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Journalists, Trespass, and Officials: Closing the Door on Florida Publishing Co. v. Fletcher

Kent R. Middleton*

I. INTRODUCTION

In the early 1970's, Jacksonville, Florida's fire and police officials customarily invited journalists to accompany them as they searched a private home for evidence of arson shortly after a fire. A Florida
photographer, named Cranford, played a quasi-official role as he accompanied officials in the search of Kienna Ann Fletcher's home. When officials ran out of film, they asked Cranford to take a picture of a spot on a bedroom floor where Ms. Fletcher's 17-year-old daughter, Cindy, had fallen after being overcome by the fire. Cranford's picture of the "silhouette" became part of the official record and was published in the *Times-Union*. Ms. Fletcher, who was out of town at the time of the fire, learned of her daughter's death by reading the *Times-Union* and thereafter sued the newspaper for trespass in *Florida Publishing Co. v. Fletcher*.

In *Fletcher*, the Florida Supreme Court ruled that a journalist has an implied consent, based on custom and usage, to enter private property after a calamity if invited by officials. The consent recognized by the court was not implied by Ms. Fletcher, the owner of the house, who objected to the journalist's entry into her home. Rather, the court recognized a privilege created by law despite a homeowner's objections.

The privilege to trespass may be recognized in law where the practice is customary and serves a public interest outweighing the harm caused. The Florida Supreme Court said it is common for journalists to accompany officials onto private property "where a disaster of great public interest has occurred," providing the entry is peaceful, at the invitation of investigating officers, and without damage to the property. The court relied on affidavits from media and law enforcement agencies testifying to the prevalence of journalists accompanying officials, and also noted the lack of litigation in this area as evidencing the recognition and acceptance of the practice by the community. The social benefits of the practice include the reporting of important newsworthy events and the aid given by journalists to officials conducting searches.

It is indeed common for journalists to accompany officials into private homes, not only on searches of fire scenes as in *Fletcher*, but also on raids and emergency entries with paramedics, police, and other officials. Geraldo Rivera is perhaps the best known practitioner of this sidekick journalism, but many other journalists routinely accom-

2. See infra notes 45-61 and accompanying text.
3. *Fletcher*, 340 So. 2d at 918. Ms. Fletcher also sued for invasion of privacy and for intentional infliction of emotional distress arising from publication of the photograph. A Florida circuit court judge dismissed the privacy count and granted final summary judgment in favor of the *Times-Union* on the counts alleging trespass and emotional distress. The Florida District Court of Appeal reversed the circuit court's grant of summary judgment on the trespass count. *Fletcher v. Florida Publishing Co.*, 319 So. 2d 100 (Fla. Dist. Ct. App. 1975). The Supreme Court of Florida held that Ms. Fletcher could not recover for trespass. *Fletcher*, 340 So. 2d at 918.
4. See Filming of Police Raids is Examined, *EDITOR & PUBLISHER*, Jan. 24, 1987,
pany officials into private places. One California television producer said he entered private residences with authorities "ten to fifteen times" to acquire film footage for a single documentary on paramedics in Los Angeles.\(^5\)

As suggested by Dave Zweifel, editor of The Capital Times in Madison, Wisconsin, it might seem reasonable that journalists be able to enter private property if invited by an official. After all, Zweifel said, "They are public officials."\(^6\) However, what is commonly practiced is not necessarily legally privileged. Since Fletcher, other courts have not accepted the Florida Supreme Court's recognition of an implied consent to trespass based on custom and usage when journalists enter private dwellings with officials.\(^7\) Nor have courts recognized a first amendment privilege for journalists to accompany officials onto

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\(^7\) The same year that Fletcher was decided, the Florida District Court of Appeal refused to review a lower court ruling denying summary judgment for journalists charged with malicious trespass for accompanying police on a midnight raid of a private school. See Green Valley School, Inc. v. Cowles Fla. Broadcasting, Inc., 327 So. 2d 810 (Fla. Dist. Ct. App. 1976). For a discussion of Green Valley, see text accompanying notes 180-183 infra.

In 1980, the Wisconsin Court of Appeals, reversing a lower court dismissal, ruled that a jury should decide whether a broadcast journalist trespassed when he accompanied officials on a raid. Prahl v. Brosamle, 98 Wis. 2d 130, 295 N.W.2d 768 (Ct. App. 1980) (no implied consent from custom and usage). Brosamle rode with Lt. Kuennen in a squad car onto the property of a rural research corporation belonging to biochemist Helmut Prahl. Id. at 135-36, 295 N.W.2d at 772. Brosamle filmed part of a police interview with Dr. Prahl in his home. Id. at 136, 295 N.W.2d at 773. Prahl claimed he did not protest because he thought Brosamle was a police employee. Id.; see also Prahl v. Brosamle, No. 82-1753, slip op. (Wis. Ct. App. Nov. 23, 1983) (no implied consent if reasonable belief owner would object).

In 1981, the New York Supreme Court granted summary judgment to plaintiffs, dismissing affirmative defenses for trespass in a case where upstate television journalists accompanied a humane society official on an administrative search of a private home. Anderson v. WROC-TV, 7 Media L. Rep. (BNA) 1987 (N.Y. Sup. Ct. 1981). The New York court called the custom and usage doctrine relied upon by the Florida Supreme Court a "self-created custom and practice," and a "bootstrap argument which does not eliminate the trespassory conduct of the defendants in this case." Id. at 1989. In Anderson, employees of three stations accompanied Ronald Storm of the Humane Society of Rochester on an investigation of abuse of animals. Id. at 1988. Storm, operating with a search warrant, investigated a complaint that animals were being mistreated at the home of Joy E. Brenon. Id. Unlike the plaintiffs in either the Fletcher or Prahl
private property. Instead, courts have held that journalists accompanying officials may be liable not only for trespass, but also for any resulting invasion of privacy and emotional stress. Also lurking in these decisions is the possibility that journalists may be liable for civil rights violations when they participate with officials in particularly intrusive raids.

Courts rejecting the custom and usage privilege of Fletcher do not offer a detailed legal analysis for their decisions. Instead, they tend to rely on the truism that first amendment and common law protections on newsgathering do not include protections for tortious conduct. Undeveloped in these cases, however, are the severe limits imposed by common and constitutional law on the powers of officials to invite journalists—or anyone else—onto private property.

This article argues that neither the affidavits nor lack of litigation relied upon by the Fletcher court support the conclusion that the practice of journalists accompanying officials into private homes is sufficiently common to constitute a legal privilege absent household consent. Furthermore, the newsgathering values served by such journalists are not sufficient to justify the violation of a homeowner's property and privacy interests protected by the law of trespass. In support of these propositions, the discussion will initially review why consent for journalists to enter homes with officials cannot be implied, and then argue that a privilege created by law under the doctrine of custom and usage is not justified. Finally, the article addresses journalists' liability, real and potential, for trespass, intrusion, and civil rights violations.

cases, Brenon objected when the television crew entered her house to shoot footage which was later broadcast.

On appeal, the appellate division for the fourth department ruled that the humane society investigator, acting under a search warrant, was not a co-trespasser with journalists where the official told press photographers he had no authority to permit them to enter. Anderson v. WHEC-TV, 92 A.D.2d 747, 748, 461 N.Y.S.2d 607, 609 (N.Y. App. Div. 1983). But see Wood v. Fort Dodge Messenger, 13 Media L. Rep. (BNA) 1610 (Iowa Dist. Ct. 1986) (journalists' entry onto farmland with permission of officials to photograph dead cattle neither an invasion of privacy nor a trespass). Unlike the journalist in Fletcher, the journalists in Wood did not enter a house, but entered adjoining land.


10. See infra notes 185-204 and accompanying text.
II. CONSENT

Journalists and other private citizens may enter private property either with consent of the possessor or with a privilege. According to the Restatement (Second) of Torts, consent "indicates that the possessor is in fact willing that the other shall enter or remain on the land, or that his conduct is such as to give the other reason to believe that he is willing that he shall enter. . . ."11 Possession is claimed by the person who occupies land with intent to control it.12 Usually, the possessor is the owner, but possession may be yielded by lease or contract to a tenant,13 or granted to a friend, relative, security guard, or other agent.14

11. Restatement (Second) of Torts § 330 comment c (1965).
12. Id. § 157. "The action for trespass is designed to protect the interest in exclusive possession of the land in its intact physical condition." W. Prosser & P. Keeton on Torts 77 (5th ed. 1984). Therefore, it is the person who possesses land who can give or deny consent for others to enter the property. The burden of establishing the possessor's consent rests with the person who relies on it. Restatement (Second) of Torts § 167 comment c (1965).

A possessor of land is defined as:

(a) a person who is in occupation of the land with intent to control it, or
(b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under clauses (a) and (b).

Id. § 328E; see also People v. Berliner, 3 Media L. Rep. (BNA) 1942, 1943 (Yonkers City Ct. 1978) (only the possessor may sue for trespass).

13. In LAL v. CBS, Inc., 726 F.2d 97 (3d Cir. 1984), the Third Circuit ruled that the owner of rental property in Pennsylvania could not bring a trespass suit against broadcasters who entered the property at the invitation of the tenants. Id. at 100. Under Pennsylvania law, "the lessor of improved land who is out of possession of the property cannot maintain" a trespass action unless he proves injury to a reversionary interest. Id.; see also Merz v. Professional Health Control of Augusta, Inc., 175 Ga. App. 110, 332 S.E.2d 333 (1985) (lessees, as possessors, may consent to filming of commercials on private property).

14. In Wood v. Fort Dodge Messenger, 13 Media L. Rep. (BNA) 1610 (Iowa Dist. Ct. 1986), the owner of farmland apparently delegated his possessory interest to a brother who then had the authority to invite others onto the land. Wood is unusual because the court found a sheriff gained possession of the property once his investigation began. Id. at 1614; see also State v. Gordon, 437 A.2d 855 (Me. 1981) (manager of a shop can delegate authority to police to evict boisterous customers); Walters v. State, 691 S.W.2d 25 (Tex. Ct. App. 1985) (security guard hired to protect property has right of possession in trespass suit against burglar).

An authorized agent may make access decisions for a person in possession of property who lacks the capacity to consent due to youth, Robalina v. Armstrong, 15 Barb. Ch. 247 (N.Y. Ch. 1852); intoxication, McCue v. Klein, 60 Tex. 168 (1883); or mental incompetence, Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906). See W. Prosser & P. Keeton on Torts 114 (5th ed. 1984).
A. Explicit Consent

Consent may be explicit or implied. The possessor of property may extend explicit consent by oral invitation or by written agreement. Journalists are accustomed to acquiring written consent from officials and residents of mental institutions and prisons where the state seeks to protect the privacy of residents. Standard practice at some television stations requires journalists to secure consent before entering someone’s home.

