin{itemize}
\item \textsuperscript{131} See \textit{Ayeni I}, 848 F. Supp. at 367-68. In denying qualified immunity to CBS, the district court reasoned that "qualified immunity... acts to safeguard the government, and thereby to protect the public at large, not to benefit its agents." \textit{Id.} (quoting Wyatt v. Cole, 504 U.S. 158, 168 (1992)). Since CBS was a private corporation, as opposed to a government official, CBS was not entitled to qualified immunity. \textit{See id.} at 368. The district court further concluded that even if CBS were a government official, qualified immunity would be denied since CBS and the Secret Service agents violated a clearly established Constitutional right. \textit{See id.} After the district court's ruling, CBS and the Ayenis arrived at a confidential settlement, and Secret Service Agent James Mottola was the sole defendant on appeal. \textit{See Ayeni II}, 35 F.3d at 684 n.2. For a discussion of \textit{Ayeni II}, see supra notes 87-94 and accompanying text.
\item \textsuperscript{133} See \textit{id.} at *1. The plaintiffs' claims against CNN arise out of the same set of facts as those in Berger v. Hanlon, No. CV 94-46-BLG-JDS, 1996 WL 376364 (D. Mont. Feb. 26, 1996), modified, 129 F.3d 505 (9th Cir. 1997). For a discussion of the factual background of both cases, see supra note 103 and accompanying text.
\item \textsuperscript{134} United States v. Berger, CR 93-46-BLG-RWA (D. Mont. 1983). The district court found that since the Constitutionality of the search had already been litigated, the causes of action based on the Constitutionality of the search were barred by collateral estoppel. \textit{See Berger v. CNN}, 1996 WL 390528, at *2.
\item \textsuperscript{135} See \textit{id.} at *3.
\item \textsuperscript{136} See \textit{id.} (citing United States v. Miller, 688 F.2d 652, 657-58 (9th Cir. 1982); United States v. Jennings, 653 F.2d 107, 110 (4th Cir. 1981)).
\item \textsuperscript{137} \textit{Parker II}, 93 F.3d at 447. The majority noted that "[i]n assessing claims of qualified immunity, we are of course required to examine the state of the relevant law at the time the officials committed the acts of which the plaintiffs complain." \textit{Id.}
\end{itemize}
there was no available case on point, and that the Supreme Court had not provided any guidance as to whether it was reasonable for police officers to allow a television crew to enter a house during the execution of a search warrant.\textsuperscript{138} The majority noted \textit{Ayeni II}\textsuperscript{139} and \textit{Buonocore v. Harris},\textsuperscript{140} but declined to apply these cases since they were rendered after the search at issue in \textit{Parker II}.\textsuperscript{141} In addition, the majority stated that even if the holdings in \textit{Ayeni II} and \textit{Buonocore} were applicable, the decisions indicate "at most only the beginnings of a trend in the law."\textsuperscript{142} The majority also declined to find it self-evident that a Fourth Amendment violation occurs when police officers invite members of the news media to enter a home during the execution of a search warrant.\textsuperscript{143} Based on its findings, the majority concluded that the police's conduct did not violate a clearly established Constitutional right of which they should have been aware at the time the search warrant was executed.\textsuperscript{144}

\textbf{B. "Color of State Law" Requirement Applied to KSDK}

In considering the § 1983 claims against KSDK, the majority applied the traditional definition of "color of state law."\textsuperscript{145} The majority also applied the first prong of the two-part test introduced in \textit{Lugar v. Edmondson Oil Co.}.\textsuperscript{146} According to the majority, the Parkers alleged only that KSDK exercised a right or privilege created by the state, which is only one attribute of the first prong of

