Wilson v. Layne: Increasing the Scope of the Fourth Amendment Right to Privacy

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Wilson v. Layne: Increasing the Scope of the Fourth Amendment Right to Privacy

I. INTRODUCTION

The Constitution of the United States guarantees the protection of certain enumerated individual rights, including the right to be free from unreasonable searches and seizures. Through the process of judicial interpretation, courts have determined that this right includes protection of the right to personal privacy from government intrusion. In the last ten years, the right of privacy has generated increasing public concern and litigation. This reemergence results from the combination of several factors. First, there has been a notable increase in the media's involvement in traditional law enforcement functions such as "car chases, arrests, and execution of search warrants." In recent years, the "ride along" has emerged as a media news gathering technique, where members of the media ride with officers as they perform their duties, or even accompany law enforcement officials as they execute search and arrest warrants on private property. Another cause for increasing concern surrounding the right to privacy is the proliferation of live-drama media shows combined with new developments in news gathering technology. In recent years, the media has exploited the ride-along as a basis for popular television shows that feature law enforcement officials in action, reflecting the reality television boom that began in the 1980s. Numerous shows use ride-alongs and live footage of law enforcement officers performing their duties, "including Cops, Real Stories of the Highway Patrol, Top Cops, Rescue 911, Emergency Call, Juvenile Justice, Citizen's Arrest, and L.A.P.D." Aside from the

1. See U.S. CONST. amend. IV.
4. See Rossbacher & Young, supra note 3, at 3.
5. See id.
6. See Johnson et al., supra note 3, at 33-34.
8. See id. (citing David Tobenkin, Real Stories of a Crowded Genre, BROADCASTING & CABLE, May 22, 1995, at 16). Additionally, the public's voracious appetite for glimpses into the homes and lives of others simply encourages shows of this nature. See id at n.6 (citing Arthur Salm, To Indulging Cultural Vice, The Gentleman Pleads Guilty, SAN DIEGO UNION TRIB., Mar. 9, 1995, at 4). These shows exist in
continuing expansion of cable channels and shows available to viewers, developments in technology have increased the media’s ability to gather information, sometimes even without the knowledge of the subject. This causal relationship was recognized by the Supreme Court in Briscoe v. Reader's Digest Ass'n, Inc. The Court stated that “[a]cceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices with their capacity to destroy an individual’s anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze.”

The ultimate result of the foregoing events has been a blurring of the distinction between legitimate news gathering and entertainment. Also, many questions have arisen, such as the liability of police officers who allow members of the media to accompany them, and the liability of the media for recording and observing events in private homes without the permission of the residents.

Wilson v. Layne attempts to answer some of these questions and reconcile a split in the circuits on the issues of law enforcement liability and qualified immunity. In Wilson, law enforcement officers allowed media personnel to accompany them into the Wilson’s home for purposes of executing arrest warrants. The media members did not in any way assist the officers in executing the warrants, but rather took photographs and observed the events for their own purposes. The Wilson’s sued the officers “in their personal capacities for money damages,” and the officers in turn claimed the defense of qualified immunity. The Supreme Court granted certiorari in order to resolve these issues, which had been the source of varied interpretations in the circuits below. The Supreme Court held that the law enforcement officers violated the Wilson’s Fourth Amendment right to privacy when they allowed media

an extremely competitive television market, and are often competing against sit-coms and other non-live drama shows, see id at n.4 (citing Cynthia Littleton, Reality Television: Keeping the Heat On, BROADCASTING & CABLE, May 20, 1996, at 24).

9. See Johnson, supra note 3, at 33. Significant new technological tools include increasingly smaller hidden cameras and microphones enabling the media to listen to conversations from a great distance away. See id.

10. 4 Cal. 3d 529 (1971).
13. See Rossbacher, supra note 3, at 3.
15. Id. at 1696.
16. Id. at 1695-96.
17. Id. at 1696.
18. Id.
19. Id.
members to accompany them during the execution of the warrants.\textsuperscript{20} However, the Court held that the officers were entitled to qualified immunity as the law in this area was not “clearly established” at the time of the violation.\textsuperscript{21}

This decision has the effect of establishing precedent with regard to the Fourth Amendment right to privacy, and setting a clear standard for lower courts to follow in similar cases. This Note will examine the Court’s decision in \textit{Wilson} and discuss its implications for future Fourth Amendment analysis. Part II traces the historical background of the Court’s interpretation of the Fourth Amendment, Title 42 of the United States Code Section 1983, and the defense of qualified immunity.\textsuperscript{22} Part III sets forth the facts of \textit{Wilson} as reported by the Court.\textsuperscript{23} Part IV analyzes Chief Justice Rehnquist’s majority opinion and Justice Stevens’ opinion dissenting in part, and compares the reasoning behind each opinion.\textsuperscript{24} Part V considers the probable impact of the Court’s decision in \textit{Wilson} on various groups, including the judiciary, legislature, and society.\textsuperscript{25} Finally, Section VI briefly concludes the Note with a look at how this ruling will protect private citizens in the future.\textsuperscript{26}

II. HISTORICAL BACKGROUND

A. The Fourth Amendment

The Fourth Amendment to the Constitution of the United States provides:

\begin{quote}
[t]he 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.\textsuperscript{27}
\end{quote}

\begin{enumerate}
\item Id. at 1699.
\item Id. at 1695.
\item See infra Section II.
\item See infra Section III.
\item See infra Section IV.
\item See infra Section V.
\item See infra Section VI.
\item U.S. CONST. amend. IV.
\end{enumerate}
The Fourth Amendment has long been the source of varied interpretations, but its primary purpose is to protect the security and privacy of individuals from arbitrary intrusions by the government. Respect for the privacy of the home is a core element of the Fourth Amendment that can be traced through jurisprudential history. For example, the Fourth Amendment is often characterized as a furtherance of the English common law tradition "that a man's house [is] his castle." The Supreme Court itself has frequently upheld the notion that the Fourth Amendment fundamentally protects the right of a person to enjoy the sanctity of his or her home, free from government invasion.

1. The Early Cases: Property is Protected

Prior to the 1960s, the Court primarily interpreted the Fourth Amendment's protections against unreasonable search and seizure as a protection of property, rather than privacy interests. This principle was clearly established by the Court in 1928 in Olmstead v. United States. Olmstead was a general manager of a business that imported and sold liquor during the prohibition era. The information leading to the discovery of Olmstead's business and his subsequent conviction was largely obtained through the use of wiretaps on Olmstead's telephones. As a result, Olmstead sued, claiming a violation of his Fourth Amendment right to be free from unreasonable searches and seizures. The Court noted that the wiretaps were placed without any trespass; therefore, the Court declined to find a violation of the Fourth Amendment. The Court reasoned that the Fourth Amendment is not violated "unless there has been an official search and seizure of [a] person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." Through this decision, the Court set forth the notion that property

28. See Bond, supra note 2, at 832 (quoting South Dakota v. Opperman, 428 U.S. 364, 377 (1975) (Powell, J., concurring)).
32. See Bond, supra note 2, at 833-35.
33. 277 U.S. 438 (1928).
34. Id. at 455-56.
35. Id. at 456-57.
36. Id. at 456-57.
37. Id. at 457, 464-67.
38. Id. at 466.
rights should be used to determine the scope of the Fourth Amendment’s protections, rather than an independent right to privacy.\textsuperscript{39}

However, the right to privacy did not go unacknowledged. Justice Brandeis dissented in \textit{Olmstead}, reasoning that “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”\textsuperscript{40} Also, four years after \textit{Olmstead} in \textit{United States v. Lefkowitz},\textsuperscript{41} the Court noted the Fourth Amendment’s protection of an individual’s privacy.\textsuperscript{42} Clearly, the idea of an independent right to privacy has continually arisen in the context of the Fourth Amendment’s protection against unreasonable searches and seizures, although this right was not explicitly recognized until the 1960s.\textsuperscript{43}

2. 1960s and After: Privacy as well as Property is Protected

Starting in the 1960s, the Court moved away from the idea that property rights outline the scope of the Fourth Amendment’s protections.\textsuperscript{44} In \textit{Warden v. Hayden},\textsuperscript{45} the Court specifically rejected the idea that property rights are determinative of the government’s right to search and seize.\textsuperscript{46} The Court recognized the shift from property to privacy, and stated that “the principal object of the Fourth Amendment is the protection of privacy rather than property.”\textsuperscript{47} Just two months after the decision in \textit{Warden}, this Court specifically overruled its previous holding in \textit{Olmstead v. United States}\textsuperscript{48} that property interests are controlling.\textsuperscript{49}