In newsworthy emergency situations—fires, raids, and medical calamities—the owner or possessor seldom expressly invites a journalist onto private property. Owners may, however, expressly invite the officials whom the journalists accompany. For example, in Miller v. NBC, Ms. Miller invited paramedics by phone to her California home to aid her husband who was having a heart attack. A journalist accompanied paramedics into the Miller’s home. Express consent to officials, however, does not constitute consent, express or implied, for anyone who might accompany them. The California Court of Appeal held that one telephoning for emergency medical attention “does not thereby ‘open the door’ for persons without any clearly identifiable and justifiable official reason who may wish to enter the premises where the medical aid is being administered.”

16. A Kansas appellate court found that a signed release by a business partner constitutes valid written consent for journalists accompanying a health inspector into nonpublic parts of a restaurant if the signature is not induced by misrepresentation. Belluomo v. KAKE TV & Radio, Inc., 596 P.2d 832 (Kan. Ct. App. 1979) (consent induced through misrepresentation is a question for the jury).
18. E.g., Smith v. Fairman, 98 F.R.D. 445 (C.D. Ill. 1982) (administrative regulations at Pontiac Correctional Center require reporters to obtain a “resident’s” signature on consent form, witnessed by a department staff member, before the resident can be interviewed or photographed).
20. Id. In Miller, Ms. Miller was taken by police to another room in the home she shared with her husband while a KNBC film crew, apparently without Ms. Miller’s knowledge, filmed efforts to save her husband’s life. Id. at 1469, 232 Cal. Rptr. at 670. Ms. Miller and her daughter sued for trespass, invasion of privacy and infliction of emotional distress. Id. at 1470, 232 Cal. Rptr. at 670. Reinstating the suit on appeal, Judge Hanson wrote: “[T]he obligation not to make unauthorized entry into the private premises of individuals like the Millers does not place an impermissible burden on news gatherers, nor is it likely to have a chilling effect on the exercise of First Amendment rights.” Id. at 1492-93, 232 Cal. Rptr. at 685.
22. Miller, 187 Cal. App. 3d at 1489-90, 232 Cal. Rptr. at 683; see also Thompson v. Louisiana, 469 U.S. 17, 22 (1984) (per curiam). But see Wood v. Fort Dodge Messenger, 13 Media L. Rep. (BNA) 1610 (Iowa Dist. Ct. 1986). According to the court, Duane Wood, who had been asked by his brother to look after his farm, gave express permission to the sheriff to enter the farm and to accompany members of the media onto the
B. Implied Consent

Consent in cases where media representatives accompany officials into private dwellings is said to be implied. Consent may be implied either from some relationship between two parties that indicates consent, or from the custom of the community without regard to any relationship between the parties.\textsuperscript{23} Where a landowner is aware of a trespass, consent may be implied from silence, acquiescence, or some other conduct between parties, including conversations. Customs of the community are taken into account in determining whether a reasonable person would understand the conduct to indicate consent.\textsuperscript{24}

1. Conversations

Consent is held to be implied when the possessor of property willingly engages in conversation with a trespasser. The Missouri Court of Appeals states that "[o]ne who silently watches another enter upon the former's land and then willingly engages the latter in conversation while standing upon the premises may not later be heard to complain of trespass."\textsuperscript{25} The United States Court of Appeals for the Second Circuit has held that the manager of a company gave explicit consent to a journalist to remain on private property when he directed the journalist to the front office to conduct an interview.\textsuperscript{26}

There are no reported cases of journalists accompanying officials where the possessor of the property, after engaging the journalist in conversation, indicated a willingness that the journalist should enter. There are, however, cases in which the media argue that consent by the owner was implied through the householder's silence or acquiescence.

2. Silence

Silence or acquiescence indicating consent may be manifest in repeated entries over a long period. Store owners imply consent for property. \textit{Id.} at 1614. The court decided that officials could invite journalists onto the property because they had possession of it. \textit{Id.}

\textsuperscript{23} Consent may be implied "from custom, local or general, from usage, or from the conduct of the parties or some relationship between them." F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 1.11, at 40 (2d ed. 1986).

\textsuperscript{24} \textit{Restatement (Second) of Torts} § 892 comment d (1977). Customs are particularly important in determining implied consent when one of the parties is silent or inactive. \textit{Id.}

\textsuperscript{25} Boling Concrete Constr. Co. v. Townsend, 686 S.W.2d 842, 843 (Mo. App. 1985).

\textsuperscript{26} Machleder v. Diaz, 801 F.2d 46 (2d Cir. 1986).
shoppers and browsers to enter when they open their doors and passively welcome all who enter day after day.\textsuperscript{27} Railroad companies and other property owners imply consent to trespass when their agents or employees continually permit the public to traverse company land or to ride company transportation for free. One court ruled that a railroad company that repeatedly permitted the public to cross a trestle "may be said to have recognized that use after it knew, or under the circumstances should have known, of it."\textsuperscript{28} The company consented to the trespasses because it was silent when large numbers of people crossed the trestle "openly, visibly, and continuously" over a "long period of time."\textsuperscript{29} In these cases of implied consent, the owner of the property or its agent knows of the entries onto the property and either welcomes them or fails to protest; therefore, it is reasonable to imply consent from a relationship between the parties.\textsuperscript{30}

Consent by homeowners and apartment dwellers to entries by journalists accompanying officials cannot be implied by a long-term relationship between the two parties.\textsuperscript{31} Journalists entering private homes with officials usually do not know the property owner. Nor has the owner or agent watched or acquiesced to a repeated entry over a long period. Unlike the relationship between shopowners and shoppers, householders have no direct experience silently watching journalists enter their houses or curtilage.

Consent can be implied, not only from a relationship or familiarity established over a long period, but also from a single occurrence if the circumstances suggest consent is intended. A housewife was found to have implied consent to the presence of magazine fashion photographers in her house when, upon returning home, she "made no meaningful effort to protect her privacy or demonstrated no visible emotional distress, but rather acquiesced in the continued presence" of the photographers that her children had admitted.\textsuperscript{32} The photographers entered peacefully, and there was no question of their identity.\textsuperscript{33}

Journalists claim that householders give implied consent by remaining silent when journalists accompany officials on raids and

\textsuperscript{27} W. PROSSER & P. KEETON ON TORTS 419 (5th ed. 1984).
\textsuperscript{28} J. Ray Arnold Lumber Co. v. Carter, 91 Fla. 548, 560, 108 So. 815, 819 (1926).
\textsuperscript{29} Id.
\textsuperscript{31} This was the conclusion of the Wisconsin Court of Appeals in Prahl v. Brosamle. 98 Wis. 2d 130, 147-49, 295 N.W.2d 768, 779 (1980).
\textsuperscript{32} Rawls v. Conde Nast Publications, Inc., 446 F.2d 313, 316 (5th Cir. 1971).
\textsuperscript{33} Id.
searches. Indeed, it is reasonable to imply consent when a householder's silence clearly signals consent. For example, it is reasonable to assume that television producer Ruben Norte was given implied consent to remain on private property when "no one objected" after he responded forthrightly to questions about why he and other journalists were accompanying officials into private homes. More often though, householders may be too confused or intimidated to ask who is accompanying officials and upon asking, may get noncommittal responses to their inquiries. In such circumstances, it is not reasonable to imply consent by the householder.

Courts generally rule that consent cannot be implied where the householders do not know who is entering their property, particularly in tense and disorienting circumstances such as a raid or fire. The California Court of Appeal found no consent, in Ms. Miller's silence when paramedics and a camera crew entered during a time of "vulnerability and confusion." Similarly, the Wisconsin Court of Appeals ruled it would be unreasonable to imply consent to entry by a journalist from the silence of one under the "distracting circumstances" of a raid, especially when the householder did not know that the man carrying a camera was a journalist. Similarly, a federal court in Wisconsin found no consent in a householder's silence after raiding police responded vaguely, "[s]he's with us," to the householder's inquiry into who was accompanying them. The woman with the officials was a reporter.

Although courts in cases involving media and officials have done little more than assert that consent may not be implied by a home-

34. Trespass, Intrusion Claims Stand, 11 NEWS MEDIA & THE LAW 22 (Summer 1987). See Prahl, 98 Wis. 2d at 149-50, 295 N.W.2d at 780.
35. Norte said he was questioned about "half the time" when he and an NBC film crew entered houses to film a documentary on paramedics and that he always responded, but "no one objected." Miller v. NBC, 187 Cal. App. 3d 1463, 1474-75, 232 Cal. Rptr. 668, 673 (1986). The California court did not have to rule whether silence in such circumstances constitutes consent.
36. Id. at 1484, 232 Cal. Rptr. at 679. Ms. Miller did not ask about the journalists' presence because she was in a different room at the time of the entry.
37. Prahl, 98 Wis. 2d at 150, 295 N.W.2d at 780. Dr. Helmut Prahl, a scientist, thought the television journalist carrying a camera was employed by the police department. Id. at 136, 295 N.W.2d at 773.
38. See NEWS MEDIA & THE LAW, supra note 34, at 22. Two experts say consent for a private policeman to search or intrude in an injured person's property "should be nullified if it was given because he mistakenly thought that the private security man was a policeman." J. KAKALIK & S. WILDHORN, IV THE LAW AND PRIVATE POLICE 9 (Law Enforcement Assistance Admin. 1971).
39. NEWS MEDIA & THE LAW, supra note 34, at 22.
owner's silence, the law supports the conclusion that consent to journalists' entries should not be implied by silence in stressful situations. Under constitutional law, consent to a warrantless entry by officials is not implied if derived from coercion or intimidation; consent must be "freely and voluntarily given." In common law, too, consent is not implied if a property owner merely submits to official authority or remains silent because he thinks that protest will be futile. Such is the case when journalists follow blue uniforms into private homes on raids, searches, and emergencies.

Officials entering private property during a raid or fire do not need consent of the homeowner and, indeed, do not find it in the household's silence. Police enter forcefully whether they are acting lawfully or not. "When a law enforcement officer claims authority to search a home under a warrant," the Supreme Court states, "he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." This is usually the case where police barge into a home to make an arrest or conduct a search. The entry of officials and those who accompany them may be perceived by the householder as entry sanctioned by law. In coercive, disorienting circumstances, it is unreasonable to imply consent to entry by journalists from a householder's silence.

### III. CUSTOM AND USAGE

Consent may be implied, not only from some relationship between the property owner and the trespasser but also, as in *Fletcher*, from custom and usage. The consent recognized in *Fletcher* was not based on any relationship between the property owner, Ms. Fletcher, and the photojournalist, Cranford, who accompanied Jacksonville officials into her fire-damaged home. Ms. Fletcher was not home at the time of the entry and presumably would have objected to the journalist's entry had she been there. Furthermore, Ms. Fletcher testified to having no special knowledge about customs concerning press entries

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41. "As to false imprisonment or battery, it is clear that yielding to a threat of force, or the assertion of legal authority, must be treated as no consent at all, but submission against the plaintiff's will; and the same is undoubtedly true as to trespass or conversion." W. Prosser & P. Keeton on *Torts* 121 (5th ed. 1984).

