COMMITTEE REPORT

Ride-Alongs Revisited: Privacy Issues Raised by Special Access Granted to News Media by Law

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Granted to News Media by Law Enforcement

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INTRODUCTION

In 1999, the Supreme Court decided *Wilson v. Layne*, holding that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of third parties in the home was not in aid of the execution of the warrant."[1] On the same day, and based on the reasoning of *Wilson*, the Court remanded to the Ninth Circuit the case of *Hanlon v. Berger*, which also involved a media "ride-along."[2] On remand, the Ninth Circuit dismissed on immunity grounds the claims against the defendant police officers, but allowed civil rights claims to go forward against the news media defendants that accompanied the officers to the plaintiff's home.[3]

Since 1999, *Wilson* and *Hanlon* have been the touchstones for analyzing privacy claims against the media in the context of law enforcement "ride-alongs." Recent cases make clear, however, that *Wilson* and *Hanlon* left unanswered many questions about the media's right to document law enforcement activities.[4] Indeed, who, what and where the media may record in areas controlled by law enforcement remains largely unsettled.

These questions grow in importance as law enforcement personnel increasingly give special access to the news media to cover police activities in patrol cars, police stations and even interrogation rooms. Although *Wilson* and *Hanlon* are often cited by

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1 *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

2 526 U.S. 808 (1999) (holding that police officers violated the Fourth Amendment when they permitted media ride-alongs onto people's property).

3 *Berger v. Hanlon*, 188 F.3d 1155, 1157 (9th Cir. 1999) (allowing Fourth Amendment claim to proceed against media defendants).

4 *Shapiro v. City of Glen Cove*, 2005 WL 1076292 (E.D.N.Y. May 5, 2005) (analyzing whether holding in *Wilson* applied to claims against the media for filming content of abandoned building owned by the plaintiff); *Thompson v. State*, 824 N.E. 2d 1265, 1269 (Ind. Ct. App. 2005) (distinguishing *Wilson* on grounds that place of criminal defendant's arrest "was a motel room, not his private residence"); *Wise v. City of Richfield*, 2005 WL 361492, *3 (D. Minn. Feb. 14, 2005) (applying *Wilson* to media "ride along" into the plaintiff's commercial property).

courts analyzing civil suits based on alleged invasions of privacy by the media in these contexts, the Supreme Court has said little about whether media liability may arise outside the specific context of media ride-alongs into privates homes.[5]

Consequently, news media personnel who are granted law enforcement access that is not enjoyed by the public at large may see more claims against them for not only civil rights violations, like those at issue in *Wilson* and *Hanlon*, but also for common law invasion of privacy and violations of statutory wiretapping laws.

Although the elements of each of these claims differ, they are all dependent, in part, on one factor: whether the person taped or recorded had an objectively reasonable expectation of privacy. "Generally …courts continue to find a suspect has no reasonable expectation of privacy in areas controlled by the police."[6] However, the Fourth Amendment "protects people, not places" and there are no specific "spatial boundaries on the rights protected by that amendment."[7] This report examines how courts decide this issue when the media has been granted special access by law enforcement officials.[8]

PATROL CARS

Courts unanimously have held that a person knowingly seated in a police patrol car has no objectively reasonable expectation that his or her conduct or conversations will remain private. Therefore, any claim against the media for "wrongful" recording of an individual in a patrol car likely would fail.

The view articulated by the Eighth Circuit Court of Appeals in *United States v. Clark* essentially has been adopted by every state and federal court that has addressed the privacy rights of persons knowingly seated in a patrol car.

> A marked police car is owned and operated by the state for the express purpose of ferreting out crime. It is essentially the trooper's office and is frequently used as a temporary jail for housing and transporting arrestees and suspects. The general public has no reason to frequent the back seat

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[5] *Wilson*, 526 U.S. at 609-610 ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home.")

[6] *Belmer v. Commonwealth of Virginia*, 553 S.E.2d 123, 128 (Va. Ct. App. 2001).

[7] *Lauro v. Charles***,** 219 F.3d 202, 211 (2d Cir. 2000) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

[8] The article does not address the circumstances under which the actions of journalists can be regarded as state action. For a thorough discussion of that issue see Hannah Shay Chanoine, *Clarifying the Joint Action Test for Media Actors When Law Enforcement Violates the Fourth Amendment*, 104 Colum. L. Rev. 1356 (2004).

