

Lauro v. Charles:

Perp Walk Decision Leaves Troubling Questions

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In *Lauro v. Charles*,¹ the Second Circuit held that by staging a “perp walk”² for the benefit of the press, where there is no other law enforcement purpose and where the arrestee is “displayed to the world, against his will, in handcuffs, and in a posture connoting guilt,” police unreasonably exacerbate the seizure of the arrestee in violation of his rights under the Fourth Amendment. The decision represents an extension of prior decisions holding that when law enforcement officers invite the media to be present at the execution of a search or arrest warrant in a private home, they violate the residents’ Fourth Amendment rights. Although the court took pains to limit the scope of its decision, which may apply only to staged perp walks, it remains troubling from a media perspective.

The plaintiff, John Lauro, a doorman in a Manhattan building, was asked by a tenant to deliver mail and water plants while the tenant was away. Shortly before leaving, the tenant learned that Lauro was suspected of committing thefts in the building. Consequently, the tenant placed a wireless camera in his bedroom. Videotape recordings from the camera later showed Lauro entering the tenant’s bedroom several times and opening dresser drawers and cabinets, handling their contents, but not stealing anything. The tenant sold the tape to Fox 5 News and filed a complaint against Lauro with the police. After being persuaded by police to accompany them from his New Jersey home to New York, Lauro was arrested by Detective Michael Charles and charged with burglary, petit larceny, and possession of stolen property. The criminal proceedings against Lauro were ultimately adjourned in contemplation of dismissal,

and the charges were later dismissed.

Several hours after Lauro had been brought to a precinct house, Detective Charles received a call from the police department’s public information office telling him that the media were interested in the case and that Lauro should be taken on a perp walk. As described in the Second Circuit’s opinion:

Charles handcuffed Lauro and walked him out of the front door and outside the station house. He then placed Lauro in an unmarked police car, drove around the block, removed Lauro from the car, and walked him back into the station house. The perp walk was filmed by a television crew from Fox 5 News.³

Lauro brought suit in federal district court against Charles, the City of New York, and the New York Police Department under 42 U.S.C. § 1983, alleging, inter alia, violations of his Fourth Amendment rights. Section 1983 imposes liability on those acting under color of state law “for conduct that subjects a complainant to deprivation of rights secured by the Constitution and laws.”⁴ Lauro did not sue Fox 5 News.

The district court rejected Lauro’s claim that his arrest violated the Fourth Amendment, holding that Detective Charles had probable cause to arrest him for attempted petit larceny.⁵ But it granted Lauro partial summary judgment on another of his Fourth Amendment claims. It found that the staged perp walk “was a seizure that intruded on plaintiff’s privacy interests and personal rights, and was conducted in a manner designed to cause humiliation to plaintiff with no legitimate law enforcement objective or justification.” The court therefore held that the perp walk was “unreasonable as a matter of law and in violation of the Fourth Amendment.”

The court found the seizure unreasonable first because “plaintiff’s control over his own body was curtailed significantly as he was handcuffed and paraded outside of the precinct.” But secondly, it believed that “intangibles such as plaintiff’s own image and the sound of his voice were also seized by defendants in a manner that implicates the Fourth Amendment.” While the first basis for

finding a constitutional violation focused squarely on police conduct, the second, the “seizure” of Lauro’s image, apparently implicated media conduct, even though it was attributed to the police defendants.⁶

No Law Enforcement Objective

The court found it significant that the defendants had nowhere even asserted that the perp walk had any legitimate law enforcement objective. The defendants had argued the plaintiff’s claim should be analyzed under the Due Process Clause, and therefore did not present a law enforcement justification to rebut the claim that Fourth Amendment interests had been impinged. Citing the police department’s “Patrol Guide on the Release of Information,” the district court noted that the defendants “theoretically” could have argued that the perp walk was intended to “ensure the right of the public to be informed and to facilitate the accurate, timely and proper dissemination of information concerning the official business of the Department.” But the court chose not to address whether this law enforcement objective could justify the police conduct because the defendants had not raised it, and because, as a factual matter, the court was “convinced beyond doubt that the perp walk procedure is not designed nor intended for the purpose of information dissemination, but rather for the purposes of incident dramatization and arrestee humiliation.” Therefore, the court concluded that “the perp walk had the effect only of humiliating plaintiff, assisting the media in sensationalizing the facts of his case, and allowing Detective Charles to appear on television.”⁷

The court discussed but did not decide what standard should apply in determining whether a law enforcement objective is sufficient to justify an infringement on the Fourth Amendment interests of an arrestee. The court analogized to *Turner v. Safley*,⁸ a case dealing with the constitutional rights of incarcerated prisoners. In that case, as the

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district court explained, the Supreme Court had held, in the prison context, that “there must be ‘a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it . . . moreover, the governmental objective must be a legitimate and neutral one.’ ” But because the *Lauro* defendants had not proffered any governmental objective for the perp walk, the district court determined it need not decide the applicability of the *Turner* standard to the treatment of pretrial arrestees.⁹

