



2000

Constitutional Law and Criminal Procedure—Media Ride-alongs into the Home: Can They Survive a Head-on Collision between First and Fourth Amendment Rights? *Wilson v. Layne*, 526 U.S. 603 (1999)

DeLeith Duke Gossett

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Recommended Citation

DeLeith Duke Gossett, *Constitutional Law and Criminal Procedure—Media Ride-alongs into the Home: Can They Survive a Head-on Collision between First and Fourth Amendment Rights? Wilson v. Layne*, 526 U.S. 603 (1999), 22 U. ARK. LITTLE ROCK L. REV. 679 (2000).

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CONSTITUTIONAL LAW AND CRIMINAL PROCEDURE—
MEDIA RIDE-ALONGS INTO THE HOME: CAN THEY SURVIVE A HEAD-ON
COLLISION BETWEEN FIRST AND FOURTH AMENDMENT RIGHTS? *Wilson v.
Layne*, 526 U.S. 603 (1999).

I. INTRODUCTION

*Bad boys, bad boys, whatcha gonna do? Whatcha gonna do when they come
for you?*¹

Millions of viewers have tuned in nightly over the last decade to experience the new phenomenon called “reality television.”² From the safe confines of their living room easy chairs, viewers can participate in daring rescue missions or observe actual police arrests on the beat and in the home.³ Although popular with viewers, reality television programming raises serious questions about personal privacy rights that stand in the way of the public’s right to know. The United States Supreme Court ruled privacy rights may take precedence, holding in *Wilson v. Layne*⁴ that the popular media ride-alongs⁵ violate the Fourth Amendment when the media accompanies law enforcement officers into a home.⁶

This note examines the *Wilson* decision and the legal landscape from which it arose. Focusing on the special deference traditionally afforded to the home, the note then discusses Fourth Amendment protections and the English common-law from which the Fourth Amendment developed. It next examines media intrusions into the home through the influx of reality programming and the tension such intrusions raise between personal privacy and the First Amendment guarantee to a free press. The note traces the development of lawsuits, grounded in both tort law and the Fourth Amendment, resulting from

1. See David E. Bond, Note, *Police Liability for the Media Ride-Along*, 77 B.U. L. REV. 825, 825 & n.1 (1997). From Big Beat/Atlantic Records, *Bad Boys* is the theme song to the Fox television program *Cops*. See *id.*

2. See Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 991 & n.1 (1995). Professor McClurg uses the label “reality television” to describe the “genre of [shows] often featuring live video coverage of dramatic events.” *Id.*

3. See *id.* “Popular segments include footage of police officers stopping, questioning, searching, or arresting motorists, and emergency response teams, such as firefighters or paramedics, responding to calls for assistance.” *Id.*

4. 526 U.S. 603 (1999).

5. See Bond, *supra* note 1, at 825. A ride-along consists of “footage obtained when television crews accompany police officers on patrol and film them in action.” See Bond, *supra* note 1, at 825.

6. See *Wilson*, 526 U.S. at 605.

media ride-alongs. The note also considers an important affirmative defense available to officers who have unwittingly violated a plaintiff's protected rights, that of qualified immunity. In closing, the impact *Wilson* will have on the media and reality programming, in particular, is analyzed.

II. FACTS

In the early morning hours of April 16, 1992, a team of Deputy United States Marshals and local county sheriffs raided the Maryland home of Charles and Geraldine Wilson, pursuant to a valid search warrant.⁷ The raid on the Wilson home was part of a national fugitive apprehension program known as "Operation Gunsmoke."⁸ This program targeted Dominic Wilson, the son of Charles and Geraldine Wilson, as a dangerous criminal wanted on probation violations for previous felony charges of robbery, theft, and assault with intent to commit robbery.⁹ The Circuit Court for Montgomery County issued three warrants for the arrest of Dominic Wilson, one for each probation violation.¹⁰ Police computer "caution indicators" warned that Dominic would likely be armed, resist arrest, and assault police.¹¹

When the Wilsons' nine-year-old granddaughter opened the door on the morning of May 16, she found officers aiming their guns at her.¹²

7. See *id.* at 606-08 (1999). The team was composed of Joseph L. Perkins and James A. Olivo of the United States Marshals Service and Mark A. Collins, Brian E. Roynestad, and Eric E. Runion of the Montgomery County, Maryland Sheriff's Department. See *Wilson v. Layne*, 110 F.3d 1071, 1072 (4th Cir. 1997), *aff'd en banc*, 141 F.3d 111 (4th Cir. 1998), *aff'd*, 526 U.S. 603 (1999). The team's supervisor was Respondent Harry Layne. See *id.* at 1073.

8. See *Wilson*, 526 U.S. at 606; Brief for Federal Respondents Harry Layne, James A. Olivo, and Joseph L. Perkins at 1, *Wilson v. Layne*, 526 U.S. 603 (1999) (No. 98-83). The aim of this program was to join federal and local law enforcement officers in an effort to apprehend "armed individuals wanted on federal and/or state and local warrants for serious drug and other violent felonies." *Wilson*, 526 U.S. at 606. The program resulted in the arrest of over 3300 criminals in 40 metropolitan areas. See *id.*; Brief for Federal Respondents at 1, *Wilson* (No. 98-83).

9. See *Wilson*, 526 U.S. at 606.

10. See *id.*; *Wilson*, 110 F.3d at 1072. The warrant stated: "THE STATE OF MARYLAND, TO ANY DULY AUTHORIZED PEACE OFFICER, GREETINGS: YOU ARE HEREBY COMMANDED TO TAKE DOMINIC JEROME WILSON IF HE/SHE BE FOUND IN YOUR BAILIWICK. . . ." *Id.* at 1072.

11. See *Wilson*, 526 U.S. at 606.

12. See Brief for Federal Respondents at 2, *Wilson* (No. 98-83). When the officers saw a child at the door, they pointed their guns away from her, asked her to come outside, and whisked her to safety. See *id.* Valencia Snowden, the Wilson's granddaughter, had been dropped off at her grandparents' house to wait for the school

The officers then swarmed the Wilson house, conducting a “sweep” for Dominic.¹³ Charles Wilson came into the living room amid the confusion, wearing only a pair of briefs.¹⁴ Encountering the unknown men wearing street clothes and carrying guns, Charles angrily demanded to know what was going on.¹⁵ Believing him to be Dominic, the officers pinned him to the floor and restrained him.¹⁶ Geraldine Wilson then rushed into the living room, wearing only a sheer nightgown, to find men with guns drawn on her husband.¹⁷

Accompanying the deputy marshals and sheriffs that morning were two members of the media, a reporter and a photographer from the *Washington Post*.¹⁸ The reporters took numerous pictures and recorded their observations throughout the entire encounter.¹⁹ They did not assist in the execution of the warrant.²⁰ Though the warrant had authorized the officers’ involvement, the warrant made no reference to the accompanying media.²¹

The Wilsons filed suit in the United States District Court for the District of Maryland against the federal officers²² under *Bivens v. Six*

bus. See Brief for Petitioner at 2, *Wilson v. Layne*, 526 U.S. 603 (1999) (No. 98-83).

13. See *Wilson*, 526 U.S. at 607. The latest address the police had for Dominic was that of his parents’ home. See *id.* at 606.

14. See *id.* at 607.

15. See *id.*

16. See *id.* “[P]rior to entering the house, the officers and media personnel [had] reviewed an arrest worksheet and photographs of Dominic Wilson that showed him to be 27 years old, 185 pounds, and clean-shaven. . . . [Charles] Wilson was 47 years old, weighed 220 pounds and had a beard that was almost completely white.” Brief for Petitioner at 3, *Wilson* (No. 98-83).

17. See *Wilson*, 526 U.S. at 607. “At no time were the Wilsons permitted to cover themselves decently.” Brief for Petitioner at 4, *Wilson* (No. 98-83).

18. See *Wilson*, 526 U.S. at 607. See also *Wilson*, 110 F.3d at 1072 (explaining, in the first court of appeals opinion, that the “reporters’ participation was part of a two-week, news-gathering investigation by the newspaper [and] was not designed to serve any legitimate law enforcement purpose”).

19. See *Wilson*, 526 U.S. at 607-08. The photographs were never published. See *id.*

20. See *id.*; Brief for Federal Respondents at 3, *Wilson* (No. 98-83).

21. See *id.* at 606; *supra* note 10. See also FED. R. CRIM. P. 4(d)(1)(3) (mandating that warrants “shall be executed . . . by a marshal or some other officer authorized by law”).