\begin{itemize}
\item \textsuperscript{138} See id.
\item \textsuperscript{139} 848 F. Supp. 362 (E.D.N.Y. 1994).
\item \textsuperscript{140} 65 F.3d 347 (4th Cir. 1995).
\item \textsuperscript{141} See Parker II, 93 F.3d at 447.
\item \textsuperscript{142} Id. The majority's characterization of these decisions as "beginnings of a trend" is presumed to mean that the decisions are far from being "clearly established" law. This characterization has led other circuit courts to doubt the force of the Second Circuit's conclusion in \textit{Ayeni II}. See Stack v. Killian, 96 F.3d 159, 162-63 (6th Cir. 1996) (citing both \textit{Ayeni II} and \textit{Parker II}).
\item \textsuperscript{143} See Parker II, 93 F.3d at 447.
\item \textsuperscript{144} See id. Therefore, the majority found that the district court had erred in finding that the police officers were not entitled to qualified immunity, and reversed the judgment against the officers. See id.
\item \textsuperscript{145} See id. at 447-48. This definition, which conveys a narrow interpretation of "color of state law," states that the defendant charged with the § 1983 claim must have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." \textit{Id.} at 447-48 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
\item \textsuperscript{146} See Parker II, 93 F.3d at 448. According to the first prong of the \textit{Lugar} test, the cause of the alleged injury must be attributed to: 1) an exercise of some state-created right or privilege; 2) a rule of conduct imposed by the state; or 3) a person for whom the state bears responsibility. See \textit{Lugar} v. \textit{Edmondson Oil Co.}, 457 U.S. 922, 937 (1982).
\end{itemize}
the Lugar test. Based on this assumption, the majority concluded that KSDK did not act under color of state law as alleged by the Parkers for two reasons: (1) the KSDK crew’s acts were committed separately from the officers’ exercise of privileges under state law; and (2) the rights that KSDK exercised in entering the Parker’s home were not created by the state.

C. Concurring Opinion

District Judge Rosenbaum, concurring specially, wrote separately to emphasize the need to first determine whether the plaintiffs’ claimed Constitutional right existed at all. Once the Constitutional right has been identified, the court can then assess whether that right was clearly established law at the time the facts of the case took place. In discussing the first step, Judge Rosenbaum concluded, contrary to the majority opinion, that police officials violate Fourth Amendment rights when they allow television crews into a private home during a search without the resident’s express consent. This conclusion, as Judge Rosenbaum noted, was consistent with the Second Circuit’s decision in Ayeni II. After recognizing the Constitutional right, Judge Rosenbaum agreed with the majority that the St. Louis police officers did not violate a Constitutional right which was clearly established at the time the officers admitted the KSDK news crew into the Parkers’ home.

147. See Parker II, 93 F.3d at 448.
148. See id. According to the majority, KSDK clearly acted independently of the police in deciding to enter the house and videotape the search. See id. In support of this, the majority noted that KSDK did not assist the police in executing the search, and the police did not assist KSDK in recording the search. See id. The majority explained that “[t]he television station was [present] for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house.” Id. The majority sided with the district court in concluding that “[a]t most, KSDK’s acts were committed parallel to and contemporaneous with the police officers’ exercise of privileges under state law in the execution of a lawfully obtained search warrant.” Parker II, 93 F.3d at 448 (quoting district court in Parker I, 905 F. Supp. at 642).
149. See Parker II, 93 F.3d at 448 (Rosenbaum, J., concurring). District Judge Rosenbaum stated, “[i]n my view, our jurisprudence demands a first determination of whether the claimed Constitutional right, in fact, exists. [The majority has] missed this required first step in the qualified immunity analysis.” Id. District Judge Rosenbaum further stated, “It is not until we have made this required decision that we analyze whether such right was clearly established at the time of its alleged violation.” Id.
150. See id.
151. See id.
152. See Parker II, 93 F.3d at 448.
153. See id. Although Judge Rosenbaum did not express any reasons for concluding that the Constitutional right was not clearly established at the time the
D. Dissenting Opinion

In his dissenting opinion, Chief Judge Richard S. Arnold disagreed with the majority’s conclusion that KSDK’s employees did not act “under color of state law” for § 1983 purposes. Contrary to the majority, Judge Arnold subscribed to the broader interpretation of “color of state law” introduced in Adickes v. S.H. Kress & Co., noting that the KSDK employees were willful participants in joint activity with the St. Louis Police Department.