In \textit{Katz v. United States},\textsuperscript{50} the Court found a violation of Katz’s Fourth Amendment right to privacy where the government wiretapped a public phone booth and recorded Katz’s conversations.\textsuperscript{51} Although the government did not trespass onto Katz’s property, a violation was found based on Katz’s expectation of privacy in a public place.\textsuperscript{52} The government agents in \textit{Katz}\textsuperscript{39}

\textsuperscript{40.} \textit{Olmstead}, 277 U.S. at 478 (Brandeis, J., dissenting).
\textsuperscript{41.} 285 U.S. 452 (1932).
\textsuperscript{42.} See Bond, supra note 2, at 834 (citing United States v. Lefkowitz, 258 U.S. 452, 464 (1932)).
\textsuperscript{43.} See id. at 834-35.
\textsuperscript{44.} See id. at 835; see also Heffernan, supra note 39, at 634.
\textsuperscript{45.} 387 U.S. 294 (1967).
\textsuperscript{46.} See id. at 304.
\textsuperscript{47.} See id.
\textsuperscript{48.} 277 U.S. 438 (1928).
\textsuperscript{49.} See id. at 466.
\textsuperscript{50.} 389 U.S. 347 (1967).
\textsuperscript{51.} See id. at 353.
\textsuperscript{52.} See id.; see also Heffernan, supra note 39, at 635.
complied with all of the procedures set forth in Olmstead, but the Court found a violation regardless, reasoning that the foundation of the Olmstead trespass doctrine had been discredited by subsequent decisions and was simply no longer applicable. The Court held that Katz had a legitimate privacy interest in using the public telephone booth, and the government violated this interest when it listened to and recorded his conversations, thereby conducting a search and seizure under the Fourth Amendment. It is evident that the Court, through its decision in Katz, unequivocally recognized the right to privacy as a legitimate basis for the protection of Fourth Amendment rights. However, the effect of Katz was not to make the infringement of a privacy interest a prerequisite to finding protection under the Fourth Amendment, but rather to make privacy a separate and independent basis for claiming protection, along with property and liberty interests.

In Soldal v. Cook County, the Court enunciated this principle of separate but independent bases for protection under the Fourth Amendment. In Soldal, the Soldals and their motor home were forcibly removed from a mobile home park under the supervision of law enforcement officers. The court of appeals found no violation of the Fourth Amendment, which the court held to only protect privacy and liberty interests and exclude property interests. The Supreme Court rejected the Court of Appeals’ reasoning and held specifically that “the Amendment protects property as well as privacy.” The Court clearly recognized separate sources for protection under the Fourth Amendment, such as “the possibility of a search without a seizure and the further possibility of a seizure without a search.”

3. The Court’s Test for Fourth Amendment Protection

Through historical, judicial interpretation, three key concepts have emerged as being determinative of whether Fourth Amendment protection exists in a particular situation: government action, the meaning of search or seizure, and reasonableness.
a. Government action

Existence of a government action is a prerequisite to finding a violation of the Fourth Amendment, because the Constitution acts only as a limitation on the government's power.44 Government action can be defined as "conduct by a government employee or a private party acting as an agent of the government."65

b. Search or Seizure

The Fourth Amendment protects against both unreasonable searches and seizures.66 In United States v. Jacobsen,67 this Court defined a search as occurring "when an expectation of privacy that society is prepared to consider reasonable is infringed."68 In Katz v. United States,69 Justice Harlan set out a two-part test in his concurring opinion for determining when the Fourth Amendment protection against unreasonable searches applies.70 The test first requires a subjective expectation of privacy on the part of the person alleging the violation, and second, the expectation must be one that society recognizes as reasonable.71 The Supreme Court officially accepted Justice Harlan's test eleven years later in Smith v. Maryland.72 This test has been clarified and discussed further in later cases. For example, in Rakas v. Illinois,73 the Court test illustrated that a legitimate expectation of privacy must be based on something other than simply the Fourth Amendment, such as real or personal property law or common understandings of society.74 Finally, to determine the reasonableness of an expectation of privacy, the Court uses a totality of the circumstances test, and considers factors such as the Framer's intent behind the

64. See id. (citing Burdeau v. McDowell, 256 U.S. 465, 475 (1921)).
65. See id.
66. See U.S. CONST. amend. IV.
70. See id. at 360-62.
71. See id. at 361; see also Levy, supra note 63, at 1165.
74. See Rakas v. Illinois, 439 U.S. 128, 143-44 n.12 (1978); see also Levy, supra note 63, at 1165-1166 (discussing the Court's test for purposes of the Fourth Amendment protection against unreasonable searches).
Fourth Amendment, the particular location in question, and societal consensus as to what deserves protection from government intrusion. 75

The Court has defined a seizure of property as occurring "when there is some meaningful interference with an individual's possessory interest in that property." 76 A seizure of a person occurs when "by means of physical force or a show of authority, his freedom of movement is restrained." 77 Similar to the tests used with searches, the Court determines if a seizure of person or property has occurred by looking at the totality of the circumstances and how a reasonable person would act in the situation. 78

c. Reasonableness

The last element of the Court's test is reasonableness. That is to say, the Fourth Amendment only protects against unreasonable searches and seizures. 79 Usually, a warrant is required before a law enforcement officer can search a citizen's home, 80 but even with a valid warrant, the search or seizure must still be "reasonably related in scope to the circumstances which justified the interference in the first place." 81 In determining reasonableness, the Court uses a case-by-case balancing approach, 82 balancing the nature and scope of the intrusion against the government's justifications for the intrusion. 83 The Court has, however, provided a few clear rules regarding reasonableness. Specifically, the Court has held that any actions taken by the police pursuant to a validly issued warrant must be related to the objectives of the authorized intrusion; any actions unrelated to the objectives of the authorized intrusion will constitute an invasion of privacy. 84 Additionally, the Supreme Court has provided a bright line rule that, in the absence of a warrant or an exception to the warrant requirement, a search is per se unreasonable. 85

It is also important to note that 18 U.S.C. § 3105 is a federal statute placing additional limitations on the use of warrants. 86 The section states that a

78. See Levy, supra note 63, at 1167.
79. See U.S. CONST. amend. IV; see also Levy, supra note 63, at 1167 (discussing the Court's test for reasonableness under the Fourth Amendment).
80. See Tourtillot, supra note 68, at 447; see also Payton v. New York, 445 U.S. 573, 602 n.55 (1980) (noting the existence of exigent circumstances as an exception to the warrant requirement, thereby authorizing law enforcement officials to execute an arrest without a warrant).
81. See Terry v. Ohio, 392 U.S. 1, 19-20 (1968); see also Levy, supra note 63, at 1168 (discussing the Court's reasonableness requirement).
82. See Bond, supra note 2, at 838 (discussing benefits and drawbacks to the Court's balancing approach for determining reasonableness).
83. See Levy, supra note 63, at 1168 (citing United States v. Place, 462 U.S. 696, 703 (1983)).
85. See Tourtillot, supra note 68, at 448.
86. See id.
search warrant can be served “by any of the officers mentioned in its direction or by an officer authorized by law to serve such [a] warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.” Courts have interpreted this section to mean that a person can only accompany an agent during the execution of a warrant if he is assisting the agent in his duties. However, compliance or noncompliance with this statute does not alone determine whether or not a search is reasonable for purposes of the Fourth Amendment, it is merely one factor to consider when assessing reasonableness.

Taken as a whole, the Court’s three part test for determining the boundaries of Fourth Amendment protection attempts to balance the interest of society in preserving and promoting law enforcement against the privacy interest of individual citizens.

