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## Notes

# Not-So-Candid Camera, Please: Law Enforcement Officers Violate the Fourth Amendment When the Media Tags Along

*Wilson v. Layne*<sup>1</sup> and *Hanlon v. Berger*<sup>2</sup>

## I. INTRODUCTION

The proliferation of television shows such as “Cops”<sup>3</sup> evidences how common it has become for members of the media to accompany law enforcement officers while they perform their daily duties. This recent proliferation has sparked questions as to when the media’s involvement in law enforcement impinges on an individual’s constitutional rights. The federal courts of appeals have disagreed over whether the Fourth Amendment is violated when the media tags along with law enforcement officers executing a warrant in a private home. In *Wilson v. Layne* and *Hanlon v. Berger*, the United States Supreme Court settled the debate over this issue by holding that the presence of the media in a private home, while law enforcement officers execute a warrant, constitutes a violation of an individual’s Fourth Amendment right to be free from unreasonable searches and seizures.<sup>4</sup> The Court also held, however, that the state of the law was not clearly established, so the officers involved in these cases were entitled to qualified immunity.<sup>5</sup> While the Court’s decision “clearly established” that media ride-alongs to private homes violate the Fourth Amendment, it left open the question of how far beyond the home the ride-along prohibition extends and to what extent the media will be liable for its participation in such events.

## II. FACTS AND HOLDING

The litigation in these companion cases arose after federal law enforcement officers invited members of the media to accompany them onto private property while the officers executed warrants. *Wilson v. Layne*<sup>6</sup> arose from a media ride-along with United States Marshals and Montgomery County, Maryland police

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1. 526 U.S. 603 (1999).

2. 526 U.S. 808 (1999).

3. “Cops” is a television show that airs on Fox and Court TV. Cameramen accompany police officers during their shifts and video tape the officers in action.

4. *Wilson*, 526 U.S. at 605-06.

5. *Id.*

6. 526 U.S. 603 (1999).

officers. The law enforcement officers were executing an arrest warrant as part of "Operation Gunsmoke," a special national fugitive apprehension program in which the Marshals were working with state and local police to apprehend dangerous criminals.<sup>7</sup> One of the targeted fugitives was Dominic Wilson, whose address was listed as 909 North Stone Street Avenue, Rockville, Maryland.<sup>8</sup> Unknown to the police officer, this address was actually the home of Charles and Geraldine Wilson.<sup>9</sup>

Pursuant to a Marshal's Service ride-along policy,<sup>10</sup> the team of law enforcement officers executing the arrest warrant on Dominic Wilson was accompanied by a reporter and a photographer from the *Washington Post*.<sup>11</sup> At approximately 6:45 a.m. on April 16, 1992, the officers and media representatives entered the Wilsons' home, while the Wilsons were still asleep in bed.<sup>12</sup> When the Wilsons heard the officers enter their home, Charles Wilson, wearing only his underwear, ran into the living room to investigate.<sup>13</sup> Charles Wilson was angry to find at least five men in street clothes with guns in his living room, and officers mistook him for an angry Dominic Wilson and proceeded to subdue him on the floor.<sup>14</sup> At that time, Geraldine Wilson entered the living room dressed in only a nightgown and found her husband pinned face down on the floor with an officer holding a gun to her husband's head.<sup>15</sup> After learning that Dominic Wilson was not in the house, police officers and media representatives departed, but not before the *Washington Post* photographer and reporter had an opportunity to take pictures and observe the confrontation between the police and Charles Wilson.<sup>16</sup>

7. *Id.* at 606. The warrant read:

The State of Maryland, to any duly authorized peace officer, greeting: you are hereby commanded to take Dominic Jerome Wilson if he/she shall be found in your bailiwick, and have him immediately before the Circuit Court for Montgomery County, now in session, at the Judicial Center, in Rockville, to answer an indictment, or information, or criminal appeals unto the State of Maryland, of and concerning a certain charge of Robbery [Violation of Probation] by him committed, as hath been presented, and so forth. Hereof fail not at your peril, and have you then and there this writ. Witness.

*Id.* at 606 n.1.

8. *Id.* at 606.

9. *Id.* Charles and Geraldine were Dominic's parents. *Id.*

10. *Id.* at 624-25.

11. *Id.* at 607.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Wilson v. Layne*, 141 F.3d 111, 120 (4th Cir. 1998).

16. *Wilson v. Layne*, 526 U.S. 603, 607 (1999).

Relying on *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>17</sup> Charles and Geraldine Wilson filed suit against the law enforcement officers in their personal capacities seeking monetary damages.<sup>18</sup> The Wilsons chose not to file suit against the *Washington Post*, the reporter, or the photographer. The Wilsons contended that the officers' actions in bringing members of the media into their home to observe and record the attempted execution of the arrest warrant violated their Fourth Amendment rights.<sup>19</sup> The officers moved for summary judgment on the basis of qualified immunity,<sup>20</sup> and the district court denied that motion.<sup>21</sup> The Fourth Circuit heard the case on interlocutory appeal, and, after twice rehearing the case en banc, ultimately upheld the defense of qualified immunity. The Fourth Circuit declined to decide if the actions of the police officers violated the Fourth Amendment. However, the court did conclude that, at the time of the search, the right violated by the media's presence during the execution of a warrant in a private residence was not clearly established, and thus the officers were entitled to qualified immunity.<sup>22</sup> The Wilsons appealed to the Supreme Court, which granted certiorari simultaneously with *Hanlon v. Berger*,<sup>23</sup> a similar case arising out of the Ninth Circuit.