In dicta, the district court asserted that it was not addressing whether Fox 5 News could also be liable for the constitutional violation involved in the case. Nevertheless, it cited case law holding that private persons may act “under color” of state law and hence be held liable under § 1983 when they act in conspiracy with state officials.¹⁰ The court further asserted that “such a claim would not be far-fetched in this case given that Fox 5 News appears to have encouraged and participated in the perp walk conducted by Detective Charles.”¹¹

Second Circuit Narrows the Lower Court Ruling

On Charles’s appeal,¹² the Second Circuit agreed that the perp walk was “best viewed as an exacerbation of the seizure that occurred when [Lauro] was arrested, [and] his claim was properly analyzed under the Fourth Amendment.”¹³ To reach its conclusion that the staged perp walk for the benefit of the media implicated Fourth Amendment interests, the court relied principally on two cases, its own decision in *Ayeni v. Mottola*,¹⁴ and the Supreme Court’s recent decision in *Wilson v. Layne*.¹⁵

Ayeni involved the execution of a search warrant in a Brooklyn apartment by Secret Service agents investigating credit card fraud, where the defendant lead agent invited a CBS News crew from the newsmagazine program *Street Stories* to accompany the Secret Service team. According to the plaintiffs’ complaint, which was accepted as true on defendants’ motion to dismiss and on interlocutory appeal, the crew videotaped the suspect’s wife and small child inside the apartment, against their will, and in a manner that humiliated them. The suspect himself was not present.

The *Ayeni* court emphasized that the

“reasonableness requirement of the Fourth Amendment applies not only to prevent searches and seizures that would be unreasonable if conducted at all, but also to ensure reasonableness in the manner and scope of searches and seizures that are carried out.”¹⁶ In finding that the agent’s bringing members of the press into a home implicated Fourth Amendment interests, the court stated:

It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situation where warrants are required, law enforcement officers’ invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. [The agent] exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose. A private home is not a soundstage for law enforcement theatricals.¹⁷

Thus, as noted in the *Lauro* decision, the *Ayeni* court found the agent’s action violated the Fourth Amendment because the presence of the television crew both exceeded the scope of the search warrant given to the Secret Service and lacked any legitimate law enforcement justification related to the execution of the warrant. The *Ayeni* court also found that the video and sound recordings taken by the news crew were “unnecessary to the purposes of the search” and were “seizures” under the Fourth Amendment that “rendered the search far more intrusive than it needed to be.” In this connection, the *Ayeni* court emphasized the crew’s videotaping of personal documents and effects in the home, asserting the law is “clear that a search of a home involves an incursion upon one of the most highly protected zones of privacy and that a search involving documents requires that officers ‘minimize unwarranted intrusions on privacy.’ ”¹⁸

The *Lauro* court also relied on the Supreme Court’s recent decision in *Wilson v. Layne* in concluding the staged perp walk infringed Fourth Amendment interests. *Wilson* involved a civil rights claim brought by homeowners after law enforcement officers invited a newspaper reporter and photographer to accompany them in executing a warrant in the home to arrest the homeowners’ son,

who, like the *Ayeni* suspect, turned out not to be present. The homeowners, a middle-aged couple, were both photographed, the husband as he was being detained, prostrate on his living room floor, dressed only in briefs, and the wife in her nightgown.

The Supreme Court held 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 the third parties in the home was not in aid of the execution of the warrant.”¹⁹ In arriving at this holding, the Court noted that the Fourth Amendment embodies a “centuries-old principle of respect for the privacy of the home,” and emphasized the “importance of the right of residential privacy at the core of the Fourth Amendment.”²⁰ The Court did not address the question of whether the photography in the home constituted a “seizure.”

A Two-Pronged Test

Applying these cases, the *Lauro* court held that determining the reasonableness of the search and seizure requires a balancing of the “intrusion on privacy caused by law enforcement against the justification asserted by the state.” Thus, the court believed it was required to ask two questions: “First, did the perp walk intrude upon interests protected by the Fourth Amendment? Second, if it did, was it nevertheless reasonable in light of legitimate law enforcement purposes?”²¹

With regard to the first question, Charles argued that the perp walk could not impinge on Fourth Amendment interests because it occurred in a location where Lauro had no reasonable expectation of privacy, unlike the media ride-alongs to private homes in *Wilson* and *Ayeni*. Notwithstanding its prior acknowledgement that both “*Wilson* and *Ayeni* emphasized the sanctity of the home, and the particular gravity the Fourth Amendment accords to government intrusions on that privacy,” the court asserted:

It is not the case, however, that the holdings in *Ayeni* and *Wilson* turned solely on the special status of the home, or that the Fourth Amendment’s privacy protections end at the door of one’s house. Our court recognized, rather, that the privacy interests threatened in *Ayeni* went beyond those that attach to the inviolability of the home, and concluded that obtaining and broadcasting images of the

Ayenis in a humiliating situation itself infringed on their Fourth Amendment privacy interests.²²

It is true that the location of police conduct does not necessarily determine whether the conduct violates the Fourth Amendment. As the *Lauro* court pointed out, the Supreme Court has held that, “[w]herever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable governmental intrusion.”²³ Apparently on the strength of *Terry v. Ohio*²⁴ and the court’s own decision in *Weber v. Dell*,²⁵ the court determined that Detective Charles impinged on Lauro’s Fourth Amendment interests by physically restraining him with handcuffs and a grip on his arm, and forcing Lauro, in that “humiliating position,” to circle the block and reenter the precinct house in front of television cameras.