B. 42 U.S.C. § 1983 and Qualified Immunity

42 U.S.C. § 1983 provides:

\[
every\ person\ who,\ under\ color\ of\ any\ statute,\ ordinance,\ regulation,\ custom\ or\ usage,\ of\ any\ State\ or\ Territory\ or\ the\ District\ of\ Columbia,\ subjects,\ or\ causes\ to\ be\ subjected,\ any\ citizen\ of\ the\ United\ States . . . to\ the\ deprivation\ of\ any\ rights,\ privileges,\ or\ immunities\ secured\ by\ the\ Constitution\ and\ laws,\ shall\ be\ liable\ to\ the\ party\ injured\ in\ an\ action\ at\ law,\ suit\ in\ equity,\ or\ other\ proper\ proceeding\ for\ redress...
\]

In layman’s terms, this section allows a person to seek monetary damages when a state government official or person acting under color of state law has violated his or her constitutional rights. The case *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* also provides for the right to obtain money damages for a violation of the Fourth Amendment by federal government officials. However, it is important to note that even if a violation

88. See Tourtiillot, supra note 68, at 448.
89. See id. (noting that a violation of § 3105 does not necessarily constitute a violation of the Fourth Amendment, and if it did, most media ride alongs would be per se unreasonable).
90. See Levy, supra note 63, at 1168.
94. See id. at 395-97.
of constitutional rights is proven, the defendant(s) may still not be liable for monetary damages if the defense of immunity is available.\textsuperscript{95}

The Court has traditionally recognized immunity defenses of two types: absolute immunity, and qualified immunity.\textsuperscript{96} Certain government officials are entitled to absolute immunity from civil suits due to their positions and the decisions they make on a daily basis in their official capacities.\textsuperscript{97} For example, legislators in their legislative functions, judges in their judicial functions, prosecutors, executive officers engaged in adjudicative functions, and the President of the United States are entitled to absolute immunity from civil suits.\textsuperscript{98}

*Harlow v. Fitzgerald*\textsuperscript{99} was the first case to find that the defense of qualified immunity may be available to ordinary government employees, and set forth the standard for when a government official is entitled to the defense of qualified immunity.\textsuperscript{100} The Court in *Harlow* stated that “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”\textsuperscript{101} The interest in allowing government officials to freely use their discretion in performing their official duties, without being influenced by the threat of civil suits explains the rationale for allowing the defense of qualified immunity.\textsuperscript{102} Additionally, it is important that citizens are not deterred from entering public service because of concerns over liability in civil suits.\textsuperscript{103}

In analyzing a claim of qualified immunity, the Court has previously indicated that it is proper to first determine if there has been an actual deprivation of a constitutional right, and then proceed to determine if the right was “clearly established” at the time of the alleged violation.\textsuperscript{104} The Court has reasoned that this is the optimal approach because it provides clear standards for official conduct in future cases, rather than fostering uncertainty in the area of constitutional law.\textsuperscript{105}

Once the court has made a determination on the issue of constitutionality, the next step in qualified immunity analysis is to determine if the constitutional

\textsuperscript{95} See Levy, supra note 63, at 1170; see also Wilson, 119 S. Ct. at 1696-97 (stating that analysis regarding the issue of qualified immunity is the same for a suit under either *Bivens* or § 1983; both require plaintiffs to prove the deprivation of an established constitutional right).

\textsuperscript{96} See *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

\textsuperscript{97} See Levy, supra note 63, at 1170 (citing Harlow, 457 U.S. at 807) (internal citations omitted).

\textsuperscript{98} See *Harlow*, 457 U.S. at 807.

\textsuperscript{99} 457 U.S. 800 (1982).

\textsuperscript{100} See Levy, supra note 63, at 1171 (discussing the facts of *Harlow* and the Court’s announcement of a standard for when the defense of qualified immunity may be claimed).

\textsuperscript{101} *Harlow*, 457 U.S. at 818.

\textsuperscript{102} See *Tourtillot*, supra note 68, at 449.

\textsuperscript{103} See *id*.


\textsuperscript{105} See County of Sacramento v. Lewis, 523 U.S. 833, 840 n.5 (1998) (discussing the drawbacks of leaving the issue of constitutionality undetermined and ruling solely on the issue of qualified immunity).
right in question was “clearly established” at the time of the alleged violation.\textsuperscript{106} In \textit{Anderson v. Creighton},\textsuperscript{107} the Court expanded the concept of a “clearly established” right, stating that “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”\textsuperscript{108} However, the Court noted that just because a particular action has not specifically been held unlawful does not mean that it has not been “clearly established” for purposes of qualified immunity.\textsuperscript{109} Instead, in order to be “clearly established,” the unlawfulness of a particular action must be apparent “in light of pre-existing law.”\textsuperscript{110} Notwithstanding the preceding standards, if an official can show extraordinary circumstances and that he neither knew nor should have known of the applicable laws, he or she is still entitled to the defense of qualified immunity.\textsuperscript{111}

The level of generality or specificity at which the right in question is defined plays a very important role in qualified immunity analysis. If the court defines a right very broadly—such as the right to be free from Constitutional violations—“[p]laintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.”\textsuperscript{112} In such a case, any action violating the Constitution would be considered a violation of a clearly established right, regardless of whether or not it was clear that the particular action in question constituted a violation.\textsuperscript{113} However, if rights are defined too narrowly or fact-specifically, then they will never be considered clearly established,\textsuperscript{114} and qualified immunity will become a “license for lawless conduct.”\textsuperscript{115} Therefore, if the defense of qualified immunity is to serve its intended purpose, courts must not define rights too abstractly or too narrowly, but instead must attempt to strike an appropriate balance.

\textbf{C. The Federal Appellate Decisions}

Four federal appellate courts have considered whether the Fourth Amendment is violated when law enforcement officials allow the media to

\begin{footnotes}
\textsuperscript{106} See \textit{Conn}, 119 S. Ct. at 1295.
\textsuperscript{107} 483 U.S. 635 (1987).
\textsuperscript{109} See id.
\textsuperscript{110} Id.
\textsuperscript{112} Tourtillott, \textit{supra} note 68, at 449 (quoting \textit{Anderson v. Creighton}, 483 U.S. at 693.
\textsuperscript{113} See \textit{Levy, supra} note 63, at 1172.
\textsuperscript{114} See Tourtillott, \textit{supra} note 68, at 449.
\textsuperscript{115} Levy, \textit{supra} note 63, at 1172.
\end{footnotes}
accompany them on the execution of warrants and document the activities, and if so, whether the defense of qualified immunity is available to the officials.\textsuperscript{116} Two circuits found a violation of the Fourth Amendment and refused to allow the law enforcement officers to assert the defense of qualified immunity; however, the other two circuits did not rule on the issue of constitutionality, but held that the officers were entitled to the defense of qualified immunity.\textsuperscript{117}

First, in \textit{Ayeni v. Mottola},\textsuperscript{118} the police were authorized by warrant to search the Ayeni's home for evidence of credit card fraud.\textsuperscript{119} The police brought with them three members of CBS television station, who videotaped and recorded the search for their weekly program, "Street Stories."\textsuperscript{120} No portion of the footage was ever broadcasted.\textsuperscript{121} Next, in \textit{Berger v. Hanlon},\textsuperscript{122} United States Fish and Wildlife Service agents searched the Berger's property—pursuant to a search warrant—for evidence of eagle poisoning.\textsuperscript{123} The agents allowed a CNN media crew to accompany them, record, and videotape the search of Berger's property, without Berger's knowledge.\textsuperscript{124} The recorded footage was broadcast worldwide, despite the fact that Mr. Berger was acquitted of all eagle-poisoning felonies charged by the government.\textsuperscript{125}

In both cases, the courts held that the law enforcement officials' actions constituted violations of the Fourth Amendment, and that the officials were not entitled to the defense of qualified immunity.\textsuperscript{126} The courts held generally that a search of private property filmed by commercial TV crews is unconstitutional.\textsuperscript{127} Both courts reasoned that this principle of law was clearly established at the time because (1) 18 U.S.C. § 3105 prohibits anyone other than law enforcement officials and people directly assisting them from executing warrants, and because (2) allowing the presence of the media during a search is an excessive impairment on the right to privacy.\textsuperscript{128}

In the third case, \textit{Parker v. Boyer},\textsuperscript{129} officers executed a search warrant of Parker's residence as part of an investigation of a Mr. Martin who was believed
to possess illegal weapons and who was living with the Parkers.\textsuperscript{130} The officers were accompanied by KSDK media personnel who videotaped and recorded the search of Parker’s residence.\textsuperscript{131} Although no charges were filed against Mr. Martin, KSDK still broadcasted the search on several news shows.\textsuperscript{132} This court declined to rule on the issue of whether the law enforcement officials’ actions constituted a violation of the Fourth Amendment, but found that the officers were entitled to qualified immunity for their actions because there was no clearly established constitutional principle on point at the time of the alleged violation.\textsuperscript{133} The court based its decision on the fact that, although the \textit{Ayeni} decision was on point, it was rendered after the officers’ actions in question.\textsuperscript{134} The fourth and final case is \textit{Wilson v. Layne}, in which the lower federal court rendered a decision similar to \textit{Parker}.\textsuperscript{135}