The *Hanlon* plaintiffs were Paul and Erma Berger, who live on a 75,000-acre ranch in Montana.<sup>24</sup> After former employees of the Bergers notified United States Fish and Wildlife Service ("USFWS") agents that they had seen Paul Berger kill bald eagles, the USFWS initiated an investigation of the Bergers.<sup>25</sup>

17. 403 U.S. 388 (1971). Under *Bivens*, a plaintiff may seek monetary damages from a federal government official who has violated the plaintiff's Fourth Amendment rights.

18. *Wilson*, 526 U.S. at 608. The Wilsons sued the state officials under 42 U.S.C. § 1983 (1994), which applies to state actors.

19. *Wilson*, 526 U.S. at 608. 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.

U.S. CONST. amend. IV.

20. Government officials performing discretionary functions are generally 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 known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

21. *Wilson*, 526 U.S. at 608.

22. *Id.* The Fourth Circuit concluded that because at the time of the search no court had held that the presence of the media during a police entry into a private residence violated the Fourth Amendment, the right allegedly violated by the officials was not "clearly established," so qualified immunity was proper. *Id.*

23. 526 U.S. 808 (1999).

24. *Id.* at 809.

25. *Berger v. Hanlon*, 129 F.3d 505, 508 (9th Cir. 1997), *cert. denied*, 526 U.S. 1154 (1999).

Jack Hamann, an employee of Cable News Network, Inc. ("CNN"), and Robert Rainey and Donald Hooper, employees of Turner Broadcasting System, Inc. ("TBS"), approached the USFWS agents to negotiate a television deal concerning the investigation.<sup>26</sup> The three parties entered into an agreement on March 11, 1993.<sup>27</sup>

Subsequent to the television deal, a magistrate judge issued a search warrant for evidence indicating the taking of wildlife off the Bergers' ranch. The warrant authorized the search of the ranch and appurtenant structures, but excluded the Bergers' residence.<sup>28</sup> On the morning of the search, federal agents, along with the broadcast team, proceeded to a point near the Bergers' ranch.<sup>29</sup> Media cameras were mounted on the outside and interior of government vehicles in order to videotape the agents at work. USFWS Special Agent Joel Scrafford was also wired with a hidden CNN microphone that continuously transmitted live audio to the CNN technical crew.<sup>30</sup> Agent Scrafford met Paul Berger on the road leading to the ranch, and the two men proceeded together to the house, which Agent Scrafford entered with Paul Berger's permission.<sup>31</sup> Though Agent Scrafford recorded all of the conversations he had with the Bergers while inside the house, the Bergers were not informed that Agent Scrafford was wired or that the cameras that were visible during the search belonged to the media.<sup>32</sup> Both the video footage and sound recordings made in the Bergers' home were later broadcast.<sup>33</sup>

As a result of the search, Paul Berger was charged with numerous violations of federal wildlife laws,<sup>34</sup> but he was acquitted of all charges with the exception

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26. *Id.*

27. *Id.* The letter confirming the agreement states:

[T]he United States Attorney's Office for the District of Montana agrees to allow CNN to accompany USFWS Agents as they attempt to execute a criminal search warrant . . . . Except as provided below, CNN shall have complete editorial control over any footage it shoots; it shall not be obliged to use the footage; and does not waive any rights or privileges it may have with respect to the footage. In return, CNN agrees to embargo the telecast of any videotape of the attempt to execute the search warrant until either: (1) a jury has been empaneled and instructed by a judge not to view television reports about the case; or (2) the defendant waives his right to a jury trial and agrees to have his case tried before a judge; or (3) a judge accepts a plea bargain; or (4) the government decides not to bring charges relating to the attempt to execute the search warrant.

*Id.*

28. *Id.*

29. *Id.* at 509.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. The unsuccessful charges were the taking of at least one golden eagle, in

of one misdemeanor charge for using a registered pesticide, Furadan, in a manner inconsistent with its labeling.<sup>35</sup> After the criminal trial, the Bergers filed suit under *Bivens* against both the media and the federal agents alleging violations of their Fourth Amendment rights.<sup>36</sup> The Bergers also filed suit against the media for the violation of the Federal Wiretap Act,<sup>37</sup> for the state law torts of conversion, trespass, and intentional infliction of emotional distress, and to enjoin further broadcasts of the video shot at their ranch.<sup>38</sup> Relying on *Bivens*, the Bergers argued that the federal agents involved in the search warrant violated their Fourth Amendment rights by permitting television cameras to film the search, and that the media acted sufficiently in concert with the federal agents to be held accountable for the violation as government actors.<sup>39</sup>

Similar to the Fourth Circuit in *Wilson*,<sup>40</sup> the district court in this case ruled that the federal agents were entitled to qualified immunity because there was no clearly established law at the time protecting an individual from the commercial recording of a search of his residence.<sup>41</sup> The court rejected the Bergers' claim that the media had become government actors for the purpose of *Bivens* liability.<sup>42</sup> The Bergers appealed to the Ninth Circuit, which reversed the lower court's ruling and held that the federal agents were not entitled to qualified immunity, and that the media had acted "under color of law" and were therefore also liable under *Bivens*.<sup>43</sup> Both the federal agents and the media appealed to the Supreme Court, which granted certiorari only to the federal agents.<sup>44</sup>

violation of 16 U.S.C. § 668(a) (1994); the killing of one ferruginous hawk, and one ring-billed gull, in violation of 16 U.S.C. § 703 (1994) and 16 U.S.C. § 707(a) (1994); and the taking of at least one bald eagle in violation of 16 U.S.C. § 1538(a)(1)(B) and 16 U.S.C. § 1540(b)(1) (1994).