> of a patrol car, or to believe that it is a sanctuary for private conversations.[9]

In *United States v. Turner*,[10] the Tenth Circuit made clear that a patrol car remains a public location regardless of whether or not the person in the car has been officially taken into custody. In *Turner*, a police officer asked the defendant driver and his passenger to wait in the patrol car "for safety reasons" while the defendant's car was searched. A hidden tape recorder in the patrol car recorded incriminating statements by the driver and passenger. In a subsequent criminal proceeding, the driver argued that he reasonably believed his conversation to be private because (1) he was not under arrest or in custody at the time of the statements and (2) the officer "deliberately represented the car as a safe haven."[11] The court found these circumstances irrelevant, noting that the "practical realities of the situation should be apparent to the occupants. Patrol cars bristle with electronics, including microphones to a dispatcher, possible video recording with audio pickup and other electronic and recording devices."[12]

The court in *Turner* appeared to limit its holding by stating that "society is not prepared to recognize an expectation that communications in a patrol car, *under facts presented here*, are not subject to interception."[13] Nevertheless, it is worth noting that no court has yet encountered facts sufficient to overcome the presumption that one cannot reasonably expect a conversation in the functional equivalent of "the trooper's office" to be private. Indeed, even where the police place individuals in a "wired" patrol car with the intent to record incriminating statements, the recorded statements violate no right to privacy.[14]

As a general matter, there is no reasonable expectation of privacy in the backseat of a patrol car, and the media has no legal obligation to refrain from recording persons located there. However, as the statement in *Turner* makes clear, courts carefully have avoided categorical determinations that a reasonable expectation of privacy does (or does not) arise in any particular location. Consequently, it is possible that some circumstances

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9 22 F.3d 799, 801-02 (8th Cir. 1994); s*ee also United States v. McKinnon*, 985 F.2d 525 (11th Cir. 1993); *United States v. Turner*, 209 F.3d 1198 (10th Cir. 2000); *State v. Smith*, 641 So.2d 849 (Fl. 1994); *People v. Todd*, 102 Cal. Rptr. 539, 541 (Cal. App. 1972) ("it was unlikely for defendant to have concluded he was being placed in the police car for a sight-seeing tour of the city").

10 209 F.3d 1198 (10th Cir. 2000).

11 *Id.* at 1201.

12 *Id.*

13 *Id.* at 1200-01 (emphasis added).

14 *People v. Lucero*, 235 Cal. Rptr. 751, 752 (Ct. App. 1987).

– which have yet to arise in any reported case – could give rise to a reasonable expectation of privacy in a patrol car. In the absence of any such case law, however, the media may record and film those located in a patrol car with little risk of civil penalties.

JAIL CELLS AND DETENTION CENTERS

It is widely accepted that inmates and detainees – both pretrial detainees and arrested detainees –maintain a ***low expectation of privacy***.[15] In fact, "[m]ost courts considering the issue have held that prisoners have no expectation of privacy in conversations with visitors because routine monitoring and recording of such conversations is a reasonable means of maintaining prison security."[16] The Supreme Court has not yet addressed invasions of privacy by the media in places where inmates or detainees are held.

In the absence of Supreme Court precedent directly on point, many courts faced with privacy claims by inmates and detainees have relied on the dicta in the Supreme Court case of *Lanza v. New York* for the proposition that a defendant's Fourth Amendment rights are not violated when jail communications are electronically intercepted.[17] In *Lanza*, the police surreptitiously recorded a conversation between Lanza and his inmate brother in a jail visiting room. Lanza argued that the eavesdropping of his conversation in the jail visiting room violated his Fourth Amendment rights.[18] The Court rejected this argument, holding "a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room. In prison, official surveillance has traditionally been the order of the day."[19] As one court summarized:

> [F]ederal courts have consistently followed *Lanza* and upheld admission of monitored conversations in jails or police stations. It still appears to be good law so far as the

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15 *Hudson v. Palmer*, 468 U.S. 517 (1984) (inmates); *Bell v. Wolfish*, 441 U.S. 520 (pretrial detainees); *Holman v. Central Arkansas Broad. Co.*, 610 F.2d 542 (8th Cir. 1979) (arrested detainees); *see also Haynik v. Zimlich*, 498 N.E. 2d 1095, 1100 (Ohio Com Pl. 1986), *superseded on other grounds*, 508 N.E.2d 195 ("Liability for intrusion does not exist where the defendant merely observes, films or records a person in a public place, such as a courthouse or a police station.").