Charles also argued that privacy interests were not implicated by the perp walk because Lauro’s physical characteristics are not subject to Fourth Amendment protection, relying on case law holding that compelled production of voice exemplars to a grand jury is not subject to a reasonableness requirement. The court found this case law inapposite, responding that “Lauro was not merely commanded to exhibit his facial features to law enforcement officials—as would be required, for instance, in order for a mug shot to be taken.” Rather, the court found, he “was displayed to the world, against his will, in handcuffs, and in a posture connoting guilt.”²⁶

With regard to its second question, the court found there was no legitimate law enforcement objective justifying the intrusion on Lauro’s privacy interests. It rejected Charles’s argument, raised for the first time on appeal, that “the importance of the press in informing the general public about the administration of criminal justice” was justification enough, asserting that the Supreme Court in *Wilson* had rejected an “identical” claim.²⁷ In *Wilson*, the Supreme Court had held that neither law enforcement discretion to determine what might further its mission, nor accurate reporting on law enforcement activities, nor the possibility that media presence might deter law enforcement abuses could justify the infringement on the Wilsons’ Fourth Amendment rights. These “generalized” objectives could

not justify media presence in light of “the importance of the right of residential privacy at the core of the Fourth Amendment.”²⁸ The *Lauro* court did not acknowledge the importance of the privacy of the home to the Supreme Court’s rejection of the sufficiency of these generalized justifications in *Wilson*.

The court did acknowledge that the interests of the press and public in viewing perp walks are “far from negligible.” But, finally reaching the heart of the matter, it emphasized that the police had facilitated media access not to the actual event of Lauro’s being brought into the station, but to a staged recreation of that event. Consequently, it held that even if there was legitimate state interest in accurate reporting on police activity, that interest was not served by “an inherently fictional dramatization of an event that transpired hours earlier.”²⁹

Having reached the conclusion that police exposure of an arrestee to press photography on a public street could constitute a Fourth Amendment violation, the court set about limiting its holding. First, it specifically stated that “[w]e do not hold that all, or even most, perp walks are violations of the Fourth Amendment,” and thus, the court was “not talking about cases in which there is a legitimate law enforcement justification for transporting a suspect.” It therefore did not address the “seemingly much more common” case “where a suspect is photographed in the normal course of being moved from one place to another by the police,” nor did it “reach the question of whether, in those circumstances, it would be proper for the police to notify the media ahead of time that a suspect is to be transported.”³⁰

Second, the court stated that because the staged perp walk itself was an unreasonable exacerbation of the seizure, there was no need to reach the question, as the district court had, of whether the videotaping constituted a separate seizure. Finally, the court distanced itself from the district court’s suggestion that a claim against the television station might have validity, stating that “because Fox 5 News was never a party

to this lawsuit, we are not intimating that it might be liable to Lauro for its participation in the perp walk.”³¹

Unanswered Questions

From a media perspective, *Lauro* is a troubling decision for a variety of reasons. To begin with, in the aftermath of the case, law enforcement officials may unduly limit the media’s access to arrestees for fear of incurring civil rights liability. In light of the court’s decision not to address the issue, law enforcement is left without guidance as to whether it may inform the media in advance of plans to transport an arrestee. Nor, more generally, did the court offer guidance as to what law enforcement objectives could justify exposing an arrestee to the media, what standard applies to test such objectives, or what manner of exposure of the arrestee might be acceptable. In addition, the court chose not to address the question whether capturing of photographs of an arrestee, even on a public street, could constitute an independent “seizure” under the Fourth Amendment. Finally, the court did not reach the issue of whether the media might be liable for participa-

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tion in a staged perp walk. As discussed below, however, since the issuance of the Second Circuit’s opinion, at least one lower federal court has begun the task of addressing these issues,³² and there is some reason to believe that the *Lauro* court’s holding will be limited to the idiosyncratic facts of the case.

The salient fact of the *Lauro* case is that the perp walk was staged—it was an inherently fictional dramatization of an event, as the court put it—and as such could be deemed per se not to have any valid law enforcement purpose. But the offense the court appeared to take at the use of an arrestee to create a fictionalized event caused it to constitutionalize purported privacy interests that should not implicate the Fourth Amendment, and to minimize law enforcement

objectives and public interests served by the media that deserve protection.