35. *Berger v. Hanlon*, 129 F.3d 505, 509 (9th Cir. 1997), *cert. denied*, 526 U.S. 1154 (1999). The charge was that Paul Berger applied Furadan to sheep carcasses intending to kill predators, including eagles, in violation of 7 U.S.C. § 136j(a)(2)(G) (1994).

36. *See supra* note 17 and accompanying text.

37. 18 U.S.C. §§ 2510-2521 (1994).

38. *Berger*, 129 F.3d at 507.

39. *Id.*

40. *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998).

41. *Berger v. Hanlon*, 129 F.3d 505, 507 (9th Cir. 1997), *cert. denied*, 526 U.S. 1154 (1999). Additionally, on the basis of collateral estoppel, the court disallowed the Bergers from litigating the reasonableness of the search because that issue had previously been decided against Paul Berger at his criminal trial. *Id.*

42. *Id.* The district court ruled that the media were not liable under the Federal Wiretap Act or any of the state law claims. The district court also declined to enjoin future broadcasts. *Id.*

43. *Id.* The Ninth Circuit reversed the district court's ruling on collateral estoppel, trespass, and infliction of emotional distress and affirmed the district court's rulings regarding the Federal Wiretap Act, the conversion claim, and its decision not to issue an injunction. *Id.*

44. *See Berger v. CNN, Inc.*, 525 U.S. 961 (1998); *Hanlon v. Berger*, 525 U.S. 981

The Supreme Court decided *Wilson* and *Hanlon* as companion cases.<sup>45</sup> The law enforcement officials in both cases argued that regardless of whether they violated the Fourth Amendment rights of the Wilsons and the Bergers, they were entitled to the defense of qualified immunity.<sup>46</sup> The Court held that: (1) law enforcement officials violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them in a private residence during the execution of a warrant; and (2) because the law was not clearly established on this issue, the law enforcement officers in both cases were entitled to the defense of qualified immunity.<sup>47</sup>

### III. LEGAL BACKGROUND

#### A. Fourth Amendment Protects Against Unreasonable Searches and Seizures

In determining what constitutes a violation of the Fourth Amendment, the Supreme Court has traditionally held law enforcement officers to a higher standard if the search was of an individual's home.<sup>48</sup> The rule is clear—absent a warrant or exigent circumstances, police officers cannot enter a home to make an arrest or to seize property.<sup>49</sup> When an arrest or seizure takes place in public, however, the standard is not as strict. An arrest without a warrant in public is valid as long as the arresting officer had probable cause to believe that the suspect was a felon.<sup>50</sup> Permissible actions, once a warrant has been issued, however, are not quite as clear.

Though the Court has held that not every police action inside an individual's home must be explicitly authorized by the text of the warrant,<sup>51</sup> if the scope of the search exceeds that permitted by the terms of the warrant, the subsequent seizure is unconstitutional.<sup>52</sup> In order for a search to be permissible under the Fourth Amendment, police actions in the execution of a warrant must

(1998).

45. *Wilson v. Layne*, 526 U.S. 603 (1999); *Hanlon v. Berger*, 526 U.S. 808 (1999).

46. *Wilson*, 526 U.S. at 613; *Hanlon*, 526 U.S. at 810.

47. *Wilson*, 526 U.S. at 605-06; *Hanlon*, 526 U.S. at 810.

48. *See Wilson*, 526 U.S. at 609-10; *see also* *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 313 (1972) (“physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed”); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).

49. *See Payton v. New York*, 445 U.S. 573, 590 (1980).

50. *Id.*

51. *See Michigan v. Summers*, 452 U.S. 692, 705 (1981).

52. *See Horton v. California*, 496 U.S. 128, 140 (1990).

relate to the objectives of the authorized intrusion or reasonably relate to the accomplishment of legitimate law enforcement objectives.<sup>53</sup>

The Supreme Court has allowed the presence of third parties during a search when the third parties directly aid in the execution of a warrant, such as for the purpose of identifying stolen property.<sup>54</sup> The presence of third parties is permissible if such an instance would be related to the objectives of the authorized intrusion. Additionally, the use of video cameras has been recognized as a reasonable measure of “quality control” in ensuring the protection of an individual’s rights.<sup>55</sup> The Court has also recognized the importance of the press in informing the public about the administration of criminal justice.<sup>56</sup> Lower courts prior to *Wilson*, however, took divergent views of how these cases affected the presence of the media during the execution of a warrant on private property.<sup>57</sup>

### B. Liability Under *Bivens* and 42 U.S.C. § 1983

Both *Bivens* and 42 U.S.C. § 1983<sup>58</sup> allow a plaintiff to seek monetary damages from a government official who has violated his Fourth Amendment

53. See *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Ayeni v. Mottola*, 35 F.3d 680, 685 (2d Cir. 1994), cert. denied, 514 U.S. 1062 (1995); see also *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (“[T]he purposes justifying a police search strictly limit the permissible extent of the search . . .”).

54. See *Boyd v. United States*, 116 U.S. 616, 628 (1886); *Entick v. Carrington*, 95 Eng. Rep. 807, 817-18 (K.B. 1765).

55. See *Ohio v. Robinette*, 519 U.S. 33, 35 (1996).

56. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (“[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring him in convenient form the facts of those operations.”); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980).