42. "[I]t is generally agreed that the mere toleration of continued intrusion where objection or interference would be burdensome or likely to be futile, as in the case of habitual trespasses on railroad tracks, is not in itself and without more a manifestation of consent." Id. at 144. What is true of habitual intrusion would also be true of a single entry under tense and confusing conditions.

43. See infra notes 71-75 and accompanying text.

into private homes. Presumably, no journalist had ever entered her property before, and she was familiar with no custom allowing journalists to enter private property without the owner's consent.45 Thus, the consent created by custom and usage on which the Fletcher court relies is a privilege created by law in which a householder's silence—in this case, Ms. Fletcher's absence—cannot reasonably be interpreted as consent. Where privileges are created by law, it may not matter that the absent or silent property owner disagrees with the "custom" as did Ms. Fletcher.

The consent recognized by the Fletcher court is similar to the nineteenth century privilege accorded cattle owners to graze their stock on open pastureland owned by others.46 The Fletcher privilege is also like that possessed by citizens in the nineteenth century to hunt and fish in private ponds without consent of the owner.47 Such privileges were created by law regardless of an individual property owner's knowledge or approval. Only if property owners fenced or posted their land could they exclude trespassers who otherwise had a privilege in custom and usage to enter.

A privilege to trespass is created by custom and usage when the social purpose of the trespass outweighs the property owner's possessory interests. On the American plains in the nineteenth century, the public policy of settling a land that was too vast to fence economically outweighed individual landowners' interests in excluding neighbors' cattle from their property.48 More recently, courts have recognized a privilege based on custom for salesmen,49 deliverymen,50 religious proselytizers,51 and neighbors52 to enter private land with-

45. Florida Publishing Co. v. Fletcher, 340 So. 2d 914, 917 (Fla. 1976).
46. Buford v. Houtz, 133 U.S. 320 (1890); Seeley v. Peters, 10 Ill. (5 Gilm.) 130 (1848); C. H. & D.R.R. v. Waterson, 4 Ohio St. 425 (1854).
48. "The existence or enforcement of such a [trespass] law would have greatly retarded the settlement of the country, and have been against the policy of both the general and the state governments." Buford, 133 U.S. at 330 (1890). The practice of letting cattle run at large was sometimes considered a right. See Waterson, 4 Ohio St. at 432 (1854).
50. E.g., Keeseker v. G.M. McKelvey Co., 68 Ohio App. 505, 42 N.E.2d 223 (1941), rev'd on other grounds, 141 Ohio St. 162, 47 N.E.2d 211 (1943).
out consent to deliver a message, ask for information, or to drop off a package.

Such privileges serve the publicly acknowledged purposes of allowing salesmen to make a living,\textsuperscript{53} proselytizers to state their mission,\textsuperscript{54} householders to receive information,\textsuperscript{55} and for all to carry out "the common purposes of life."\textsuperscript{56} As long as an entry is peaceful, is not conducted in defiance of a "no trespassing" sign, and does not go beyond the threshold of a house, custom and usage establish a privilege to trespass as long as the property owner does not object and even though the possessor of property may later disapprove.

One of the most elusive aspects of a privilege based on custom and usage is determining what Justice Holmes called "the habits of the country"\textsuperscript{57} on which a privilege is based. It is difficult to determine whether a practice is sufficiently common to be recognized in law because the privilege rests in part on public opinion.\textsuperscript{58} Disagreement is certain concerning the scope of the privilege and the underlying social policy.\textsuperscript{59} Defining the privilege is made more difficult because customs may shift with changing economic and social conditions.\textsuperscript{60}

\begin{itemize}
  \item \textsuperscript{53} See, e.g., Prior v. White, 132 Fla. 1, 21, 180 So. 347, 356 (1938); DeBerry v. City of La Grange, 62 Ga. App. 74, 8 S.E.2d 146 (1940). The right to earn a living "is fundamental, natural, inherent, and is one of the most sacred and valuable rights of a citizen." \textit{Id.} at 79, 8 S.E.2d at 150.
  \item \textsuperscript{54} See, e.g., Martin v. City of Struthers, 319 U.S. 141, 146-47 (1943); \textit{Richardson}, 313 Mass. at 638, 48 N.E.2d at 683.
  \item \textsuperscript{55} \textit{Martin}, 319 U.S. at 149.
  \item \textsuperscript{56} Writing expansively, Justice Holmes said "entry upon another's close, or into his house, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life, cannot be regarded as a trespass." Riley v. Harris, 177 Mass. 163, 164, 58 N.E. 584, 584 (1900) (quoting Lakin v. Ames, 64 Mass. 198, 220 (1852)).
  \item \textsuperscript{57} McKee v. Gratz, 260 U.S. 125, 127 (1922).
  \item \textsuperscript{58} See Seeley v. Peters, 10 Ill. (5 Gilm.) 130, 153 (1848) (Clayton, J., dissenting).
  \item \textsuperscript{59} Judge Clayton in Seeley argued on policy grounds against a privilege for roaming cattle. As a matter of political economy, Judge Clayton asserted it would be better law to protect crops which might be damaged by a trespassing cow than to protect the open range. "One acre in tillage is of more value than many acres of wild grass." \textit{Id.} at 150 (Clayton, J., dissenting). Defending the common law of the time, Judge Clayton said, "This principle of the common law was most unquestionably the law of natural justice, when it originated, for it secures to each one the quiet enjoyment of his own, without intrusion or molestation from another." \textit{Id.} at 151 (Clayton, J., dissenting).
  \item Judge Clayton objected to the alteration of the common law by burdening one person for the benefit of another without consent and saw danger in letting the law be determined by appeal to popular opinion. \textit{Id.} at 151-53 (Clayton, J., dissenting).
  \item \textsuperscript{60} While social policy dictated against holding owners of livestock liable for the trespasses of their animals on the vast plains of nineteenth century America, it became reasonable to hold them liable when the land became more populated, more valuable, and more economical to fence. Thus, the Ohio Supreme Court, which had upheld the privilege of cattle roaming in \textit{C., H & D.R.R. v. Waterson}, 4 Ohio St. 425 (1854), changed its mind by 1908. See Marsh v. Koons, 78 Ohio St. 68, 84 N.E. 599 (1908). Referring to a state trespass statute adopted in 1865, the Ohio court stated: "But conditions changed, the larger part of the land having been brought under cultivation, the
Recognizing a privilege for journalists to enter a home is particularly problematical because custom and usage usually create a privilege only to enter private property to the threshold of the house, not to enter the interior.

To determine whether a trespass is sufficiently customary to be privileged by law, courts consider the frequency of the entry, whether the practice has been challenged by litigants, and whether the social purpose outweighs the intrusion on the property. On none of these grounds could a court conclude that the law should create a privilege for journalists to enter private homes when the householder does not consent.

A. Frequency of Entries

The Florida Supreme Court was impressed by the number of affidavits submitted by the news media and law enforcement agencies attesting to the frequency with which journalists peacefully enter private property at the scene of a calamity when invited by officials. Several media and law enforcement organizations submitted affidavits attesting to the commonness of journalists accompanying officials into private places. In other cases, media organizations have testified to the frequency with which journalists accompany officials on raids, searches, and other entries onto private property.

A trespass, like any tort, is not privileged simply because it occurs often; and an illegal practice will not become privileged just because public welfare required that the burden be transferred to the owners of the cattle. Id. at 70, 84 N.E. at 600.

Similarly, the Michigan Supreme Court, which in 1878 recognized a privilege for a fisherman to fish in a private pond, Marsh v. Colby, 39 Mich. 626 (1878), saw no need to recognize such a privilege in 1917. Winans v. Willetts, 197 Mich. 512, 163 N.W. 993 (Mich. 1917).

Privileges created by law, irrespective of consent, are either conditional privileges serving an important social value or are absolute privileges providing functionaries the freedom necessary to the performance of their duties. RESTATEMENT (SECOND) OF TORTS § 10 comment d (1965). The absolute privilege belongs primarily to the judiciary, witnesses, jurors, and counsel who aid in the administration of law. Id. If journalists have a privilege to trespass, it is a conditional privilege to further first amendment interests by reporting public affairs. To be recognized in law, the social values served by the privilege must be of such importance "as to justify the harm caused or threatened by its exercise." Id. § 10.

Affidavits were filed in Fletcher by the Duval County Sheriff, the Florida Attorney General, ABC-TV, the Associated Press, The Washington Post, and several other news organizations. Florida Publishing Co. v. Fletcher, 340 So. 2d 914, 916 (Fla. 1976), cert. denied, 431 U.S. 930 (1977).

it is often repeated. An entry that is frequently repeated may be a nuisance rather than a privileged activity. Affidavits from media and law enforcement agencies are self-serving sources for asserting public approbation of journalists accompanying officials onto private property. Some courts are unwilling to recognize a custom allowing journalists to enter private property when property owners themselves do not testify to the commonness of the practice. A Wisconsin appellate court held that newscasters “cannot establish a right to enter the lands of others without taking into account the reaction of the landowners.” In a New York case in which a television news manager submitted the only affidavit, the supreme court found that implied consent is not created “by asserting that it exists and without evidence to support it.” If a privilege is to be implied by the owner or created by law, affidavits are needed from affected householders, attesting to the frequency of journalists accompanying officials into private dwellings.

_Fletcher_ does not, however, rely entirely on the implied consent of householders to permit entry by journalists. In fact, the _Fletcher_ privilege allowing journalists to trespass depends more on the invitation to journalists made by officials than on implied consent of property owners. Without the invitation from officials, the _Fletcher_ court would have found no privilege in favor of journalists. The court noted both the absence of objection to the entry and also that “there was an invitation to enter by the officers investigating the fire.” The Florida court even suggested that officials might have invited the photographer onto the property if Ms. Fletcher had been home to object. Other courts, not recognizing a privilege for journalists to enter private property, have distinguished _Fletcher_ because of the invitation extended by Florida officials to journalists.

Several courts since _Fletcher_ have followed the common law more closely by ruling that an official who lawfully enters property in an emergency has no general power to invite others, including journalists, onto the property.

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67. _Fletcher_, 340 So. 2d at 918 (emphasis in original).
68. Id. at 917.
69. See, e.g., Prahl v. Brosmale, 98 Wis. 2d 130, 149, 295 N.W.2d 708, 780 (Ct. App. 1983).
70. “[A] law enforcement officer is not as a matter of law endowed with the right or authority to invite people of his choosing to invade private property and participate
severely restrict the authority of officials to invite even other officials onto private property.

