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Subjecting the Fourth Amendment to Intermediate Scrutiny: The Reasonableness of Media Ride-Alongs


John P. Cronan†

I.

Many television viewers can readily recognize the catchy lyrics of the theme song from the popular television series, "Cops." With "Bad Boys" playing in the background, the show opens with a montage of graphic footage: courageous police officers hotly pursuing a criminal in a dangerous high-speed car chase and others invading the home of a stunned or oblivious suspect.

This real-life footage comes from media ride-alongs, which allow media crews to accompany police officers on patrol and film them in action. Ride-alongs clearly appeal to both law enforcement officials and the media. They portray police officers courageously taking the seemingly guilty off of our streets while achieving the deterrent effect of publicizing specific law enforcement activities. Media executives are enticed by the high ratings potential of dramatic footage, which offers a level of reality that other television cannot achieve. As a result, the number of shows with

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1. Cops (Fox television broadcast).
2. INNER CIRCLE, Bad Boys, on BAD BOYS (Atlantic Records 1993).
4. See generally Dateline NBC: Tale of the Tape (NBC television broadcast, Feb. 9, 1999) ("The police cooperate with [ride-alongs] because they are usually good P.R.").
5. Ten years after the show's premier on March 11, 1989, "Cops" continues to attract large viewership. For March 1999, Cops received average Nielsen Ratings of 6.175 for its 8:00 p.m. slot and 6.7 for its 8:30 p.m. slot on Saturdays. These ratings make "Cops" one of the highest rated shows on the Fox Network and the second highest for its time-slot. See Nielsen Media Research (visited Mar. 30, 1999) <http://www.ultimatetv.com/news/nielsen>.
ride-alongs has burgeoned in recent years, and ride-alongs have been making their way into network news broadcasts with increased regularity.

Ride-alongs, however, are clearly problematic when considered in context of the Fourth Amendment's guarantee against "unreasonable search and seizure." At first blush, subjecting individuals to public exposure for mere suspicion of criminal activity seems antithetical to the detailed protections at the amendment's core. Nevertheless, the government has interests in permitting ride-alongs, ranging from deterrence of crime to publicity for its police force. This situation creates an impasse where legitimate government interests and individual liberties are mutually countervailing. One solution to this gridlock is found in the Amendment's textually mandated reasonableness standard. By balancing what is reasonable for the suspect and society, it is possible to remain faithful to the text of the amendment while articulating a judicially acceptable standard that would only permit those ride-alongs that are substantially related to important government objectives.

II.

On March 24, 1999, the U.S. Supreme Court heard oral arguments on the constitutionality of ride-alongs in two companion cases, Hanlon v. Berger and Wilson v. Layne. In both cases, federal law enforcement officials permitted news crews to observe and record the execution of warrents.


7. See, e.g., Lyle Denniston, The Center of Attention, AM. LAW., Mar. 1999, at 136 (summarizing forthcoming Supreme Court cases for March, 1999); Real Stories of a Crowded Genre, BROADCASTING & CABLE, May 22, 1995, at 16 (punning on the television show entitled "Real Stories of the Highway Patrol" and reporting that, although a saturated television market creates high barriers to entry, real footage has proven successful).

8. The Fourth Amendment guarantees that:
   [that] the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend IV.

9. Constitutional law scholar David O'Brien considers the Fourth Amendment to be the most detailed guarantee of the Bill of Rights. See 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 770 (3d ed. 1997).

10. See Joan Biskupic, Justices Question TV's Use on Raids: Court To Rule on Case This Spring, WASH. POST, Mar. 25, 1999, at A2.


Hanlon arose from a May 1993 federal search of Paul Berger's Montana ranch under suspicion that Berger was illegally poisoning eagles. The representatives of the Cable News Network ("CNN") joined the agents in the search pursuant to an agreement between Kris McLean, the Assistant U.S. Attorney in charge of the investigation, and Jack Hamann, CNN Environmental Unit Correspondent. The agreement permitted CNN to film the search and use the footage as part of two subsequent environmental television programs. The Bergers filed two related civil actions against the government and media in the United States District Court in Montana under Bivens, the Federal Wiretap Act, and state common law, for declaratory and injunctive relief and monetary damages. After an adverse ruling from the District Court, the Bergers appealed to the Ninth Circuit, which held that the federal agents were not entitled to qualified immunity, the media's presence violated the Fourth Amendment, and the "open fields" and "invited informer" doctrines were not applicable defenses. The Ninth Circuit also held that the media defendants had not violated the Federal Wiretap Act, as the Bergers had alleged. In their brief before the Supreme Court, the Bergers argue that law enforcement officials violated the Fourth Amendment by allowing the media to join and videotape the execution of a search warrant and that these officials are not shielded from liability by the qualified immunity doctrine.