57. *Wilson v. Layne*, 526 U.S. 603, 616 (1999).

58. Section 1983 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, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994).



rights.<sup>59</sup> Where a federal statute provides for a right to sue for the invasion of legal rights, federal courts may use any remedy to right the wrong.<sup>60</sup> *Bivens*, decided based on both the Fourth Amendment and Section 1983, allows a plaintiff to seek compensation under federal law rather than seek redress in a state court tort action.<sup>61</sup>

*Bivens* and Section 1983 liability may also be imposed on non-government officials if their actions are so closely tied to those of government officials that they are found to be acting "under color of law."<sup>62</sup> To act "under color of law" does not require that the accused be an officer of the state.<sup>63</sup> Rather private actors may be considered government actors if they are willful participants in a joint action with the government or its agents.<sup>64</sup>

To be liable under *Bivens* and Section 1983, the court first determines whether the law enforcement officers' actions are unconstitutional.<sup>65</sup> If so, the court must then decide whether the officers are entitled to a grant of qualified immunity.<sup>66</sup> Qualified immunity is an affirmative defense that must be plead by a defendant official.<sup>67</sup> Qualified immunity analysis is identical in suits brought under either Section 1983 or *Bivens*<sup>68</sup> and officers can be granted qualified immunity to shield them from liability when their conduct does not violate clearly established rights of which a reasonable person would have known.<sup>69</sup>

Liability turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken.<sup>70</sup> Whether a rule is clearly established depends upon the level of generality at which the rule is to be identified.<sup>71</sup> For instance, the right to be free from unreasonable searches and seizures is clearly established by the Fourth Amendment, but if the test of clearly established law were to be applied at such a high level of generality, the "objective legal reasonableness" of the action would not come into play.<sup>72</sup>

59. *Wilson*, 526 U.S. at 607.

60. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971).

61. *Id.* at 390-91.

62. 42 U.S.C. § 1983 (1994).

63. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982).

64. *See Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980).

65. *See Conn v. Gabbert*, 526 U.S. 286, 290-91 (1999).

66. *Id.*; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 841-42 (1998); *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991).

67. *See Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982).

68. *See, e.g., Graham v. Connor*, 490 U.S. 386, 394 n.9 (1989).

69. *See Harlow*, 457 U.S. at 818.

70. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); *see also Graham*, 490 U.S. at 396.

71. *See Anderson*, 483 U.S. at 639.

72. *Id.* at 639-40.

At the correct level of specificity, clearly established means 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. . . . [I]n the light of pre-existing law the unlawfulness must be apparent.”<sup>73</sup> Thus, the appropriate question is whether a reasonable officer could have objectively believed that his actions were lawful, in light of clearly established law and the information the officers possessed.<sup>74</sup>

Reasonableness therefore depends on the state of developed law. Where the law is undeveloped, officers “cannot be expected to predict the future course of constitutional law . . . .”<sup>75</sup> However, an officer will not be shielded from liability if he acts with such disregard for the plaintiff’s clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.<sup>76</sup> For instance, where a state judge used his official power to extort sexual favors from a potential litigant, the Supreme Court declined to grant him qualified immunity, even though no prior judicial opinion had held that such action was unconstitutional.<sup>77</sup>

### C. *The Circuit Split*

Courts have differed over whether media accompaniment during the execution of a search warrant violates individuals’ Fourth Amendment rights.<sup>78</sup> In *Wilson v. Layne*,<sup>79</sup> the Fourth Circuit held that “it was not clearly established that permitting media representatives to accompany law enforcement officers into a private residence to observe and photograph their attempt to execute an arrest warrant would violate the homeowner’s constitutional rights,” but declined to decide if such action was indeed a Fourth Amendment violation.<sup>80</sup> The Fourth Circuit reasoned that as the police officers only permitted the reporters who accompanied them into the private residence to engage in activities the officers themselves could have undertaken consistent with the warrant, the officers could not have known if they were exceeding the scope of the warrant.<sup>81</sup> The court also noted that reasonable law enforcement officers could conclude that permitting reporters to observe and photograph the events surrounding the

73. *Id.* at 640 (citations omitted).

74. *Wilson v. Layne*, 526 U.S. 603, 616 (1999).

75. *Procnier v. Navarette*, 434 U.S. 555, 562 (1978); *see also* *Wood v. Strickland*, 420 U.S. 308, 320-21 (1975); *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

76. *See Procnier*, 434 U.S. at 562.

77. *See United States v. Lanier*, 520 U.S. 259, 271 (1997).

78. *See, e.g., Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998); *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997); *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995).

79. 141 F.3d 111 (4th Cir. 1998).