According to the court, the perp walk infringed Lauro's Fourth Amendment rights because he had a reasonable expectation that he would not be "exposed to the world, against his will, in handcuffs, and in a posture connoting guilt." Yet presentation to the world as a person believed to have broken the law is precisely the fate of every arrestee. Whether it is by release of a mug shot by police or broadcast by the media of videotape truthfully showing an actual transfer in handcuffs, or even merely by the filing of a criminal complaint, the arrestee is portrayed in a manner that may well be considered humiliating and that certainly carries a connotation of guilt. Where the individual has been arrested on probable cause, as the district court ruled Lauro was, it can reasonably be argued there is no violation of a privacy interest in such a portrayal, since it accurately reflects the arrestee's status, known publicly through documents necessarily filed in the criminal proceeding against him.

Perhaps the perp walk in this case brought to mind for the court the perp walk to which Timothy McVeigh was subjected soon after his arrest. The image of McVeigh in an orange jumpsuit and handcuffs arguably conveyed a

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powerful image of guilt, and, according to some, made it more difficult for him to receive a fair trial. But this type of concern is addressed, not by treating the exposure of the arrestee to the public and press as a constitutional violation, but by invoking the safeguards in the criminal law system designed to ensure a fair trial—rigorous voir dire of prospective jurors, changes of venue where appropriate, and the like.³³

One might ask what significant difference there is between the release of a mug shot, which almost certainly will look incriminating, and the presentation

by law enforcement officers of an arrestee to the press so that he can be photographed. Suppose Detective Charles had not staged the perp walk to create the false impression that Lauro was then being transported to the station house, but instead merely brought him outside for the explicit purpose of showing the public who had been arrested. Would the court have considered this act to have unreasonably impinged on Lauro's rights? Surely, the answer should be no. Similarly, would the court's analysis have been different if Lauro's posture had not been "humiliating," for example, if he had not been handcuffed? While a question such as this seems too insignificant a basis on which the presence or absence of a Fourth Amendment violation should turn, the court's decision leaves its relevance in doubt.

Image "Seizure" and the Fourth Amendment

In addition, the court's equation of the humiliation of the suspect's wife and child in *Ayeni* to Lauro's humiliation at being photographed on a public street appears unwarranted. Outside of the Fourth Amendment context, the law draws a clear distinction between the privacy rights one enjoys in public and in private circumstances. Under the tort law of every state, it is no violation to

record the image of an individual in a public space, and in virtually all states it is permissible to record one's voice in public, even without the person's knowledge. In contrast, under the law of every state, entering a private home

without consent is a trespass or an intrusion on seclusion in violation of the homeowner's right to privacy, even if no visual or sound recording is made.

Thus, while there may be validity to the *Ayeni* court's view that the "seizure" of an image may impinge privacy rights under the Fourth Amendment when taken in a private home,³⁴ the extension of this concept to photographs taken on a public street could unjustifiably infringe on First Amendment rights. Important constitutional free-speech and -press issues were therefore left unaddressed by the court's decision not to reach the

question of whether the videotaping constituted a separate seizure. Nevertheless, the *Lauro* court's decision not to address this question at least represents a refusal to endorse the district court's view that recording a person's voice and image in a public setting may constitute a seizure implicating the Fourth Amendment. The court's reluctance to follow the district court may well reflect an understanding that powerful First Amendment interests mitigate against treating photography in nonprivate places as a "seizure."

A more definitive resolution of the question of whether public photography can be a "seizure" under the Fourth Amendment has particular importance for the media. Although in *Lauro* the photographic "seizure" was claimed against the law enforcement defendants, it might have been asserted against the television station that shot the videotape. To the extent courts are contemplating the liability of the media as "joint actors" with law enforcement for constitutional violations,³⁵ acceptance of the principle that facilitating public photography of arrestees could violate the Fourth Amendment would be extremely damaging to First Amendment interests.

Public versus Private: Does It Make a Difference?

Although the *Lauro* court was unquestionably correct in stating that Fourth Amendment protections apply whether an individual has a reasonable expectation of privacy, the court discounted too greatly the significance in *Wilson* and *Ayeni* of the fact that the conduct occurred in a private home. The "centuries-old principle of respect for the privacy of the home"³⁶ was essential to both decisions, and for that reason these cases do not support the conclusion that police exposure of an arrestee to the media on a public street infringes on Fourth Amendment rights.

This was the view of the court in *United States v. Edelin*,³⁷ where a criminal defendant attempted to raise a challenge to a perp walk allegedly arranged for the media's benefit. After the court stated that the only possible remedy that the defendant might seek in the criminal case would be a change of venue (based on alleged prejudicial pre-trial publicity), the court opined that any civil rights action the defendant

might bring “would prove difficult for the defendant to establish.” Writing prior to the Second Circuit’s decision in *Lauro*, the *Edelin* court expressed its fundamental disagreement with the *Lauro* district court’s ruling:

Since the [district court’s] decision in *Lauro*, the Supreme Court has addressed the issue of “media ride-alongs.” In *Wilson v. Layne*, the Supreme Court held “media ride-alongs” to be a violation of the Fourth Amendment due, in large part, to an “overriding respect for the sanctity of the home.” However, since “perp walks” do not raise the same concerns regarding the home, the instant case can easily be distinguished from the “media ride-alongs” upon which *Lauro* relied.³⁸

There is good reason to doubt whether the Supreme Court would find the analogy between media presence at a warrant execution in the home and at a perp walk on the street sufficiently close to find an infringement on Fourth Amendment interests in the latter.