In Wilson, the plaintiff sued federal and state law enforcement officers who arrested him on April 14, 1992, in an effort to apprehend fugi-
tives with a history of armed and violent criminal conduct. Wilson’s arrest was observed and recorded by two reporters from the Washington Post as part of a two-week, newsgathering exercise. The Wilsons brought a Bivens action in the United States District Court of Maryland, alleging that the police-led media invasion of their home violated their Fourth Amendment right to be secure against unreasonable searches and seizures. The District Court granted summary judgment in part in favor of the officers but denied the officers’ motion for summary judgment motion on the Wilsons’ claim that the officers violated their Fourth Amendment rights. The officers appealed this ruling, and the Fourth Circuit held that, because it was not clearly established at the time that permitting members of the media to shadow law enforcement officers violated the Fourth Amendment, the officers were entitled to qualified immunity. In particular, the Fourth Circuit noted that reasonable officers had no clearly established law from any court indicating that they would exceed the scope of an arrest warrant by permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant. In the brief they filed in the Supreme Court, the Wilsons argue that the law enforcement officials violated their Fourth Amendment rights by bringing the news media into their home and that these officials are not entitled to qualified immunity.

III.

The methods of analyses used in Hanlon and Wilson have been used by other courts faced with ride-along suits. This Case Note argues that neither an isolated interpretation of the Fourth Amendment nor the qualified immunity doctrine represents the appropriate form of constitutional analysis for ride-alongs. Rather, the Supreme Court should go

26. The effort was part of “Operation Gunsmoke,” a special apprehension program intended to take into custody dangerous fugitives wanted for drug and violent crimes. Because of Dominic Jerome Wilson’s outstanding charges for theft, robbery, and assault, as well as his past probation violations, deputy sheriffs identified Wilson as a target of “Operation Gunsmoke.” See Brief for Respondent at 1-2, Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) (No. 98-83).
27. See id. at 2.
28. See Brief for Petitioner at 6, Wilson (No. 98-83).
29. See Wilson, 141 F.3d at 113.
30. See id. at 114-16.
31. See id. at 115.
32. See Brief for Petitioner at 12-33, Wilson (No. 98-83).
33. See id. at 33-48.
34. See Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996) (holding that the police were entitled to qualified immunity). But see Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994) (denying motion to dismiss on grounds of qualified immunity because an objectively reasonable police officer could not have concluded that inviting a television crew to participate in a search was in accordance with the Fourth Amendment).
back to basics. To determine the constitutionality of ride-alongs, the
Court should recall the explicit wording of the Fourth Amendment and
ask one fundamental question: What is reasonable?

The language of the Fourth Amendment is clear. People have a right
to be secure against "unreasonable searches and seizures." Nevertheless,
nor the Fourth Circuit nor the Ninth Circuit spent any time explicating
this reasonableness requirement. In fact, the Supreme Court itself has
largely ignored this simple but clear textual standard. Professor Akhil
Amar has advanced this approach as a way out of what he terms the
"mess" of current Fourth Amendment law. Under Amar's analysis, rea-
sonableness stands at the core of the amendment and forces us to ask
whether the government-sponsored search or seizure in question was
reasonable. To clarify this requirement, we must consider two kinds of
reasonableness: common sense and constitutional. Common sense rea-
sonableness is grounded in tort law principles. It looks beyond probable
cause and considers the "importance of finding what the government is
looking for, the intrusiveness of the search, the identity of the search tar-
get, [and] the availability of other means of achieving the purpose of the
search." Constitutional reasonableness considers this requirement in
light of the rules and principles affirmed elsewhere in the Constitution,
viewing the Constitution as a "single document designed to cohere,
rather than a grab bag of random clauses jumbled together."