Officials, as Ms. Fletcher acknowledged, are privileged to enter private property in an emergency without consent of the possessor.71 Police are privileged under both common law and constitutional law to enter without consent to make an arrest72 and to save lives and property.73 The Supreme Court states: "A burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze."74 Indeed, an officer may have a duty to enter private property in an emergency.75

Fire and police officials may invite private citizens onto the prop-


Although otherwise trespassory conduct may be legalized or justified by lawful authority, such as an officer of the law acting in the performance of his duty [citation omitted], such authority does not extend by invitation, absent an emergency, to every and any other member of the public, including members of the news media. Anderson v. WROC-TV, 7 Media L. Rep. (BNA) 1987, 1989 (N.Y. Sup. Ct. 1981).

In Prahl v. Brosamle, the Wisconsin Court of Appeals said that a police officer has no authority to invite a journalist onto private property. 98 Wis. 2d at 154-55, 295 N.W.2d at 782. A new trial was ordered to determine whether the officer's statement that Brosamle could "come forward" when the situation was under control represented consent for Brosamle to proceed or simply an indication of no objection by the officer. If it was consent, the officer might be ruled to be a co-trespasser. Id.

71. Fletcher, 340 So. 2d at 918.
72. Law enforcement officers may enter private property without a warrant to, among other things, prevent the destruction of evidence and pursue a suspect. Warden v. Hayden, 387 U.S. 294 (1967). Entry onto private property to make an arrest for a criminal offense is also privileged in the common law of trespass. RESTATEMENT (SECOND) OF TORTS § 204 (1965).

A private person, including a journalist, is privileged in common law to enter land to avert an imminent public disaster, id. § 196; or to prevent serious harm to himself or the possessor, unless the actor knows the possessor on whose behalf he is acting does not want him on the property, id. § 197. "Where a conflagration is raging, a person may lawfully enter upon another's premises in order to save others, and he is not regarded as a trespasser. [citations omitted] In other situations necessity, especially in the interest of preservation of human life, will legally excuse or justify trespass." State v. Hoyt, 21 Wis. 2d 284, 297, 128 N.W.2d 645, 651-52 (1964); see also Larco Drilling & Exploration Corp. v. Brown, 267 So. 2d 308 (Miss. 1972).

73. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." Warden, 387 U.S. at 298-99. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." Mincey v. Arizona, 437 U.S. 385, 392 (1978) (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963)). The government bears the burden of showing the existence of an exceptional situation to justify official entry. Arkansas v. Sanders, 442 U.S. 733, 760 (1979).
75. For example, an officer called to a home may have a duty to enter and lend
property to help make an arrest.76 Officials may also invite "experts" such as a deputy fire marshal or chemical expert onto private property to insure that an extinguished fire is unlikely to rekindle or cause an explosion.77 A journalist, like any other citizen, may be required to assist an officer to make an arrest78 or help an official in an emergency.79 “From earliest times, an officer charged with the duty of preserving the peace and arresting offenders has had the authority to call upon bystanders to assist him.”80 A citizen acting in good faith does not have to inquire into the authority of the officer making an arrest and, in such circumstances, the citizen is protected from liability if the officer acts illegally.81 Accordingly, if citizens cannot refuse to render aid, they should not be liable if they participate in an unauthorized arrest.82

Journalists are not typically invited onto private property to assist with an arrest or to render aid in an emergency, but often are invited to gather information after an emergency is over. Officials customarily do not have the authority to invite anyone of their choosing onto private property during or after an emergency. Officials on private property are usually licensee83 with the limited authority to perform their ministerial duties84 and then to leave.85 Officers who enter assistance if he sees a body through a window and no one answers the door. State v. Hoyt, 21 Wis. 2d 284, 128 N.W.2d 645 (1964).

76. W. PROSSER & P. KEETON ON TORTS 154 (5th ed. 1984). “An officer may call upon private persons to assist him in making any arrest, and those who do so will be privileged, even though the officer himself is without authority, so long as he is known to be a peace officer.” Id.; see Note, The Private Person’s Duty to Assist the Police in Arrest, 13 WYO. L.J. 72 (1958).

77. When firemen are not trained to handle explosives, they may call in police with special expertise to evaluate chemicals used to manufacture explosives and “render safe” the premises. United States v. Urban, 710 F.2d 276, 279 (6th Cir. 1983).

78. See Note, supra note 76, at 74.

79. This usually occurs when an officer acting alone could not make an arrest. Id.; see also Blackman v. City of Cincinnati, 66 Ohio App. 485, 35 N.E.2d 184 (1941).

80. Id. at 498, 35 N.E.2d at 185-66.


85. Whatever authority an official has to be on private property, “[w]hen the search is over, any license to remain on the premises lapses. The police then have only a bare temporary license to search and do not acquire any further legal interest to sustain a trespass action.” People v. Berliner, 3 Media L. Rep. (BNA) 1842, 1944 (Yonkers City Ct. 1978).
property illegally, remain longer than they are authorized, conduct unauthorized searches, or invite unauthorized personnel onto the property, may themselves become trespassers\textsuperscript{86} liable for the damage they and their invitees cause.\textsuperscript{87} Instead of having the authority to invite whomever they choose to enter private property, officials have a duty to secure private property from unauthorized entry by outsiders.\textsuperscript{88}

\section*{B. Lack of Litigation}

In addition to considering the frequency of a trespass when determining a privilege, courts may also consider lack of litigation as evidence that a practice is generally accepted. Since the nineteenth century, courts have cited a lack of plaintiffs as evidence that a practice is commonly accepted.\textsuperscript{89} The \textit{Fletcher} court considered the trespass by the photojournalist a case of first impression.\textsuperscript{90} "This, in itself, tends to indicate that the practice has been accepted by the general public since it is a widespread practice of long-standing."\textsuperscript{91}

While lack of litigation may indicate public acceptance of a practice, it also may be explained by other reasons. The California Court of Appeal suggests the lack of intrusion cases may result not from widespread acceptance of the practice, but from public recognition

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\item \textsuperscript{86} 75 AM. JUR. 2D Trespass § 41 (1974). "Person who cooperates, instigates, commands, encourages, ratifies, condones, or aids, assists, or advises the commission of a trespass is liable as a cotrespasser." J. DOOLEY, 3 MODERN TORT LAW § 40.04 (1984).
\item \textsuperscript{87} The common law holds public officials as well as private citizens liable for trespass, intrusion, and other torts that invade privacy. Under the rarely invoked doctrine of trespass \textit{ab initio}, an official who enters property legally but becomes a trespasser may be liable for any damages resulting from the beginning of his entry. W. PROSSER & P. KEETON ON TORTS 151 (5th ed. 1984).
\item \textsuperscript{88} Where fire-prone buildings come under state control, officials may be negligent if they permit entry by unauthorized people. Buckeye Union Fire Ins. Co. v. State, 164 N.W.2d 699 (Mich. App. 1968); \textit{see also} People v. Berliner, 3 Media L. Rep. (BNA) 1942, 1943 (Yonkers City Ct. 1978) (police have duty to bar admission of trespassers during a search). However, in \textit{Anderson} v. \textit{WHEC-TV}, 92 A.D.2d 747, 748, 461 N.Y.S.2d 607, 609 N.Y. App. Div. (1983), a New York appeals court found that a peace officer executing a search warrant had no duty to prevent unlawful entry of journalists where the officer told the journalists he had no authority to invite them onto the property. In \textit{Anderson}, the officer who did not object to the journalists' trespass was not himself a trespasser. \textit{Id.}
\item \textsuperscript{89} Seeley v. Peters, 10 Ill. (5 Gilm.) 130, 142 (1848). "No man has questioned this right [to let cattle roam], although hundreds of cases must have occurred where the owners of cattle have escaped the payment of damages." \textit{Id.}; \textit{see also} Prior v. White, 132 Fla. 1, 180 So. 347 (1938) (salespeople solicited 100 homes without complaint).
\item \textsuperscript{90} \textit{Fletcher}, 340 So. 2d at 918-19.
\item \textsuperscript{91} \textit{Id.}
\end{itemize}
that such entry is improper. The court explains that most individuals do not enter private homes without the occupant’s consent unless they are acting in “some clearly identified official capacity.” People understand “widely held notions of decency preclude” entry; “most individuals understand that to do so is either a tort, a crime, or both.”

The California court’s reasoning perhaps better explains why journalists sometimes forego accompanying officials into private homes rather than why so few people sue journalists who do enter. “[W]idely held notions of decency” may deter intrusions by journalists but would not explain why victims of trespass or intrusion do not sue. If journalists’ frequent entry into private homes with officials violates widely held notions of decency, one might anticipate many suits for trespass and intrusion.

The reason relatively few people sue over trespass and invasion of privacy may lie in the adequacy of the legal system to compensate successful litigants for their loss of privacy and possessory interests to trespassers. As Gavison suggests, the relative rarity of privacy suits might generally be explained “by expectations that such injuries are not covered by law, by the fact that many invasions of privacy are not perceived by victims, and by the feeling that legal remedies are inappropriate, in part because the initiation of legal action itself involves the additional loss of privacy.” What is true of privacy may also be true of trespass, which is often antecedent to a privacy claim.

Victims of trespass may be discouraged from using the courts because litigation may yield only nominal or insufficient compensatory damages. Such damages are hardly an incentive for a would-be plaintiff or an attorney working on a contingency basis. Victims of trespass may be discouraged from suing for larger punitive damages or damages for intrusion and emotional distress because litigation will further publicize the private matters. Furthermore, victims of trespass or invasion of privacy may consider monetary damages inappropriate compensation for the violation of their property and the shame and degradation suffered. Thus, there may be few trespass and privacy suits against the media since the law is not attuned to protecting dignity and self-respect, both of which are violated by trespass and invasions of privacy.

A victim of a trespass or invasion of privacy may also consider a

93. Id.
94. Id.
95. Id.
97. Id. at 373-74.
suit against the media futile because of the frequency with which newsworthiness and first amendment values prevail. Potential plaintiffs may also feel it is futile to sue journalists whose trespass or intrusion merits a government sanction. Finally, many whose houses are intruded upon may be too poor to consider contacting an attorney.