V. CRITICAL ANALYSIS

The majority’s analyses of the qualified immunity issue and the “color of state law” requirement do not reflect careful consideration of prior case law. Some parts of the majority’s analysis fail to conform to binding Supreme Court decisions that address how to apply qualified immunity and interpret the “color of state law” requirement. As a result, the majority’s analyses of these two areas of the law are difficult to reconcile with relevant precedent.

A. Qualified Immunity to Police Officers

The majority’s analysis of the qualified immunity issue is questionable in two major respects. First, the majority’s assessment of preexisting law fails to look at relevant case law that implicitly establishes the unlawfulness of the St. Louis police officers’ conduct (as opposed to expressly holding that such conduct is unlawful). Second, the majority opinion overlooks clearly established Constitutional principles in declaring that the unlawfulness of the police officers’ conduct was not self-evident. This conclusion ignores well known principles that the Fourth Amendment limits searches

officers searched the Parker residence, it is likely that his concurring opinion was based on the same reasons set forth by the majority. See id.


156. See Parker II, 93 F.3d at 449 (quoting Adickes, 398 U.S. at 152). Judge Arnold stated, “[i]n my view, the news crew acted in concert with the police in entering the Parkers’ home.” Id. Judge Arnold pointed out that the news crew arrived at the Parkers’ residence with police, and the news crew could not have been able to enter the Parkers’ house if police had not entered first. See id. Judge Arnold noted that “[the KSDK team] did not simply happen along the street at the time that a search was being conducted.” Id.

157. See infra notes 163 and 180 and accompanying text.

158. See infra note 162 and accompanying text.

159. See infra notes 166-71 and accompanying text.
to the scope set forth in a warrant and that the Fourth Amendment requires officers to minimize the extent of their intrusions into homes.¹⁶⁰

1. Assessment of Preexisting Law

In granting qualified immunity to the St. Louis police officers, the majority improperly examined the relevant law which was available at the time of the search. The majority examined Ayeni II and Buonocore and concluded that neither case was applicable since the cases were decided after the facts in Parker II took place.¹⁶¹ This decision ignores the fact that while Ayeni II was decided after the search of the Parkers’ residence, Ayeni II merely applied other relevant law which was established at the time the Parkers’ residence was searched.¹⁶²

By limiting their discussion to cases like Ayeni II and Buonocore, the majority apparently looked only for cases which expressly hold that the conduct in question is unlawful. This ignores the true standard to defeat qualified immunity set forth by the Supreme Court in Harlow v. Fitzgerald.¹⁶³ According to the Court in Harlow, the test to defeat qualified immunity for § 1983 purposes requires that the unlawfulness of the act be apparent to the police officers at the time they acted, in light of preexisting law.¹⁶⁴ In order to deny qualified immunity to police officers, courts do not have to locate

¹⁶⁰ See infra notes 170-74 and accompanying text.
¹⁶¹ See Parker II, 93 F.3d at 447.
¹⁶² See Ayeni II, 35 F.3d 680, 685 (2d Cir. 1994). For example, the Second Circuit in Ayeni II discussed the Fourth Amendment objectives which sought to preserve the right to privacy in the home to the maximum extent. See id. The text of the Fourth Amendment expressly requires that all police searches must be reasonable. See U.S. Const. amend. IV. The Supreme Court has interpreted the “reasonableness” requirement as a means to ensure reasonableness in the manner and scope of searches that are carried out. See Ayeni II, 35 F.3d at 687 (citing Graham v. Connor, 490 U.S. 386, 395 (1989); Tennessee v. Garner, 471 U.S. 1, 7-8 (1985)). In addition, the Second Circuit discussed the significance of 18 U.S.C. § 3105 in assessing the reasonableness of police conduct. See Ayeni II, 35 F.3d at 687. Although the decision in Ayeni II was not available, the legal precedents underlying the Ayeni II decision were available at the time St. Louis police acted.