80. *Id.*

81. *Id.* at 115.

execution of an arrest warrant would serve a legitimate law enforcement purpose, such as affording protection to the officers, improving public oversight of law enforcement activities, and deterring crime and improper conduct by law enforcement officers.<sup>82</sup> As the court had already determined that the qualified immunity doctrine would apply if the officers' conduct was indeed a Fourth Amendment violation, it decided not to determine whether the Fourth Amendment had been violated.<sup>83</sup>

In *Berger v. Hanlon*,<sup>84</sup> the Ninth Circuit held that federal agents and accompanying media violated the Bergers' Fourth Amendment rights against unreasonable searches and seizures.<sup>85</sup> Unlike the Fourth Circuit, the Ninth Circuit ruled that the media's presence was outside the scope of the warrant because it could not have served law enforcement purposes; the media was present to videotape the execution of the warrant for entertainment purposes, and the search therefore violated the property owners' Fourth Amendment rights.<sup>86</sup> Additionally, the court held that neither the media nor the federal agents were entitled to qualified immunity because the degree of cooperation and planning that went on between the media and the agents before the warrant was executed evidenced the media's active, rather than passive, role in executing the search and showed that the main purpose of the search was for purposes other than law enforcement.<sup>87</sup>

The Eighth Circuit, in *Parker v. Boyer*,<sup>88</sup> held that it was not "self-evident" that the police were violating any Fourth Amendment rights by allowing the media to enter a private residence. The Eighth Circuit reasoned that most courts had rejected the argument that the Constitution forbids the media to encroach on a person's property while the police search it,<sup>89</sup> and those courts that had found that there was a clearly established constitutional right forbidding the police from allowing the media to enter a home during a search had issued their decisions after the conduct at issue in this case had occurred.<sup>90</sup> The court therefore held that the law enforcement officials were entitled to qualified immunity because they did not violate any clearly established constitutional rights of which they

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82. *Id.* at 116.

83. *Id.* at 119.

84. 129 F.3d 505 (9th Cir. 1997), *cert. denied*, 526 U.S. 1154 (1999).

85. *Id.* at 510.

86. *Id.*

87. *Id.* at 512.

88. 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997).

89. *Id.* at 447; *see also* *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984); *Moncrief v. Hanton*, No. 85-3076, 1985 WL 14124 (6th Cir. Dec. 23, 1985); *Higbee v. Times-Advocate*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 195 N.W.2d 768 (Wis. Ct. App. 1980).

90. *Parker*, 93 F.3d at 447.

should have been aware.<sup>91</sup> The Eighth Circuit did not rule on whether the conduct in the case violated the homeowners' Fourth Amendment rights.<sup>92</sup>

Finally, in *Ayeni v. Mottola*,<sup>93</sup> the Second Circuit held that "Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there."<sup>94</sup> The Second Circuit reasoned that because the objective of the Fourth Amendment is to preserve the right of privacy to the extent consistent with the reasonable exercise of law enforcement duties,<sup>95</sup> and as the media's presence was not explicitly authorized within the terms of the warrant,<sup>96</sup> the officers violated a clearly established constitutional right.<sup>97</sup> The court also held that the police officers' conduct in bringing the media along was "wholly lacking in justification based on the legitimate needs of law enforcement."<sup>98</sup>

As the circuits that had issued decisions regarding whether media accompaniment during the execution of a warrant violated an individual's Fourth Amendment rights did not agree on an answer, the Supreme Court took up the issue with an eye toward resolving it. The Supreme Court granted certiorari in *Wilson* and *Hanlon* and sided with the Fourth Circuit.<sup>99</sup>

#### IV. INSTANT DECISION

##### *A. Majority Opinion*

In *Wilson* and *Hanlon* the Supreme Court considered two issues on which the lower federal circuit courts of appeals had disagreed. In so doing the Court held that it is a violation of the Fourth Amendment rights of homeowners when a police officer brings a member of the media or other third party into a home during the execution of a warrant when the presence of the third party was not in aid of the warrant's execution.<sup>100</sup> The Court further determined that the law

91. *Id.*

92. *Id.* at 448. The concurring judge held that the court skipped the Fourth Amendment step of the two-part qualified immunity analysis, noting that "[i]t is not until we have made this required decision that we analyze whether such right was clearly established at the time of its alleged violation." *Id.* (Rosenbaum, J., concurring).

93. 35 F.3d 680 (2d Cir. 1994).

94. *Id.* at 686.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1997), *cert. granted in part*, 525 U.S. 981 (1998); *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, 525 U.S. 981 (1998).

100. *Wilson v. Layne*, 526 U.S. 603, 613-14 (1999); *Hanlon v. Berger*, 526 U.S.

enforcement officers were entitled to a grant of qualified immunity because the law on the question was not clearly established before the instant decisions.<sup>101</sup>

The law enforcement officials in both *Wilson* and *Hanlon* plead the affirmative defense of qualified immunity to charges under *Bivens* and 42 U.S.C. § 1983.<sup>102</sup> The Court initially addressed the Fourth Amendment question, reasoning that before a court can evaluate a claim of qualified immunity, it must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right. Then, if a plaintiff has alleged the deprivation of a constitutional right, the court must determine whether the right was clearly established at the time of the alleged violation.<sup>103</sup> Such an order of procedure, the Court explained, promotes clarity in the legal standards for official conduct and spares a defendant unwarranted liability and the unnecessary demands of a long lawsuit.<sup>104</sup>

The Court's determination that the officers' actions violated the Fourth Amendment was based on the traditional regard for the privacy of the home. Because physical entry of the home is the primary evil against which the Fourth Amendment protects, police officers cannot enter a home without a warrant or exigent circumstances.<sup>105</sup> Though the officers in *Wilson* and *Hanlon* possessed warrants, the Court believed that the officers' actions in allowing the media to accompany them exceeded the warrants' scope.<sup>106</sup> The Court explained that police actions in the execution of a warrant must be related to the objectives of the authorized intrusion.<sup>107</sup>

The Court determined that the presence of the reporters was not related to the officers' objectives in the execution of the warrants because the media were acting for their own private purposes.<sup>108</sup> Though the officers argued that the presence of the media as third parties served the law enforcement purposes of publicizing the government's efforts to combat crime and facilitate accurate reporting of law enforcement activities, minimizing police abuses and protecting suspects, and protecting the safety of the officers, the Court ruled that furthering the law enforcement objectives of the police in a general sense was not related

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808, 809 (1999). The Court's decision on the Fourth Amendment issue was unanimous.