16 *Belmer v. Commonwealth of Virginia*, 553 S.E. 2d 123, 127 (Va. Ct. App. 2001) (*citing United States v. Hearst*, 563 F.2d 1331, 1345-46 (9th Cir. 1977)).

17 *Lanza v. New York,* 370 U.S. 139 (1962).

18 *Id*. at 142.

19 *Id*. at 143.

> Fourth Amendment is concerned, jail officials are free to intercept conversations between a prisoner and a visitor.[20]

In Fourth Amendment cases involving invasive searches by prison authorities, the administrative need to maintain prison order and inmate safety diminishes an inmate's expectation of privacy to the point that prison guards can routinely search an inmate's body cavity after contact with visitors without violating the inmate's (or detainee's) right of privacy.[21] Does it get any more private than this?

Nonetheless, although inmates "lose many rights when they are lawfully confined, they do not lose all civil rights. Inmates . . . retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others."[22] It follows that some courts have held that inmates do at least maintain some privacy from media attempts to film or record them. Rex Heinke in his book, Media Law, explains that while photographing prisoners is usually not intrusive, "courts appear to distinguish between inmates photographed in private areas of a prison and areas open to public view."[23]

Cases finding violations of right of privacy

In *Huskey v. NBC*,[24] a federal district court in Illinois denied a TV station's motion to dismiss a prisoner's complaint that he was filmed without his consent while exercising wearing only gym shorts (and with tattoos exposed) in an exercise cage. In its tort law privacy analysis, the court stated that "no case has been cited to this court (or discovered by independent research) holding that no areas of seclusion exist within a prison as matter of law."[25] In fact, the court noted that federal regulations prohibit prisoners from being filmed without their consent. The court held that the "mere fact a person can be seen by others does not mean that person cannot legally be 'secluded.'"[26]

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20 *Belmer*, 553 S.E. 2d at 128 (citations omitted).

21 *Bell, supra,* 441 U.S. at 558.

22 *Houchins v. KQED*, 438 U.S. 1, 5 n.2 (1978).

23 Rex Heinke, *Media Law* § 4.6(c) ("Private Information"); *see also, e.g., Sciringione v. Columbia Broadcasting Co*., No. CV 78-4197, slip op. at 2 (C.D. Ill. June 26, 1979) (No intrusion where prisoner was photographed while walking to the dining room); *but see Smith v. Fairman*, 98 F.R.D. 445, 450 (C.D. Ill. 1982) (holding that prison official who allowed media to film prisoner in his cell not entitled to summary judgment on prisoner's claim for violation of the Fourth Amendment).

24 632 F. Supp. 1282 (N.D. Ill. 1986).

25 *Id*. at 1288.

26 *Id.* at 1287-88.

A prisoner may be constantly watched by the administration "at the same time feeling justifiably secluded from the outside world (at least certain areas not normally visited by outsiders)."[27] On a positive note for the media, the court did leave the door open for filming prisoners in areas of seclusion if there was a legitimate public interest. For example, the media could show that filming an inmate was necessary to public exposure of improper prison conditions.[28]

One final issue to be careful of that came up in *Huskey* is the potential for breach of contract claims against the media when the media sign access agreements required by prison authorities, which today invariably include an agreement not to film inmates without their permission.

In *Smith v. Fairman*,[29] the district court denied the defendant's summary judgment motion and upheld a prisoner's privacy right in not being filmed by the news media without his consent. The camera crew was escorted into the prisoner's locked cell despite his protests. The prisoner filed a Section 1983 action against the warden for authorizing the filming in direct violation of a prison regulation "which requires that an inmate give his consent before photographing or interviewing of the inmate will be permitted."[30]

One point of future concern is the court's statement that a prison's administrative regulations may create a "protectible" liberty interest.[31] Moreover, the court concluded that because " 'the media has no special right of access to the… jail different from or greater than that accorded the public generally' . . . the inmate would have a reasonable expectation of privacy from the media's intrusion."[32]

Another case that is instructive even though it did not involve the news media is *Demery v. Arpaio*.[33] In *Demery*, an Arizona county sheriff installed four webcams and "began streaming live images of pre-trial detainees to internet users around the world."[34]

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27 *Id.* at 1288.

28 *Id.* at 1291, n.13.

29 98 F.R.D. 445 (C.D. Ill. 1982).

30 *Id.* at 446.

31 *Id.* at 450.

32 *Id.* (*quoting Houchins*, *supra*, 438 U.S. at 16).