22. See *Wilson*, 526 U.S. at 609. David H. Coburn, one of the Wilsons’ attorneys, explained why the Wilsons pursued a Fourth Amendment claim against the law enforcement officials rather than a tort claim against the *Washington Post*. Telephone Interview with David H. Coburn, Attorney, Steptoe & Johnson LLP, Washington, D.C. (Oct. 22, 1999). The reporters were in the Wilson home at the invitation of officers who had apparent authority to invite them. See *id.* Coburn feared, under Maryland law, that might provide a defense to a tort action. See *id.* According to Coburn, the primary parties at fault were the U.S. Marshals and the Deputy Sheriffs. See *id.* Coburn posited

Unknown Named Agents of Federal Bureau of Narcotics,²³ and the state officials²⁴ under 42 U.S.C. § 1983.²⁵ The Wilsons alleged that the officers' actions in bringing the reporters into their home violated their Fourth and Fourteenth Amendment rights.²⁶ The officers moved for summary judgment, asserting they were entitled to qualified immunity.²⁷ The district court denied the motion for summary judgment.²⁸

The officers appealed to the United States Court of Appeals for the Fourth Circuit,²⁹ where a divided panel reversed the decision of the district court.³⁰ Stressing that it was not deciding the legality of the officers' conduct under the Fourth Amendment, the court limited its review to the issue of qualified immunity.³¹ Because no court had held prior to 1992 that media ride-alongs violate the Fourth Amendment,³² the appellate panel concluded that the right asserted by the Wilsons was

it did not matter whether it was the media or a high school civics class—the officers were in no position to invite anyone into the Wilson home not authorized by the warrant. *See id.* Therefore, the Wilsons agreed to forego a tort action against the media representatives to pursue the Fourth Amendment claims against the U.S. Marshals and the Deputy Sheriffs. *See id.*

23. 403 U.S. 388 (1971). In *Bivens*, the United States Supreme Court held that a federal common law right of action for money damages exists against federal officials who violate an individual's constitutional rights. *See Bivens*, 403 U.S. at 397. *Bivens* accomplished as a matter of federal common law what 42 U.S.C. § 1983 had long provided for constitutional violations carried out by persons acting under the color of state law. *See infra* note 25.

24. *See Wilson*, 526 U.S. at 609.

25. *See* 42 U.S.C. § 1983 (1994). This statute reads:

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 or other person within the jurisdiction thereof 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

42 U.S.C. § 1983 (1994).

26. *See Wilson*, 526 U.S. at 608. The Wilsons also claimed the police used excessive force and lacked probable cause to believe Dominic would be at their home. *See Wilson*, 110 F.3d at 1073.

27. *See Wilson*, 110 F.3d at 1073. The district court dismissed the petitioners' complaints of excessive force and lack of probable cause, and the Supreme Court did not address these issues. *See id.*

28. *See id.* (Messitte, J., presiding).

29. *See id.* at 1072.

30. *See id.* at 1076. Circuit Judge Wilkins wrote the majority opinion for the three-member panel, in which Justice Herlong joined. *See id.* at 1072. Judge Russell wrote a dissenting opinion. *See id.* at 1076 (Russell, J., dissenting).

31. *See id.* at 1075-76.

32. *See Wilson*, 526 U.S. at 616.

not “clearly established” at the time the officers acted and, thus, the officers were entitled to qualified immunity.³³

A majority of the judges on the Fourth Circuit Court of Appeals voted to grant rehearing en banc.³⁴ With five judges dissenting, the en banc court followed the district court in declining to address the Fourth Amendment issue and holding that the officers enjoyed a qualified immunity.³⁵ The Supreme Court granted certiorari in this case and another case raising the same issue³⁶ to resolve a split among the circuit courts that had since developed on the issue of whether police action in bringing media representatives into a home during the execution of a warrant violates the Fourth Amendment and, if so, whether the officers in these cases were entitled to qualified immunity on the basis that such a right was not clearly established at the time of the searches.³⁷

III. BACKGROUND

Historically, the home has been afforded substantial Fourth Amendment protection by the courts. However, today’s media, claiming its own constitutional immunity, threatens to encroach on this private arena to serve a hungry and profitable entertainment market. The popular media ride-along practice has not only spawned numerous popular reality programs, it has created controversy for the courts as well. This section highlights some of the cases, both under state tort

33. See *Wilson*, 110 F.3d at 1076.

34. See *Wilson v. Layne*, 141 F.3d 111, 112 (4th Cir. 1998), *aff’d*, 526 U.S. 603 (1999). Judge Wilkins wrote the majority opinion, in which Chief Judge Wilkinson, and Judges Niemeyer, Luttig, and Williams joined. See *id.* at 111. Judge Widener wrote a concurring opinion. See *id.* at 119 (Widener, J., concurring). Judge Murnaghan dissented. See *id.* at 119 (Murnaghan, J., dissenting). Judges Ervin, Hamilton, Michael, and Moltz joined in the dissent. See *id.* at 111.

35. See *Wilson*, 141 F.3d at 118-19. The court introduced into its reasoning, for the first time, several examples of how allowing media presence in the execution of a warrant might further legitimate law enforcement purposes. See *id.* at 116. See also Brief for Petitioner at 29-30, *Wilson* (No. 98-83) (commenting on the court’s reasoning): Under the plurality’s standard, the carefully limited scope of a warrant becomes meaningless in the face of an officer’s—or a court’s—post hoc speculation that some nebulous law enforcement purpose would be served by expanding a search beyond the warrant’s scope. Such a purpose could always be hypothesized, as the plurality’s opinion illustrates.

Brief for Petitioner at 29-30, *Wilson* (No. 98-83). See also Reply Brief for Petitioners at 9, *Wilson v. Layne*, 526 U.S. 603 (1999) (No. 98-83) (referring to an “ever-growing number of post hoc rationalizations,” none of which were brought up in the district court).

36. See *Hanlon v. Berger*, 526 U.S. 808 (1999).

37. See *Wilson v. Layne*, 525 U.S. 981 (1998).

theories and under the Fourth Amendment, that have resulted when the media accompanies public authorities into private homes.

A. Fourth Amendment Respect for the Home

Historians generally attribute the development of the Fourth Amendment to the abuses suffered by the colonists at the hand of the English Crown.³⁸ King James I first authorized the issuance of writs of assistance, general warrants requiring no specific purpose, which permitted officers to enter private property and search with unlimited discretion for smuggled goods.³⁹ Though English common law resounded with the anthem of “[a] man’s home is his castle”⁴⁰ and regarded the home as sacrosanct,⁴¹ in reality, citizens could place little reliance on these lofty ideals.⁴² Even the homes of those who penned the very declarations we quote and rely on were subject to intrusion.⁴³

38. See JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 19-20 (1966); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13 (1937).

39. See LANDYNSKI, *supra* note 38, at 22. The warrant derived its name from the fact that the writ “charged all officers of the Crown with assisting [the customs officials who were executing the warrant].” LANDYNSKI, *supra* note 38, at 22. Other historians attribute the emergence of the writ to the reign of Charles II. See LANDYNSKI, *supra* note 38, at 22 n.8. For a brief yet helpful discussion of this topic, see LANDYNSKI, *supra* note 38, at 32 n.53.

40. See LANDYNSKI, *supra* note 38, at 20.

41. See LANDYNSKI, *supra* note 38, at 25. William Pitt proclaimed:

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter; all his force dares not cross the threshold of that ruined tenement!

LANDYNSKI, *supra* note 38, at 25.

42. See LANDYNSKI, *supra* note 38, at 34. James Otis denounced the writ as “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law-book.” LANDYNSKI, *supra* note 38, at 34. Originally, the writs targeted all heretical and seditious writings and books offensive to the state. See LANDYNSKI, *supra* note 38, at 22. The Court of Star Chamber, a judicial tribunal made powerful under Elizabeth, ensured the suppression of seditious printing. See LANDYNSKI, *supra* note 38, at 21-22. The Star Chamber conferred unlimited power to the Stationers’ Company, a private guild organization, to enforce the writs and seize and destroy all contraband materials, including the presses they were printed on. See LANDYNSKI, *supra* note 38, at 21. In return, the Stationers’ Company received monopolistic privileges to print official state materials. See LANDYNSKI, *supra* note 38, at 21. See also LASSON, *supra* note 38, at 23-27, for a more detailed discussion of the Star Chamber.

43. See LANDYNSKI, *supra* note 38, at 23. Even Lord Coke, who wrote the opinions

The authors of the Constitution responded to the arbitrary invasions of their homes by including the Fourth Amendment in the Bill of Rights, requiring that warrants be based on probable cause and that the places to be searched, and the persons or things to be seized, be particularly described.⁴⁴ The framers sought to provide enforceable safeguards that would uphold the protection of their homes espoused by common-law doctrine.⁴⁵ Since then, the Supreme Court has labored to determine what constitutes a reasonable search under the terms of the Fourth Amendment.⁴⁶ While recent decisions have seemingly chipped away at what some regard as Fourth Amendment rights,⁴⁷ the Court has steadfastly resolved to leave the integrity of the home intact.⁴⁸ Evident of the deference given to the home, the Court has consistently required a high degree of justification to warrant the intrusive search of a home.⁴⁹

of the court, was subject to the officious searches. See LANDYNSKI, *supra* note 38, at 23. As he lay dying, officers ransacked his study and library, appropriating his manuscripts and works. See LANDYNSKI, *supra* note 38, at 23. See also Michael N. Levy, Comment, *The Price of Fame: Should Law Enforcement Officers Who Permit Camera Crews to Film the Execution of a Warrant in a Private Home Be Held Liable for Civil Damages?*, 92 NW. U. L. REV. 1153, 1162 n.69 (1998) (crediting Lord Coke with the English maxim, "a man's home is his castle").

44. See U.S. CONST. amend. IV. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id. Indicative of the colonists' desire to avoid recurrences of past abuses, "six of the newly independent American states almost immediately wrote into their own constitutions provisions akin to those of the Fourth Amendment." LANDYNSKI, *supra* note 38, at 20.