Unlike the majority in Parker II, the district court in Parker I showed a more careful consideration of Ayeni II. While the majority in the Eighth Circuit focused only on the date of the Ayeni II decision, the district court looked beyond the date of the decision to examine the rationale and conclusions asserted by the Second Circuit. See Parker I, 905 F. Supp. 638, 643 (1995). Since the rationale and conclusions were based on Constitutional and statutory principles in existence long before the facts in Parker II, the district court was justified in considering them during its treatment of the qualified immunity issue.

¹⁶⁴ See Harlow, 457 U.S. at 818.
case law that expressly holds the officers' conduct to be unlawful.\textsuperscript{165} Therefore, the majority failed to apply the proper standard to defeat qualified immunity.

2. \textit{Self-evident Violations of Fourth Amendment Principles}

The majority found that it is not self-evident that police violate Fourth Amendment principles when they allow the media to accompany the execution of a search warrant.\textsuperscript{166} This is problematic, since police conduct which exceeds the express limits of a search warrant clearly violates Fourth Amendment principles.\textsuperscript{167} Given the Fourth Amendment limitation on unreasonable searches, the unreasonableness of allowing a television crew to enter a suspect's home during the execution of a search warrant without any type of authorization is self-evident.\textsuperscript{168} As in \textit{Ayeni II}, neither the police nor KSDK provided any justification for the presence of television cameras in the Parker residence during the search.\textsuperscript{169} Intrusions such as this must be justified by a governmental interest that outweighs

\begin{itemize}
\item \textsuperscript{165} See id. Throughout their analysis, the majority failed to make any assessment as to the apparent unlawfulness of the officers' conduct in light of Fourth Amendment principles and statutory laws that were available to the officers. See id.
\item \textsuperscript{166} See \textit{Parker II}, 93 F.3d at 447.
\item \textsuperscript{167} See \textit{Buonocore v. Harris}, 65 F.3d 347, 356 (4th Cir. 1995). According to the Fourth Circuit, law enforcement officers who invite individuals not authorized in the search warrant to accompany the officers during the search clearly exceed the scope of the warrant. See id. Based on common law which dates back to the framing of the Constitution and Supreme Court interpretations of the Fourth Amendment since that time, the Fourth Amendment clearly prohibits police conduct which exceeds the scope of the warrant. See id. "A search warrant circumscribes the right to search. If the search exceeds the scope of the search warrant then the search becomes unreasonable." \textit{Id.} at 359.
\item \textsuperscript{168} See \textit{Hagler v. Philadelphia Newspapers, Inc.}, No. CIV.A. 96-2154, 1996 WL 408605, at *2 (E.D. Pa. July 12, 1996). Senior District Judge Vanartsdalen's opinion in \textit{Hagler} expressed the obvious Fourth Amendment violations that occur when police officers allow newspaper reporters and cameras to be present during a search. See id. In denying qualified immunity to police officers who allowed newspaper personnel to witness a search, Judge Vanartsdalen explained:
\begin{quote}
It should have been obvious to the officers . . . that a warrant issued only in the name of the officers, for the limited purpose of searching for narcotics, did not authorize them to allow members of the media to enter a private home. A reasonable person would know that the purpose of a warrant is to facilitate proper law-enforcement, not to provide a "photo opportunity." A search warrant is simply not a press pass.
\end{quote}
\textit{Id.} See also \textit{Antonio Yanez, Jr., Ayeni v. Mottola and the Implications of Characterizing Videotaping as a Fourth Amendment Seizure}, 61 BROOK. L. REV. 507, 532 (1995) (stating that warrantless entry into home, without more, is universally held to be unreasonable per se).
\item \textsuperscript{169} See Yanez, supra note 168, at 532 (emphasizing that no justification was given for presence of television cameras in \textit{Ayeni II} and that it was difficult to imagine circumstances where presence of television cameras would be justified).
\end{itemize}
the reasonable expectations of privacy in the home. Since the St. Louis Police Department did not assert any governmental interest in allowing KSDK to film the search, the Department's actions, like the government's actions in Ayeni II, were violations of the Fourth Amendment.