Of course, the physical handling of *Lauro* by the police was of central concern to the *Lauro* court. Apparently analogizing to the “stop and frisk” involved in *Terry v. Ohio* and the strip search in *Weber v. Dell*, the court found that the physical restraint of *Lauro* “by handcuffs, and the grip of Detective Charles on his arm” to constitute an aggravation of *Lauro*’s original seizure. Would the court’s analysis have been different if the police had not physically handled *Lauro* in order to facilitate the photography, but rather had invited the press into the station house to photograph him where he was otherwise being held?³⁹ The mere handling of a validly arrested person, whom the police have the right to handcuff and detain, in a manner that allows the press to photograph the individual in a public place does not seem a sufficient basis to find an infringement on Fourth Amendment privacy interests. As with the ride-along cases, there does not appear to be a close analogy between the handling of *Lauro* and the strip search in *Weber* or “stop and frisk” in the absence of probable cause to arrest in *Terry*.

Legitimate Public Interests

Counterbalancing the relatively weak privacy interest involved in this case, there are powerful public interests and law enforcement objectives furthered by the government’s exposure of those it has in custody to public view, which the court apparently discounted. First, ex-

posing an arrestee to the media may induce witnesses or victims to come forward to provide evidence connecting the individual, or people with whom he associates, to the same or other crimes.⁴⁰ For example, law enforcement’s exposure of Timothy McVeigh to the media was undoubtedly intended to help identify and arrest the individual with whom McVeigh was thought to have rented the Ryder truck used in the Oklahoma City bombing.

Moreover, the public has a legitimate interest in learning the identity and condition of those held in government custody. For example, the Dallas police intended for the press to photograph the transfer of Lee Harvey Oswald so that the public could see his physical condition.⁴¹ Photographs of Dr. Martin Luther King, Jr., while in the custody of Birmingham authorities may have reassured the public about his treatment in jail. Although such exposure may be in the interest of the arrestee, it is also of great interest to the public. The public value of the release of criminal defendants’ photographs has been acknowledged by the Sixth Circuit when it held that the Freedom of Information Act required the government to release mug shots of individuals involved in ongoing criminal proceedings, and that such releases did not invade the individuals’ privacy rights. The Sixth Circuit stated:

Public disclosure of mug shots in limited circumstances can, however, serve to subject the government to public oversight. For example, release of a photograph of a defendant can more clearly reveal the government’s glaring error in detaining the wrong person for an offense than can any reprint of only the name of an arrestee. Furthermore, mug shots can startlingly reveal the circumstances surrounding an arrest and initial incarceration of an individual in a way that written information cannot. Had the now-famous videotape of the Rodney King beating in Los Angeles never been made, a mug shot of Mr. King released to the media would have alerted the world that the arrestee had been subjected to much more than a routine traffic stop and that the actions and practices of the arresting officers should be scrutinized.⁴²

The legitimate public interest in disseminating photographs of arrestees is consistent with the long-standing principle embedded in our laws that openness in criminal proceedings is critical to the functioning of a democratic society. The Supreme Court has held that the press and public are entitled to attend criminal trials and pretrial proceedings in order that the public can oversee the ad-

ministration of justice and maintain confidence in governmental institutions.⁴³ The same considerations dictate that the public should have access to information relating to the government’s custody of those it intends to prosecute. Photography of arrestees, even if facilitated by law enforcement for no other reason than to allow the press to inform the public about the arrestee’s identity and condition, serves an important public service.

Although the Supreme Court in *Wilson* held that generalized law enforcement objectives did not justify media presence in the *Wilson* home, it did not reject their validity. To the contrary, the Court stated that “[a]ccurate media coverage of police activities serves an important public purpose.”⁴⁴ The *Lauro* court also acknowledged the value of media presence to observe law enforcement’s conduct when it stated that the “interests of the press, and of the public who might want to view perp walks, are far from negligible.”⁴⁵ The interest in accurate reporting on law enforcement activities certainly justifies allowing the media to ride with police to observe and record arrests on the street, even if the broadcast of those images may be humiliating to the arrestees. As this example points out, there are valid, albeit “generalized,” law enforcement objectives in having the media observe police activities; while they may not be sufficient to justify media presence in a private home, at least in the circumstances presented in *Wilson*, the calculation should be different in a nonprivate setting.