### III. FACTS OF THE CASE

The Attorney General of the United States approved a program designed to pair state and local police officers with United States Marshals for the apprehension of dangerous criminals, called “Operation Gunsmoke.”\textsuperscript{136} Dominic Wilson was identified as a target of the program because he had violated probation on three felony charges: “robbery, theft, and assault with intent to rob.”\textsuperscript{137} Police computers indicated that Wilson was likely to be armed and to resist arrest.\textsuperscript{138} The computer also listed his place of residence as the home of petitioners, Dominic Wilson’s parents.\textsuperscript{139} The Montgomery County Circuit Court issued arrest warrants for each of Dominic Wilson’s probation violations, but the warrants did not in any way mention the presence of the media or assistance of persons other than law enforcement officers.\textsuperscript{140}

On April 16, 1992, the “Operation Gunsmoke” team, consisting of Deputy United States Marshals and Montgomery County Police officers, prepared to

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.} at 447.
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{See generally Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998), aff’d, 526 U.S. 603 (1999).}
  \item \textsuperscript{136} \textit{See Wilson, 526 U.S. at 606. The stated policy of “Operation Gunsmoke” explained that the program was to concentrate on “armed individuals wanted on federal and/or state and local warrants for serious drug and other violent felonies.” \textit{Id.} Additionally, the program was very effective, resulting in over three thousand arrests in forty different metropolitan areas. \textit{Id.}}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{See id.}
  \item \textsuperscript{139} \textit{See id. The law enforcement officers were unaware that this was not in fact Dominic Wilson’s place of residence. \textit{See id.}}
  \item \textsuperscript{140} \textit{Id.}
\end{itemize}
execute the arrest warrants for Dominic Wilson’s probation violations. The Deputy United States Marshals invited a Washington Post reporter and photographer to join them in the execution of the warrants as part of the Marshal’s Service documented ride-along policy.

In the early hours of the morning, the “Operation Gunsmoke” team, the photographer, and the reporter entered the home of petitioners Charles and Geraldine Wilson, parents of Dominic Wilson. Petitioners were still in bed when they heard the team enter their home, and, upon hearing the entry, Charles Wilson went into the living room to investigate, dressed in just a pair of underwear. Charles Wilson became angry at the armed officers’ presence in his home, and he addressed them with harsh words and insisted that they explain their presence in his home. The officers assumed that Charles Wilson was in fact Dominic Wilson, the person they were looking for, and proceeded to restrain Charles Wilson on the floor. Petitioner Geraldine Wilson then entered the living room dressed only in her nightclothes, where she observed her husband being subdued on the floor by the armed law enforcement officials.

The officers performed a protective sweep, determined that Dominic Wilson was not on the premises, and departed. However, while the officers were in the home, the reporter saw the exchange between Charles Wilson and the officers, and the photographer took many pictures of the events. The reporter and photographer did not assist the law enforcement officers in any way with the execution of the arrest warrants.

Petitioners Charles and Geraldine Wilson sued the Deputy United States Marshals under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, and the Montgomery County Police officers under 42 U.S.C. § 1983. Petitioners alleged that the officers’ actions in allowing media personnel to accompany them and observe and record the execution of the arrest warrant was a violation of their Fourth Amendment rights.

141. Id. at 607.
142. Id. at 607. The Marshal’s ride-along policy is included as an appendix to Justice Stevens’ dissenting opinion. Id. at 625-26.
143. Id. at 607.
144. Id.
145. Id. The officers were dressed in street clothes rather than uniforms, adding to Charles Wilson’s confusion and anger at the officers’ presence. See id.
146. Id.
147. Id.
148. Id.
149. Id. at 607-08. The Washington Post did not publish the photographs of the incident. Id. at 608.
150. Id. at 608.
151. 403 U.S. 388 (1971) (holding that Petitioner had a cause of action for alleged violation of Fourth Amendment rights where Petitioner alleged federal agents entered and searched Petitioner’s apartment without a warrant or probable cause).
152. Wilson, 526 U.S. at 608.
153. Id.
Respondents, the law enforcement officials, moved for summary judgement on the basis of the defense of qualified immunity, but the District Court denied this motion.\textsuperscript{154}

\section*{IV. PROCEDURAL HISTORY}

The Court of Appeals heard the case on interlocutory appeal, and held that the law enforcement officers were entitled to the defense of qualified immunity.\textsuperscript{155} The case was reheard en banc two times, where the Court of Appeals, divided, again upheld the officers' defense of qualified immunity.\textsuperscript{156} However, the Court of Appeals did not decide the issue of constitutionality—that is to say, whether the officers' actions in bringing media personnel along for the execution of warrants is a violation of the Fourth Amendment.\textsuperscript{157} The court held that, because no other court had previously held specifically that the presence of the media during police entry into a private home was a Fourth Amendment violation, the right in question was not “clearly established” at the time of the violation, and therefore, the defense of qualified immunity was appropriate.\textsuperscript{158} There were five dissenting justices, who argued that the officers’ actions did violate the protections of the Fourth Amendment, and that the law in this area was clearly established at the time of the violation.\textsuperscript{159}

In order to reconcile the split among the Circuits, the Supreme Court granted certiorari in this case and Berger v. Hanlon,\textsuperscript{160} which raised the same question.\textsuperscript{161}

\section*{V. ANALYSIS OF THE COURT’S OPINION}

\subsection*{A. The Majority Opinion}

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id. (citing Wilson v. Layne 141 F. 3d. 111, 115 (4th Cir. 1998)). Later courts held that media presence during police entry into private homes for the execution of warrants is a violation of the Fourth Amendment, but these cases were not decided before April 16, 1992, the date of the search in the instant case. See id; see also Section II C, supra (discussing the Ayeni and Berger cases where the courts found a violation of the Fourth Amendment).
\textsuperscript{159} See Wilson, 526 U.S. at 608 (citing Wilson v. Layne, 141 F.3d 111, 119 (4th Cir. 1998) (Murnaghan, J., dissenting)).
\textsuperscript{160} 129 F.3d 505 (9th Cir. 1996), cert. granted, Hanlow v. Berger, 525 U.S. 981 (1998).
\textsuperscript{161} See Wilson, 526 U.S. at 608.
Chief Justice Rehnquist delivered the Court's opinion. Justice Rehnquist began the opinion by noting that a plaintiff can seek monetary damages from government officials who have violated his or her constitutional rights under either Bivens or 42 U.S.C. § 1983. However, even if a violation exists, "government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Chief Justice Rehnquist then pointed out that the qualified immunity analysis is the same under either cause of action, and that a court evaluating a claim of qualified immunity must first decide whether there has in fact been a violation of an actual constitutional right. The Chief Justice then set forth the rationale for first deciding the issue of constitutionality: it spares the defendant unnecessary liability and the expense and inconvenience of defending a lengthy lawsuit. Additionally, deciding the issue first fosters clear legal standards for official conduct, benefiting the public as well as law enforcement personnel.

Pursuant to the aforementioned principles, the Chief Justice next turned to the issue of constitutionality. He began by considering historical concepts concerning the right to privacy and the sanctity of the home. The Chief Justice quoted "that the house of every one is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose." He then looked to William Blackstone's Commentaries on the Laws of England, which discussed English law's traditional respect and heightened protection for the sanctity and privacy of the home, and the prohibition against government intrusion into the home. Finally, Chief Justice Rehnquist sets forth the text of the Fourth Amendment to the Constitution of the United States.