Whatever the reason for the relatively few trespass and privacy cases against the media, the number is increasing, thus undermining the conclusion in *Fletcher* that infrequent litigation indicates public acceptance of trespassing journalists. Since *Fletcher*, several courts have recognized a cause of action against journalists for trespass, intrusion, and infliction of emotional distress. Juries have occasionally awarded damages.98

C. First Amendment Values Served by Trespass

In cases where landowners are aware of trespassers over a long period of time, consent may be implied if the owner of the property derives some benefit which makes it reasonable for a court to assume that consent is intended. For example, drovers were said to have an implied consent to ride trains for free in the nineteenth century to tend their own cattle.100 Similarly, where the owner is not aware of a trespass, social policy may justify a privilege in law. The policy of settling the vast American plains in the nineteenth century justified a privilege for a cattle owner to graze his herds on others’ property, despite occasional objections.101

If social policy is to justify a privilege for journalists to accompany officials into private homes, that policy is based in the first amendment and common law privileges for gathering news. One media trespass defendant argued that a journalist’s entry with officials, causing no actual damage, is at most a technical trespass for which journalists should not be liable when gathering news.102 Treating trespass as an intrusion, one television station argued for a qualified

98. See *supra* notes 7 and 8 and accompanying text.
99. See *supra* note 9 and accompanying text.
101. Buford v. Houtz, 133 U.S. 320 (1890); Seeley v. Peters, 10 Ill. (5 Gilm.) 130 (1848); C., H. & D.R.R. v. Waterson, 4 Ohio St. 425 (1854); see *supra* notes 45-61 and accompanying text.
first amendment privilege which balances newsworthiness against the degree of intrusion.\textsuperscript{103} Any other approach, the station argued, “would border on prior restraint.”\textsuperscript{104}

However, only the \textit{Fletcher} court has recognized the journalist’s newsgathering function as a rationale for creating a privilege to trespass based on custom and usage. While not citing the first amendment, the court noted that the photojournalist accompanying Jacksonville officials gathered information on an important newsworthy event.\textsuperscript{105} The court also noted that the journalist helped officials take pictures and conduct a search for evidence of arson.\textsuperscript{106}

Without question, journalists accompanying officials serve important first amendment goals. Like journalists covering criminal court proceedings—for which the Supreme Court has created a first amendment right of access—journalists covering officials in private homes monitor public officials, educate the public, develop public acceptance for the workings of government, and provide a “community catharsis.”\textsuperscript{107} Certainly, much of the reportage resulting from journalists’ coverage of fires, raids, and other occurrences on private property is protected speech about public issues and officials. Such expression occupies the “highest rung of the hierarchy of First Amendment values.”\textsuperscript{108}

While not denying the newsworthiness of many events which occur on private property, courts since \textit{Fletcher} have been reluctant to recognize a first amendment defense for trespassing or intruding journalists, whether or not journalists accompany officials. Some courts suggest balancing a household’s privacy against a journalist’s first


\textsuperscript{105} \textit{Fletcher}, 340 So. 2d at 918.

\textsuperscript{106} \textit{Id.}


James Cole, an attorney for WISC in Madison, Wisconsin, justifies broadcasters accompanying police during a 5:00 a.m. raid on a private home by saying: “They wanted people in southern Wisconsin to know what it’s like when police come bursting in at 5 in the morning.” Rogers & Callender, \textit{Jurors Award Couple $25,000 in Privacy Lawsuit}, The Capital Times (Madison, Wis.), Jan. 10, 1987, at 3, col. 1. Cole added that it was not the station’s coverage of the arrest that caused plaintiff emotional distress, but the public notice of her husband’s arrest. \textit{Id.}
amendment rights to gather news. Most courts, however, usually reject such balancing and rely instead on language in *Dietemann v. Time*, that the first amendment does not permit tortious newsgathering. In rejecting a first amendment privilege for journalists to enter private property, the courts also cite the Supreme Court’s dictum in *Branzburg v. Hayes* that “[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded. . . .”

While the Court’s rationale for denying first amendment protection for trespassing or intruding newsgatherers is formulaic, it is consistent with the weak first amendment right to gather news. Although the Supreme Court has recognized a first amendment right of access to courtrooms for the press and public, the right to gather news is a weak entitlement relative to the constitutional right to speak and publish. The right to gather, have access to, or receive in-

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The *Miller* court suggested it would balance a homeowner’s right of privacy with journalists’ first amendment interests in newsgathering and dissemination where a television crew filmed and broadcast unsuccessful attempts by paramedics to resuscitate the plaintiff’s husband in the plaintiff’s home. *Miller v. NBC*, 187 Cal. App. 3d 1463, 1490, 232 Cal. Rptr. 668, 683 (1986). The California court noted that newsgathering, as well as news dissemination, “may be within the protective ambit of the first amendment.” *Id.* at 1492, 232 Cal. Rptr. at 684 (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)); see also *Note, Press Passes and Trespass: Newsgathering on Private Property*, 84 Colum. L. Rev. 1298 (1984).

110. 449 F.2d 245 (9th Cir. 1971) (opinion by Hufstedler, J.).

111. “The first amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The first amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office.” *Id.* at 249 (cited in *Miller*, 187 Cal. App. 3d at 1490, 232 Cal. Rptr. at 683, and in *Anderson v. WROC-TV*, 7 Media L. Rep. (BNA) 1987, 1990-91 (N.Y. Sup. Ct. 1981)); see also *Le Mistral v. CBS, Inc.*, 3 Media L. Rep (BNA) 1913, 1914 (N.Y. Sup. Ct. 1978).


113. *Id.* at 684-85; see *Miller*, 187 Cal. App. 3d at 1492, 232 Cal. Rptr. at 685; *Prah v. Brosamle*, 98 Wis. 2d 130, 151, 295 N.W.2d 768, 780 (Ct. App. 1980). Without explanation, the court in *Miller* ruled that privacy rights would prevail. 187 Cal. App. 3d at 1493, 232 Cal. Rptr. at 685. Without analysis, the court also concluded that barring unauthorized entries into private premises is unlikely “to have a chilling effect on the exercise of First Amendment rights.” *Id.*; see also *Note, The Rights of the Public and the Press to Gather Information*, 87 Harv. L. Rev. 1505 (1974).

formation, though always an entitlement concurrent to the right to speak and publish, has never been very potent except when it provides access to the courts.\textsuperscript{115} Even access to political speech—found atop the hierarchy of constitutionally protected expression—has been, at best, subsidiary to the right to speak and publish.\textsuperscript{116} Absent a willing speaker (as is usually the case when the press seeks access to private homes), the Supreme Court has been reluctant to create a first amendment right to gather news.

D. Possession and Privacy

Even if the right of access for newsgatherers were a more developed doctrine, it would seldom justify a journalist’s entry into a private home or apartment. Unlike the courtroom, a home is not dedicated to first amendment purposes, nor are first amendment activities appropriate there.\textsuperscript{117} Historically, a home, in contrast to a court, has not been open to the press and public for discussion of public affairs.\textsuperscript{118} The home or apartment is even less accessible for first amendment activity, whether newsgathering or speech, than an army base\textsuperscript{119} or a jail\textsuperscript{120}—public institutions which the Supreme Court has ruled are not appropriate locations for expressive activities. The householder is an absolute censor who may exclude the religious proselytizer\textsuperscript{121} and anyone else whom he or she does not wish to pass

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    \item 115. The right to gather or receive information is a passive right that provides little protection against government control. For example, while the first amendment protects commercial speech because of citizens’ interests in receiving commercial information, the Supreme Court holds that truthful advertising might be banned. Posadas de Puerto Rico Ass‘n v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986).
    
    \item 116. There is no first amendment right of access to (i.e., no right to gather information from) government controlled records or meetings. See generally Stewart, Or of the Press, 26 Hastings L.J. 631 (1975); Note, The Rights of the Public and the Press to Gather Information, 87 Harv. L. Rev. 1505 (1974); Note, The First Amendment Right to Gather State-Held Information, 89 Yale L.J. 923 (1980). Similarly, there is no first amendment right to hear distinguished foreign intellectuals. Kleindienst v. Mandel, 408 U.S. 753 (1972). Furthermore, the Supreme Court does not recognize a right of access to accident scenes, as in Colten v. Kentucky, 407 U.S. 104 (1972), nor to government institutions other than courts, such as in Houchins v. KQED, Inc., 438 U.S. 1 (1978).
    
    \item 117. The Supreme Court said the press and public have a first amendment right of access to criminal trials because courtrooms have historically been places for open discussion of governmental affairs. See Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982). Because courtrooms have traditionally been open for debate on matters of governing importance, Chief Justice Burger suggested they take on the character of a public forum. Richmond Newspapers, 448 U.S. at 577-78.
    
    \item 118. Id. at 589.
    
    \item 119. Greer v. Spock, 424 U.S. 828 (1976). “[I]t is . . . the business of a military installation . . . to train soldiers, not to provide a public forum.” Id. at 838.
    
    \item 120. Adderley v. Florida, 385 U.S. 39 (1966). “The State . . . has power to preserve the property under its control for the use to which it is lawfully dedicated.” Id. at 47. “Traditional” public forums include streets and parks. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983).
    
    \item 121. In Martin v. Struthers, 319 U.S. 141, 148 (1943), the Court ruled “[a] city can
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the threshold.\textsuperscript{122} It does not matter that the person seeking entry has a constitutionally protected right to speak.\textsuperscript{123}

A court determining whether the customs of a community create a privilege in law must consider whether the values served by the privilege are outweighed by the harm caused or threatened.\textsuperscript{124} The householder’s authority to exclude all would-be intruders, even those exercising first amendment rights, is founded in the essential privacy of the home. The possessory and privacy interests of the home, protected by common and constitutional law, create an expectation of privacy that is not diluted by the entry of officials and journalists during a news event.

The home with its curtilage is a special place where the sanctity of privacy has been protected in constitutional and common law since the 1700’s. The fourth amendment protects both the property and the privacy of the home from unreasonable government searches and seizures. A person at home occupies a special zone with an expectation of privacy that society is prepared to recognize as reasonable.\textsuperscript{125} “At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasona-

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\item The Supreme Court has never ruled on a person’s right to speak in someone else’s private home, but Justice Harlan once observed that the right to freedom of speech “would surely not encompass verbal expression in a private home if the owner has not consented.” Garner v. Louisiana, 368 U.S. 157, 202 (1961) (Harlan, J., concurring). Newsgathering can certainly have no stronger first amendment claim in the home. See also Schaumburg v. Citizens For a Better Environment, 444 U.S. 620 (1980). While stating that political solicitation is imbued with first amendment interests, the Supreme Court upheld an ordinance requiring door-to-door solicitors to depart immediately when confronted with a no soliciting sign and described the ordinance as a necessary measure to protect privacy. \textit{Id.} at 639.

“Since a large part of the ‘mission’ of a private residence is precisely privacy and repose, there can be no doubt that on balance the privacy interest outweighs the speech interest [of those who would intrude to speak], so that no First Amendment right may be recognized contrary to the wishes of the resident occupant.” M. Nimmer, \textit{Nimmer on Freedom of Speech} 4-121 (student ed. 1985).

123. A person in his home has “the very basic right to be free from sights, sounds, and tangible matter” he does not want, even if protecting that privacy interest means interfering with “the highly important right to communicate.” Rowan v. United States Post Office Dept, 397 U.S. 728, 736 (1970). In \textit{Rowan}, the Supreme Court upheld the constitutionality of a statute allowing a recipient of a mailed advertisement to require the mailer to remove the recipient’s name from the mailing list if the ad offered to sell erotic material. \textit{Id.} “[A] mailer’s right to communicate must stop at the mailbox of an unreceptive addressee.” \textit{Id.} at 736-37.