Unlike the district court, the Second Circuit did not address the issue of the correct standard for assessing the proffered law enforcement objective. Undoubtedly, the more egregious the invasion of privacy interests, the more substantial the law enforcement objective may need to be. But the standard suggested (but not adopted) by the district court may be appropriate: simply that the government objective be “neutral and legitimate” and that there be a “rational, valid connection” between the official’s conduct and the governmental objective.⁴⁶ In the normal case of police exposure of an arrestee to the press in the course of a transfer of the arrestee, even if the press is notified in advance, the routine law enforcement objective of keeping the public informed of police business unquestionably should be

found sufficient. It is only in a sui generis case like this one, where the perp walk was held to have no legitimate law enforcement purpose because it was a fabricated event, that exposure of an arrestee to the press could violate the Fourth Amendment.

Resolving the Open Questions

In a recent opinion, one federal district court within the Second Circuit has begun the tasks of defining the boundaries of and answering the questions left open by the *Lauro* opinion, in a manner that recognizes the many problems outlined above. In *Caldarola v. County of Westchester*,⁴⁷ the plaintiffs, corrections officers who had been arrested for filing false injury claims while on injured leave, asserted violations of their Fourth Amendment rights in connection with the Westchester County Department of Corrections' facilitation of media coverage of their arrest and arraignment. The department had instructed the officers to report to headquarters, where they were arrested and then, while being removed from the building, were videotaped by a county employee who had been invited onto department property, normally closed to the public, for the specific purpose of photographing the officers.

The *Caldarola* court also found legitimate public interest purposes in the facilitation of media access.

The videotape was then made available to the media and played by the department at a news conference, where the media were advised that the officers were soon to be transported to court for their arraignment. On arrival outside the courthouse, the officers were left in vehicles for a period of time as part of a department-coordinated effort to facilitate media photography of them.

As understood by the court, the officers' Fourth Amendment claims were based on three sets of actions: (1) the decision to allow a county employee on the department grounds to videotape the officers and the coordination of their arrests to facilitate this photography; (2) the use of the videotape at the press

conference and the tape's dissemination to the media; and (3) the advisory to the media of the forthcoming arraignment and coordination of the officers' arrival at court to facilitate media photography. Applying the legal standard set out in *Lauro*, balancing the purported intrusion on privacy against the law enforcement justifications, the *Caldarola* court found all of the officers' claims without merit.

First, the court rejected the officers' claim, derived from the *Lauro* district court's opinion, that the videotaping by the county official constituted a "seizure." As the court noted, the videotaping involved no physical seizure of the officers nor any unreasonable intrusion on their "space." Alluding to the nonprivate setting of the photography, the court also observed that there was no physical intrusion that interfered with any possessory interest of the officers. Essentially rejecting the *Lauro* district court's analysis, the court opined that in that case "the videotaping was not the unlawful seizure—forcing *Lauro* to participate in the fictitious arrival drama was." The *Caldarola* court therefore concluded that the officers "were not 'seized' unreasonably or otherwise by virtue of being videotaped."⁴⁸ Similarly,

the court found no "exacerbation" of the officers' seizure in the fact that the arrests were "choreographed" to permit the county employee's photography, distinguishing *Lauro* because the events videotaped were the actual transportation

of the officers, "albeit with scripted stage directions," not a "wholly fictitious event," as in *Lauro*.⁴⁹

In rejecting the officers' claim that use and dissemination of the videotape at the press conference violated their rights, the court provided instructive commentary relevant to the *Lauro* court's concern with the "humiliation" caused by a perp walk. Noting the case law establishing that there is no constitutionally protected interest in being free from reputational injury alone,⁵⁰ the court found that the interest of a suspect in privacy must yield to the public interest in his apprehension. It concluded that no constitutional interest was implicated where "the unflattering press cov-

erage came in the context of legitimate, as opposed to wholly fictitious, law enforcement activity."⁵¹ The court likened the use and dissemination of the videotape to the distribution of a mug shot, noting "no one has ever suggested that giving a mug shot to the local newspaper or television station transforms the taking of that photograph into a seizure."⁵²

Finally, the *Caldarola* court recognized that the media photography prior to the officers' arraignment raised two questions left open in *Lauro*: whether law enforcement may facilitate media access to an arrestee in the normal course of transportation, and whether it may provide prior notice of that transportation. The court squarely answered these questions in the affirmative:

[T]he State does have a legitimate interest in the accurate reporting of police activity, and to that end is free to advise the press about events related to a suspect's arrest, processing and arraignment, including events that by their nature will rise to "photo opportunities" and Kodak moments. . . . There is nothing unconstitutional about advising the press that defendants will be arraigned at a particular time and place. And there is nothing unconstitutional about having press present—even by arrangement—when a defendant is legitimately taken to court, as occurred here.⁵³

The *Caldarola* court believed this analysis was compelled by *Lauro*, which, in its view, "at least hinted, if it did not make clear, that it would not deem a warning or notification to the press to be unconstitutional." In fact, the court continued, to find media notification unconstitutional, it would have to conclude that the officers had the constitutional right to keep their identities and the fact of their arrests secret, a proposition inconsistent with the reasoning of the Supreme Court in *Paul v. Davis*.⁵⁴