The Chief Justice then considered how the Supreme Court had previously applied these historical principles to situations in which police enter a private home pursuant to a warrant. He concluded that traditional concepts of respect for the home mean that police cannot enter a home to make an arrest without either a warrant or exigent circumstances. Also, an arrest warrant based on probable cause confers on law enforcement personnel the limited authority to

162. Id. at 605.
163. Id. at 608 (citing 42 U.S.C. § 1983 and Bivens, 403 U.S. 388, 396(1971)).
164. Id. at 609 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
165. Id.(citing Conn v. Gabbert, 526 U.S. 286, 290 (1999)).
166. Id. (quoting Seigert v. Gilley, 500 U.S. 226, 232 (1991)).
167. Id. (citing County of Sacramento v. Lewis, 523 U.S. 833, 840-42 n.5 (1998)).
168. Id. (quoting Semayne's Case, 77 Eng. Rep. 194, 5 Co. Rep. 91a, 91b 195 (K.B.)).
169. Id. at 610 (quoting William Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND 223 (1765-1769)).
170. Id. (quoting U.S. CONST. amend. IV and citing United States v. United States District Court for E.D. Michigan, 407 U.S. 299, 313 (1972)); see also Section II A, supra (quoting the text of the Fourth Amendment).
171. Id. (citing Payton v. New York, 445 U.S. 573, 603-04 (1980)).
enter a private home where the suspect resides if there is a reason to believe that the suspect is inside.\(^\text{172}\)

The Chief Justice observed that, although the officers in the instant case had a valid warrant and were thereby authorized to enter the Wilson’s home, that does not necessarily mean that they were entitled to bring members of the media as well.\(^\text{173}\) He noted that in *Horton v. California*,\(^\text{174}\) this Court held that if the scope of a search exceeds what was authorized by the warrant or exception to the warrant requirement, any subsequent seizure is improper and unconstitutional.\(^\text{175}\) He went on to say that, although this does not require explicit authorization for every action taken in a private home, it does mean that any actions taken by law enforcement personnel in execution of a warrant must be "related to the objectives of the intrusion."\(^\text{176}\)

The Chief Justice pointed out that the media’s presence inside the Wilsons’ home was clearly not related to the objectives of the authorized intrusion because the reporters did not in any way participate in or assist with the execution of the warrant or the attempted apprehension of Dominic Wilson.\(^\text{177}\) However, in some cases, the presence of third parties can directly assist in the execution of a warrant.\(^\text{178}\) For example, Chief Justice Rehnquist pointed out that when police have a warrant to enter a home to search for stolen property, the Court has traditionally approved the presence of third parties in order to identify the stolen property.\(^\text{179}\)

The Chief Justice next outlined and addressed the three arguments raised by the law enforcement officials ("Respondents"). First, Respondents argued that law enforcement officials should be allowed to use their discretion in determining when the presence of media members at the execution of a warrant would “further their law enforcement mission.”\(^\text{180}\) Chief Justice Rehnquist responded that the furtherance of law enforcement objectives in a general sense is not the same as the furtherance of the purposes of a search, and is not enough to justify an exception to the guaranteed protections of the Fourth Amendment.\(^\text{181}\)

\(^{172}\) *Id.* at 610-11 (citing Payton, 445 U.S. at 603-04).

\(^{173}\) *Id.* at 611.


\(^{175}\) *Wilson*, 526 U.S. at 611 (quoting Horton v. California, 496 U.S. 128, 140 (1990)).

\(^{176}\) *Id.* (citing Arizona v. Hicks, 480 U.S. 321, 325 (1987); Maryland v. Garrison, 480 U.S. 79, 87 (1987)).

\(^{177}\) *Id.*

\(^{178}\) See *id.*

\(^{179}\) See *id.*

\(^{180}\) *Id.*

\(^{181}\) *Id.*
Respondents next argued that the presence of the media could serve the legitimate purpose of communicating the government’s efforts in preventing crime, and promoting accurate reporting of law enforcement activities. The Chief Justice conceded that the press does play an important role in informing the public about law enforcement practices, because each person has a small amount of time and little ability to personally observe the operations of the government; therefore, people rely on the media to publicize the facts of such activities. He commented that although the First Amendment does protect the freedom of the press from governmental constraint, media ride alongs must be judged in terms of the Fourth Amendment’s protections of the individual. Justice Rehnquist further stated that the interest in good public relations for law enforcement and the need for accurate reporting of law enforcement activities are not enough to justify an intrusion into the home of a private citizen.

Finally, the respondents argued that the media’s presence would protect the officers’ safety and guard against abuses by the law enforcement officers. The Chief Justice responded that, although police officers might be justified in videotaping entries themselves, such a situation cannot be likened to the media presence in the instant case. He pointed out that the reporter and photographer present in the Wilsons’ home were not present in order to protect the police, but rather to further their own purposes of securing a story, and therefore their presence was not reasonable in this case.

Chief Justice Rehnquist concluded that none of the respondents’ arguments justified the presence of the media inside the Wilsons’ home, and 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.”

In Part III of his opinion, the Chief Justice turned to the issue of qualified immunity. He began with general rules and concepts, and restated the principle that “government officials performing discretionary functions generally are granted qualified immunity and are ‘shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

182. Id.
183. Id. (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1975)).
184. Id.
185. Id.
186. Id at 1699.
187. Id.
188. Id.
189. Id. The Court further noted that the violation of the Fourth Amendment lies in the presence of the media, not the police, in the home. See id. at n.2. Also, the Court declined to decide whether the exclusionary rule applies to any evidence discovered or developed by members of the media. See id.
190. See id. at 1699.
He explained that this means that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Further, the meaning of the term "clearly established" depends substantially on the level of abstractness or specificity at which the right in question is said to be established. While this does not mean that an action must be specifically held unlawful in order to be clearly established, it does mean that it must be apparent to a reasonable official that what he is doing violates a right.

The Chief Justice acknowledged that it could be argued that any violation of the Fourth Amendment violates a clearly established right, since the protections of the amendment clearly apply to law enforcement officials. However, as per the Court's decision in Anderson, the right must not be defined too generally or too narrowly. Justice Rehnquist set forth the appropriate inquiry in this case as "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." Chief Justice Rehnquist held that it was not unreasonable for a law enforcement official to have believed that bringing media personnel into a home during the execution of an arrest warrant was lawful, in light of existing law at the time of the alleged violation in this case. He set forth three reasons for the Court’s decision. First, he felt that the constitutional question in the instant case was by no means open and shut. He noted that media coverage of law enforcement functions serves the public interest, and that, based on general Fourth Amendment principles, it was not obvious that the officials’ conduct in Wilson violated the Constitution.

Second, the Chief Justice noted the fact that, in 1992, there were no judicial decisions holding that media ride-alongs become unconstitutional when

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191. Id. (quoting Harlow, 457 U.S. 800, 818 (1982)).
192. Id. (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citing Harlow, 457 U.S. at 819)).
193. Id.
194. See id.
195. Id.
196. See id. at 1700.
197. Id. (citing Anderson, 483 U.S. at 641).
198. See id.
199. Id.
200. Id.
members of the media enter a home. Prahl v. Brosamle was the only case on point at the time, and the court there held that such conduct on the part of law enforcement officials was not unreasonable. He then addressed the two unpublished federal District Court decisions identified by the parties in the instant case. Both of these cases concerned media entry into private homes, but the courts there upheld the search on unusual “non-Fourth Amendment right to privacy theories.” He pointed out that cases such as these do not mean that the law is “clearly established” regarding media entry into private homes as part of a ride-along with law enforcement officers. Bills v. Aseltine was also referred to by the petitioners to support the proposition that the law was clearly established. In that case, the court denied summary judgment on the issue of whether law enforcement personnel exceeded the scope of a warrant when they allowed a private security guard to accompany them on the search to identify stolen property that was not described in the original warrant. Although the court in Bills did allude to the rule established in the instant case, that police may not bring third parties into a private home for purposes unrelated to the objectives of the warrant, the Chief Justice stated that this was not enough to render the law “clearly established.” He concluded that petitioners had not pointed to any controlling authority on point, nor had “they identified a consensus of cases of persuasive authority such that a reasonable officer” would have known that his actions violated the law.

Finally, in support of his decision, Chief Justice Rehnquist pointed to the fact that the United States Marshals in this case were acting pursuant to a written ride-along policy that set forth guidelines for bringing media members into private homes. This policy did not prohibit media entry into private homes, and therefore precludes any reasonable belief that such actions would be contrary to “clearly established” law.