\item See \textit{supra} notes 48-59 and accompanying text.
\item Smith v. Maryland, 442 U.S. 735, 740 (1979).
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ble governmental intrusion.” Homes have always “received special protection in analysis under the Fourth Amendment.” The home, particularly one’s bedroom, is a place where one does not expect intruders.

The law of trespass is said to protect property, not privacy. Nonetheless, the right to control property, as ensured by trespass law, is based upon enduring American values (including privacy) which originated in natural law. Early American state constitutions proclaimed property as one of the natural rights of man. Property was a key concept in the development of the theory of possessive individualism at the end of the seventeenth century.

Societal views of property, particularly the homestead, are traditionally connected to a citizen’s sense of autonomy and personhood. The home, whether a private dwelling or apartment is, as Professor Radin suggests, “affirmatively part of oneself.” Trespass law protects not only property but also private interests by ensuring, as Cooley said, that every man’s castle is “sacred” against unlicensed intrusion.

As property ownership has consolidated under industrial capitalism, government regulation and taxation have diminished the owner’s absolute dominion over his economic property. At the same time, one’s control over his domicile as a refuge and retreat has taken on new importance. Trespass law helps ensure that journalists

128. In Griswold v. Connecticut, 381 U.S. 479, 485 (1965), the Supreme Court referred to bedrooms as “sacred precincts” in which government officials have little right to be. See also United States v. Parr, 716 F.2d 796, 816-17 (11th Cir. 1983), reh’g denied, 734 F.2d 1481 (11th Cir. 1984).
133. Id.
134. T. COOLEY, 2 COOLEY ON TORTS 649 (Lewis 3d ed. 1906). The action for trespass from its origin was “intended to provide a remedy for an injury to property or to the person.” Deiser, The Development of Principle in Trespass, 27 YALE L.J. 220, 221 (1917). The interest in private buildings is not simply a “property” interest, as the law of trespass might suggest. As Nimmer says:

The term ‘property’ is a catch-all term for that bundle of rights which the law ordinarily accords to one who has acquired ‘title,’ and is, therefore, a property owner. Perhaps the most central of these is the right to exclude the world, which is to say, a right of privacy over that domain in which a property interest resides . . . which explains why there is no First Amendment right to speak in or at the threshold of a private residence contrary to the occupant’s wishes.

M. NIMMER, NIMMER ON FREEDOM OF SPEECH 4-118 to -119 (student ed. 1985).
135. Donahue, supra note 131, at 56.
and others, who would claim new privileges for entry into the home, will not diminish the value of the home as a shield from the outside world. Cooley's observation that trespass law protects the quiet, convenience, and security of the dwelling place is still valid.\textsuperscript{136}

The property owner or tenant does not lose the common law right of possession or the constitutional right of privacy vis-a-vis officials simply by being the victim of a calamity, raid, or tragedy. Unless property is abandoned, the possessor retains possessory interests in it. Property damaged by fire is not abandoned unless it is destroyed.\textsuperscript{137} Otherwise, property is not considered abandoned unless it is run-down, unoccupied, and "wholly forsaken or deserted."\textsuperscript{138} The Florida Supreme Court in \textit{Fletcher} recognized that the fire did not terminate Ms. Fletcher's possessory powers.\textsuperscript{139} The court felt that Ms. Fletcher could have excluded the journalists had she been present.\textsuperscript{140} Of course, government officials may also be denied entry if they have no warrant and there is no emergency.\textsuperscript{141}

The owner's power of possession and, therefore, the power to invite and exclude, is not lost because the owner is absent during a fire or other newsworthy event.\textsuperscript{142} Intrusion and trespass are still torts.

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\textsuperscript{136} T. Cooley, \textit{2 Cooley on Torts} 650 (Lewis 3d ed. 1906).
\textsuperscript{137} The Supreme Court has said that reasonable privacy expectations may remain in fire-damaged premises. Michigan v. Clifford, 464 U.S. 287, 292 (1984) (charging the Cliffords with arson of their own home). "People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises." \textit{Id.} (quoting Michigan v. Tyler, 436 U.S. 499, 505 (1978)). Even householders who set their own homes on fire retain sufficient privacy interests requiring a warrant for a criminal search once the exigencies have passed. \textit{See} Michigan v. Tyler, 436 U.S. 499, 505-06 (1978). When reasonable privacy interests remain, the warrant requirement applies absent consent or exigent circumstances. \textit{Clifford}, 464 U.S. at 292-93.
\textsuperscript{139} \textit{Fletcher}, 340 So. 2d at 918. The Florida Supreme Court apparently recognized Ms. Fletcher's possessory interests when it observed that implied consent for the photojournalist to enter "would, of course, vanish" if the owner or possessor had informed anyone not to enter. \textit{Id.}
\textsuperscript{140} \textit{Id.} at 917. The Florida Supreme Court also believed police had the possessory powers to invite the journalists into the home even if Ms. Fletcher had been present to object. The court said that the police would have requested the photographer to take the picture of the silhouette "even had the Plaintiff been there and objected." \textit{Id.}
\textsuperscript{141} \textit{See}, e.g., State v. Boilard, 488 A.2d 1380 (Me. 1985) (holding that policeman may arrive at a home in response to a neighbor's complaint of a disturbance, but absent exigent circumstances, the officer may not enter the house against the wishes of the person in possession).
\end{flushleft}
even though they occur when an owner or tenant is absent.\textsuperscript{143} One

does not abandon his property rights, including rights of possession,

"until he has been gone for a sufficiently long period of time that his

intention not to return may be inferred."\textsuperscript{144} Since the owner's pos-
sessory interests in his property remain even during his absence, fire

and police officials have no greater authority to conduct a warrant-

less search of a private residence when the owner is absent than if he

is present. So stringent are the fourth amendment restrictions on of-

ficials that one circuit has ruled fire officials need warrants after ex-

tinguishing a fire, even to secure valuable possessions from looters.\textsuperscript{145}
The court stated it did not want a firefighter to have unbridled dis-
cretion "to decide whether or not to look through closets, drawers,

desks, personal papers, toiletries, bathrooms, or bedrooms . . . with-

out any set standards to guide his decision."\textsuperscript{146} Surely, homeowners

retain a reasonable expectation that journalists and other private citi-
zens do not enjoy privileges to enter which are constitutionally for-

bden to police and fire officials.

Finally, temporary control of private premises by public officials
does not generally open those premises for public access as did the

presence of firefighters and police officers in \textit{Fletcher}.\textsuperscript{147} Prisons\textsuperscript{148}
and accident scenes\textsuperscript{149} are under government control, but are not

open for public entry. Furthermore, the summoning of officials by a

householder is not "an invitation to the general public" that converts

a private home into a public place.\textsuperscript{150} On the contrary, even access to

public property may be tightly limited without violating constitu-
tional or common law. Instead of the presence of officials opening a

home to the public, officials may have a duty to exclude citizens to

preserve property and evidence as well as to avoid charges of trespass

and intrusion.\textsuperscript{151} Private persons may not do what an official is pro-

\begin{itemize}
  \item \textsuperscript{143} \textit{Cifford}, 464 U.S. at 292; see also \textit{Ford Motor Co. v. Williams}, 108 Ga. App. 21, 132 S.E.2d 206 (1963).
  \item \textsuperscript{145} \textit{U.S. v. Parr}, 716 F.2d 796, 816 (11th Cir. 1983); \textit{reh’g denied}, 734 F.2d 1481 (1984).
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Besides the photojournalist Cranford, "numerous members of the general public also went through the burned house" with officials. \textit{Fletcher}, 340 So. 2d at 918.
  \item \textsuperscript{150} \textit{Thompson v. Louisiana}, 469 U.S. 17, 22 (1984) (per curiam); see also \textit{Miller v. NBC}, 187 Cal. App. 3d 1463, 1490-91, 232 Cal. Rptr. 668, 683 (1986).
  \item \textsuperscript{151} In one fourth amendment case, the Ninth Circuit rejected a lower court statement that entry by a firefighter into a home "broke the secrecy of the place," thus opening the premises for warrantless entry by police. \textit{United States v. Hoffman}, 607 F.2d 280, 284 n.1 (9th Cir. 1979). The policeman first needed to get a warrant even though his intrusion into the home was no greater than the firefighters who preceded him.
\end{itemize}
hibited from doing simply because they are invited in by an official.

If property owners, even when absent, retain possessory and privacy interests in their homes despite calamities and the presence of officials, one cannot assume society would recognize a custom creating a privilege for journalists to enter with officials. On the contrary, it is more reasonable to think that householders would oppose access by journalists. It is unreasonable to assume that householders would willingly acquiesce to the presence of cameras and microphones in their living rooms or that they would choose to be displayed on television in their nightgowns while undergoing emergency resuscitation or arrest. The intrusion into Ms. Fletcher's fire-damaged home is perhaps less severe than in cases of raids when the owner is present; however, there is no reason to think the community would approve public entrance to a bedroom and later publication of a picture of the spot where a young woman lay dead.152

IV. BEYOND PRIVILEGE

Even if journalists' entry with officials is so common as to be privileged under the doctrine of custom and usage, the privilege is conditional. A privilege, like consent, is limited to the purpose for which it is granted. The Restatement (Second) of Torts states that nonconsensual privileges are conditioned on their exercise for a proper purpose.153 A trespasser's privilege terminates when the entry is no longer "normal and proper"154 or when a privileged entry becomes "an unwarranted or offensive intrusion."155 If trespassers are inten-

152. One commentator suggests that it is easier to assume that a property owner would consent to a peaceful entry resulting in a broadcast about a natural disaster, such as the fire in the Fletcher case, than to a nighttime raid resulting in reports of a person's arrest, as in Green Valley School, Inc. v. Cowles Fla. Broadcasting, Inc., 327 So. 2d 810 (Fla. Dist. Ct. App. 1976). See Note, The Doctrine of Custom and Usage as a Defense for Trespassing Newsmen; Florida Publishing Co. v. Fletcher, 30 FED. COMM. L.J. 77, 82 (1977). Reporting the natural disaster, the commentator says "would probably not damage the landowner's reputation and would not invariably cause him emotional distress." Id. However, it is difficult to see how learning about the death of one's daughter from a newspaper photo, as Ms. Fletcher did, would be any less emotionally disturbing than reading about or enduring a raid on one's home. Even if peaceful entry after a calamity is less intrusive than a raid, it remains sufficiently intrusive to vitiate implied consent. The growing number of suits against reporters who accompany police on entries to private property suggests householders do find this practice intrusive.