33 378 F.3d 1020 (9th Cir. 2004).

34 *Id.* at 1024.

The webcams were installed in areas not typically open to the public, including the (1) men's holding cell and the hallway outside the holding cell; (2) pre-take area; (3) intake search area; and, at one point, (4) the toilets and the surrounding areas of the women's holding cell. Within days of the launch of the Web site, 6 million hits were recorded from all over the world.[35] Former detainees moved for a preliminary injunction prohibiting the sheriff from streaming the video and the district court granted it, holding that under the 14th Amendment due process clause, pretrial detainees may not be punished prior to an adjudication of guilt. The Ninth Circuit upheld the preliminary injunction, finding that streaming their activities on the Internet unconstitutionally punished them in violation of the 14th Amendment.[36]

According to the Court:

> Having every moment of one's daily activities exposed to general and world-wide scrutiny would make anyone uncomfortable. Exposure to millions of complete strangers, not to mention friends, loved ones, co-workers and employers, as one is booked, fingerprinted, and generally processed as an arrestee, and as one sits, stands or lies in a holding cell ***constitutes a level of humiliation that almost anyone would regard as profoundly undesirably [sic] and strive to avoid***.[37]

The Court stated further:

> Being detained in a county jail necessarily involves being observed by the staff of the jail and the other detainees. The webcams increase exponentially the number of people observing detainees, and also alter drastically the classes of people who can watch the detainees. The ***discomfort*** to a detainee of having her children, for example, watch her while she is being detained ***is incalculably greater*** than having jail guards watch the same procedure.[38]

This kind of language from the Court suggests that even though the case was analyzed under the 14th Amendment, detainees could also bring tort claims as well as other civil rights claims for invasion of privacy.

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35 *Id.* at 1025.

36 *Id.*

37 *Id.* at 1029 (emphasis added).

38 *Id.* at 1030 (emphasis added).

The Court rejected the contention that there was a legitimate government purpose to the Web streaming even though the sheriff claimed his practice served as a deterrent and provided public scrutiny of the detention process. The Court "fail[ed] to see how turning pre-trial detainees into unwilling objects of the latest reality show serves any of these legitimate goals."[39] Thus, even though the news media was not involved in *Demery*, the court's rationale could be applied to the news media who taped inmates in areas not generally accessible to the public for broadcast to the public at large.

Cases finding no violations of right of privacy

The easiest case to decide must have been *Cox Communications Inc. v. Lowe.*[40] The Georgia Court of Appeals reversed a lower court's denial of a television station's summary judgment motion for invasion of privacy. The station was investigating prison abuse, and for its "b-roll," it shot some film of the prison buildings and the prison yard. Incidentally, Lowe, an inmate, was walking in the yard in his prison uniform. The shot was taken several hundred feet away from the publicly accessible parking lot outside the fence. Therefore, the "the scene depicted in the video tape was visible from a public place, and ….while he was in open public view from prison yard."[41] Moreover, the Court found that Lowe's "right to recover under an invasion of privacy theory is restricted where matters of public interest are involved," even if Lowe only "incidentally became involved."[42]

Another case involving a prison's "public area" was *Jones/Seymour v. LeFebvre*.[43] In *Jones/Seymour*, after settling his case against the media defendant, the plaintiff filed a Section 1983 action against a prison official for a constitutional violation of his right of privacy. In this case, the inmate was filmed while he was walking in the corridor by a local station investigating overcrowding at the facility. The court held that nothing personal was revealed except "facts which are already public, that plaintiff has been convicted and is incarcerated… ."[44] In contrast to *Smith v. Fairman*, the court in *Jones/Seymour* specifically mentioned that the existing administrative directive requiring an inmate's consent to being filmed did not create a protectible liberty interest.[45] The

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39 *Id.* at 1031.

40 328 S.E. 2d 384 (Ga. Ct. App. 1985).

41 *Id.* at 385.

42 *Id*. at 386.

43 781 F. Supp. 355 (E.D. Pa. 1992).

44 *Id*. at 358.