201. Id. 295 N.W.2d 768 (1980).
202. See Wilson, 526 U.S. at 616; see also Prahl, 295 N.W.2d at 782. The court in Prahl “did not engage in an extensive Fourth Amendment analysis,” and the decision was rendered in a state intermediate court. See Praul, 295 N.W.2d at 782.
203. Wilson, 526 U.S. at 616 (referring to Moncrief v. Hanton, 10 Media L. Rptr. (BNA) 1620 (ND Ohio Jan. 6, 1984)) and Higbee v. Times-Advocate, 5 Media L. Rptr. (BNA) 2372 (S.D. Cal. Jan. 9, 1980)).
204. Id. at n.3 (citing Fla. Publ’g Co. v. Fletcher, 340 So.2d 914, 918 (1976) (noting that “it is a widespread practice of long standing for media to accompany officers into homes”) cert. denied, 431 U.S. 930 (1977)).
205. Id. at 616-17.
206. Id. at 617.
207. Id. at 616-17.
208. Id. (citing Bills v. Aseltine, 958 F.2d 697, 709 (6th Cir. 1992)).
209. Id. at 616-17.
210. Id. at 617.
211. Id. Justice Stevens’ dissent, in the appendix, contains the actual provisions of the United States Marshals Service ride-along policy, which was distributed to the Marshals as a booklet. See id. at 625-28.
In conclusion, Chief Justice Rehnquist held that the law in this area was not clearly established, and "the officers in this case cannot have been 'expected to predict the future course of constitutional law,'" and were thus entitled to qualified immunity. He affirmed the judgement of the Court of Appeals.

B. Justice Stevens' Dissent

Although Justice Stevens concurred with the Court in their finding that the officers' actions in this case violated the Fourth Amendment, he dissented with regard to the issue of qualified immunity. He felt that the law in this area was "clearly established" long before the search of the Wilson's home took place. He pointed to several factors in support of his opinion: the clarity of the constitutional rule, the provisions of 18 U.S.C. § 3105, common law decisions, and the senior law enforcement official's oral testimony. In Section I of his opinion, Justice Stevens began by restating the rule that the actions of law enforcement officials when executing a warrant must be exclusively limited to the objectives of the original authorized intrusion. He stated that this represents a merging of traditional English common law respect for the privacy of the home, and American colonists' traditional dislike for warrants and intrusion. He agreed with the majority's enunciation of the rule

213. Id. (quoting Procunier v. Navarette, 434 U.S. 555, 562 (1978) and citing Wood v. Strickland, 420 U.S. 308, 321 (1975); Pierson v. Ray, 386 U.S. 547, 557 (1967)). One critic points out that, had the Court not allowed the defense of qualified immunity in this case, law enforcement officials would likely deny the media the opportunity to observe police functions in all situations, precluding the media from providing the public with valuable information. See Eve Klindera, Note, Qualified Immunity for Cops (and other Public Officials) with Cameras: Let Common Law Remedies Ensure Press Responsibility, 67 GEO. WASH. L. REV. 399, 403 (1999). However, others feel that the Court erred in finding the law was not clearly established on this issue. See Mitchell, supra note 30, at 962 (stating that the officials' conduct was "repugnant to the clearly established rights and ideals set forth in the Fourth Amendment" and that the officials should have known that they were acting in violation of clearly established law). Additionally, David E. Bond, in his article, felt that the Court's grant of qualified immunity would demonstrate how little value that the Court gives to the Fourth Amendment right to privacy. See Bond, supra note 2, at 838.

214. See Wilson, 526 U.S. at 618.

215. Id. at 618-19 (Stevens, J., dissenting).

216. Id. at 619 (Stevens, J., dissenting). The majority in this case defined the right to narrowly; the right in question here was the right to be secure in one’s home and free from intrusion by third persons accompanying law enforcement officials. See Tourtillot, supra note 68, at 456. This right was clearly established before the 1992 violation in the instant case. See id.

217. See Wilson, 526 U.S. at 619 (Stevens, J., dissenting). Justice Stevens contrasts this with the majority’s support for its conclusion: the proposition that the constitutional question was not "open and shut," three judicial opinions that were not on point, and the officers' reliance on the Marshals' Service booklet discussing ride-along policies. Id. (Stevens, J., dissenting).

218. See id. at 619 (Stevens, J., dissenting).

219. Id. at 619-20 (Stevens, J., dissenting).

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and all of its details, but noted that all of the cases referred to by the majority in support of the rule were decided before 1992, and that none of the cases identified any exceptions to this rule. Justice Stevens then noted that, in all of the cases he had heard concerning the Fourth Amendment, rarely did the Court ever decide unanimously that a violation was present. He went on to say that the fact that “the Court today speaks with a single voice on the merits of the constitutional question is unusual and certainly lends support to the notion that the question is indeed ‘open and shut.’” More importantly, he thought that the law enforcement officials should have known that their actions clearly exceeded the scope of the authorized warrant, and noted that the majority did not cite any authority supporting the idea that such actions could have been considered reasonable.

In Part II of his opinion, Justice Stevens stated that the mere fact that no previous court found a violation of the Fourth Amendment when law enforcement officials allow members of the media to accompany them into private homes does not mean that it was reasonable for an official to believe such actions were lawful. He pointed to an example where the Court found a constitutional violation of clearly established law where there was no previous case directly on point.

Justice Stevens next discounted the idea that the absence of rulings on point could be explained by the fact that ride-along practices were common. Even if officers regularly allowed media personnel to go on ride-alongs, this does not translate into a policy of allowing members of the media to enter private homes absent the consent of the owners. He also discounted the lower court opinions relied on by the majority, because they did not address the Fourth Amendment directly and thus could not be relied on by the officers to

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220. Id. at 620 (Stevens, J., dissenting). Justice Stevens stated that the respondent’s position rested solely on the proposition that the presence of the media served legitimate purposes, and the majority’s rejection of this rationale cannot be considered the establishment of a new rule of law. See id. (Stevens, J., dissenting).

221. Id. (Stevens, J., dissenting).

222. Id. (Stevens, J., dissenting) (referring to the majority opinion’s determination that the constitutional question was not “open and shut” at the time of the violation in this case).

223. Id. at 620-21 (Stevens, J., dissenting).

224. Id. at 621 (Stevens, J., dissenting). Just because there was not a previous case with the exact same fact pattern holding such actions unconstitutional does not mean that preexisting law was not clearly established. See Mitchell, supra note 30, at 961-62.

225. Wilson, 526 U.S. at 621 (Stevens, J., dissenting). In United States v. Lanier, 520 U.S. 259 (1997), the Court found that a state judge violated clearly existing law when he used his position to obtain sexual favors from a party in lawsuit, even though no court had previously held these specific actions to be unconstitutional. Id.

226. Wilson, 526 U.S. at 621 (Stevens, J., dissenting).

227. Id. (Stevens, J., dissenting). Justice Stevens distinguished the instant case from situations where firefighters allow photographers to enter and take pictures of buildings damaged by fire. Id. (Stevens, J., dissenting). In that situation, the photographer’s conduct is proper based on a theory of implied consent, which is not applicable to the instant case. Id. at 621-22 (Stevens, J., dissenting).
justify their conduct.\textsuperscript{228} The fact that some of the cases relied on by the majority were unpublished makes reliance on them very problematic, and even if they were persuasive, these cases relied on theories other than the Fourth Amendment right to privacy.\textsuperscript{229} As for \textit{Prahl v. Brosamle},\textsuperscript{230} the other case relied upon by the majority, "it actually held that the defendants' motion to dismiss should have been denied because the allegation supported the conclusion that the officer committed a trespass when he allowed a third party to enter the plaintiff's property."\textsuperscript{231} He noted that this case, therefore, could not possibly support the assumption that the officers in \textit{Wilson} acted reasonably.\textsuperscript{232}

He thought that the most persuasive evidence of an officer's understanding of the state of the law at the time of the search in the instant case was testimony provided by the Sheriff of Montgomery County, who stated that "'[w]e would never let a civilian into a home. . . . That's just not allowed.'"\textsuperscript{233} Finally, in Part III of his opinion, Justice Stevens discredited the majority's recognition of the Marshals' reliance on the documented ride-along policy as evidence of the reasonableness of the officers' actions.\textsuperscript{234} He noted that the author of the policy was clearly not a lawyer, but an employee of the United States Marshals Service concerned with public relations, particularly interested in creating a good impression with Congress.\textsuperscript{235} Additionally, the policy does not set forth any prerequisite conditions to be met before media entry into the home becomes proper.\textsuperscript{236} Rather, it contains rules regarding how officers should act and speak in front of the camera, with no more.\textsuperscript{237} In sum, Justice Stevens thought that "'[t]he notion that any member of that well-trained cadre of professionals would rely on such a document for guidance in the performance of dangerous law enforcement assignments is too far-fetched to merit serious consideration."\textsuperscript{238}

In conclusion, Justice Stevens did not think the officers in this case were entitled to qualified immunity, because the law in this area was clearly estab-
lished before the alleged violation occurred. By granting the defense of qualified immunity, he believed that the majority needlessly authorized a "free violation" of the clearly established protections of the Fourth Amendment.