101. *Wilson*, 526 U.S. at 617-18; *Hanlon*, 526 U.S. at 810. The Court's decision on the qualified immunity issue was 8-1, with Justice Stevens dissenting. The Court, which issued a full opinion in *Wilson*, issued only a short decision in *Hanlon*, citing its reasoning in *Wilson*. Therefore, unless otherwise noted, all explanations of the Court's reasoning apply to both cases.

102. *Wilson*, 526 U.S. at 609; *Hanlon*, 526 U.S. at 810.

103. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

104. *Id.*

105. *Id.* at 610.

106. *Id.* at 611.

107. *Id.*

108. *Id.* at 613-14.

to the objectives of the authorized intrusion.<sup>109</sup> Hence, the Court made it clear that “law enforcement objectives” must further the purposes of the particular search, rather than merely the objectives of the police in a general sense.<sup>110</sup> Therefore, having found a violation of the Fourth Amendment, the Court proceeded to the issue of qualified immunity.

In concluding that the police officers in both *Wilson* and *Hanlon* were entitled to a grant of qualified immunity, the Court noted that the rule on qualified immunity is that law enforcement officers are shielded from liability for civil damages so long as their conduct does not violate a clearly established right of which a reasonable person would have known.<sup>111</sup> The Court explained that practically applied, the “clearly established” requirement means, given pre-existing law, the boundaries of the right must be sufficiently clear so that a reasonable official would understand that his conduct violated that right.<sup>112</sup>

Applying this standard to *Wilson* and *Hanlon*, the Court concluded that it would not have been unreasonable for an officer in 1992<sup>113</sup> to believe that bringing media observers along during the execution of a warrant was lawful.<sup>114</sup> The Court offered three reasons why an officer might have considered such behavior reasonable. First, the constitutional question regarding whether the Fourth Amendment was violated was not clear; it was not obvious that the media’s presence exceeded the scope of the warrant.<sup>115</sup> Second, media ride-alongs were a common police practice and no judicial opinions existed that held the practice was unlawful.<sup>116</sup> Finally, the officers had relied on formal ride-along policies that did not prohibit media entry into private homes.<sup>117</sup>

Furthermore, in the extremely limited case law addressing this issue, courts’ decisions were neither uniform nor controlling on federal appellate jurisdictions.<sup>118</sup> The Court explained that where judges disagree on a

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109. *Id.* at 614.

110. *Id.* at 613-14.

111. *Id.* at 614.

112. *Id.* at 614-15.

113. The conduct in *Hanlon* took place a year later, but the Court stated that the parties had not called the Court’s attention to any decisions that would have made the state of the law any clearer at the time the disputed search took place. *Hanlon v. Berger*, 526 U.S. 808, 809-10 (1999).

114. *Wilson v. Layne*, 526 U.S. 603, 616-17 (1999).

115. *Id.*

116. *Id.*

117. *Id.*

118. *See, e.g.*, *Bills v. Aseltine*, 958 F.2d 697, 708 (6th Cir. 1992), *cert. denied*, 516 U.S. 865 (1995) (holding that material issues of fact existed, precluding summary judgment on the question of whether police officers exceeded the scope of a search warrant when they allowed a private security guard to participate in a search to identify stolen property other than that described in the warrant); *Moncrief v. Hanton*, No. 85-3076, 1985 WL 14124 (6th Cir. Dec. 23, 1985) (upholding a search where the media entered a home on a non-Fourth Amendment theory); *Higbee v. Times-Advocate*, 5 Med.

constitutional question, it would be unfair to hold law enforcement officials liable for choosing the losing side of the controversy.<sup>119</sup> The Court further reasoned that where the relevant body of case law was undeveloped, it would not have been unreasonable for law enforcement officials to rely on their department's established policies.<sup>120</sup> Therefore, because a reasonable officer could have believed it was lawful for the media to accompany him into a home while he executed a warrant, and because the officers could not be expected to predict the future course of the law, the law enforcement officials were granted qualified immunity.<sup>121</sup>

### B. Dissenting Opinion

While Justice Stevens concurred with the majority in regard to the Fourth Amendment issue, he believed that the right was clearly established before the conduct in question and therefore would have denied the officers qualified immunity.<sup>122</sup> Justice Stevens rejected the majority's argument that the absence of judicial opinions addressing the issue provided a basis for a reasonable belief that allowed the media to accompany law enforcement officers into a home during the execution of a warrant as lawful behavior.<sup>123</sup> He compared the instant situations with an earlier case where the Court held that a state judge knew that he was violating a potential litigant's constitutional rights when he used his official power to extort sexual favors from her, even though there was no judicial opinion specifically on point.<sup>124</sup>

Moreover, Justice Stevens rejected the argument that media ride-alongs were common police practice and that officials relied on department ride-along policies to justify their actions because such documents were prepared for public relations purposes, not by lawyers as a reliable source on the state of the law.<sup>125</sup> Finally, Justice Stevens argued that the cases relied on by the majority to describe the current boundaries of the law<sup>126</sup> did not provide support for an

L. Rptr. 2372 (S.D. Cal. 1980) (also upholding such a search based upon a non-Fourth Amendment theory); *Prahl v. Brosamle*, 295 N.W.2d 768, 782 (Wis. Ct. App. 1980) (holding that media accompanying police into a home was not unreasonable).