From either standpoint, ride-alongs present a unique problem. Two
competing notions of reasonableness come into play: reasonableness to
the suspect and reasonableness to society. The Court should assess both
notions and attempt to find the most appropriate means of balancing
them. Amar has touched upon this issue in his analysis of Terry v. Ohio.
According to Amar, reasonable intrusions must be proportional to le-
gitimate government purposes—the more intrusive the government ac-
tion, the greater the required justification.

Ride-alongs are replete with problems surrounding reasonableness to
the suspect. These flaws stem from the significant weight the Court has

35. See AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST
PRINCIPLES 1, 1-45 (1997).
36. See id.
37. See id. at 31.
38. See id. at 34.
39. Id. at 32.
40. Akhil Reed Amar, Terry and Fourth Amendment First Principles, 72 ST. JOHN'S L.
REV. 1097, 1119 (1998); see also AMAR, supra note 35, at 35-40.
41. 392 U.S. 1 (1968) (permitting police officers to stop and frisk suspects on less than
probable cause). Terry stands for the proposition that reasonableness is the "central inquiry un-
der the Fourth Amendment." Id. at 19.
42. See Amar, supra note 40, at 1098.
afforded individual privacy in Fourth Amendment interpretation.\textsuperscript{43} The Court has particularly emphasized privacy rights in the strict requirements placed on the execution of warrants. Law enforcement officials conducting searches are limited in their conduct to those actions "strictly within the bounds set by the warrant"\textsuperscript{44} or to further actions that are reasonably necessary to accomplish the search.\textsuperscript{45} The ride-alongs in Hanlon and Wilson fail to satisfy even these requirements. The media presence was not part of the warrants granted by the magistrate, and it thereby arguably exceeding their strict bounds. Even if the ride-alongs had been included in these warrants, however, constitutional problems linger. A ride-along is not reasonably necessary to accomplish a search, because members of the media generally lack qualifications to abet the police effort. In fact, a ride-along could hinder the search by distracting the police who are executing the search.

Further problems arise from the Court's jurisprudence surrounding privacy within the home.\textsuperscript{46} The Court has considered the protection of privacy from the encroachment of government officials to be the principal object of the Fourth Amendment.\textsuperscript{47} These protections of privacy seem irreconcilable with the inherent nature of ride-alongs, which often involve camera crews filming a private residence while the police seize property or persons therein. There is a clear difference between a few police officers entering a home and such an unwanted intrusion being aired on the evening news.

\textsuperscript{43} See Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (stating that the Fourth Amendment protects places where people have a "reasonable expectation of privacy").
\textsuperscript{45} See Michigan v. Summers, 452 U.S. 692, 705 (1971) (permitting detention of a suspect during a warrant search of a home); see also 18 U.S.C. § 3105 ("A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.").
\textsuperscript{46} In Silverman v. United States, 365 U.S. 505 (1961), the Court argued that "[a]l the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." \textit{Id.} at 511 (citing Boyd v. United States, 116 U.S. 116, 626-30 (1885)). The Court reiterated this proposition in future cases, calling physical entry of the home the "chief evil against which the wording of the Fourth Amendment is directed." United States v. United States Dist. Court, 407 U.S. 297, 313 (1972); see also Payton v. New York, 445 U.S. 573, 585 (1980) (noting that the Fourth Amendment is designed to prevent a greater evil than the abuse of a general warrant).
\textsuperscript{47} See, e.g., Winston v. Lee, 470 U.S. 753, 758, 767 (1985) (holding that surgical intrusion into the left chest area of a suspect of an attempted robbery in order to recover a bullet fired by the victim was unreasonable because of the risks involved); Warden v. Hayden, 387 U.S. 294, 304 (1967); Jones v. United States, 362 U.S. 257, 266 (1960) (holding that the defendant had standing to contend that an entry and subsequent seizure were unlawful even though he testified that property seized was not his and that the place of arrest was not his home).
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An additional danger of ride-alongs is the risk that police actions may become unreasonable or unprofessional for the sake of good television. With media crews filming their every move, law enforcement officials may be tempted to show off in front of the cameras and take unnecessary measures. This danger became reality in Hanlon. Berger was a sickly, seventy-two-year-old man with neither a criminal record nor a history of violence. The U.S. Fish and Wildlife Service suspected that Berger had poisoned eagles based solely on allegations from three former employees who had not worked on his ranch in years. With the cameras rolling, however, the search proceeded twenty-one men converging on the ranch, accompanied by a stockpile of weapons, a caravan of trucks, and an airplane. Berger was ultimately acquitted.