The Supreme Court has stated that searches must be conducted "in a manner that minimizes unwarranted intrusions upon privacy." Accordingly, officers who serve a search warrant have little discretion regarding the scope and nature of the search, and they must strictly obey the terms of the warrant. In Parker II, KSDK personnel were not authorized to be present by the search warrant, and the police did not impose any limitations on their conduct. Consequently, the police officers failed to minimize intrusions upon the Parkers' privacy, and in doing so violated general Fourth Amendment principles.

B. "Color of State Law" Analysis

In addressing the § 1983 claims against the KSDK personnel, the majority made questionable conclusions of law and fact. First, the majority began with an incomplete application of the Lugar test, leaving out important components of the test which are pertinent to the analysis of KSDK's actions. Second, the majority drew a questionable conclusion that KSDK personnel acted independently of the police, notwithstanding facts which indicate that police and KSDK personnel collaborated before and during the search. Third, the majority characterized KSDK's conduct as an ordinary trespass as opposed to an exercise of a state-created right, which is

170. See id. Police officers violate the public's trust when they invite private parties along during a search while being fully aware that those parties serve no role in carrying out the search. See United States v. Sansusi, 813 F. Supp. 149, 160-61 (E.D.N.Y. 1992). In allowing the media to enter homes during searches, police officers disregard the important values that are threatened any time the government enters a private person's home. See id.

171. See Yanez, supra note 168, at 532 (noting that government agents in Ayeni II provided no governmental interest which would be served by allowing CBS to film search of Ayeni's home).

172. See Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976).


174. See Parker II, 93 F.3d 445, 447 (8th Cir. 1996).

175. See infra notes 178-88 and accompanying text.

176. See infra notes 189-92 and accompanying text.
questionable in light of the police department's policy of preventing trespassing and intrusions during searches.\textsuperscript{177}

1. Misapplication of the Lugar Test

The majority's conclusion that KSDK personnel did not act under color of state law was reached through improper analysis. First, the majority's application of the first prong from \textit{Lugar v. Edmondson Oil Co.} was incomplete.\textsuperscript{178} In its analysis under the first prong, the majority assumed that the plaintiffs only alleged that KSDK exercised a right or privilege created by the state in entering the house.\textsuperscript{179} In doing so, the majority ignored other components of the first prong which may be used to determine whether the party acted under color of state law.\textsuperscript{180} The last part of the first prong plainly states that the alleged violation must be caused by the exercise of some privilege created by a "person for whom the state is responsible."\textsuperscript{181} Looking to the facts in \textit{Parker II}, it is clear that the St. Louis Police Department, for whom the state was responsible, often allowed members of the news and television industry to accompany them during the execution of search warrants.\textsuperscript{182} As the district court found, the St. Louis Police Department allowed KSDK personnel to accompany Officers Rodney Boyer and Dan Dell as they executed the search warrant at the Parker residence.\textsuperscript{183} Therefore, KSDK personnel exercised a privilege that was created by individuals for whom the state was responsible.\textsuperscript{184} This conduct

\textsuperscript{177} See infra notes 193-95 and accompanying text.

\textsuperscript{178} See \textit{Parker II}, 93 F.3d at 448. For a discussion of the two-part test introduced in \textit{Lugar}, see supra notes 125-27 and accompanying text.

\textsuperscript{179} See \textit{Parker II}, 93 F.3d at 448. The majority quickly disposed of this claim, finding that KSDK acted independently of the police and entered the Parkers' house for its own reasons with no authority from the state. See id.

\textsuperscript{180} See id. For a discussion of the requirements set forth in the first prong of the \textit{Lugar} test, see supra note 125.

\textsuperscript{181} \textit{Parker II}, 93 F.3d at 448. It should be clarified that the first prong in \textit{Lugar} imposes no requirements as to who the "actor" must be; rather, the first prong only requires that the alleged violation be caused by the exercise of a right or privilege which originates from the state in one of three ways. See \textit{Lugar}, 457 U.S. at 937. Therefore, the actor could be a state actor, or, as in \textit{Parker II}, the actor could be a private entity. For a discussion of the requirements set forth in the first prong of the \textit{Lugar} test, see supra note 125.