VI. IMPACT OF THE COURT'S DECISION

A. Judicial Impact

The Court's decision in Wilson v. Layne has impacted several areas of judicial analysis: the Fourth Amendment, the defense of qualified immunity, and the liability of the media.

1. Fourth Amendment Analysis

In Wilson v. Layne, the Court created a bright line test holding that media intrusions into the private home violate the Fourth Amendment when the media's presence is unrelated to a legitimate law enforcement justification for entry into the home. As a result, the law will be considered "clearly established" for purposes of qualified immunity analysis in future cases. Lower courts will no longer have to treat media ride-alongs into private homes as a gray area of the law, but instead have a clear constitutional rule to follow.

The impact is already apparent and evidenced by several lower court decision. In McDonald v. State, the Florida Court of Appeal also read Wilson narrowly, as only invalidating actions that are not specifically authorized by the warrant, but upholding the validity of any previous actions before the violation occurred. In McDonald, police officers had a search warrant to search the home of Donat McDonald for evidence of possession of marijuana. The officers executed the search warrant and discovered large quantities of marijuana. The officers then proceeded to set up a reverse sting operation whereby McDonald was told to act normal and proceed to sell drugs to all who came to his house. The officers arrested, handcuffed and

239. See id. (Stevens, J., dissenting).
240. Id. (Stevens, J., dissenting).
242. See Mitchell, supra note 30, at 963.
243. Id. Cases like this will no longer turn on whether or not the officers should have known that their conduct violated established law. See id.
244. Id.
245. 742 So.2d 830 (Fla. App. 4 Dist. 1999), reh'g denied, 763 So.2d 1043 (Fla. 2000).
246. Id.
247. Id. at 831.
248. Id.
249. Id.

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processed approximately twenty-three people who came to McDonald's house to purchase drugs, over the course of six hours. McDonald challenged the use of the original marijuana as evidence against him, stating that the reverse-sting operation was an unreasonable search and seizure in violation of his constitutional rights, thereby excluding any evidence obtained through the search. The court looked to Wilson, where the Supreme Court specifically declined to decide whether the exclusionary rule would apply to evidence discovered by media members who accompanied law enforcement officials into private homes in violation of the Fourth Amendment. The court in McDonald interpreted this to mean that, even if a search or seizure becomes unlawful, evidence obtained prior to the point where the search or seizure becomes unlawful would still be admissible. Therefore, the court found that, even if the reverse sting operation exceeded the scope of the warrant, any evidence obtained prior to the reverse sting operation would still be admissible. Thus, this lower court read Wilson narrowly in terms of its effect on the exclusionary rule.

2. Qualified Immunity Analysis

Wilson’s obvious impact on qualified immunity analysis is that officers can no longer claim the defense of qualified immunity when they are sued in their personal capacities for violating individuals’ Fourth Amendment right to privacy by allowing media members to accompany them into private homes. However, the decision in Wilson has raised some interesting issues in the lower courts regarding the issue of qualified immunity.

First, in Bevill v. UAB Walker College, the District Court for the Northern District of Alabama read Wilson as relaxing the standard for showing that a law is clearly established for purposes of qualified immunity. The court in Bevill stated that in Wilson, “the Supreme court apparently relaxed this requirement, indicating that a plaintiff can demonstrate the existence of clearly established law not only by pointing out ‘cases of controlling authority in their

250. Id.
251. Id.
252. Id. at 833-34 (citing Wilson v. Layne 526 U.S. 603, 614 n.2 (1999)).
253. Id.
254. Id.
255. See Mitchell, supra note 30, at 962.
257. See id. at 1299.
jurisdiction at the time of the incident,' but also through reference to 'a consensus of cases of persuasive authority.' 258

Additionally, the Supreme Court’s decision in Wilson has created some confusion among courts as to whether the Supreme Court intended to promulgate a rule requiring courts considering a defense of qualified immunity to decide first whether a constitutional right has been asserted and then to decide whether a violation of that right occurred. 259 For example, in McCall v. Williams, 260 the District Court for the District of South Carolina held that Wilson clarified the previously ambiguous methodology for qualified immunity analysis. 261 In this case, the District Court required the trial court to first consider whether the officer in question applied excessive force before making a determination of whether or not he was entitled to qualified immunity, as per the Wilson requirement. 262

Conversely, in Horne v. Coughlin, 263 the Court of Appeals for the Second Circuit held that Wilson did not create a rigid rule requiring a preliminary determination of the constitutional issue in all cases. 264 Horne read the Supreme Court’s rulings on the issue of qualified immunity to mean that “lower courts must be mindful of facts and circumstances that often justify addressing the merits of constitutional claims, even though qualified immunity would supply a sufficient ground for decision.” 265 The Horne court felt that the major issue for consideration in such cases was whether or not the constitutional question before the court would escape review by a federal court for a long period of time, in which case it would be important to decide the issue first. 266

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258. Id. (quoting Wilson v. Layne, 526 U.S. 603, 615-17 (1999)).
259. See generally Wilson v. Layne, 526 U.S. 603, 609 (1999) (quoting Conn v. Gabert, 526 U.S. 286 (1999). The reasoning set forth by Wilson for upholding this requirement was drawn from previous cases. See id. Notwithstanding these facts, some lower courts still hold that Wilson established the rule and removed prior ambiguity in this area.
261. See id. at 559. Also, the Florida District Court in Geidel v. City of Bradenton Beach also cited Wilson in requiring a prior determination of the issue of constitutionality before considering the issue of qualified immunity. Geidel v. City of Bradenton Beach, 56 F. Supp. 2d 1359, 1366 (M.D. Fla. 1999) (quoting Wilson v. Layne, 526 U.S. 603, 609 (1999)).
263. 191 F.3d 244 (2d Cir. 1999), cert. denied, 120 S.Ct. 594 (1999).
264. Id. at 248-49.
265. Id. at 249.
266. Id. In making this determination, the court relied on the holding in Sacramento v. Lewis, 523 U.S. 833 (1998), where a footnote to the opinion described deciding the constitutional issue first "as 'normally' the 'better approach.' Id. at 245 (quoting Sacramento, 523 U.S. at 841 n.5). The court interpreted this to mean that the constitutional issue must only be decided first when necessary to ensure that certain conduct by officers will not indefinitely escape review. Id. at 246. Additionally, the court in Horne sought to heed the Supreme Court’s traditional warning against the unnecessary adjudication of constitutional matters. Id. (citing Ashwater v. Tenn. Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring); Burton v. United States, 196 U.S. 283, 295 (1905); Liverpool, N.Y. & Phila. S.S. Co. v. Comm'r of Emigration, 113 U.S. 33, 39 (1885)). The Horne court viewed the statements of the Supreme Court in Wilson regarding qualified immunity as dictum rather than as establishing or clarifying rules. See id. at 248 (citing Wilson v. Layne, 526 U.S. 603 (1999)).
Thus, the Court in *Wilson* created some ambiguity and confusion with regard to the preliminary determination of constitutional issues in qualified immunity analysis.\(^{267}\) If this issue becomes a persistent source of conflicting decisions, it may require the attention of the Supreme Court in the future.

3. Media Liability

Finally, the Court’s decision in *Wilson* has some implications for the media regarding liability for intrusion into private homes. First, the media cannot be held liable under 42 U.S.C. § 1983\(^{268}\) or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,\(^{269}\) as the officers in *Wilson* were, because these causes of action require an action by a government actor, and members of the media are not government actors by definition.\(^{270}\)

The likely result is that, if media members enter a private home without the permission of the residents, they “might be liable under the torts of trespass or invasion of privacy.”\(^{271}\) In order to state a claim for trespass, there must be an intentional entry upon privately owned property.\(^{272}\) A trespass claim can be defeated by either express or implied consent.\(^{273}\) In defense to claims of trespass, the media often asserts that the First Amendment protects legitimate newsgathering.\(^{274}\) However, courts usually reject this theory on the proposition that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”\(^{275}\) In addition, there are other restrictions on

\(^{267}\) See *supra* notes 259-266 and accompanying text.


\(^{269}\) 403 U.S. 388 (1971) (allowing recovery for federal narcotics agents’ Fourth Amendment violations).

\(^{270}\) See *supra* notes 61-62 and accompanying text.

\(^{271}\) *Levy*, *supra* note 63, at 1192-93 (citations omitted).