The defense of qualified immunity fails to alleviate for these infringements on privacy rights. This doctrine grants a law enforcement officer immunity if he violates rights not “clearly established” at the time of the search or if an “objectively reasonable” officer could believe that his acts did not violate those clearly established rights.

Law enforcement officials are exposed regularly to the exclusionary rule, which instructs them that searches not conducted in accord with the Fourth Amendment


49. The presence of a television crew during the conduct of police business may have contributed to the death of a twenty-one-year-old girl. During the early morning hours of November 24, 1996, a camera crew from Real Stories of the Highway Patrol filmed a state trooper's high-speed pursuit of a male drunk driver. The chase ended when the drunk driver slammed into Amanda Smales's car, killing the girl instantly. The attorney for the decedent's family has alleged that the audio tape from the ride-along reveals that the camera crew encouraged prolonging the chase. Immediately following the crash, Trooper Kevin Plummer, the pursuing officer, is heard on the tape exclaiming, “I killed her.” See Dateline NBC: Tale of the Tape (NBC television broadcast, Feb. 9, 1999).


51. See id. at 377.

52. Id. at 377.

53. See, e.g., Anderson v. Creighton, 483 U.S. 635, 659 (1987) (remanding a suit brought against FBI agents for a warrantless search of the plaintiff's home); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (holding that presidential aids are usually only entitled to qualified, but not absolute, immunity); Ayeni v. Mottola, 35 F.3d 680, 684 (2d Cir. 1994) (denying Secret Service Agents' motion to dismiss on grounds of qualified immunity following a ride-along); Soares v. Connecticut, 8 F.3d 917, 920 (2d Cir. 1993) (holding that arresting officers were entitled to qualified immunity inasmuch as there was no clearly established right not to be handcuffed in the course of a particular arrest, even if the arrestee was not resisting or attempting to flee); Finnegans v. Fountain, 915 F.2d 817, 823 (2d Cir. 1990) (holding that the qualified immunity defense was available for a police officer against an excessive force claim).
are futile.\textsuperscript{44} As such, law enforcement officials should understand the undesirable consequences of violating the Fourth Amendment. The individual privacy rights under the Fourth Amendment are well established,\textsuperscript{55} and "objectively reasonable" law enforcement officials should understand that permitting members of the media to join in a search violates those rights. The Second Circuit in\textit{Ayeni v. Mottola}\textsuperscript{56} agreed, holding that an objectively reasonable officer could not have concluded that inviting a television crew—or any third party not providing assistance to law enforcement—to participate in a search was in accordance with the Fourth Amendment.\textsuperscript{57}

These constitutional flaws aside, ride-alongs can be reasonable from the standpoint of the state, by advancing important law enforcement objectives. When the media present footage of police in action, government efforts to crack down on particular crimes are freely publicized.\textsuperscript{58} As a result, ride-alongs depicting police activity surrounding specific laws can provide a particularly effective means of law enforcement through the intimidation and deterrence of present and potential criminals. The strength of this government interest is greater for certain crimes, in light of the cost of violations and the problems with their investigation.\textsuperscript{59}

Ride-alongs can also advance the government interest of presenting to the public a credible and respected police department. In most ride-alongs, police are portrayed positively, seen making our streets safer by busting drug suspects or arresting violent criminals.\textsuperscript{60} Ride-alongs can also help prevent negative police stereotypes, since it is unlikely officers will overstep their authority while being filmed.\textsuperscript{61} For example, a police officer, aware that his actions are being recorded on film, is far more likely to

\textsuperscript{44} The exclusionary rule prohibits the prosecution from using at a criminal trial evidence obtained when a defendant's constitutional rights were violated in its collection. \textit{See}, \textit{e.g.}, \textit{Mapp v. Ohio}, 367 U.S. 643 (1961). In a criminal trial, this rule permits the exclusion of evidence, but a wronged defendant may have no civil recourse because of the immunity doctrine.