45 *Id.* at 359.

court then hinted that it was unlikely plaintiff could have prevailed with a privacy tort claim under state law, though it declined jurisdiction to hear it.[46]

Finally, in *Holman v. Central Arkansas Broadcasting*,[47] a detainee was arrested for DUI and recorded by a news reporter. The plaintiff's civil rights action against the media was dismissed on summary judgment and the appellate court affirmed, even though the reporter was invited by the police into the cell block area – an area where the public is not authorized to be.[48] Essentially the record was so full of the detainee's outrageously loud and persistent yelling, as well as banging on the door, that the Court found that he had no expectation of privacy anywhere in the police station.[49]

Summary

In today's post-9/11 environment, it seems unlikely that the news media will find itself in a position of intruding upon an inmate's privacy in police custody unless they are filming or recording inmates in "private areas," *e.g.*, the inmate's cells or any other area where the inmate may expect to have skin exposed. This is especially the case if the purpose of shooting or filming has little legitimate public interest. Detainees at police stations, because of the nature of police stations, appear to have very little expectation of privacy anywhere in the police station where the public has a right to be. And, under *Holman*, the prisoner's own conduct may eliminate what little privacy he or she does have, making anywhere in the police station "public."

INTERROGATION AND INTERVIEW ROOMS

There is no case law addressing the liability of the news media for taping conversations of suspects or defendants in interrogation or interview rooms. However, there are many cases involving the surreptitious taping of suspects in interrogation and interview rooms by police.[50] Therefore, most of these cases have arisen in the context of motions by defendants to suppress evidence. In these cases, courts have found no reasonable expectation of privacy for conversations between a suspect and others in an

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46 *Id*.

47 610 F.2d 542 (8th Cir. 1979).

48 *Id.* at 544.

49 *Id.* at 545.

50 The taping of the interrogation that occurred in *Combest*, *supra*, was not surreptitious.

interview or interrogation room unless officers "lull" a suspect into believing, or "clearly foster" an expectation, that a conversation will be private.[51]

Cases Finding Reasonable Expectation of Privacy

Those cases that have found a reasonable expectation of privacy have done so based on the words and actions of the police officers. The consensus seems to be that where "the police make an express representation that a conversation will be private, they create a legitimate and reasonable expectation of privacy and the surreptitious monitoring and recording of that conversation is violative of the Fourth Amendment."[52]

For example, in *State v. Calhoun*,[53] on a defendant's motion to suppress, the Florida District Court of Appeal ruled that the surreptitious recording with a hidden camera of the conversation between the defendant and his brother in a police interrogation room was a violation of Florida's privacy statute (Florida Constitution

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[51] *People v. Plyler,* 22 Cal. Rptr. 2d 772, 775 (Cal. App. 1993) (acknowledging that representations by police may create a reasonable expectation of privacy, but affirming trial court finding that no such conduct occurred); *Belmer v. Commonwealth of Virginia*, 553 S.E.2d 123, 129 (Va. Ct. App. 2001) (citing *People v. A.W.*, 982 P.2d 842, 848-49 (Colo. 1999) (finding reasonable expectation of privacy where detective assured defendant "nobody was behind the two-way mirror" and "he would not be listening" to conversation between defendant and his father)); *State v. Calhoun*, 479 So. 2d 241, 243 (Fla. Ct. App. 1985).

Courts have also found a reasonable expectation of privacy for privileged conversations (e.g., attorney-client privilege, marital communications). In *State of Delaware v. Howard and Rodriguez*, 728 A.2d 1178, 1184 (Del. Sup. Ct. 1998), the court granted a defendant's motion to suppress statements she made to her codefendant husband that had been surreptitiously recorded by police when she was in a locked police interview room. The court found that the surreptitious recording violated the Delaware wiretap statute (Del. Code Ann. 11, § 1336) and the Fourth Amendment because the wife had a reasonable expectation of privacy to her marital communications where no indication had been made to her that the room would be electronically monitored and the undisclosed taping was not for security reasons. *Accord*, *Robinson v. Superior Court of Sacramento County*, 164 Cal. Rptr. 389 (Ct. App. 1980) (removed from official reporter by grant of hearing by California Supreme Court) (suppressing tape recording of marital communications between defendant and his wife secretly made when he and his wife were placed in an interview room in the police department after their arrest where the recording had been made only to obtain incriminating evidence and not for security purposes and there were no visible signs of or indications made about eavesdropping equipment).

[52] *People v. Hammons*, 5 Cal. Rptr. 2d 317, 320 (Cal. App. 1991).

[53] 479 So. 2d 241, 243 (Fla. Ct. App. 1985).