\textsuperscript{182} See \textit{Parker I}, 905 F. Supp. at 641. In his deposition, Police Chief Harmon testified that the department screens requests by the media to accompany officers during their shifts. See id. In evaluating requests, Chief Harmon testified that he focused on physical safety issues, potential for interference in police activity, subject matter of the media report and the potential effect the report may have on the public's perception of police officers. See id.

\textsuperscript{183} See \textit{Parker II}, 93 F.3d at 446-47.

\textsuperscript{184} See id. at 446.
clearly caused the injury claimed by the Parkers, as KSDK would not have entered the Parkers' home but for the police department's invitation. Therefore, the first prong of the Lugar test was satisfied.

The majority did not consider the second prong of the Lugar test in its analysis. From the clear language of the second prong, private parties are considered state actors if they have acted together with or have obtained significant aid from state officials. Looking to the facts of Parker II, KSDK acted together with police officers in entering the home. In addition, the St. Louis police officers provided significant aid to KSDK personnel, first by informing KSDK about the Parker search, and then by providing transportation and access to the Parkers' residence. Therefore, thorough consideration of the Lugar test indicates that KSDK personnel were acting under color of state law for § 1983 purposes. The majority's conclusion that KSDK did not act under color of state law is not supported by proper application of the Lugar test.

2. Characterization of KSDK Crew as "Independent Actors"

The majority stressed that KSDK acted independently from the St. Louis Police Department, rather than in conjunction with them. In making this determination, the majority noted that the

185. The second prong of the Lugar test states:

[T]he party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.


186. See id.

187. See Parker II, 93 F.3d at 447. Judge Richard S. Arnold, in his dissent, pointed out that the news crew came to the Parker residence with police and could not have entered if the police had not done so first. See id. at 449 (Arnold, J., dissenting). Although KSDK personnel and the police were engaged in separate activities after entering the house, Judge Arnold concluded that the KSDK news crew acted in concert with the police when they entered the house. See id.

188. See id. at 446-47. Based on the district court's findings of fact, the police department contacted the KSDK reporter and informed him of a weapons investigation that was in progress. See id. at 446. Sgt. Risk made arrangements to have Officer Boyer take the KSDK personnel along during his shift. See Parker II, 93 F.3d at 446. Officer Boyer and Officer Dell subsequently drove the KSDK personnel to the scene. See id. Once at the scene, the officers detained the suspect Martin so as to facilitate the officers' and camera crew's safe access into the house. See id. at 446-47.

189. See id. at 448. According to the majority, KSDK acted independently of the police when they entered the house and recorded the search. See id. The majority found that KSDK and the police did not assist each other as they performed their separate tasks. See Parker II, 93 F.3d at 448. The television station acted for reasons of its own and was not engaged in the mission which brought the police to the house. See id.
KSDK personnel and police officers entered the Parker residence for their own purposes. In addition, the majority noted that the police officers and KSDK personnel did not enter the Parker residence at the same time. This reasoning is unpersuasive in two respects. First, the distinction between KSDK's motives and the police department's motives in entering the residence has no bearing on whether KSDK exercised a privilege created by persons for whom the state is responsible. Second, the majority's analysis of the facts is narrowly aimed at events occurring after the parties entered the house and ignores the events leading up to the search. The alleged violation of the Parkers' rights was manifested not only in the parties' conduct in the home, but also the parties' collaborative planning prior to the search which made the subsequent events possible.

3. Characterizing KSDK's Conduct as a Trespass

The majority chose to characterize KSDK's conduct as "[s]eizing an opportunity to trespass" rather than "invoking a right or privilege" created by a state agent. There are problems with characterizing KSDK's conduct as a trespass. First, it is difficult to believe that police officers would not stop a blatant trespasser, with whom they have no association, from roaming through a suspect's residence during a search. More importantly, some element of

190. See id. According to the majority, each party was engaged "in the performance of their separate and respective tasks." Id. (emphasis added). The television station was present "for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house." Id. (emphasis added).