119. *Wilson*, 526 U.S. at 618.

120. *Id.* at 617.

121. *Id.*

122. *Id.* at 618; *Hanlon v. Berger*, 526 U.S. 808, 810 (1999).

123. *Wilson v. Layne*, 526 U.S. 603, 619 (1999).

124. *Id.* at 623.

125. *Id.* at 626-27.

126. The majority cited a state court decision, *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980), and two unpublished district court decisions, *Moncrief v. Hanton*, No. 85-3076, 1985 WL 14124 (6th Cir. Dec. 23, 1985), and *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (S.D. Cal. 1980), in its assertion that the law regarding media entry into homes during a police ride-along was not clearly established. *Wilson*, 526 U.S. at 616.

officer's assumption that media accompaniment was lawful.<sup>127</sup> Therefore, Justice Stevens would have refused the Court's grant of qualified immunity.<sup>128</sup>

## V. COMMENT

The Supreme Court's decisions in *Wilson* and *Hanlon* are important not only for what the Court decided, but also for what issues the Court chose not to address. It is important to note that the instant decisions clearly establish that media accompaniment during the execution of a search warrant in a private home violates the homeowner's Fourth Amendment rights; law enforcement officials who allow such action after these decisions will not be entitled to the qualified immunity defense.<sup>129</sup> By refusing to grant certiorari to the media,<sup>130</sup> the Supreme Court left open the question as to what extent the media can be held responsible for their participation in ride-alongs that include entry into an individual's private home during the execution of a warrant. By finding a Fourth Amendment violation without specifying the point at which the media's presence makes the search unreasonable, it is unfortunately likely that the instant decisions will put an end to ride-along programs because of the uncertainty as to where officials' liability for bringing along a third party will begin. Finally, by rejecting the government's argument that the media's presence serves valuable law enforcement purposes, the Supreme Court has effectively closed the only avenue the public had to monitor the actions of their law enforcement officers and to hold the officers accountable for their actions.

The most immediate response to the Supreme Court's decision came from the Ninth Circuit, which had to apply the Court's present reasoning to the *Hanlon* case after its earlier opinion was vacated in the Court's instant ruling. Though CNN and the other media defendants were not a party at the Supreme Court because of the denial of certiorari, CNN's case was not resolved until the Ninth Circuit heard the entire case again on remand.<sup>131</sup> In *Berger v. Hanlon*,<sup>132</sup> the Ninth Circuit held that the media defendants had acted so closely with the government agents as to be able to be held liable for a violation of the Fourth

127. *Wilson*, 526 U.S. at 625.

128. *Id.*; *Hanlon v. Berger*, 526 U.S. 808, 810 (1999).

129. The rule stated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is that law enforcement officers 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." *Id.* at 818. It therefore follows that where conduct does violate clearly established rights, the qualified immunity defense will not protect the officers. *Id.*

130. CNN, Inc. v. *Berger*, 526 U.S. 1154 (1999). The *Washington Post*, which never ran a story or any of the pictures it took during the execution of the warrant, was not sued.

131. *Berger v. Hanlon*, 188 F.3d 1155 (9th Cir. 1999).

132. 188 F.3d 1155 (9th Cir. 1999).



Amendment under *Bivens* and Section 1983 as “joint actors” with the federal officers.<sup>133</sup> However, the court also held that the media were not entitled to assert qualified immunity as a defense,<sup>134</sup> citing the Supreme Court’s opinion in *Wyatt v. Cole*,<sup>135</sup> which held that qualified immunity is not available to private defendants charged with Section 1983 liability for invoking state replevin, garnishment, or attachment statutes.<sup>136</sup>

This result is incredibly unfair; it holds the media liable solely because of its joint action with the government, but it denies the media the same defense it allows the government. Based on the Ninth Circuit’s decision in *Berger*, the media can be held liable for civil damages as state actors for violating an individual’s Fourth Amendment rights against unreasonable searches and seizures. The case has been remanded to the district court<sup>137</sup> and it is likely that the Ninth Circuit, if not the Supreme Court, will hear from these parties again.

There is no need to impose additional liability on the media. Even without the Fourth Amendment cause of action, plaintiffs like the Bergers and the Wilsons can still collect civil damages from the media through state law claims such as trespass, invasion of privacy, and intentional infliction of emotional distress.<sup>138</sup> The Supreme Court could have resolved the issue by granting certiorari to the media and overruling the Ninth Circuit’s holding that the media acted sufficiently in concert with the government to be held liable as state actors. This would have avoided the establishment of a dangerous precedent that puts the media in a “catch-22”; it can be held liable for violating the Fourth Amendment, but is not entitled to the qualified immunity defense that the government is granted. It would not, however, have left the media immune from prosecution for their part in the ride-along, because their conduct would still be subject to state law.

*Wilson* and *Hanlon* are likely to significantly impact how the police and the media interact in the future.<sup>139</sup> As it is now clearly established law that law

133. *Id.* at 1157.

134. *Id.* The law enforcement officers’ lawyer in both cases, Richard Cordray, agrees with the Ninth Circuit and does not think the media can use the qualified immunity defense. Jonathan Ringel, *CNN Tags Along for Press, Privacy Clash at High Court*, FULTON COUNTY DAILY REP., Mar. 24, 1999, at 1.