Article I, sections 12 & 23), wiretapping statute (Section 940.03 Florida Statutes) and civil rights law (5th Amendment right to remain silent and 6th Amendment right to counsel) and should be suppressed as evidence. The recording was made by police after the defendant told police in response to being read his Miranda rights that he wanted to talk to his brother privately before talking to the officers and "[t]he police ostensibly complied with his request, brought in his brother, and exited the room giving every indication that the conversation was to be secure and private. Consequently, it was a justified expectation of privacy."[54]

Similarly, in *People v. A.W.*,[55] the Colorado Supreme Court found a reasonable expectation of privacy where a detective assured the defendant "nobody was behind the two-way mirror" and "he would not be listening" to conversation between defendant and his father in an interrogation room. In *People v. Hammons*,[56] a California appellate court found a reasonable expectation of privacy where two codefendants were told by a police officer that they could "talk by themselves" in a police interrogation room, and thus the surreptitious recording of the conversation was not admissible.

Based on these cases, if the news media is granted special access by the police to surreptitiously tape conversations in interrogation rooms when the police foster or lull defendants into an expectation of privacy, the news media could be liable for civil rights, privacy and wiretapping claims.

Cases Finding No Reasonable Expectation of Privacy

Other courts have denied motions to suppress when they have found that defendants had no reasonable expectation of privacy for their communications in interrogation or interview rooms. In *Belmer v. Commonwealth of Virginia*,[57] the Virginia Court of Appeal affirmed the denial of a motion to suppress an electronically monitored conversation because it found the defendant had no reasonable expectation of privacy where police officers did not suggest that he could talk freely to his mother and her boyfriend without fear of eavesdropping when the officers left them alone in a police interview room after suspect said he wanted to talk to a lawyer.

Similarly, in *People v. Preciado*,[58] a California appellate court affirmed the denial of a defendant's motion to suppress a videotape recording of a conversation between him and his mother, affirming the trial court's finding of no reasonable expectation of privacy

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54 *Id.*

55 982 P.2d 842, 848-49 (Colo. 1999).

56 5 Cal. Rptr. at 320.

57 553 S.E.2d 123, 128-29 (Va. Ct. App. 2001).

58 2003 Cal. App. Unpub. LEXIS 237 (Jan. 9, 2003).

since "[t]he conversation took place at the police station in the interrogation room…No representations or inquiries were made as to privacy or confidentiality. There's no evidence of any subjective expectation of privacy…The tape was simply rolling."[59]

A handful of states have "mandated the electronic recording of custodial interrogations."[60] "As of summer 2004, law enforcement agencies in at least 238 cities and counties…regularly record custodial interviews of suspects in felony or other serious investigations."[61] In these jurisdictions, there would be no reasonable expectation of privacy unless fostered by the law enforcement officials, and the news media would most likely not be subject to liability based on privacy violations. It is worth noting, however, that the California Supreme Court has interpreted California law as "now permit[ting] law enforcement officers to monitor and record unprivileged communications between inmates and their visitors ***to gather evidence of crime***."[62] Therefore, if the mandates or policies permit recording only for the purpose of gathering evidence, as the California law does, then the news media could violate an expectation of privacy and be subjected to liability for the related claims, even if the government officials are immune, since the news media's purpose would not be for gathering evidence.

CONCLUSION

There are no categorical rules as to when individuals in police or under prison custody are protected from media recording of their words and conduct. For the most part, the media may safely record individuals in locations controlled by the police or prison authorities. However, this general rule is not without exceptions. Particularly where (1) law enforcement gives the media access beyond that available to the general public; (2) the individuals filmed or recorded were induced to believe conversations were private; or (3) the conduct filmed is of a particularly private nature or in a private area, the media may be liable in civil damages for disseminating images or conversations it lawfully secured.

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59 *Id.* at *34; *see also State v. Trevino,* 2003 WL 21185085 (Tex. App. 2003) ("there is no legitimate expectation of privacy in conversations between arrestees who are in custody in a county law enforcement building, even when only the arrestees are present and they subjectively believe that they are unobserved.") (quoting *State v. Scheineman*, 77 S.W.3d 810 (Tex. Crim. App. 2002)).

60 The court in *People v. Combest*, 4 N.Y. 3d 341 identified Alaska, Illinois, Maine, Minnesota, Texas and the District of Columbia as those jurisdictions that require such recording. The court also noted that a resolution calling for all law enforcement agencies to videotape in their entirety the custodial interrogations of crime suspects has recently been adopted by the New York State and American Bar Associations. *Id.* at 353 n.5.

61 *Id.*

62 *People v. Loyd*, 27 Cal. 4th 997, 1010 (2002) (emphasis added).