45. See LANDYNSKI, *supra* note 38, at 20.

46. See Bond, *supra* note 1, at 836. "The Warren Court ushered in a general expansion of Fourth Amendment protections. This expansion, however, was followed by a period of retrenchment initiated by the Burger Court and carried on during Chief Justice Rehnquist's tenure." Bond, *supra* note 1, at 836. Furthermore, Bond claims the Court's treatment of the "reasonableness" test it employs has "undercut the right to privacy and give[n] rise to a shifting and confusing Fourth Amendment jurisprudence." Bond, *supra* note 1, at 837.

47. See Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174 (1988). Strossen asserts that recent Supreme Court decisions have "steadily reduced the scope of the privacy and liberty rights that the [F]ourth [A]mendment protects." *Id.*

48. See *Payton v. New York*, 445 U.S. 573, 585, 589-90 (1980). The Court opined that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* at 585.

49. See *Winston v. Lee*, 470 U.S. 753, 767 (1985). The Court stressed that "the Fourth Amendment's command that searches be 'reasonable' requires that when the State seeks to intrude upon an area in which our society recognizes a significantly

B. Media Intrusions into the Home

1. *The Controversy*

A new genre of television shows⁵⁰ emerged in the 1980s with the advent of the camcorder.⁵¹ Beginning with shows like *America's Funniest Home Videos*, where contestants vied for weekly cash prizes for funny or embarrassing moments caught on videotape,⁵² the American public was soon captivated by programming where even the most intimate details of other people's lives were subject to public scrutiny.⁵³ The term "reality television" was coined to describe these new shows where the viewing audience could watch such activities as police making arrests in citizen's homes, highway patrolmen in high-speed chases, and emergency rescue teams in action.⁵⁴

Scholars and reporters alike have shared concern regarding the American public's thirst for voyeurism and voyeuristic television.⁵⁵ After the reality television shows proved successful, more shocking programs soon followed, such as the trash talk shows like *Jenny Jones* and *Jerry Springer*, where people exposed their secrets and bared their souls to millions of viewers who craved this new form of entertainment.⁵⁶ Tabloid news shows appeared, engaging in sensational

heightened privacy interest, a more substantial justification is required to make the search 'reasonable.'" *Id.*

50. See *supra* note 2 for a description of these shows.

51. See McClurg, *supra* note 2, at 1021 & n.177.

52. See Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 275 n.13 (1999). *America's Funniest Home Videos* debuted in November 1989; by February 1990, it captured the first place slot in the national television ratings. See *id.*

53. See Valerie Milano, *Syndication Gets Real*, VIDEO AGE INT'L, Jan. 1, 1999, at 30. Since the February 1997 debut of *World's Scariest Police Chases* on the Fox network, Fox has cornered the reality TV market. See *id.* Fox's successes include *Cops*, *Cops 2*, *When Animals Attack*, *When Disasters Strike*, *When Stunts Go Bad*, *World's Scariest Police Shootouts*, and *World's Scariest Police Chases*, combining for an overwhelming viewing audience of over 37 million. See *id.*

54. See McClurg, *supra* note 2, at 1013-14. Professor McClurg asserts "the goal of these programs is to compress as much human suffering and failing as possible into the allotted thirty- or sixty-minute time slot." McClurg, *supra* note 2, at 1013.

55. See Calvert, *supra* note 52, at 274 & n.9. While the word voyeurism usually carries with it a sexual connotation, Professor Calvert uses the term in the more generic sense of the "urge to gaze at the alien and the intimate." Calvert, *supra* note 52, at 274 & n.9. *Nightline* host Ted Koppel warned graduates in his 1998 commencement address at Stanford University that, "America was becoming a nation of electronic voyeurs whose capacity for dialogue is a fading memory." Calvert, *supra* note 52, at 275 n.13.

56. See Calvert, *supra* note 52, at 277. Professor Calvert claims these shows "often are about little more than watching others' lives unfold—frequently, in fact, unraveling

ist broadcasting.⁵⁷ Even traditional local news broadcasts have been accused of blurring the lines between news and entertainment.⁵⁸ Critics feel the networks have responded with a simple supply and demand analysis; the public demands this form of voyeuristic entertainment and, for as long as it remains profitable, the networks supply the programming.⁵⁹

2. *The First Amendment Balance*

The First Amendment expressly guarantees the right of a free press.⁶⁰ However, whereas the founding fathers advocated a free press as a means of political thought and reform,⁶¹ commentators suggest that vision has been distorted to accommodate even the most intrusive acts in furtherance of the public's "right to know."⁶² The question arises, then, as to how far the law will go in protecting the rights of the media to satisfy the public's demand for invasive, voyeuristic entertainment. The Supreme Court ruled, two decades ago, that the First Amendment does not create for the press a greater right of access to information than that accorded to the general public.⁶³ However, the Court has also determined that newsgathering is not without First Amendment protection.⁶⁴

in front of our eyes." Calvert, *supra* note 52, at 277.

57. See Calvert, *supra* note 52, at 277 & n.19. *Inside Edition* won six journalism awards for investigative reporting in the 1996-97 season alone. See Calvert, *supra* note 52, at 277 & n.19.

58. See Calvert, *supra* note 52, at 286.

59. See McClurg, *supra* note 2, at 1017. Professor McClurg places the responsibility for this boon on willing American consumers. See McClurg, *supra* note 2, at 1017. See also Quentin Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1108-09 (1997) (applying a supply and demand analysis).

60. See U.S. CONST. amend. I (providing, in relevant part, that "Congress shall make no law abridging the freedom of speech or of the press").

61. See *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). "The constitutional safeguard . . . was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

62. See Gary Williams, *The Right of Privacy Versus the Right to Know: The War Continues*, 19 LOY. L.A. ENT. L.J. 215, 215 (1999).

63. See *Houchins v. KQED*, 438 U.S. 1, 16 (1978) (holding that the First Amendment does not create for the press a right of access to information "different from or greater than that accorded the public generally").

64. See *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). See also Larissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 186 (1998) (naming *Branzburg* a "pivotal case" in newsgathering). Professor Lidsky explains that *Branzburg* was not really about

While the media possesses a constitutional right to gather news, the Court has held that the right is subordinate to the laws that govern all citizens,⁶⁵ even if these laws cause the media to experience a greater burden in its newsgathering.⁶⁶ In fact, some scholars assert that the lack of judicial sympathy that existed towards media ride-alongs, in particular, has been converted into overt hostility.⁶⁷

3. *Home Invasions by the Media Accompanying Public Authorities*

a. Cases based on the tort of intrusion

Plaintiffs in cases against the press have increasingly challenged the media's pre-publication newsgathering conduct under a variety of state tort theories.⁶⁸ The recent media ride-along cases have focused primarily upon claims for trespass and invasion of privacy.⁶⁹

Though considered by many to be a fundamental right, the Constitution makes no reference to a right of privacy.⁷⁰ The first legal

newsgathering methods. *See id.* According to Lidsky, *Branzburg* was a "reporter's privilege" case, in that the Court held the First Amendment does not protect subpoenaed reporters from withholding information obtained from confidential sources when called before a criminal grand jury. *See id.* *Branzburg* is nonetheless important for newsgathering, Lidsky stresses, because the remainder of the Court's opinion seems to indicate that while a constitutional right to gather news may exist, that right is going to be seen as "quite limited in scope." *See id.*

65. *See Branzburg*, 408 U.S. at 684. "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* *See also* *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). In *Dietemann*, the court observed, "[T]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office." *Id.*

66. *See Branzburg*, 408 U.S. at 682. The court postulated 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. *See id.* *See also* Lidsky, *supra* note 64, at 187 (simplifying the court's holding to "[i]f the general public has a right to use particular methods to gather news, so does the press; if the public does not, then neither does the press.>").

67. *See* Victor A. Kovner et al., *Recent Development in Newsgathering, Invasion of Privacy and Related Torts*, 540 PRAC. L. INST. 445, 456 (1998).

68. *See id.* at 451.

69. *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, 416 (1999).

70. *See* ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* i. The authors gave expression to the inherent belief passed down by our ancestors that if a man's home is, indeed, his castle, it stands to reason "that man is king of that domain and, by extension, the whole of his private life." *Id.*

recognition of a right to privacy came under tort law when Samuel D. Warren and Louis D. Brandeis penned their seminal article in 1890 calling on courts to provide a tort remedy for invasions of what they described as the "right to be let alone."⁷¹ Written during a period of "yellow journalism,"⁷² Warren and Brandeis were concerned that new technological inventions of the time posed a threat to individual privacy.⁷³

Over half a century later, Dean William Prosser, in his own famous law review article on the subject,⁷⁴ surveyed the cases recognizing tort claims for invasion of privacy and asserted that "invasion of privacy" actually constitutes four distinct torts: intrusion, public disclosure of private facts, false light, and appropriation.⁷⁵ Of the four, many agree that intrusion provides the most likely remedy for plaintiffs whose privacy has been invaded by intrusive newsgathering.⁷⁶ Intrusion is aimed specifically at protecting one's sphere of privacy, whether physical or psychological, and covers a wide array of newsgathering techniques now employed.⁷⁷ In addition, intrusion does not require

71. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). The authors have often been quoted for their remarkable declaration: "The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?" *Id.* at 220.

72. See BLACK'S LAW DICTIONARY 1616 (6th ed. 1990) (defining "yellow journalism" as "a type of journalism which distorts and exploits the news by sensationalism in order to sell copies of the newspapers or magazines").