\textsuperscript{55} \textit{See supra} text accompanying notes 42-46.

\textsuperscript{56} 35 F.3d 680 (2d Cir. 1994).

\textsuperscript{57} \textit{See id.} at 686.

\textsuperscript{58} For a discussion of the general objectives served by publicizing the government's efforts to combat crime, see Brief for Petitioner at 23, \textit{Hanlon} (No. 97-1927).

\textsuperscript{59} Any publicity of enforcement of laws with enforcement barriers (such as crimes that are committed predominantly in rural areas or that require reliance on informants) gives the impression, even if that impression is false, that the police are effectively "cracking down" on those crimes. This public perception, it is roundly presumed, could help deter current or potential violators.

\textsuperscript{60} \textit{See supra} note 5. \textit{But see supra} note 47.

\textsuperscript{61} In \textit{Berkemer v. McCarty}, 468 U.S. 420 (1984), the Court touched on a very similar point when holding that roadside questioning of motorists detained pursuant to routine traffic stops does not constitute "custodial interrogation," and hence is not subject to \textit{Miranda}. Writing for the Court, Justice Marshall noted, "the typical traffic stop is [conducted] in public... [and] the atmosphere surrounding [it] is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in \textit{Miranda}." \textit{Id.} at 439.
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arrest a suspect in accordance with proper criminal procedure than he would be if he were confident that no one would be watching.

When we consider ride-alongs from the perspective of the competition between privacy rights (reasonableness to the suspect) and government interests (reasonableness to society), we create a familiar paradigm for the Court. When faced with actions that infringe upon an individual right yet simultaneously advance a government interest, the Supreme Court often performs a balancing test. This well-worn approach has given us three principal levels of scrutiny: strict, intermediate, and rational basis.62

Strict scrutiny erects the highest hurdle for government actions, requiring a "compelling" government objective achieved by narrowly tailored and necessary means.63 The Court has administered strict scrutiny in equal protection review based on race64 or the restriction of a fundamental right,65 and substantive due process analysis involving a fundamental right.66

In contrast to the rigid standards of strict scrutiny, rational-basis scrutiny is the weakest level of review. Here, a regulation must merely possess a rational relationship to a legitimate government objective.67 Rational-basis scrutiny has been applied in equal protection analysis of nonsuspect classifications68 and in substantive due process analysis of regulations of nonfundamental rights.69

62. Justice Stevens’ concurrence in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 451-55 (1985), bears particular relevance to the reasonableness review proposed in this Case Note. Stevens argues that the three standards of scrutiny lead to a question of whether the government regulation is rational. This rationality review asks whether "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." Id. at 452; see also Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring).


69. The Court has included most social and welfare regulation in the category of nonfundamental rights. See, e.g., Walen v. Roe, 429 U.S. 589 (1977).
Lastly, intermediate scrutiny is applied to regulations that merit a less severe standard than strict scrutiny but a more rigid standard than rational-basis review. Intermediate scrutiny requires the regulation to be substantially related to an important government objective. The Court has applied intermediate scrutiny to government regulations imposing only a light or non-content-based restriction on speech and to equal protection cases involving a quasi-suspect classification.

To determine the appropriate level of scrutiny, we must ask whether the privacy rights infringed upon by ride-alongs are fundamental. Guidance for this determination is found in the vast array of exceptions the Court has carved out to the privacy rights protected by the Fourth Amendment, thus apparently indicating that the Court does not view those rights as fundamental. Among the more prominent exceptions to the warrant requirement are the “open fields” doctrine, the “stop and frisk” exception, and the “invited informer” doctrine. Similarly, the Court has forged exceptions to the exclusionary rule. One major exemption to the exclusionary rule, the “good faith” exception, allows the use of evidence discovered in searches conducted by police acting in reason-