The *Caldarola* court also found legitimate public interest purposes in the facilitation of media access to the officers. Even assuming that the perp walk outside the courthouse could be considered a "seizure" and that the police were waiting for the press to arrive before removing the officers from the vehicles, the court did not believe this action unconstitutionally aggravated the initial seizure. Rather, the arrests were "a newsworthy event," which the media could not be prohibited from covering, and, the court concluded, the police were not constitutionally compelled to make the media's job more difficult.⁵⁵

The Constitutionality of Unstaged Perp Walks

Caldarola points the way to a legally sound interpretation of the Second Circuit's decision in *Lauro*. It recognizes that the humiliation and damage to reputation caused by media coverage of actual events related to the arrest process, even if facilitated by law enforcement, do not implicate constitutional rights, but are incidental to life in an open society in which freedom of speech and of the press occupy a preferred position. There is also compelling logic to the court's explicit rejection of the notion that photography of an arrestee in a nonprivate setting could constitute a seizure. Its conclusion that advance notice to the media of legitimate law enforcement actions cannot be unconstitutional is consistent with, and compelled by, pre-*Lauro* case law. Finally, *Caldarola* reasonably found that legitimate law enforcement objectives are served by facilitation of media access to arrestees.

Ultimately, the *Lauro* court discounted the value to the public of viewing the particular perp walk involved in that case for one critical reason: it was a staged recreation, in which the arrestee was forced to participate in a dramatic reenactment of his being brought to the station, rather than the real event that had occurred hours earlier. But for the fact that the perp walk was "an inherently fictional dramatization" the outcome of the case should, and in all likelihood would, have been different.⁵⁶ From a media perspective, the proper reading of this case is that as long as law enforcement does not stage a fictitious event or allow media access to an area in which the arrestee has a reasonable expectation of privacy, no liability should attach. **C**

Endnotes

1. 219 F.3d 202 (2d Cir. 2000).
2. As described by the court, a "perp walk" is a police practice "in which the suspected perpetrator of a crime, after being arrested, is 'walked' in front of the press so that he can be photographed or filmed." *Lauro*, 219 F.3d at 203.
3. *Id.* at 204–05.
4. *Rizzo v. Goode*, 423 U.S. 362, 370–71 (1976).
5. *Lauro v. Charles*, 39 F. Supp. 2d 351, 361 (S.D.N.Y. 1999).
6. *Lauro*, 39 F. Supp. 2d at 363–64.
7. *Id.* at 364 & n.9.
8. 482 U.S. 78 (1987).
9. *Lauro*, 39 F. Supp. 2d at 365.

10. *Id.* at 365, n.11, citing, inter alia, *Adickes v. Kress & Co.*, 398 U.S. 144, 152 (1970).

11. *Id.* at 365, n.11.

12. Charles appealed both on the grounds that his conduct did not violate *Lauro*'s Fourth Amendment rights, and that, in any event, he was entitled to qualified immunity because the unconstitutionality of his conduct was not clearly established at the time he acted. While, as described below, Charles lost on the first issue, he prevailed on the qualified immunity claim, 219 F.3d at 214–16.

13. Charles had argued that *Lauro*'s claim was most closely analogous to the Due Process claim rejected by the Supreme Court in *Paul v. Davis*, 424 U.S. 693 (1976). There, the plaintiff, who had been arrested for, but not convicted of, shoplifting argued that police circulation of photographs of individuals arrested for shoplifting to local merchants constituted a deprivation of his rights under the Due Process Clause of the Fourteenth Amendment. The Supreme Court rejected the claim that the plaintiff's interest in his reputation was a protected liberty or property interest within the meaning of the Due Process Clause. It held that, in the absence of any contention that a more specific constitutional provision had been infringed, the plaintiff's claim was properly viewed as a state law defamation action, and that recognition of the claim under the Fourteenth Amendment would improperly result in the creation of a body of general federal tort law. In contrast, the Second Circuit believed that *Lauro* had properly invoked a constitutional provision specifically imposing limits on governmental action—the Fourth Amendment.

14. 35 F.3d 680 (2d Cir. 1994).

15. 526 U.S. 603 (1999).

16. *Ayeni*, 35 F.3d at 684 (citations omitted).

17. *Id.* at 686.

18. *Id.* at 688–89 (citations omitted).

19. *Wilson*, 526 U.S. at 614.

20. *Id.* at 610–12.

21. *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000).

22. *Lauro*, 219 F.3d at 211. In fact, CBS never broadcast the videotape shot in the *Ayeni* home.

23. *Id.* at 211, quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968). *Terry* held that the physical handling of a person, as to whom there was no probable cause for an arrest, in a "stop and frisk" could violate his Fourth Amendment rights unless justified by reasonable belief that he is a danger to the officer or others.

24. 392 U.S. 1 (1968).