73. See Warren & Brandeis, *supra* note 71, at 195. The authors spoke almost prophetically of today's voyeuristic thirsts when they wrote, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" Warren & Brandeis, *supra* note 71, at 195. See also Burrows, *supra* note 59, at 1085 (listing the camera, the printing press, tabloid papers, and the telephone as new technological inventions at that time). See also Williams, *supra* note 62, at 216 (suggesting that today the battle for privacy is "being waged along new technological and sociological fronts"). In support, Professor Williams claims "[t]he explosion of reality programming with its insatiable appetite for visual and aural images of exciting, bizarre, and tragic human occurrences threaten[s] to intrude on the privacy of ordinary citizens [in an unprecedented way]." Williams, *supra* note 62, at 217.

74. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

75. See *id.* at 389. See also Lidsky, *supra* note 64, at 204 n.159 (noting that Dean Prosser's work has been pivotal to the development of the law of privacy and instrumental in the drafting of the Restatement (Second) of Torts).

76. See Lidsky, *supra* note 64, at 203; Elsa Y. Ransom, *No Place for "Law Enforcement Theatricals"—The Outlawing of Police/Media Home Invasions in Ayeni v. Mottola*, 16 LOY. L.A. ENT. 325, 345 (1995).

77. See RESTATEMENT (SECOND) OF TORTS § 652B (1977), which reads: "[O]ne who

publication as an element of the tort.⁷⁸ Because it focuses on newsgathering behavior rather than publication, intrusion is able to overcome otherwise insurmountable First Amendment concerns.⁷⁹

Prosser's definitions of the four invasion of privacy torts were embraced by the Restatement (Second) of Torts and have been generally recognized by the courts.⁸⁰ However, because the construction, interpretation, and application of tort law is within each individual state's discretion, inconsistent decisions have arisen, and the issue has been left in an overall state of confusion.⁸¹

Perhaps the most prominent case recognizing a tort claim for intrusion arising from media intrusions into the home is *Miller v. National Broadcasting Co.*⁸² When Dave Miller collapsed one evening in his Los Angeles home, a neighbor called 911 and soon paramedics, with a news crew in tow, were working to revive Miller.⁸³ Dave Miller's wife, Brownie, was standing in the hallway and did not even notice the news crew in the confusion of the moment.⁸⁴ Three weeks later, she was horrified as NBC began repeatedly broadcasting the video footage of the paramedics' unsuccessful attempts to save her husband's life.⁸⁵ Brownie Miller and her daughter brought suit against the television station and the producer for invasion of privacy.⁸⁶

The media representatives defended their actions by claiming the focus of the story was on the paramedics and that the victims were only incidental.⁸⁷ They argued that entries into other homes presented no problems and conveyed an attitude that had Mrs. Miller wanted them

intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.* "[T]he tort's initial purpose . . . was to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights." Lidsky, *supra* note 64, at 205.

78. See RESTATEMENT (SECOND) OF TORTS, *supra* note 77, § 652B cmt. b.

79. See Lidsky, *supra* note 64, at 204.

80. See McClurg, *supra* note 2, at 998 & n.41 (citing cases from 28 states adopting all four torts).

81. See ALDERMAN & KENNEDY, *supra* note 70, at 156.

82. 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).

83. See *Miller*, 232 Cal. Rptr. at 674. The television crew, led by producer Ruben Norte, had been riding with the paramedics in preparation for a report on emergency medical services in the Los Angeles area. See *id.* at 673.

84. See *id.* at 674.

85. See *id.*

86. See *id.* at 670.

87. See *id.* at 673. Norte stated that his intent was "to film and document whatever [the paramedics'] work was and whatever it happened to be when we filmed." *Id.*

out, she could have asked them to leave.⁸⁸ The trial court accepted this viewpoint and dismissed the claims against the media.⁸⁹

The California Court of Appeals, however, took a dim view of the media actions. Concentrating on whether the media's actions were highly offensive to a reasonable person, the court declared that the crew had clearly intruded into Brownie Miller's private space as she witnessed her husband's dying moments.⁹⁰ The fact that neither Brownie Miller nor the other referenced residents objected to the media presence only proved to the court the confusion that existed pertaining to this area of the law.⁹¹

An earlier New York case, *Anderson v. WROC-TV*,⁹² recognized a claim for trespass when a county humane society investigator invited three television stations to accompany him into a private home to witness the execution of a search warrant.⁹³ The television stations unsuccessfully raised a defense that entry was impliedly authorized by custom and practice.⁹⁴ Recalling William Pitt's famous oratory regarding the sanctity of the home, the court declined to recognize an implied consent defense, whether created by law or custom, that would give a television station a license to enter a place where even the sovereign could not.⁹⁵

88. See *Miller*, 232 Cal. Rptr. at 673 (testifying that he had entered approximately 10 to 15 private residences without consent and, of the half of those who inquired about his business, none had objected to his presence).

89. See *id.* at 672.

90. See *id.* at 679. The court, disturbed by the media attitude and actions in this case, reasoned that "reasonable people could construe the lack of restraint and sensitivity NBC producer Norte and his crew displayed as a cavalier disregard for ordinary citizens' rights of privacy, or, as an indication that they considered such rights of no particular importance." *Id.*

91. See *id.* at 682. The court claimed that such behavior "illustrates, perhaps, a widespread loss of certainty about where public concerns end and private life begins, and a loss of personal identity manifested by individual members of the public when confronted by aggressive media representatives." *Id.* In an eloquent summation of the tort of intrusion, the court continued, "Personal security in a society saturated daily with publicity about its members requires protection not only from governmental intrusion, but some basic bulwark of defense against private commercial enterprises which derive profits from gathering and disseminating information." *Id.*

92. 441 N.Y.S.2d 220 (N.Y. App. Div. 1981).

93. See *Anderson*, 441 N.Y.S.2d at 222. The warrant authorized the investigator to seize any animals "found to be in a confined, crowded or unhealthy condition or in unhealthy or unsanitary surroundings or . . . not properly cared for or without sustenance, food and drink." *Id.*

94. See *id.* at 223.

95. See *id.* at 226. The court opined that "[i]f the news media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs

However, an Ohio court recently granted summary judgment to media defendants confronted with tort claims in *Reeves v. Fox Television Network*.⁹⁶ Police officers asked Willie Reeves if they could enter his home prior to arresting him.⁹⁷ A television crew from the show *Cops* entered along with the police, videotaped, and later broadcast the encounter and arrest.⁹⁸ Reeves sued Fox for invasion of privacy by intrusion and for trespass.⁹⁹

The court accepted the media's defense that Reeves had consented to the media entry into his home.¹⁰⁰ Because Reeves opened the door to the police, acknowledged the presence of the crew, and did not ask the cameraman to leave, the court concluded that consent had been given.¹⁰¹ Finding no facts that indicated an intrusion or trespass had occurred, the court granted summary judgment in favor of the media.¹⁰²

In *Magenis v. Fisher Broadcasting*,¹⁰³ a television crew accompanied a police raid into a home on a search warrant for stolen vehicles and narcotics.¹⁰⁴ The Oregon Court of Appeals declined to rescind a jury instruction that demanded a high degree of offensiveness for the jury to find an intrusion had occurred.¹⁰⁵ Though clearly on the Magenis property without permission, the court held that fact insufficient for an invasion of privacy claim.¹⁰⁶ Interpreting the requirement of section 652B of the Restatement (Second) of Torts that the intrusion be highly offensive to a reasonable person, the court concluded that the jury might find other factors, beyond merely entering the Magenis property, relevant in deciding whether the intrusion met that standard.¹⁰⁷

of assistance which were so odious to the American colonists." *Id.*

96. 983 F. Supp. 703 (N.D. Ohio 1997).

97. *See Reeves*, 983 F. Supp. at 707.

98. *See id.*

99. *See id.*

100. *See id.* at 712.

101. *See id.* at 712-13. The court considered it a "novel position" advanced by Reeves that "unless a homeowner gives specific oral consent to each person in a group of people that enter his home . . . every person after the first person to enter the home is a trespasser or intruder despite the fact that the homeowner opened his door and admitted them; was aware of their presence; and did not object." *Id.* *See also* Baugh v. CBS, Inc., 828 F. Supp. 745 (N.D. Cal. 1993) (stating that California law holds consent to be an absolute defense to intrusion, whether or not fraudulently induced).

102. *See Reeves*, 983 F. Supp. at 714.

103. 798 P.2d 1106 (Or. Ct. App. 1990).

104. *See Magenis*, 798 P.2d at 1107-08.

105. *See id.* at 1110.

106. *See id.*

107. *See id.* (claiming "the extent of the intrusion, the context, conduct and circumstances surrounding the intrusion, the defendant's motives, the setting into which defendant intruded and the plaintiff's expectation of privacy" might also be considered

According to the court, trespass was only one factor to be considered in finding the conduct “highly offensive.”¹⁰⁸

The difficulty in bringing tort cases against the media, as illustrated by the above cases, is that what is regarded as “highly offensive” seemingly varies from state to state, rendering inconsistent decisions on like causes of action.

b. Fourth Amendment cases against government officials

The chief aim of the Fourth Amendment is to protect individuals from arbitrary government intrusion.¹⁰⁹ When law enforcement officers invite the media into a private home during the execution of a warrant, the constitutional rights to privacy arising under the Fourth Amendment are thus challenged.¹¹⁰ However, prior to the 1992 events of *Wilson*, no judicial opinion had held that media ride-alongs into the home were a violation of the Fourth Amendment.¹¹¹ In fact, the sole reported decision at that time dealing with the issue found the conduct not unreasonable, though the court did not engage in a Fourth Amendment analysis to reach its conclusion.¹¹²

Before *Wilson* reached the United States Supreme Court, a series of cases focusing on the constitutional issue came before the district and appellate courts.¹¹³ One of the more well-known cases, *Ayeni v. Mottola*,¹¹⁴ arose after a Secret Service agent allowed a CBS crew into a home to videotape the execution of a warrant.¹¹⁵ The agents had reason

by the jury).