191. See Parker II, 93 F.3d at 448. The majority pointed out that the KSDK personnel entered the Parkers' house after the police did. See id.

192. For a discussion of the planning done between the police and KSDK, see supra note 188 and accompanying text. As previously stated, this collaboration included the police department's act of notifying the KSDK reporter, Sgt. Risk's efforts in arranging the ride-along and Officer Boyer's act of driving the KSDK personnel to the scene. See Parker II, 93 F.3d at 446.

193. Id. at 448.

194. See Parker I, 905 F. Supp. at 638. According to testimony from Police Chief Harmon and Lieutenant Joseph Richardson of the St. Louis Police Department, it is not likely that the police officers at the Parker residence would have tolerated the presence of a trespasser during the execution of a search warrant. See id. In Chief Harmon's view, the media personnel are responsible for obtaining permission from the citizen prior to entering the citizen's home and filming the search. See id. If the media personnel fail to obtain permission, the supervising officer on the scene is instructed to bar the media from entering the residence, on the ground that such entry without the resident's permission would constitute a trespass. See id. Lieutenant Richardson testified that it was his policy to bar the media from a suspect's residence unless the crime scene was secure and the media had obtained permission from those involved. See id. As stated earlier, KSDK did not obtain any permission from the Parkers prior to entering the residence and
state authorization for KSDK's conduct must have existed when KSDK entered the Parkers' home and recorded the search.\textsuperscript{195} For these reasons, the majority's characterization of KSDK's conduct as a mere trespass is questionable.

VI. IMPACT

By addressing Fourth Amendment claims against police officers and the media, \textit{Parker II} has influenced rules of conduct for both law enforcement officials and media representatives. This Section will address the relative impact \textit{Parker II} has on each of these groups.

A. Impact on Law Enforcement Officials

In \textit{Parker II}, Judge Arnold analyzed the officers' conduct and found that Fourth Amendment violations were neither self-evident nor apparent through clearly established principles that reasonable police officers should know.\textsuperscript{196} Although the St. Louis police officers were given qualified immunity, the majority's decision is unlikely to affect future lawsuits against police officers who permit media representatives to accompany them during searches. First, Judge Arnold's view that \textit{Ayeni II} and \textit{Buonocore} are "beginnings of a trend in the law," as opposed to sources of clearly established law, is not likely to be shared by other circuits.\textsuperscript{197} Second, fewer cases will

\textsuperscript{195} See Kevin E. Lunday, \textit{Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States following Ayeni v. Mottola and a Framework for Analysis}, 65 \textit{Geo. Wash. L. Rev.} 278, 303 (discussing additional authorization media must obtain in order to access private areas). While the media may enjoy certain privileges in accessing areas where an ordinary citizen may not be authorized to enter, the media does not enjoy a privilege to conduct illegal activity, such as intruding upon the privacy of the home. \textit{See id.} When media personnel enter an area for the purpose of gathering news, they do so under a traditional color of public access. \textit{See id.} When the media enters private homes during searches that trigger the Fourth Amendment, the nature of their access is no longer "public" but rather "governmental." \textit{See id.} Thus, when the media enters a private home during the execution of a search warrant, it does so under the color of state law enforcement authority. \textit{See id.}

\textsuperscript{196} See \textit{Parker II}, 93 F.3d at 447. For a discussion of the majority's analysis, see \textit{supra} notes 137-44 and accompanying text.

\textsuperscript{197} In \textit{Hanlon II}, decided only a year after \textit{Parker II}, the majority relied almost exclusively on \textit{Ayeni II} and \textit{Buonocore} to conclude that a residential search
involve searches taking place before the Ayeni II and Buonocore decisions; thus, more courts will have to account for Ayeni II and Buonocore when they determine the relevant law during the time of the search. 198

The concurring opinion in Parker II will likely have more of an impact on police conduct than Judge Arnold’s opinion. In his concurring opinion, Judge Rosenbaum disagreed with Judge Arnold and found that police officers violate a person’s Fourth Amendment rights when they admit media representatives into the person’s home during the execution of a search warrant. 199 In concluding that such searches are unconstitutional, Judge Rosenbaum’s opinion has reinforced the Ayeni II and Buonocore decisions as clearly established law and will likely dispel Judge Arnold’s notion that they are merely beginnings of a trend. 200 Consequently, Judge Rosenbaum’s concurring opinion strongly supports Ayeni II and will discourage police officers from permitting the presence of media representatives during searches.