155. DeBerry v. City of La Grange, 62 Ga. App. 74, 83, 8 S.E.2d 146, 156 (1940). The
tionally intrusive, they may become liable for tortious intrusion or malicious trespass.156 To determine whether an entry is a tortious intrusion, a court will “consider the degree of intrusion, the context, conduct, and circumstances surrounding the intrusion, as well as the intruder’s motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.”157

A. Intrusion

If custom and usage create a privilege for journalists to trespass, the easiest case in which to recognize the privilege would involve trespass on the property beyond the curtilage. Trespass by news-gathering journalists on the outer boundaries of property may serve first amendment goals while intruding only minimally on the property and privacy interests of a householder.158

As journalists move inside the home it is difficult to discern a custom reasonably permitting trespass. Ironically, journalists have said they consider even daytime police raids on a workplace to be offensively intrusive, particularly if a camera records the proceedings. A journalist for the Ventura, California, Star-Free Press, felt “violated” when police she was accompanying raided her newspaper office looking for drugs. “[This] was my house, this is where I work,” the journalist said.159 Especially disturbing to some reporters and editors during the raid was the presence of a newspaper-hired security guard who stood near the entrance to the newspaper and videotaped the proceedings. “Several reporters made a point of getting out of her

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156. The intruder may be liable for invasion of privacy if he “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns” in a manner that would be “highly offensive to a reasonable person.” RESTATEMENT (SECOND) OF TORTS § 652B (1977).


158. See, e.g., McLain v. Boise Cascade Corp., 533 P.2d 343 (Or. 1975) (surveillance on edge of property is trespassory but not malicious harassment or an invasion of privacy).

Curtilage is difficult to define, but at common law it is the area to which extends the intimate activity associated with the “sanctity of a man’s home and the privacies of life.” Boyd v. United States, 116 U.S. 616, 630 (1886). Curtilage includes the “yard, courtyard or other pieces of ground included within the fence surrounding a dwelling house.” Marullo v. United States, 328 F.2d 361, 363 (5th Cir. 1964). Curtilage also includes the following: (1) the backyard not normally used as a common passageway in a four unit apartment building, Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974); (2) a tobacco barn within a fenced farm, Norman v. State, 379 So. 2d 643 (Fla. 1980); (3) rear unenclosed yard of a residence, State v. Morsman, 394 So. 2d 408 (Fla. 1981); and (4) a hothouse made of clear plastic behind a house, Huffer v. State, 344 So. 2d 1332 (Fla. Dist. Ct. App. 1977).

field of vision."\(^{160}\)

While the daytime entry of journalists with officials at workplaces might not be tortiously intrusive, entries beyond the threshold of the home, particularly nighttime entries into bedrooms, are much more offensive. Thus, the California Court of Appeal ruled in *Miller v. NBC*\(^{161}\) that the plaintiff had a cause of action for trespass, intrusion, and infliction of emotional distress. The court remarked that reasonable people might regard an NBC camera crew's entry into a bedroom with paramedics "at a time of vulnerability and confusion" to be "highly offensive" conduct.\(^{162}\)

Particularly offensive to the court in *Miller* was the failure of the producer of a television documentary to seek permission to enter private homes.\(^{163}\) Instead, the producer worked out an agreement with officials to enter several homes for documentary filming.\(^{164}\) Reasonable people, the court said, "could construe the lack of restraint and sensitivity NBC producer Norte and his crew displayed as a cavalier disregard for ordinary citizens' rights of privacy."\(^{165}\) The court further stated that "crossing the threshold of a private residence without, apparently, even a moment's hesitation," was also evidence of the "reckless disregard of the rights and sensitivities of others" which supported Ms. Miller's emotional distress claim.\(^{166}\) Reckless disregard of the rights and sensitivities of others could also be evidence of malicious trespass.\(^{167}\)

Similarly, a Dane County, Wisconsin, jury awarded a Beloit couple $25,000 for trespass by journalists and police and for a civil rights violation by officials when the Rock County Sheriff's Department allowed a Madison television reporter to accompany deputies on a 5:00 a.m. raid.\(^{168}\) The jury also awarded $5,000 punitive damages against

\(^{160}\) *Id.* at 11.


\(^{162}\) *Id.* at 1484, 232 Cal. Rptr. at 679.

\(^{163}\) *Id.*

\(^{164}\) *Id.*

\(^{165}\) *Id.*

\(^{166}\) *Id.*

\(^{167}\) *Id.* at 1487-88, 232 Cal. Rptr. at 682.

\(^{168}\) Malice requires a showing that the wrong is aggravated by an evil or wrongful motive or that there was willful and intentional misdoing, or a reckless indifference equivalent thereto. Le Mistral v. CBS, Inc., 3 Media L. Rep. (BNA) 1913, 1914 (N.Y. Sup. Ct. 1978).

Kyle McKinnon, a reporter for WISC in Madison accompanied Rock County Sheriff's Department deputies on a 5:00 a.m. raid at the home of Robert and Sandra Stevens on September 25, 1984. The Stevens' were not mentioned by name in the audio report. Rogers & Callender, *supra* note 9. A jury later awarded the Stevens $25,000 damages, but did not separate the award into amounts for the joint trespass by
the journalist for malicious trespass.\textsuperscript{169}

A warning to all journalists accompanying officials into private homes is found in \textit{Huskey v. NBC}.\textsuperscript{170} The district court held that a prisoner had a cause of action for intrusion and public disclosure of private facts for film taken of him while he was exercising.\textsuperscript{171} The court reasoned that a prisoner in an “exercise cage” accessible only to prison guards is in a “secluded” place where he has an expectation not to be seen or filmed without his consent.\textsuperscript{172} The court concluded that prisoners may expect prison officials to intrude upon their privacy, but prisoners retain an expectation to be free from private intrusions.\textsuperscript{173} If a convicted prisoner may have an expectation against unwanted filming in an exercise cage, a presumably innocent householder should have at least an equal expectation in his or her bedroom.

Also beyond a privilege created by custom would be journalists’ participation in a search that violates a householder’s fourth amendment rights. While trespass by an official may not invade privacy sufficiently to violate the fourth amendment,\textsuperscript{174} official conduct that does violate the fourth amendment is sufficiently intrusive to be tortious if carried out by private citizens. If an official’s warrantless search and seizure within a home is presumptively unreasonable,\textsuperscript{175} a privilege based on custom would not be reasonable if it permits the same conduct by a private citizen. Filming and broadcasting a rea-
reasonable search and seizure may not make an official entry unreasonable,\textsuperscript{176} but participation by journalists and camera crews in an unconstitutional search should not be privileged.

Journalists would surely be liable for intrusion or malicious trespass if they participated with officials in severe abuses of a citizen's right of privacy, such as taking unnecessary photographs of a nude person,\textsuperscript{177} or participating in body searches of the opposite sex.\textsuperscript{178} Less extreme and more likely is journalist participation in unconstitutionally "rude invasions of privacy."\textsuperscript{179} In \textit{Green Valley School v. Cowles Florida Publishing Co.,}\textsuperscript{180} a Florida District Court of Appeal denied summary judgment for journalists in a malicious trespass case where the journalists accompanied officials on a midnight raid of the school. Groggy teachers and students were interviewed on camera in front of bright television lights after being rousted from their beds by police.

Although fourth amendment issues were not raised, officials in \textit{Green Valley} were accused of using abusive force and operating under a faulty warrant. The court stated that officials conducted an "inexcusable and probably illegal" search.\textsuperscript{181} According to testimony in the case, broadcast journalists took footage of rooms only after police jumbled the contents.\textsuperscript{182} The Florida District Court of Appeal rejected a custom and usage defense. The court declared that recognizing a custom to enter bedrooms during a police investigation "could well bring to the citizenry of this state the hobnail boots of a nazi stormtrooper equipped with glaring lights invading a couple's bedroom at midnight with the wife hovering in her nightgown in an attempt to shield herself from the scanning TV camera."\textsuperscript{183}

Even the search in \textit{Fletcher}, though calm and orderly, probably violated the fourth amendment. Although the officials' entry in \textit{Fletcher} was not boisterous or rude, they apparently conducted a warrantless search for arson which, in 1988, would be unconstitutional. Once the emergency is over, as in \textit{Fletcher}, officials may search without a warrant for the cause and origin of a fire. However, the fourth amendment does not permit officials to conduct a warrant-

\begin{itemize}
\item \textsuperscript{176} Prahl v. Brosame, 98 Wis. 2d 130, 138, 295 N.W.2d 768, 774 (Ct. App. 1980).
\item \textsuperscript{177} York v. Story, 324 F.2d 450 (9th Cir. 1963).
\item \textsuperscript{178} Doe v. Duter, 407 F. Supp. 922 (W.D. Wis. 1976).
\item \textsuperscript{179} Mapp v. Ohio, 367 U.S. 643, 660 (1961).
\item \textsuperscript{180} 327 So. 2d 810 (Fla. Dist. Ct. App. 1976).
\item \textsuperscript{181} Id. at 817.
\item \textsuperscript{182} Id. at 815.
\item \textsuperscript{183} Id. at 819.
\end{itemize}
less search for arson. Furthermore, custom does not create a privilege for journalists to participate in a criminal search, particularly in a bedroom, when the inviting officials are violating the fourth amendment.

Even if officials did not violate Ms. Fletcher's fourth amendment right of privacy, it was unnecessary for them to invite journalists into the home to take pictures and search for evidence of arson. Officials could have found experts with greater skills than journalists to provide leads in an arson investigation.

B. Civil Rights Liability

Lurking in the cases of journalists accompanying officials is possible civil rights liability. Trespassing journalists and officials would normally be liable only for the most egregious intrusions into privacy. One federal court has ruled a prisoner can pursue a civil

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184. Once on the property, officials making an arrest are permitted under the fourth amendment to conduct warrantless searches of the immediate vicinity to insure their own safety and to be certain that evidence will not be destroyed. The most common warrantless search is incident to arrest. See W. LAFAVE, 2 SEARCH AND SEIZURE § 5.2(c), at 275 (1978). While insuring his safety and preventing destruction of evidence, an officer is supposed to limit the search to the arrestee's person and area of immediate control. See Chimel v. California, 395 U.S. 752, 762-63 (1969).

Police and fire officials may legally seize criminal evidence in plain view while securing an arrest area or searching for the cause and origin of a fire, but they may not use that evidence as a pretext for a warrantless search of the premises. The scope of an administrative search once a fire is under control “is limited to that reasonably necessary to determine the cause and origin of a fire and to ensure against rekindling.” Michigan v. Clifford, 464 U.S. 287, 297 (1984). Fire officials may also conduct such “routine procedures” as “searching for and rescuing occupants, ventilating the building, searching for any additional fires, and securing the premises.” United States v. Johnson, 524 F. Supp. 199, 204 (D. Del. 1981). The Eleventh Circuit holds that fire officials must procure a warrant after a fire even to seek out valuable possessions in a home to secure them from looters. United States v. Parr, 716 F.2d 796, 816 (11th Cir. 1983), reh’g denied, 734 F.2d 1481 (11th Cir. 1984).