108. *See id.*

109. *See* Henry H. Rossbacher & Tracy W. Young, *Law Enforcement Theatricals: Privacy in Peril*, PRAC. L. INST., June-July 1998, at 54. Rossbacher served as co-counsel in both the *Ayeni* and *Berger* cases. *See infra* notes 114-127 and 138-149 and accompanying text for a discussion of these cases.

110. *See* Rossbacher, *supra* note 109, at 54.

111. *See Wilson*, 526 U.S. at 616.

112. *See Wilson*, 526 U.S. at 616, 622 n.3 (Stevens, J., concurring in part and dissenting in part) (quoting *Prahl v. Brosamle*, 295 N.W.2d 768, 780 (Wis. Ct. App. 1980)). In *Prahl*, the court held that it would not imply consent as a matter of law for media representatives entering another’s property for a newsworthy event without the owners’ consent. *See id.* at 622 n.3 (Stevens, J., concurring in part and dissenting in part). The case did not, however, embark on a detailed constitutional analysis. *See id.* at 616. The Court also referred to *Moncrief v. Hanton*, 10 Media L. Rptr. 1620 (N.D. Ohio 1984), and *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (S.D. Cal. 1980), unpublished decisions upholding the reasonableness of a search on “unorthodox non-Fourth Amendment right to privacy theories.” *Id.*

113. *See Wilson*, 526 U.S. at 618.

114. 35 F.3d 680 (2d Cir. 1994).

115. *See Ayeni*, 35 F.3d at 683. The producer of the weekly news program *Street*

to believe Babatunde Ayeni was involved with credit card fraud.¹¹⁶ Although Ayeni was not home at the time of the raid, the news crew proceeded to film the Secret Service interrogation of his wife over her objections and while her young son stood behind her crying.¹¹⁷ Personal effects were searched and recorded on film, all while the agent narrated the details of the alleged credit card fraud.¹¹⁸

On interlocutory appeal, the United States District Court for the Second Circuit affirmed the trial court's findings that Agent Mottola had violated the Fourth Amendment proscription against unreasonable search and seizures.¹¹⁹ Recognizing the high degree of privacy afforded the home,¹²⁰ the court reiterated the long-standing principle that, when entry into a home is authorized by a warrant, the officers are limited to the express terms of the warrant or to actions that reasonably relate to the objectives of the warrant or other legitimate law enforcement purposes.¹²¹ The court concluded that Mottola exceeded these "well-established [constitutional] principles" by bringing third parties into the Ayeni home who were neither authorized by the warrant nor serving a legitimate law enforcement purpose there.¹²² Furthermore, the court denounced Mottola's actions as exploitative of the very privacy value the Fourth Amendment sought to protect.¹²³

The court noted that there were no reported decisions expressly forbidding agents from inviting the press into the home of one being

Stories led the news crew. *See id.* at 683 n.1.

116. *See Ayeni*, 35 F.3d at 683.

117. *See id.* Mrs. Ayeni, dressed only in a nightgown, tried to avoid the camera by shielding her face with a magazine. *See id.* When she attempted to cover her son's face with a magazine, Agent Mottolo grabbed the magazine from her hand, threw it on the floor, and told Mrs. Ayeni and her son to "shut up." *See id.* The agent then directed the cameraman to aim directly at Mrs. Ayeni's face while he interrogated her. *See id.*

118. *See id.*

119. *See id.*

120. *See id.* at 685. The court asserted, "The home has properly been regarded as among the most highly protected zones of privacy . . . afford[ing] the most stringent Fourth Amendment protection." *Id.*

121. *See id.* at 685 & n.6 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). The court noted that "[i]t has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with [the] reasonable exercise of law enforcement duties." *Id.* at 686. When warrants are necessary, the court requires that a law enforcement officer's invasion of the privacy of the home be restricted to either the express terms of the warrant or reasonable actions related to the execution of the warrant. *See id.*

122. *See Ayeni*, 35 F.3d at 686.

123. *See id.* The court directed this scathing remark to the defendants: "A private home is not a soundstage for law enforcement theatricals." *Id.*

searched when the Secret Service allowed the media to invade the Ayeni home.¹²⁴ However, despite the absence of a case on point, the court held that no officer could have found such conduct to be reasonable.¹²⁵ A federal statute, 18 U.S.C. § 3105, guided the court in its decision.¹²⁶ Because CBS did not assist the officers, but the officers did assist CBS in procuring video materials, the Second Circuit found the search to be constitutionally unreasonable.¹²⁷

Two years later, the United States District Court for the Eighth Circuit reviewed an alleged violation of Fourth Amendment rights in *Parker v. Boyer*.¹²⁸ Police invited reporters into a home to record a weapons investigation of suspect Travis Martin;¹²⁹ the reporters planned to use the video as part of a news story concentrating on police efforts to eradicate illegal weapons.¹³⁰ Gaining entry through an unlocked front door, the police proceeded to execute the warrant and found two weapons, along with a substance thought to be cocaine, while the news crew filmed the search.¹³¹

The appellate court reversed the trial court's grant of summary judgment against the officers on grounds of qualified immunity, and affirmed the district court's judgment in favor of the television station.¹³² Finding no case on point, and receiving no specific guidance from the

124. *See id.*

125. *See id.*

126. *See id.* at 687; *see also* 18 U.S.C. § 3105 (1994). The statute provides:

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1994). *See also* Ransom, *supra* note 76, at 335 (explaining that the court recognized that the statute was not controlling authority on the scope of the Fourth Amendment).

127. *See Ayeni*, 35 F.3d at 688.

128. 93 F.3d 445 (8th Cir. 1996).

129. *See Parker*, 93 F.3d at 446-47.

130. *See id.* at 446. *See also* Christopher A. Rothe, Note, *The Legal Future of "Reality" Cop Shows: Parker v. Boyer Dismisses § 1983 Claims Against Police Officers and Television Stations Jointly Engaged in Searches of Homes*, 5 VILL. SPORTS & ENT. L.J. 481, 485 (1998) (noting that Martin resided at the home of Sandra Parker and her sixteen-year-old daughter).

131. *See Parker*, 93 F.3d at 447. KSDK subsequently broadcast the tapes of the search of the Parker's residence—showing the teenage daughter, wearing only a nightgown and being held at gunpoint—on several of its news programs. *See* Bond, *supra* note 1, at 828. The weapons turned out to be legally registered, the substances were never analyzed, and criminal charges were never filed. *See* Bond, *supra* note 1, at 828. The Parkers subsequently brought suit against both the police officers and the media who entered their home. *See Parker*, 93 F.3d at 446.

132. *See Parker*, 93 F.3d at 446.

Supreme Court, the Eighth Circuit claimed it was not “self-evident” that the police were violating any Fourth Amendment rights by allowing the media to enter a private residence during the execution of a warrant.¹³³ Since *Ayeni* was decided after the events in *Parker* transpired, the court viewed the Second Circuit decision as, at most, only the beginning of a trend in the law and not law that was clearly established.¹³⁴

In a concurring opinion, Judge Rosenbaum criticized the analysis of the court, insisting that the first step in a qualified immunity analysis, that of first determining the existence of a constitutional right, had been overlooked.¹³⁵ Consistent with *Ayeni*, Judge Rosenbaum concluded that police officers executing a warrant violate a resident’s Fourth Amendment rights when they allow the media to enter a private citizen’s home without consent of the resident.¹³⁶ Writing separately, Judge Richard Arnold stated that he, too, would find constitutional rights had been violated because of the joint police and media action.¹³⁷

In yet another decision, *Berger v. Hanlon*,¹³⁸ the United States Court of Appeals for the Ninth Circuit overturned a district court’s findings and concluded that federal agents who permitted the media to accompany them when they executed a search warrant on a ranch violated the Fourth Amendment.¹³⁹ Former employees of Mr. Berger had told United States Fish and Wildlife Service agents that they had seen Berger previously shooting or poisoning eagles.¹⁴⁰ Hearing of a possible investigation, representatives from Cable News Network (CNN) and Turner Broadcasting System (TBS) approached the federal agents for permission to film the discovery of any evidence the agents might find.¹⁴¹ The parties entered into a contract;¹⁴² however, agents failed to

133. *See id.* at 447.

134. *See id.*

135. *See id.* at 448 (Rosenbaum, J., concurring).

136. *See id.* (Rosenbaum, J., concurring).

137. *See id.* at 448-49 (Arnold, C.J., concurring in part and dissenting in part). According to Judge Arnold, the news crew came with the police and entered with the police. *See id.* at 449. “They did not simply happen along the street at the time that a search was being conducted.” *Id.*

138. 129 F.3d 505 (9th Cir. 1997).

139. *See Berger*, 129 F.3d at 507-08.