\(^{272}\) *Klindera*, *supra* note 213, at 416 (citing *Restatement (Second) of Torts* § 158 (1965)).

\(^{273}\) *Levy*, *supra* note 63, at 1193 (citing Fla. Publ’g Co. v. Fletcher, 340 So. 2d 914, 917 (Fla. 1976); see also *Klindera*, *supra* note 213, at 416. In *Fletcher*, the court held that no trespass occurred when a newspaper photographer entered a home destroyed by fire to photograph the scene, because custom and usage provided the newspaper with implied consent. *Klindera*, *supra* note 213, at 417-18. Most courts distinguish *Fletcher* on the basis of its unique factual circumstances, and are reluctant to find implied consent. *Id.* at 418.

\(^{274}\) *Klindera*, *supra* note 213, at 416-417.

the right to recover under tort theories. Some recoveries under tort require a showing of actual malice, which can be a difficult test for a plaintiff to meet.

Even if a private party is able to establish all of the elements necessary for a valid tort claim, the media may still protect itself from liability through the use of consent. If the media obtains consent from the persons that they film or photograph, it will be a complete defense to any tort claims. Presumably, media members act at their own risk if consent is denied but they proceed to film or photograph.

B. Legislative Impact

Media intrusiveness has become an increasingly prevalent issue in constitutional litigation. Following Princess Diana’s death, Congress and a number of states introduced bills aimed at restraining paparazzi. These proposals, however, are likely to affect all members of the media. The Supreme Court’s decision in Wilson v. Layne has the potential to spur a similar watershed of legislative proposals to protect private persons from unnecessary intrusion by either the media or law enforcement. For example, the recent interest in privacy protection was a catalyst for the Personal Privacy Protection Act legislation, designed to “create additional civil and criminal violations for newsgathering activities like filming and photographing for a commercial purpose when it constitutes an unwarranted harassment or a violation of privacy.”

Also, in California, anti-paparazzi bills have been introduced specifically to restrict the activities of celebrity photographers. Additionally, Utah is considering the Personal Privacy

276. See Levy, supra note 63, at 1193.
277. Id.
278. Klindera, supra note 213, at 430.
279. Id.
280. Id. The author notes that, if consent is withheld, the media still has the option of “conceal[ing] the person’s identity or redact[ing] the footage to leak out identifying details.” Id.
282. Id.
283. Id.
286. See Hernandez, supra note 281, at 293.
287. See id. Senator Burton (D-San Francisco) proposed SB 262 to provide a cause of action for the tort of invasion of privacy where a plaintiff can prove that a person capturing his or her impression (1) has persistently physically followed or chased the plaintiff in a manner to cause the plaintiff to have a reasonable fear of bodily injury in order to capture a visual image, sound recording or other physical impression of the plaintiff, (2) has committed an act of trespass in order to capture a visual image, sound recording or other physical impression of the plaintiff, or (3) if the defendant attempted to capture any type of image or sound recording if the image or recording could not have been captured without a trespass unless a visual or auditory device was used and the plaintiff had a reasonable expectation of privacy.” Id. at 293-94.
Information Amendments which would serve to limit the use of private information about individuals.\textsuperscript{288}

\textbf{C. Social Impact}

The Court's decision will have a social impact on law enforcement, the media, and private individuals. First, law enforcement officials will now have to take obvious precautions to guard themselves from liability. Any time the police allow the media to accompany them into private homes, it is "trouble with the law."\textsuperscript{289} Law enforcement officers will have to take care not to allow members of the media to accompany them into private homes without the consent of homeowners.\textsuperscript{290} For example, the government might be wise to adopt a policy requiring the media to get consent from private persons before broadcasting or printing any information as a condition to allowing the media to accompany officers and observe law enforcement activities.\textsuperscript{291}

On a positive note, some critics of media participation feel that law enforcement officers will perform their duties more efficiently absent the presence of the media.\textsuperscript{292} Law enforcement officers will no longer feel compelled to "baby-sit" the media personnel or perform for the camera.\textsuperscript{293} Law enforcement officers will now be motivated more by the public interest, and less by publicity.\textsuperscript{294} It is important to note that ride-alongs can still serve a valid function if they are limited to recording events that occur in public places, as this is a legitimate way to promote public knowledge and awareness of law enforcement activities.\textsuperscript{295}

With regard to the media, they, too, will need to take precautions to guard against liability. Although consent or newsworthiness can be defenses to tort claims, media members should take note that such arguments are "largely ineffective."\textsuperscript{296} Additionally, the Court's decision severely limits the media's

\textsuperscript{288} \textit{Id.} at 294. The proposed amendments would impose criminal liability on one who reports "an individual's name, age, address, race, criminal history, educational or employment history, financial transactions," or personal opinions or views unless the individual consents in writing. \textit{Id.} at 294-95.


\textsuperscript{290} \textit{See id.} Additionally, the practice should be avoided as it has the potential to tarnish the reputation of both the police and the media. \textit{Id.} at 358.

\textsuperscript{291} \textit{See Klindera, supra note 213, at 430.}


\textsuperscript{293} \textit{Id.}

\textsuperscript{294} \textit{Id.}

\textsuperscript{295} \textit{See Bond, supra note 2, at 870-71.}

\textsuperscript{296} \textit{See Ransom, supra note 289, at 357-58.}
ability to provide members of the public with information regarding law
enforcement activities. An amicus curiae brief filed on behalf of twenty-four
news organizations with regard to the Wilson case argued that the press has an
important role in monitoring abuse of government power "by observing and
recording first hand the activities of government officials charged with
enforcing the law." The Court has consistently noted the value of the media
as a method for informing the public about government power and government
affairs, and the decision in Wilson v. Layne will certainly limit media's
ability to perform this function.

Finally, with regard to private persons, the Court's decision in Wilson
serves to protect valuable individual rights guaranteed by the Constitution.
Media ride-alongs often catch private persons off guard, "in various stages of
undress, sometimes cowering in corners or closets, and invariably shielding
their faces from the glare of the camera lights . . . ." The Fourth Amendment
requires that individuals' right to privacy be completely protected, within the
bounds of public safety and crime control. Media ride-alongs are unreasonale as they do not foster the utmost protection of individuals' Fourth
Amendment right to privacy, and further, during ride-alongs, law enforcement
officials are fostering unlawful conduct by the media. Clearly, the Court's
decision in Wilson will serve to better protect these vital constitutional rights.

VII. CONCLUSION

In Wilson v. Layne, the Supreme Court set a defining precedent, that law
enforcement officials are liable when they allow media members to accompany
them into private homes when executing warrants. Although the Court
softened the blow by allowing qualified immunity in Wilson, courts will not be
so lenient in the future. Law in this area is now without a doubt clearly
established for future qualified immunity analysis. Police officers and media
members alike will be required to reconsider current policies allowing for "ride-
alongs," and both groups will now strive to protect themselves against liability.

297. See Klindera, supra note 213, at 403.
298. See Rebecca Porter, Media 'Ride-Alongs' Violate the Constitution, Supreme Court Rules, TRIAL
July 1999, at 120 (1999). Note that "the effectiveness of the media in scrutinizing the conduct of law
enforcement personnel may be greatly compromised given the potentially collusive and non-spontaneous
nature of the joint enterprise. See Ransom, supra note 289, at 356.
299. See Klindera, supra note 213, at 430 n.40 (citing Supreme Court decisions supporting this
proposition).
301. Note that the press does not have a First Amendment right to accompany public officials. Klindera,
supra note 213, at 403 n.40.
302. Ransom, supra note 289, at 355.
303. Id.
304. Id.
The Court left several issues undetermined. For example, the Court did not consider whether the exclusionary rule will apply to any evidence that is obtained by the media in violation of the Fourth Amendment.\(^{306}\) Also, the Court did not consider the extent to which the media and law enforcement must be joint actors in order to hold the law enforcement officials liable for the media’s presence.\(^{307}\) These issues may require future attention, or perhaps they will be left up to the interpretation of the lower courts.

Although *Wilson* left several issues unresolved, it did take a large and definite step towards protecting the individual’s Fourth Amendment right to privacy and freedom from unnecessary intrusion. Individuals are no longer left without a remedy when law enforcement officials violate their constitutional rights by bringing media members into private homes.

ASHLEA WRIGHT\(^{308}\)

\(^{306}\) See *id.* at 614 n.2.

\(^{307}\) See *id.*

\(^{308}\) J.D. Candidate, 2001.