72. See, e.g., Schneider v. State, 308 U.S. 147 (1939) (considering the right to distribute circulars or handbills).
74. The “open fields” doctrine was established in Hester v. United States, 265 U.S. 57 (1929), and permits police officers to perform warrantless searches of items in open public view. This doctrine has been employed to uphold a variety of warrantless searches of land. See, e.g., Florida v. Riley, 488 U.S. 445 (1989) (helicopter search of private property); United States v. Dunn, 480 U.S. 294 (1987) (nighttime search of a barn); California v. Ciraolo, 476 U.S. 207 (1986) (aerial photographs of land used to grow marijuana); Dow Chem. Co. v. United States, 476 U.S. 227 (1986) (use of aerial photographs to inspect for illegal pollution).
75. The “stop and frisk” exception was created by Terry v. Ohio, 392 U.S. 1 (1968), and permits officers to stop and frisk suspicious individuals in an attempt to “discover weapons which might be used to assault a police officer.” Id. at 30. While police discretion to stop and frisk was originally limited, see Sibron v. New York, 393 U.S. 40 (1968) (refusing to permit the search of a drug suspect whom the police had no reason to believe was armed or dangerous), the Burger and Rehnquist Courts have broadened the exception to allow significant police discretion. See, e.g., United States v. Sokolow, 490 U.S. 1 (1989) (establishing that a police officer needs only “reasonable suspicion,” rather than probable cause, to stop and frisk a suspect); Adams v. Williams, 407 U.S. 143 (1972) (upholding the authority of a police officer to stop and frisk an individual based solely on a tip that the individual was carrying narcotics and a gun).
76. The “invited informer doctrine” was articulated in United States v. White, 401 U.S. 745 (1971), and permits law enforcement officials to listen in on a two-party conversation with the consent of one of the parties.
77. For example, the Court has permitted prosecutors to introduce illegally obtained evidence for the purpose of impeaching the testimony of either the defendant, see Walder v. United States, 347 U.S. 62 (1954), or the testimony of an accomplice testifying for the defendant, see United States v. Havens, 446 U.S. 620 (1980).
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able reliance on a warrant that is later determined to be based on insufficient cause. Furthermore, the current Court seems inclined to cut back on the Fourth Amendment privacy rights. Just this term the Court significantly curtailed the privacy rights of automobile passengers. In *Wyoming v. Houghton*, the Court held that police officers with probable cause to search a car may inspect the passengers’ belongings found in the car. The ruling marks the first acknowledgement that passengers who are not suspected of wrongdoing are subject to warrantless searches.

At the same time, however, the Court has not appeared to hold these privacy rights so nonfundamental as to merit rational-basis scrutiny. In fact, the Court has often emphasized the importance of privacy rights. In *Wolf v. Colorado*, Justice Frankfurter wrote that “[t]he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in ‘the concept of ordered liberty’ . . .” For example, the Court has justified the open fields exception on the basis that a person lacks a legitimate expectation of privacy in open fields. As such, the open fields doctrine distinguishes open fields from constitutionally protected areas of privacy, like the home. Moreover, as discussed earlier, the Court has emphasized that the Fourth Amendment’s protections are particularly strong when the privacy of one’s dwelling is at issue. This privacy is inherently at risk as long as media crews can enter into and film the interior of a mere suspect’s home.

Because the Court has arguably held that these privacy rights are less fundamental than rights that merit strict scrutiny but more fundamental than rights that call for rational-basis scrutiny, intermediate scrutiny appears to be the most appropriate review. A test of intermediate scrutiny would only permit ride-alongs that bear a substantial relationship to an important government objective. This represents a judicially articulated means of applying the reasonableness standard that is textually mandated by the Fourth Amendment.

80. See id.
81. See Joan Biskupic, *Court Expands Car Search Authority*, WASH. POST, Apr. 6, 1999, at A1. Previously, the Court has permitted officers to inspect a driver’s car and its compartments without a warrant, provided the police have probable cause to believe the driver had committed some crime. This ruling now permits officers to search the belongings of passengers by virtue of their mere presence in the car and not because of anything they do. See id. at A1.
82. 338 U.S. 25 (1949).
83. Id. at 27.
85. See supra text accompanying notes 46-47.
IV.

As with any theoretical proposal, the true challenge lies in proving its real-world usefulness. To be effective, the review would require a careful case-by-base evaluation of each particular ride-along that weighs the level of reasonableness to the suspect and to society.