140. *See id.* at 508. The Bergers, an elderly couple, lived on and operated a 75,000-acre ranch in Montana. *See id.*

141. *See id.* at 508. CNN and TBS wanted video footage of the search for broadcast on their environmental television shows *Earth Matters* and *Network Earth*. *See id.* at 507.

142. *See id.* at 507-08.

disclose this fact when seeking a search warrant from the magistrate judge.¹⁴³

A convoy of ten vehicles containing agents and film crews entered the Berger property.¹⁴⁴ One of the agents wore a concealed wire that transmitted his conversations with Berger to the media, even those made inside the Berger residence.¹⁴⁵ The media later broadcast both video footage and the sound recordings made from within the home.¹⁴⁶

In an opinion reminiscent of *Ayeni*, the court found the agents and media, acting together, had infringed on the Berger's expectation of privacy when they illicitly recorded the conversations within the home.¹⁴⁷ The court cited a Fourth Circuit decision where officers violated the Fourth Amendment by bringing along an employee of a private corporation on a search warrant, when that employee was acting for the corporation's purposes and not in aid of the officers.¹⁴⁸ To the Ninth Circuit, the joint effort between the officers and the media presented a search that was conducted for purposes other than that of law enforcement.¹⁴⁹

In examining the cases that have arisen regarding the constitutional right to privacy, an important point to note from Justice Stevens's dissent in the *Wilson* case is that each of these decisions agreed on the merits of the constitutional issue.¹⁵⁰ According to Justice Stevens, the

143. See *id.* at 508-09. Apparently, the magistrate judge "[possessed] no knowledge of the planned media participation in the search . . . [nor did he authorize] videotaping of the search for broadcast purposes." *Id.*

144. See *id.* at 509.

145. See *Berger*, 129 F.3d at 509. United States Fish and Wildlife Service Special Agent Joel Scrafford was wired with a hidden microphone that fed live audio to the CNN crew located in the van. See *id.* Neither Agent Scrafford nor anyone else informed the Bergers of the microphone or that any visible cameras belonged to the media. See *id.*

146. See *id.*

147. See *id.* at 511-12 (citing *Wilson*, 110 F.3d 1071 (4th Cir. 1997) (discussed *supra* in notes 8-37 and accompanying text); *Parker*, 93 F.3d 445 (8th Cir. 1996) (discussed *supra* in notes 128-137 accompanying text); and *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996) (allowing a search to stand where the warrant expressly authorized photography and videotaping)). The court contrasted the conduct of the agents and media in those cases with the present actions (and made this stinging comment): "In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case." *Id.* at 512.

148. See *id.* at 511. The historical foundations of the Fourth Amendment proved to the court that "[t]he right to be free from government officials facilitating a private person's general search was 'manifestly included' within the 'core' Fourth Amendment protection." *Id.* (quoting *Buonocore v. Harris*, 65 F.3d 347, 357 (4th Cir. 1995)).

149. See *id.* at 510.

150. See *Wilson*, 526 U.S. at 619 n.1 (Stevens, J., concurring in part and dissenting in part).

split that existed between the circuits dealt solely with the issue of qualified immunity.¹⁵¹

C. Qualified Immunity

1. *Background and Development*

If a search or seizure violates the Fourth Amendment, an officer sued for damages under 42 U.S.C. § 1983 or *Bivens* may still find relief by way of qualified immunity.¹⁵² *Wood v. Strickland*¹⁵³ first set the standard in determining when a plaintiff could claim a defense of qualified immunity.¹⁵⁴ In *Strickland*, the United States Supreme Court set forth a subjective test that focused on whether the official acted in good faith.¹⁵⁵ Seven years later, the Court changed its position in *Harlow v. Fitzgerald*,¹⁵⁶ replacing the subjective inquiry with an objective test.¹⁵⁷ Under *Harlow*, an officer must show that the rights claimed by the plaintiffs were not "clearly established" at the time of the action, or that it was "objectively reasonable" for the agent to believe that the acts did not violate "clearly established" guidelines.¹⁵⁸ Later, the Court added an additional requirement to the qualified immunity test in *Anderson v. Creighton*.¹⁵⁹ The Court mandated that the right a government official is

151. See *id.* (Stevens, J., concurring in part and dissenting in part).

152. See SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.1, at 8-4 (4th ed. 1999). Section 1983 contains no provision for defenses or immunities, but Supreme Court decisions have extended this protection to certain entities. See *id.* at 8-4. See also, e.g., *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (mental hospital administrators); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (executive officials); *Pierson v. Ray*, 386 U.S. 547 (1967) (police officers).

153. 420 U.S. 308 (1975).

154. See *id.*

155. See *id.* at 321. The Court claimed that the appropriate standard in a qualified immunity analysis contained elements of both objective and subjective good faith. See *id.*

156. 457 U.S. 800 (1982). See also Bond, *supra* note 1, at 846 (positing that the doctrine of qualified immunity set forth in *Harlow* "seeks to promote more effective and decisive state action by relieving public officials who perform discretionary duties from the fear of civil liability").

157. See Bond, *supra* note 1, at 844.

158. See *Harlow*, 457 U.S. at 818. See also Bond, *supra* note 1, at 845 (stressing that the Court is not reformulating a subjective analysis, even when determining the objective legal reasonableness of an action requires inquiry into the information possessed by the officers in question).

159. 483 U.S. 635 (1987).

alleged to have violated must be established with a degree of specificity so that a reasonable officer would understand that his actions violate that right.¹⁶⁰

2. *Split in the Circuits*

The Second and Ninth Circuits held in *Ayeni* and *Berger*, respectively, that the officers involved were not protected under a qualified immunity defense.¹⁶¹ Both courts seemed to look to general, abstract principles established by the Fourth Amendment to guide their decisions.¹⁶² The defendant officers did, however, receive protection under the qualified immunity defense from the Fourth and Eighth Circuits in *Wilson* and *Parker*.¹⁶³ To those circuits, the law was uncertain, presenting no clearly established guidelines for officers to follow.¹⁶⁴ Such was the state of law when *Wilson* came before the Supreme Court.

160. See *Anderson*, 483 U.S. at 640 (explaining that the right must be established in a "particular sense," such that a reasonable officer would be aware that his actions violated that right). See also Casey Tourtillot, Note, *Wilson v. Layne: The Growing Relationship Between Law Enforcement and the Media: Should It Extend into Private Homes?*, 67 UMKC L. REV. 445, 449 (1998) (explaining that the right allegedly violated must be defined at a level neither too general nor too specific). "If the Court defines the right at the highest level of abstraction—e.g., the right to be free from violations of the Constitution—then every right is clearly established; all officers should know that they cannot violate the Constitution." *Id.* If, on the other hand, a right is defined too narrowly, requiring specific fact patterns, Tourtillot claims the right could never be considered clearly established. See *id.*

161. See *Ayeni*, 35 F.3d at 686; *Berger*, 129 F.3d at 511.

162. See *supra* notes 119-24, 147-48 and accompanying text.

163. See *Wilson*, 141 F.3d at 119; *Parker*, 93 F.3d at 447.

164. See *Wilson*, 141 F.3d at 117. Referring to the split in circuit court decisions, the *Wilson* court reasoned that, "given that reasonable jurists can differ on this question, we cannot say that the law was so clear that a reasonable officer must have known his actions transgressed constitutional bounds." *Id.* Likewise, the *Parker* court could not say the kind of conduct the police engaged in was a violation of clearly established constitutional principles of which the officers should have known. See *Parker*, 93 F.3d at 447. Even given two cases decided after the events of this case, the court saw them only, at most, as an indication of the beginnings of a trend in the law and not clearly established guidelines. See *id.*

IV. REASONING

In *Wilson v. Layne*,¹⁶⁵ the United States Supreme Court held that police bringing members of the media or other third parties into a home during the execution of a warrant is a violation of the Fourth Amendment when those third parties are not present to aid in the execution of the warrant.¹⁶⁶ The Court further held, however, that the officers were entitled to qualified immunity because such a right was not clearly established in 1992 at the time the officers undertook the searches.¹⁶⁷

A. Majority Opinion

1. *Fourth Amendment Violation*

The Court commenced its Fourth Amendment analysis with a famous observation made by an English court almost four centuries ago that “the house of every one is to him as his castle and fortress, as well for his defence [sic] against injury and violence, as for his repose.”¹⁶⁸ This respect for the home led William Blackstone to comment, “the law of England has so particular and tender a regard to the immunity of a man’s house, that it stiles it his castle, and will never suffer it to be violated with impunity.”¹⁶⁹ The Court noted how this principle regarding the sanctity of the home had become so established in the minds of our forefathers as to make its way into the text of the Fourth Amendment.¹⁷⁰ The Court further observed that it was this respect for the home, embedded in historical traditions and embodied in our constitutional framework, that had led the Court in prior decisions to deny police entry into the home absent a warrant or exigent circumstances.¹⁷¹

165. 526 U.S. 603 (1999).

166. See *Wilson*, 526 U.S. at 614. Chief Justice Rehnquist wrote the majority opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which Justices O’Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer joined. See *id.* at 605. Justice Stevens wrote an opinion concurring in Parts I and II and dissenting in Part III. See *id.* at 618 (Stevens, J., concurring in part and dissenting in part).