135. 504 U.S. 158 (1992).

136. *Id.* at 169. In *Wyatt*, the Court noted that its holding was narrowly limited to the facts of that case. The Court also noted that its decision did not foreclose the possibility that defendants faced with § 1983 liability in different circumstances could be entitled to an affirmative defense based on good faith and/or probable cause, or that § 1983 suits against private parties could require plaintiffs to carry additional burdens. *Id.*

137. *Berger v. Hanlon*, 188 F.3d 1155, 1157 (9th Cir. 1999).

138. *See id.*; *see also* Eve Klindera, *Qualified Immunity for Cops (and Other Public Officials) With Cameras: Let Common Law Remedies Ensure Press Responsibility*, 67 GEO. WASH. L. REV. 399, 431 (1999).

139. *See* James E. Grossberg & Jay Ward Brown, *Can’t We All Ride Along?* <https://scholarship.law.missouri.edu/mlr/vol65/iss3/4>

enforcement officials violate the Fourth Amendment rights of individuals if they allow the media to ride-along when executing a warrant in an individual's home, the qualified immunity defense will no longer be available. In order to avoid *Bivens* and Section 1983 liability, law enforcement officers will likely no longer allow the media to accompany them in such situations. As a result, the public's window into law enforcement officers' daily activities may effectively be closed and the public shut out from its ability to hold officials accountable for abuses of power.

Not only do the decisions in *Wilson* and *Hanlon* close the media out of law enforcement activities, they do not establish how far beyond official police/media interactions such liability extends. This puts the future of media ride-alongs in jeopardy. *Hanlon* involved a 75,000-acre ranch, and though the media videotaped buildings near the Bergers' home and recorded a conversation between the government agent and the Bergers that took place inside the home, the media never actually entered the Bergers' home.<sup>140</sup> Therefore, if law enforcement officers violate the Fourth Amendment by bringing the media within the bounds of a 75,000-acre private ranch, it seems likely that they would violate the Amendment if they allowed the media to wait in the front yard, or across the street. The question then arises as to whether officers who allow the media to observe the execution of a warrant-authorized search of an individual's car would be liable as the Fourth Amendment also protects people's "effects" against unreasonable searches and seizures.<sup>141</sup>

Because the Supreme Court held that it was the presence of the media, not the officers' actions, that constituted the Fourth Amendment violation,<sup>142</sup> questions about liability extend even further. Though officers are authorized to make warrantless arrests and seizures in public as long as the arresting officer has probable cause to believe the suspect is a felon,<sup>143</sup> would the officer-authorized presence of the media push such a warrantless action over the Fourth Amendment line? This unresolved issue, and the fact that a situation might arise involving private property, will most likely keep officials from inviting the media along in the first place.<sup>144</sup>

Keeping the media at too far of a distance from the day-to-day dealings of law enforcement officers, the likely result of the instant decisions' refusal to resolve the media issue, is unsound policy. Allowing the media to ride along with law enforcement officials makes sense for all of the reasons advanced in *Wilson*—publication of the government's efforts to combat crime, facilitation of

*Supreme Court Ponders Whether Press May Come When Police Execute Warrants*, LEGAL TIMES, Feb. 15, 1999, at S32.

140. *Berger v. Hanlon*, 129 F.3d 505, 509 (9th Cir. 1997), cert. denied, 526 U.S. 1154 (1999).

141. U.S. CONST. amend. IV.

142. *Wilson v. Layne*, 526 U.S. 603, 613-14 (1999).

143. See *Payton v. New York*, 445 U.S. 573, 590 (1980).

144. See *Grossberg & Brown*, *supra* note 139, at S32.

accurate reporting of law enforcement activities, protection of subjects through the minimization of police abuses, and protection of the officers.<sup>145</sup> It is not enough that the Court intimated that officers could videotape home entries as an effort to ensure that the rights of homeowners were not violated.<sup>146</sup> Without media involvement, the public will never get the chance to view such departmental tapings, especially if they reveal abuses.

The press serves as a medium for accountability; the information it provides allows the public to make rational choices about how it wants the government to operate. The media provides the public a rare unobstructed view of the daily activities of law enforcement officers, and without its involvement, the public would not have the same chance to monitor the conduct of public officials.<sup>147</sup> The Supreme Court's refusal to decide the media's case leaves the law unnecessarily unresolved, and consequently closes the public's main window into law enforcement activities.

## VI. CONCLUSION

In *Wilson* and *Hanlon*, the Supreme Court addressed a split in the circuits regarding whether the media's presence during the execution of a warrant in a private home was a violation of the Fourth Amendment rights of the occupants of the home. The Court held that it was.<sup>148</sup> However, because the law regarding this issue was not clearly established, the law enforcement officers who were being sued for damages under *Bivens* and Section 1983 were entitled to the defense of qualified immunity and were therefore not liable.<sup>149</sup> The Court refused certiorari to the media defendants, however, leaving open the question of the media's liability for such conduct. As a result, the media will likely be forced to curtail its activity in the face of possible liability, cutting off much of the public's ability to monitor its law enforcement officials.

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145. *Wilson*, 526 U.S. at 612.

146. *Id.* at 613.

147. See Grossberg & Brown, *supra* note 139, at S32.

148. *Wilson v. Layne*, 526 U.S. 603, 605 (1999).

149. *Id.* at 605-06.