The most appropriate individual to perform this scrutiny is the judge or magistrate ruling on the warrant request. This suggestion is supported by the Supreme Court's insistence that the Fourth Amendment confines an officer within the bounds set by the warrant.\textsuperscript{87} Coupled with the exclusionary rule, this doctrine would mean that a ride-along later held unconstitutional would invalidate an entire search. From a more pragmatic perspective, the magistrate is the most cost-efficient individual to perform the intermediate scrutiny analysis. Since the magistrate will already be in the position of evaluating each individual warrant, the judiciary will not need to rely on a separate entity to evaluate ride-alongs. Moreover, the magistrate will become familiar with the details of the case while evaluating the warrant request, thereby enabling him to make an informed decision.

Federal criminal procedure requires law enforcement officials seeking a warrant to submit a signed affidavit\textsuperscript{88} or, in rare cases, simply sworn oral testimony.\textsuperscript{89} If the magistrate is satisfied that grounds for the warrant exist or that there is probable cause to believe grounds exist the magistrate issues a warrant identifying the property or person to be seized and naming or describing the person or place to be searched.\textsuperscript{90} Under this Case Note's suggestion, law enforcement officials requesting media accompaniment would also present the magistrate with a proposal for the ride-along. This proposal would be as precise as possible, providing the magistrate with relevant details of the anticipated ride-along. Although it may be impossible to know with absolute certainty the specifics of the requested ride-along at this point, police should know certain details, especially if a strong government interest truly does exist for this particular ride-along. Included in the officer's proposal should be the role that the media will play during the search, the means by which the media will pre-

\textsuperscript{88} See FED. R. CRIM. P. 41(c)(1).
\textsuperscript{89} See FED. R. CRIM. P. 41(c)(2) ("If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.").
\textsuperscript{90} See FED. R. CRIM. P. 41 (c)(1).
sent information, and any benefits law enforcement officials hope to attain.

Moreover, the warrant should detail the level of police force that will be used. This information is not usually required in a warrant request, but it should be included because it bears particular relevance to ride-alongs. As discussed earlier, media presence runs the risk of encouraging the police to take unnecessary measures and put on a show in front of the cameras. To prevent this danger, the magistrate should ensure that the number of officers for the ride-along warrant does not exceed the number normally used for an operation of similar magnitude.

Under this proposal, the magistrate would first determine whether the ride-along would be unreasonable to the suspect. This determination should rely on the amount of private information to be disclosed by the media as well as whether the individual has an expectation of privacy at the time. Upon finding that the ride-along would induce a violation of the suspect’s privacy rights, the magistrate would consider whether the ride-along bears a substantial relationship to an important government objective. In sum, the magistrate would ask whether the ride-along is reasonable to society. The factors that influence this determination include:

- **Overall severity of violation of the law.** The government may possess a stronger interest in targeting laws facing widespread violation. In these cases, traditional law enforcement efforts may be inadequate and other means should be explored. Conversely, if a law is only rarely violated, the government interest in exploring alternative means of enforcement are much weaker and current law enforcement techniques may suffice.

- **Difficulty in enforcing the law.** Certain crimes, by their nature, present particular problems in enforcement. Law enforcement benefits substantially from media coverage of official efforts to crack down on such crimes. This publicity gives the impression of widespread prosecution, thereby deterring potential criminals.

- **Public familiarity with the law and with police efforts of enforcement.** Certain laws, perhaps because they criminalize activities that are not clearly wrong or because they have only recently been enacted, may be

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91. While limits on certain aspects of the execution of a warrant have been set forth by Rule 41 of the Federal Rules of Criminal Procedure, such as requiring the warrant to be served within ten days of its issuance and in the daytime, unless reasonable cause justifies otherwise, see id., no restrictions have been imposed on the size of the police force used in executing the warrant.

92. See supra note 49; see also supra text accompanying notes 48-52.

93. See United States v. White, 401 U.S. 745 (1971) (holding that no search had occurred because the defendant had no reasonable expectation of privacy in his conversations).

94. See supra note 59. The poisoning of eagles in a rural area, the crime alleged in Hanlon, thus seems particularly suitable to enforcement with a ride-along.
widely unknown. Ignorant criminals may cease violating the law once they learn that their actions are illegal. For these laws, media coverage serves to educate potential violators of the law and prevent future infractions.