B. Impact on the Media

The majority’s analysis of the “color of state law” requirement will prolong the confusion which surrounds the analysis of § 1983 claims against private parties like the media. As previously stated, the Supreme Court has appeared inconsistent in how it determines whether a party acts “under color of state law.” 201 The most recent of these tests, which perhaps was aimed at clearing up these incon-

videotaped by television cameras is unreasonable and therefore in violation of the Fourth Amendment. See Hanlon II, 129 F.3d 505, 511 (9th Cir. 1997). Therefore, the majority in Hanlon II did not share Judge Arnold’s view, finding Ayeni II and Buonocore to represent clearly established law. See id.

198. In Parker II, Judge Arnold noted, “Because both Ayeni [II] and Buonocore were decided after the police in this case executed their search, those cases cannot weigh in the balance against a finding of qualified immunity.” Parker II, 93 F.3d at 447. As time passes, fewer and fewer courts will have the opportunity to discount the holdings in Ayeni II and Buonocore for the reason Judge Arnold provided.

199. See id. at 448. For a discussion of Judge Rosenbaum’s concurring opinion, see supra notes 149-53.

200. In support of Ayeni II, Judge Rosenbaum concluded, “I would find, consistent with Ayeni [II], that police officials executing a search warrant violate a resident’s Fourth Amendment rights, when they admit representatives of the public media into a private citizen’s home, without first securing the resident’s express consent.” Parker II, 93 F.3d at 448. Judge Rosenbaum’s concurring opinion has already been followed by other circuits. See Hanlon II, 129 F.3d 505, 511-12 (citing Rosenbaum’s separate opinion in Parker II to support view that media presence during execution of search warrants is unconstitutional).

201. See supra notes 116-20 and accompanying text.
sistencies, is the two-prong test in Lugar v. Edmondson Oil Co. 202 Instead of applying the Lugar two-prong test, the majority made scattered references to an earlier test articulated in United States v. Classic, as well as pieces of the first prong in Lugar. 203 This analysis distorts the systematic approach the Supreme Court set forth in Lugar, and it may incline other circuits to use the same "cut-and-paste" application of different tests rather than apply the complete test set forth in Lugar. 204 As a result, the process for determining whether private actors such as television crews are actors under color of state law will remain spotty and inconsistent. 205

As a result of this inconsistency in analysis, the majority opinion's impact on the media is unclear. In addition, the commercial success of reality programming makes the significance of Parker II even less certain. Lawsuits will not discourage producers of reality programs from continuing to film police searches of homes if the profits they earn exceed settlements to § 1983 claims. 206 In the end, the settlements and judgments that networks pay each year are just a cost of doing business, which is currently justified by the revenue the programs generate. 207

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203. See Parker II, 93 F.3d at 447-48. The majority began its discussion of the "color of state law" requirement by referring to the traditional definition set forth in Classic. See id. Without any further discussion of Classic, the majority jumped to the first prong of the Lugar test, which is considerably broader than the Classic standard. See id. at 448. The majority then focused on a section of text contained within the first prong and applied it to the facts of the case without considering the remaining language in the first prong. See id.
204. See supra notes 178-88 and accompanying text.
205. For a discussion of Supreme Court's decision to develop more consistent analysis of the "color of state law" requirement, see supra notes 115-24 and accompanying text.
206. See Symposium, Current Issues in Media and Telecommunications Law - Panel I: Accountability of the Media in Investigations, 7 Fordham Intell. Prop. Media & Ent. L.J. 401 (1997). Commentators note that while networks may incur costly settlements for producing programs in violation of individuals' rights, the money earned in selling the programs and running advertisements during the programs more than makes up for the money lost in settlements. See id.
207. See id.

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