25. 804 F.2d 796 (2d Cir. 1986). In *Weber*, the court held that a strip/cavity search of a misdemeanor arrestee violated the Fourth Amendment absent reasonable

suspicion that the arrestee was concealing a weapon or contraband.

26. *Lauro*, 219 F.3d at 212, n.7.

27. *See id.* at 212.

28. *Wilson v. Layne*, 526 U.S. 603, 612–13 (1999).

29. *Lauro v. Charles*, 219 F.3d 202, 213 (2d Cir. 2000).

30. *Id.*

31. *Id.* at 213–14.

32. *Caldarola v. County of Westchester*, 142 F. Supp. 2d 431 (S.D.N.Y. 2001).

33. *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

34. Even this proposition is subject to question, since, as the *Lauro* court noted, the Supreme Court in *Wilson* did not adopt the *Ayeni*'s court's view on this point, and did not even consider the question:

Wilson relied principally on the notion that execution of a warrant in a private home must be strictly limited to actions that further the objectives of the warrant. For the *Wilson* Court, it was the unnecessary presence of reporters in the *Wilson*'s home (and not the photographs taken of the *Wilson*'s) that triggered the Fourth Amendment violation. Consequently, *Wilson* did not address *Ayeni*'s second holding—that a jury could find that the videotaping of the *Ayeni*s rendered the search overly intrusive.

Lauro, 219 F.3d at 210–11. The *Lauro* court apparently believed the question remains open, stating in a footnote to the above passage, "That is not to say that the *Wilson* court found the photographing of the *Wilson*'s to have no constitutional significance. It simply did not consider that question." *Id.* at 210, n.6. Nonetheless, the Supreme Court may well have implicitly rejected the claim.

35. *See, e.g., Berger v. Hanlon*, 188 F.3d 1155 (9th Cir. 1999). The *Berger* case was recently settled on a confidential basis.

36. *See Wilson v. Layne*, 526 U.S. 603, 610–12 (1999).

37. 76 F. Supp. 2d 1, 3–4 (D.D.C. 1999).

38. *Edelin*, 76 F. Supp. 2d at 4 (citations omitted).

39. *See, e.g., Huskey v. Dalles Chronicle*, 13 Media L. Rep. 1057 (D. Or. 1986) (court dismisses as "frivolous" claim by arrestee that his Fourth Amendment rights were violated by sheriff's allowing news photography of arrestee's being booked in the jail).

Of course, photography of an arrestee in a location within a jail where he does have a reasonable expectation of privacy could infringe privacy rights in a more significant way than can a photograph of an arrestee on a public street. *See, e.g., Huskey v. Nat'l Broad. Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986) (network crew's filming of prisoner in exercise cage without his consent made out intrusion claim).

40. There was brief deposition testimony regarding a specific incident in which this

had occurred in the record in *Lauro*, to which the defendants referred in their reply brief on appeal. See Appellant's Reply Brief at 3–4 (Docket No. 99–7239).

41. Oswald had cuts and a dark bruise over his eye, which Dallas police said he sustained when he was taken into custody. These injuries had raised questions about police treatment of Oswald in custody, and the police purportedly wanted the media “to see we haven't abused and mistreated him in any way, and the only way to do that is to let them view the transfer.” *Dallas Observer*, Nov. 26, 1998 (available online). The fact that Oswald was assassinated is no argument against a public transfer, but rather a reason for better security, a fact understood by the officials who transferred Timothy McVeigh.

42. *Detroit Free Press, Inc. v. Dep't of*

Justice, 73 F.3d 93, 98 (6th Cir. 1996). This authority was brought to the *Lauro* court's attention by a group of media entities in their amicus brief. See Brief Amici Curiae of ABC Inc., et al. (Docket No. 99–7239).

43. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986).

44. *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

45. *Lauro v. Charles*, 219 F.3d 202, 213 (2d Cir. 2000).

46. *Lauro v. Charles*, 39 F. Supp. 2d 351, 365 (S.D.N.Y. 1999).

47. 142 F. Supp. 2d 431 (S.D.N.Y. 2001).

48. *Caldarola*, 142 F. Supp. 2d at 438–39.

49. *Id.* at 439–40.

50. Citing, inter alia, *Paul v. Davis*, 424 U.S. 693 (1976), and *Rosenberg v. Martin*,

478 F.2d 520 (2d Cir. 1973).

51. *Caldarola*, 142 F. Supp. 2d at 441.

52. *Id.* at 442–43.

53. *Id.* at 443.

54. *Id.*

55. *Id.*

56. This view is consistent with another post-*Lauro* district court decision, which denied defendant City of New York's motion to dismiss, where plaintiff-arrestee alleged sufficient facts to state a claim that he had been subjected to a *staged* perp walk. *Lyde v. New York City*, 00 Civ. 1764 (WCC), 2001 U.S. Dist. LEXIS 7108 (S.D.N.Y. May 30, 2001) (complaint alleged that arrestee, who had made a coerced confession, was “instructed” by a police officer to stand on the precinct steps and pull a jacket over his head while a news station (also a defendant) videotaped him).