**Expected effect of media coverage.** Although it is impossible to know the effect of the media coverage with absolute certainty, the magistrate should evaluate the likely audience and the nature of the coverage. Hence, the magistrate should consider whether the coverage is likely to reach a desirable audience and what, if any, beneficial effects might ensue from the ride-along.

**Alternative means of educating the public.** Any other means of public education and publicity that are bereft of constitutional flaws must be seriously considered. These alternatives could include television commercials, public literature campaigns, and newspaper advertisements. The magistrate should evaluate these alternatives by comparing their relative costs and benefits with those of the proposed ride-along.

Based on these considerations, the magistrate has four options. If the warrant itself were to lack probable cause, the magistrate should deny both the warrant and the media request in their entirety. If probable cause exists for the warrant, but the government lacks an important interest in the ride-along, the magistrate should grant the warrant but deny the media request. If the warrant is justified and the government interest in the proposed ride-along overcomes intermediate scrutiny, the magistrate should grant the warrant with the media request. Finally, if probable cause justifies the warrant, and an important government interest exists for a ride-along, but the requested ride-along fails to substantially achieve this interest, the magistrate should grant the warrant and modify the media ride-along. The magistrate would thus be authorized to regulate and adjust the media’s role in order to mitigate its infringement on the privacy rights of the suspect. In short, the magistrate could transform an otherwise unreasonable ride-along into a reasonable one.

V.

Applying intermediate scrutiny to the two cases coming before the Court would render the search in *Hanlon* constitutional and the search in *Wilson* unconstitutional. The Court should thus reverse both the Ninth Circuit and the Fourth Circuit.

Law enforcement officials possessed a strong government interest in publicizing the law enforcement efforts at issue in *Hanlon*. The poisoning of eagles is a very specific type of illegal activity and generally occurs only
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in remote areas by a few violators. These characteristics of the crime create particular difficulty for government enforcement. The media personnel were present to gather news through video and audio footage that petitioners determined would abet their law enforcement mission by publicizing their efforts to combat environmental crime. As a result, this ride-along served an important role in crime prevention. Unfortunately, the Ninth Circuit failed to acknowledge this strong government interest and instead narrowly focused on the issue of qualified immunity. By examining this strong government objective, the Ninth Circuit should have found that the ride-along in Hanlon was extremely reasonable to society. As a result, the ride-along should have been upheld.

Hanlon nevertheless points to a serious danger inherent in ride-alongs. The actions of the federal agents seemed excessive and unreasonable to the suspect. The search of the property of an ailing and aged man with no prior record did not necessitate the dramatic search in this case. Under the system proposed by this Case Note, this danger could have been averted. When reviewing the proposal for the ride-along, the magistrate would have evaluated the extent of the police force to be used and seen it to be unreasonably excessive. Under this system, the magistrate could have modified the police presence to mitigate the unreasonableness of the search from the Bergers' perspective.

A government interest of comparable strength was lacking in Wilson. Federal agents were not attempting to target a specific form of conduct; rather they were targeting the broad range of "fugitives with a history of armed, violent, criminal conduct." This form of conduct is widely recognized as illegal and most people know that the police vigorously pursue violators. The conduct resembled many forms of behavior targeted by police activity and failed to possess the peculiar characteristics needed to constitute an important government objective substantially related to the ride-along.

VI. CONCLUSION

The issue of ride-alongs reminds us that the Fourth Amendment requires that all searches and seizures must be reasonable. Yet two different notions of reasonableness come into conflict with ride-alongs. Al-

95. The Bergers' ranch, for example, covers about 75,000 acres in Montana. See Brief for Petitioner at 4, Hanlon (No. 97-1927).
96. See id. at 27.
97. For some reason, however, the reasonableness and validity of the search were never brought into question. See id at 4.
98. See supra text accompanying notes 50-52.
99. Wilson, 141 F.3d at 113.
though ride-alongs may seem unreasonable to the suspect, they can be reasonable to society by advancing important law enforcement objectives. In *Wilson* and *Hanlon*, the Court has the opportunity to resolve these two competing interests. By empowering the magistrate issuing the warrant to evaluate the ride-alongs from a standard of intermediate scrutiny, the Court can enable the magistrate to ensure that the government possesses an important objective that is substantially related to the ride-along. This standard will protect an individual’s privacy rights while acknowledging that certain strong government interests can sometimes outweigh them.