167. See *Wilson*, 526 U.S. at 606.

168. See *id.* at 609-10 (quoting *Semayne’s Case*, 77 Eng. Rep. 194, 195 (1604)).

169. See *id.* at 610 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *223 (1765-69)).

170. See *supra* notes 38-45 and accompanying text.

171. See *Wilson*, 526 U.S. at 610-11. In support of this belief, the Court cited to *Payton v. New York*, 445 U.S. 573 (1980), which held that, absent a warrant or exigent

The Court did not deny that the officers in this case had due authority to enter the Wilson home to execute the warrant.¹⁷² That authority did not extend, however, to allowing the media representatives to enter the home with them, according to the Court.¹⁷³ Recalling earlier decisions, the Court explained that a search becomes unreasonable under the Fourth Amendment if the scope of the search exceeds the terms of a validly issued warrant.¹⁷⁴ The Fourth Amendment mandates that any activity conducted in the execution of a warrant must properly relate to the objectives of the authorized intrusion.¹⁷⁵

The Court expressed its concern that the media presence in this case bore any relation to the objectives of the lawful warrant.¹⁷⁶ Because the officers admitted that the reporters were not present for the purpose of aiding the officers in the execution of the warrant,¹⁷⁷ the media presence was not related to the objective of the warrant, i.e., the apprehension of Dominic Wilson.¹⁷⁸ The Court contrasted this case with cases where the presence of third parties is necessary to the execution of a warrant, as, for example, to identify stolen goods.¹⁷⁹ The media in this case served no such purpose.¹⁸⁰

In concluding its constitutional analysis, the Court discounted several arguments advanced by the marshals and deputy sheriffs that the presence of the media in the Wilson home served legitimate law enforcement purposes.¹⁸¹ First, the officers argued that to further law enforcement missions, officers should be given reasonable discretion in allowing media ride-alongs when executing warrants.¹⁸² While the

circumstances, police could not enter a home to make an arrest. *See id.* at 611.

172. *See Wilson*, 526 U.S. at 611.

173. *See id.*

174. *See id.* (citing *Horton v. California*, 496 U.S. 128 (1990)).

175. *See id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987)). *See also* *Maryland v. Garrison*, 480 U.S. 79 (1987) (stating that “the purposes justifying a police search strictly limit the permissible extent of the search”).

176. *See Wilson*, 526 U.S. at 611.

177. *See* Brief of Respondents Mark A. Collins, Eric E. Runion, and Brian E. Roynestad at 25, *Wilson v. Layne*, 526 U.S. 603 (1999) (No. 98-83).

178. *See Wilson*, 526 U.S. at 611.

179. *See id.* at 611-12 (citing *Boyd v. United States*, 116 U.S. 616 (1886)).

180. *See id.*

181. *See id.* at 612-14. *See also* Tourtillott, *supra* note 160, at 447 & n.22 (explaining the Court’s directive in *Michigan v. Summers*, 452 U.S. 692, 702 (1981), that an officer can “take only those actions authorized by the warrant, unless he can show that [the actions in question] are reasonably related to a legitimate law enforcement interest or are necessary to ensure safety”).

182. *See Wilson*, 526 U.S. at 612; Brief for Federal Respondents at 14, *Wilson* (No. 98-83).

Court admitted that some unspecified law enforcement objectives might be met by the presence of the media, such "generalized law enforcement objectives" did not outweigh the Fourth Amendment interests at stake.¹⁸³ Furthermore, the Court stressed that the officers' claim ignored the right to residential privacy inherent in the Fourth Amendment.¹⁸⁴

Next, the Court addressed a First Amendment argument that allowing the media presence would facilitate accurate reporting while furthering the law enforcement purpose of publicizing the government's efforts to combat crime.¹⁸⁵ The Court, in essence, applied a balancing test between competing First and Fourth Amendment concerns. While the Court acknowledged the importance of the media in keeping the public informed of matters pertaining to the administration of criminal justice,¹⁸⁶ it found that interest to be less important than the Fourth Amendment right of freedom from intrusion into the home in the present case.¹⁸⁷

Finally, the Court gave little credence to the officers' argument that the presence of media representatives might serve to protect suspects by curbing police abuse, as well as to protect the safety of the officers.¹⁸⁸ The Court observed that the reporters from the *Washington Post* were not in the Wilson home to protect either the Wilsons or the officers.¹⁸⁹ Rather, the reporters were acting for their own commercial purposes, as evidenced in part by the fact that the newspaper, and not the police, retained possession of the photographs.¹⁹⁰

Taken together, the arguments raised by the marshals and deputy sheriffs lacked persuasiveness to convince the Court that the media presence in a home could be justified.¹⁹¹ The Court concluded that bringing members of the media into a home during execution of a warrant, when their presence does not aid in the execution of that warrant, violates the Fourth Amendment.¹⁹²

183. See *Wilson*, 526 U.S. at 612.

184. See *id.*

185. See *id.*

186. See *id.* at 612-13.

187. See *id.* at 613. The Court found the Fourth Amendment took precedence in this case: "Surely the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home." *Id.*

188. See *id.*

189. See *Wilson*, 526 U.S. at 613.

190. See *id.*

191. See *id.* at 614. The Court concluded that "[t]he reasons advanced by respondents, taken in their entirety, fall short of justifying the presence of media inside a home." *Id.*

192. See *id.* The Court did not limit the holding to media; it applies to other third

2. *Qualified Immunity*

Having established that the officers' conduct in this case did, in fact, violate the Fourth Amendment, the Court next addressed the issue of whether the officers were entitled to qualified immunity.¹⁹³ The Court stated that prior decisions had established that government officials performing discretionary functions enjoy a qualified immunity from liability for civil damages when their conduct, even though unlawful, does not violate a clearly established right "of which a reasonable person would have known."¹⁹⁴ According to the Court's definition, the parameters of the right must be sufficiently clear so that a reasonable official would know whether or not his conduct fell within proscribed boundaries.¹⁹⁵ The Court noted that the very act in question must not have been previously held unlawful, but the unlawfulness must be apparent to a reasonable officer in light of existing law.¹⁹⁶

The Court considered the argument that any violation of the Fourth Amendment is violating a clearly established right.¹⁹⁷ Not only had the Wilsons made this assertion, the dissent in the appellate decision premised its argument on that basis.¹⁹⁸ The Court opined that the right at issue must be assessed with a much greater degree of specificity.¹⁹⁹ The Court narrowed its inquiry to the question of whether, in this case, a reasonable officer would have known that bringing members of the media into a home during the execution of a warrant would violate Fourth Amendment rights.²⁰⁰

parties as well. *See id.*

193. *See id.* The Court wrote, "A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" *Id.* at 609 (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)).

194. *See Wilson*, 526 U.S. at 614 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

195. *See id.* at 614-15. The Court further determined that whether an official may be held personally liable or find relief in qualified immunity "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." *Id.* at 614 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

196. *See id.* at 615 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

197. *See id.*

198. *See id.*

199. *See id.* The Court posited that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). *See also supra* note 160 and accompanying text.

200. *See Wilson*, 526 U.S. at 615.

The Court concluded that an officer in April 1992 could reasonably have believed this conduct was lawful.²⁰¹ Media ride-alongs had become a routine police practice, and no judicial opinions existed as of that date holding media accompaniment into a home to be unlawful.²⁰² Moreover, the only published decision directly on point was a state intermediate court decision that found such conduct was not unreasonable.²⁰³ The Court also noted two unpublished district court decisions referred to by the parties that upheld media entry on searches in the home, albeit not on Fourth Amendment grounds.²⁰⁴ In the Court's view, these three cases did not clearly establish that a Fourth Amendment violation occurred when police allowed the media accompanied access into the home.²⁰⁵ Even a Sixth Circuit case decided five weeks before the events of this case did not sway the Court from its opinion that the law on third-party entry into homes was not clearly established in April 1992.²⁰⁶ Because the Wilsons could not point to any controlling case law in their jurisdiction, nor identify a consensus of persuasive authority, the Court concluded that reasonable officers could have believed this conduct was lawful.²⁰⁷

In holding that the right to be free from third-party entry during the execution of a warrant was not clearly established, the Court further relied on the United States Marshals Service ride-along policy.²⁰⁸ This policy anticipated the likelihood of media entry into homes when accompanying officers on fugitive apprehension arrests.²⁰⁹ The Court noted that the Montgomery County Sheriff's Department also had a ride-along policy that allowed media entry into private homes.²¹⁰ Such

201. See *id.* The court claimed, "the constitutional question presented by this case is by no means open and shut." *Id.*

202. See *id.* at 616.

203. See *id.* See also *supra* note 112 (discussing *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. App. 1980)).

204. See *Wilson*, 526 U.S. at 616. See also *supra* note 112 (referring to *Moncrief v. Hanton*, 10 Media L. Rep. 1620 (N.D. Ohio 1984), and *Higbee v. Times-Advocate*, 5 Media L. Rep. 2372 (S.D. Cal. 1980)).