186. See, e.g., York v. Story, 324 F.2d 450 (9th Cir. 1963); Doe v. Duter, 407 F. Supp. 922 (W.D. Wis. 1976). A police officer has immunity from liability under section 1983 if he operates in good faith. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). An official loses his qualified immunity if he “knew or reasonably should have known” that his action would violate a citizen’s constitutional rights or if he acts “with malicious intention to cause a deprivation” of a constitutional right. Id. at 815 (emphasis in original).

It is not a civil rights violation for an official to make public the fact of an arrest, Paul v. Davis, 424 U.S. 693 (1970); or to photograph or disseminate information about an arrest or other official activity in a public place, Huskey v. Dallas Chronicle, 13 Media L. Rep. (BNA) 1057 (D. Or. 1986). The Huskey court found that it was not a civil rights violation to photograph a suspect being booked at the police station. Id. at 1058. The court held that the photographs did not constitute an unreasonable seizure even though jail policy prohibited photography, because the suspect was photographed in a “public premise.” Id.
rights suit against a warden who permits a camera crew to film a prisoner without the prisoner's consent. The court refused summary judgment because there remained a question whether the prisoner's privacy was invaded by filming him without his consent where the filming served no legitimate security interest of the prison. Could an official face similar liability for permitting journalists to film a presumably innocent person in a bedroom?

Even if a journalist participates in an entry that might violate a civil right, the journalist will not be held liable unless he acts under color of law. Whether a private individual acts as an agent or instrument of the state depends on all of the circumstances of a case. Section 1983 of Title 42 of the United States Code "does not reach purely private conduct." One is not a government agent simply because he operates under a government tariff or voluntarily acts out of a desire to help officials.

Thus, journalists working for a newspaper or broadcaster are not arms of the law simply because they enter private property with an official. Journalists who take the initiative to enter private property with officials and who do not act under the supervision of authorities operate for themselves and their employer, not under color of law. The Wisconsin Court of Appeals found that a broadcast journalist acted "exclusively for his private employer" by going to the scene on his own initiative, asking officials for admittance, and playing no official role in the raid.


190. Under United States tariff regulations, an airline employee who conducts an inspection of a suspicious package engages in a private search as opposed to a search conducted by a government agent. United States v. Ford, 525 F.2d 1308, 1312 (10th Cir. 1975). The court specifically noted that a person agrees as a condition to sending a package with a private airline that the package may be opened by the carrier. Id. at 1311.

191. United States v. Andrews, 618 F.2d 646, 650 (10th Cir. 1980); see also Marshall v. United States, 352 F.2d 1013, 1014 (9th Cir. 1965) (landlady held not a government agent, but merely acting "as any responsible citizen should" when she volunteers to give police a suitcase containing contraband entrusted to her care by tenant). The wife of a criminal suspect is not an agent of officials if she voluntarily provides evidence in response to noncoercive questions. Coolidge v. New Hampshire, 403 U.S. 443, 489 (1971).

192. Prahl v. Brosamle, 98 Wis. 2d 130, 137, 295 N.W.2d 768, 774 (Ct. App. 1980).
A private citizen's actions are under color of law when he acts in "collusion" with,\textsuperscript{193} or at the "behest" of the government.\textsuperscript{194} Furthermore, a private citizen may be held to have acted under color of law if he willfully participates in joint activity with the state or its agents.\textsuperscript{195} A private citizen has been found to act as an agent of police when conducting a search under the direction of police.\textsuperscript{196} Journalists are said to be acting "in concert" with police when they secretly transmit conversations to police tape recorders.\textsuperscript{197}

Ironically, journalists suggest they operate under color of law when they seek a privilege to trespass with officials under the doctrine of custom and usage. Citizens may act under color of law when they act

Brosamle learned of the raid from monitoring a police radio. There was a question, however, whether the officer consented to Brosamle's entry or merely indicated no objection to Brosamle's presence when he allowed the journalist to come forward after the situation was under control. \textit{Id.} at 154, 295 N.W.2d at 782.

\textsuperscript{193} United States v. Harding, 475 F.2d 480, 483 (10th Cir. 1973).

\textsuperscript{194} United States v. Gibbons, 607 F.2d 1320, 1324 (10th Cir. 1979).

\textsuperscript{195} Prahl, 98 Wis. 2d at 137, 295 N.W.2d at 774 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970)). Some courts have examined whether a private citizen participating in a search does so solely for governmental purposes. \textit{E.g.}, Corngold v. United States, 367 F.2d 1, 5 (9th Cir. 1966).


\textsuperscript{196} People v. Turner, 249 Cal. App. 2d 909, 926, 57 Cal. Rptr. 854, 865 (1967). In \textit{Turner}, the court found no civil rights violation when employees of a private company helped officers search for evidence of crime in accounting records. \textit{Id.} at 926-27, 57 Cal. Rptr. at 865. The court noted, however, that the company agents, who were operating under officers' supervision, were acting as the arms of the arresting officers. \textit{Id.} at 927, 57 Cal. Rptr. at 865.

\textsuperscript{197} A federal district court in California ruled that journalists acting as informants for police, secretly transmitting conversations to police tape recorders, were subject to fourth amendment restrictions because they were agents acting "in concert" with police. Dietemann v. Time, Inc., 284 F. Supp. 925, 931 (C.D. Cal. 1968). The district court stated, "the officers as well as their agents were subject to the restrictions of the Fourth Amendment, particularly where they were acting in concert. Certainly the activities of the officers and their agents (Life's employees) constituted a search." \textit{Id.}

On appeal, the Ninth Circuit did not decide whether journalists' surreptitious transmission to police violated the fourth amendment because Time, Inc., the journalists' employer, denied its employees were acting on behalf of the police. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). However, Judge Carter thought the appeals court should decide the fourth amendment question and believed "that the agreement constituted \textit{Life} and its employees agents of the police." \textit{Id.} at 250 (Carter, J., concurring and dissenting).

A private detective may act under color of law if he has a special city police officer's card, even though he acts under the authority of, and is paid by, a private employer. William v. United States, 341 U.S. 97 (1951); see Note, \textit{The Use of Trespass Laws to Enforce Private Policies of Discrimination}, 16 Hastings L.J. 445, 451 (1965). Plant guards under owner's pay and control act under color of law when sworn in as civilian auxiliaries to military police. NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947).
as part of official policy and custom. Customs established in law include the "persistent and widespread . . . practices of . . . officials." One commentator writes that a form of "deputization" occurs when a private person agrees to an official request to assist in a search and arrest. In a suit that was dismissed for failure to establish violation of a constitutional right, a plaintiff argued that journalists were imbued with state action because officials had a custom of allowing the press to participate in criminal investigations.

Many journalists accompanying officials into private homes are clearly not acting under color of law. If the journalists ask to enter private property and do not participate in official activities, they do not act under color of law. However, journalists may be held to act under color of law when they, like the photojournalists in Fletcher, customarily enter private property at the request of police and firefighters to participate in official duties. To other courts, the distinguishing features of Fletcher are the invitation from officials and the photojournalist's participation in an official search. Journalists might also be said to act under color of law when it is established that officials invite the media only if they expect favorable publicity. Plaintiffs in Wisconsin charged that officials invited journalists on a no-knock search of a family's home in order to harass the family and promote better public relations for the police department.

198. A municipality might be liable under section 1983 if action were the result of a municipal "policy statement, ordinance, regulation . . . decision . . . or governmental 'custom.'" Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978); see Note, Municipal Liability Under Section 1983: The Meaning of 'Policy and Custom', 79 COLUM. L. REV. 304 (1979).


201. Higbee v. Times-Advocate, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980). Not deciding the state action question, the court determined that allowing journalists to accompany officials on a search warrant was not a gross abuse of the constitutional right of privacy. Id. at 2372-73.

202. See An Attorney v. Mississippi State Bar Ass'n, 481 So. 2d 297 (Miss. 1985); Prahl v. Brosmale, 98 Wis. 2d 130, 149, 295 N.W.2d 768, 780 (Ct. App. 1980). In Mississippi State Bar, an attorney's trespassory entry with an inspector into a burned-out building was contrasted with the nontrespassory entry by a photographer in Fletcher. The cases are distinguishable because the photographer in Fletcher entered by "invitation of the fire marshal and was part of the official investigation of the fire." 481 So. 2d at 300.


204. Umhoefer, Ripon Police, Newspaper Lose Lawsuit Over Search of Home, Mil-
V. ETHICAL CONCERNS

Even if journalists accompanying officials do not act under color of law and are not subject to legal liability, there are ethical concerns which suggest journalists do not want to work too closely with officials. Eugene Patterson, former President and Editor of the St. Petersburg Times, once warned that “the public had better start worrying” when the press and police become partners.205

Generally, journalists shun identification as helpmates or agents of police, fire, or other officials. While journalists cooperate and share information with officials, they frequently eschew extensive collaboration out of fear that the public will no longer find journalists credible as independent surrogates for the reader or viewer.206 It is difficult for journalists to maintain the role of independent reporter or government adversary207 when they routinely rely on official custom to enter private homes.

Relying on official invitations to gather news may also undermine journalists' independence by obliging them to provide pictures, tapes, and other information to officials either as a quid pro quo for an invitation or in response to a subpoena. Cooperating with police to gather information may also jeopardize journalists' privilege to withhold sources subpoenaed by officials.208

VI. CONCLUSION

Officials who invite journalists into private homes and apartments place journalists in a paradoxical position. On the one hand, journalists are invited on a newsworthy expedition, the reporting of which serves first amendment purposes. On the other hand, journalists who accompany officials risk liability for trespass and violations of privacy. The journalist's potential liability may be highest where the newsworthiness of the event is greatest.

Despite the newsworthiness of journalists' coverage of official activities in private homes, journalists should have no privilege to enter private homes with officials. Courts are correct not to extend the custom and usage privilege of Florida Publishing Co. v. Fletcher to other situations where the press accompanies officials into private

waukeen J., Nov. 26, 1986, at 6B, col. 5. Another Wisconsin sheriff who invited journalists on a drug raid and a pre-raid briefing with 50 officers was running for reelection. Olson, Does the Wisconsin Privacy Act Work? An Interview With the Jury Foreman in Stevens v. Television Wisconsin, Inc. 1 (unpublished manuscript on file with the author).

205. See supra note 203, at 16.

206. Id. at 12, 23.


208. See supra note 203, at 11-12.

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homes. There is little evidence that the practice is indeed customary in the sanctity of the private dwelling. Even if journalists do have a privilege to trespass on private property, it should not extend to rude and intrusive entries into bedrooms where a householder's privacy interests are the greatest. Journalists entering private places, particularly bedrooms, may be liable not only for trespass, but also for intrusion, malicious trespass, and perhaps eventually civil rights violations. In relying on the invitation of officials to gain entry to private homes, journalists compromise their reputation for ethical and independent newsgathering.