205. See *Wilson*, 526 U.S. at 616.

206. See *id.* at 616-17. The Court did not see as controlling *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), a case precluding summary judgment on the question of whether police exceeded the scope of a search warrant by allowing a security guard to look for stolen property that was not mentioned in the warrant. See *id.*

207. See *id.* at 617.

208. See *id.*

209. See *id.*

210. See *id.* However, "[i]n contrast to the written policy of the Marshal's Service, the Montgomery County Sheriff's Office had no established procedures applicable to media ride-alongs." Brief of Respondents Mark A. Collins, Eric E. Runion, and Brian

policies could not be relied on if contrary to established case law,²¹¹ but because the law was not clearly established at this time, the Court found it reasonable that officers would rely on the departmental policies.²¹²

At the conclusion of its opinion, the Court noted the significant split that had since developed among the federal circuits on the question of police liability when the media accompany them into homes.²¹³ The Court deemed it unfair to subject the police to money damages for a constitutional issue that federal appellate judges had not agreed upon.²¹⁴ Accordingly, the Court affirmed the judgment of the Fourth Circuit Court of Appeals.²¹⁵

B. Dissenting Opinion

While Justice Stevens agreed with the Court's holding that unlawful media entry into a home violates the Fourth Amendment, he disagreed on the issue of qualified immunity.²¹⁶ Justice Stevens rejected the majority's reasoning that the absence of a judicial opinion directly on point justified an officer's conduct in bringing media into private homes.²¹⁷ In Justice Stevens' view, a specific judicial ruling on media entry into homes was not required because Fourth Amendment protections had been clearly established long before April 1992.²¹⁸ In furtherance of his argument that a reasonable officer would have understood the relevant law despite the absence of established law on the precise issue, Justice Stevens quoted the testimony of the sheriff of Montgomery County who, despite the lack of a ruling on media entry into homes, would not have engaged in similar conduct due to its apparent unlawfulness.²¹⁹

E. Roynestad at 3, *Wilson v. Layne*, 526 U.S. 603 (1999) (No. 98-83).

211. *See Wilson*, 526 U.S. at 617.

212. *See id.*

213. *See id.* at 618.

214. *See id.*

215. *See id.*

216. *See Wilson*, 526 U.S. at 618 (Stevens, J., concurring in part and dissenting in part).

217. *See id.* at 621 (Stevens, J., concurring in part and dissenting in part).

218. *See id.* at 619-20 (Stevens, J., concurring in part and dissenting in part). Justice Stevens posits: "The clarity of the constitutional rule, a federal statute (18 U.S.C. § 3105), common-law decisions, and the testimony of the senior law enforcement officer all support my position that it has long been clearly established that officers may not bring third parties into private homes to witness the execution of a warrant." *Id.* at 619 (Stevens, J., concurring in part and dissenting in part).

219. *See id.* at 624 (Stevens, J., concurring in part and dissenting in part). "We would never let a civilian into a home. . . . That's just not allowed." *Id.* (Stevens, J.,

Finally, Justice Stevens discussed what he considered the most disturbing aspect of the Court's ruling.²²⁰ After determining the officers' conduct violated the protections of the Fourth Amendment, the Court nonetheless granted qualified immunity due, in part, to its reliance on the public relations document prepared by the United States Marshals Service.²²¹ Although the document mentioned ride-alongs, Justice Stevens maintained the document did not purport to train officers in this endeavor or to regulate their conduct, or that of the media.²²² In Justice Stevens' opinion, that the Court would think that well-trained professionals would rely on a public service announcement to guide them in their duties, rather than generally known principles of law, was an idea too preposterous for the Court to even consider.²²³

V. SIGNIFICANCE

Twenty-five years ago, Justice Rehnquist opined that if the constitutional balance were to swing in favor of privacy, other societal values would suffer.²²⁴ Indeed, the United States Supreme Court has since demonstrated its willingness to derogate privacy values when competing interests have been involved.²²⁵ Despite the watering down of general Fourth Amendment protections, the *Wilson* Court refused to strip away the protection afforded the home. In a rare, unanimous

concurring in part and dissenting in part) (quoting Brief for Petitioner at 40, *Wilson* (No. 98-83)).

220. See *Wilson*, 526 U.S. at 624 (Stevens, J., concurring in part and dissenting in part).

221. See *id.* at 617.

222. See *id.* at 624-25 (Stevens, J., concurring in part and dissenting in part).

223. See *id.* (Stevens, J., concurring in part and dissenting in part). See also Brief for Petitioner at 44, *Wilson* (No. 98-83) (supporting Justice Stevens' argument, the officers stated that not only would they not rely on such a policy, they did not even know at the time that one existed).

224. See William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 KAN. L. REV. 1, 2 (1974).

225. See, e.g., *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (finding invasion of privacy claim outweighed by school's interest in random drug testing of students who participate in interscholastic sports); *California v. Greenwood*, 486 U.S. 35, 41 (1988) (holding no expectation of privacy in trash left in opaque bags at curb); *California v. Ciraolo*, 476 U.S. 207, 214 (1986) (finding no expectation of privacy from aerial surveillance); *Schmerber v. California*, 384 U.S. 757, 772 (1966) (upholding blood sample of intoxicated person taken by physician despite patient's objections).

Fourth Amendment decision,²²⁶ the Court reaffirmed centuries-old common law traditions upholding the sanctity of the home.

In ruling that media ride-alongs into the home violate the Fourth Amendment, *Wilson* also sent a message to an overly aggressive media. While the First Amendment clearly provides for a free press, the right to gather that news does not stand absolute.

What remains unclear from *Wilson* is the impact this decision will have on the media ride-alongs. Though producers of the popular reality television programs were reportedly “unfazed” by the recent Supreme Court decision,²²⁷ other journalists have acknowledged that *Wilson* signals the end of the media ride-along into the home.²²⁸ And while the reality producers insist their shows will remain strong, skeptics think otherwise. Some reporters predict that fear of liability and money damages will cause law enforcement officers to overreact and abolish the ride-along practice completely.²²⁹

Others, however, insist the *Wilson* holding is a narrow one and will have little effect on media activities; with a few modifications, the media will carry on business as usual.²³⁰ Indeed, since *Wilson* is limited to home invasions, it does not restrict the media from accompanying officers and televising arrests made on the street or in public places.²³¹

Arguably, following *Wilson*, some media practices will have to be amended. While the Court declined to address all aspects of media ride-alongs, *Wilson*'s message centered clearly on the media presence in the home.²³² Before *Wilson*, camera crews would accompany officers on

226. See Stuart Taylor, Jr., *Along for the Ride*, 31 NAT'L J. 1448 (1999).

227. See Greg Braxton, *Producers Say Ruling Won't Affect Shows: COPS and Others Claim Privacy Issues Are Already Addressed*, L.A. TIMES, May 26, 1999, at F4.

228. See Kurt Wimmer, *Supreme Court Ruling in "Ride-Along" Case May Spell Doom for Practice*, NEWS PHOTOGRAPHER, July 1, 1999; David G. Savage, *Media Ride-Alongs Struck Down*, A.B.A. J., July 1999, at 38; Taylor, *supra* note 226.

229. See Wimmer, *supra* note 228. “The issue is what a cautious law enforcement community will do when it weighs the risks and benefits of media participation in enforcement activities.” Wimmer, *supra* note 228. Wimmer further asserts that *Wilson* “if read too broadly could have a significant chilling effect on media coverage of police activities.” Wimmer, *supra* note 228.

230. See Wimmer, *supra* note 228; Greg Braxton, *supra* note 227, at F4.

231. See Tony Mauro, *High Court Rulings Forever Change Relationship Between Media, Law Enforcement*, THE FREEDOM FORUM ONLINE (visited May 25, 1999) <<http://www.freedomforum.org/press/1999/5/25sctmediaridealongs.asp>>. “The Court drew a bright line at the doorstep of private homes. Outside that line, in areas that are visible or accessible to the public, the court ruling implied that the media could continue to observe police activity.” *Id.*

232. See *id.* “The decision was about home, home, home. I’m sure that if you did a word count, ‘home’ would be the most commonly used word.” *Id.*

raids into the home and seek permission or releases from the homeowners afterwards. Now, in order to enter a home, the media will seemingly have to obtain permission beforehand—eliminating the elements of surprise and drama common to the reality shows. Reporters may still trail officers on the street and from the curb, and obtain footage there, if the law enforcement officers wish to continue the practice. But *Wilson* drew the bright line—the sanctity of the home has been preserved.

With respect to the Court's qualified immunity analysis, the question arises as to when a police officer will be expected to objectively know that a right has been clearly established. Chief Justice Rehnquist made the point that the official action in question need not have been previously held unlawful. However, he then proceeded to base the bulk of his analysis on whether any court had previously held media ride-alongs into homes unlawful.²³³ Contrary to Justice Rehnquist's assertion, plaintiffs will have a difficult time proving a police officer should objectively know his or her conduct is unlawful without a prior judicial ruling on the matter.

Likewise, the Court made it clear that, in deciding whether a right is clearly established, it is going to view that right very narrowly.²³⁴ Justice Stevens would have decided the issue based on a much higher level of generality of Fourth Amendment rights than the majority. The majority stressed that an officer cannot be made to interpret nebulous, abstract principles. Realistically, the only way an officer will know whether his conduct is unlawful according to clearly established guidelines is if courts have expressly ruled on the lawfulness of the specific issue prior to the challenged conduct.

By holding that officers violate the Fourth Amendment by bringing members of the media into a private residence, the Supreme Court in *Wilson v. Layne*²³⁵ clearly established that media ride-alongs into the home are not constitutionally protected. Privacy prevails—at least in this episode.

*DeLeith Duke Gossett**

233. See *Wilson*, 526 U.S. at 615.

234. See *id.*

235. 526 U.S. 603 (1999).

* J.D. expected May 2001; B.S.E., 1998, University of Central Arkansas.