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Media Participation in the Execution of a Search Warrant Inside a Home Violates the Fourth Amendment to the United States Constitution: *Wilson v. Layne*

CONSTITUTIONAL LAW — FOURTH AMENDMENT SEARCH AND SEIZURE — QUALIFIED IMMUNITY — The United States Supreme Court held that federal and state law officers violated the Fourth Amendment's prohibition against unreasonable searches when they invited reporters into a home to record the execution of an arrest warrant, but that the officers were entitled to qualified immunity because the state of the law was unclear at the time the search was conducted.

Wilson v. Layne, 119 S. Ct. 1692 (1999).

At 6:45 a.m. on the morning of April 16, 1992, Deputy United States Marshals, in conjunction with Montgomery County Police officers and accompanied by a team of reporters, entered the home of Charles and Geraldine Wilson to execute an arrest warrant.¹ The officers were attempting to arrest Dominic Wilson, the son of Charles and Geraldine Wilson, as part of a national program called "Operation Gunsmoke," in which federal, state, and local police worked together to apprehend dangerous felons and fugitives.² Dominic Wilson was the subject of three outstanding warrants issued by the Circuit Court of Montgomery County, all of which directed "any duly authorized peace officer" to arrest Wilson and bring him immediately before the circuit court to answer charges that he had violated his probation.³

1. See *Wilson v. Layne*, 119 S. Ct. 1692, 1695 (1999). Deputy United States Marshals and Montgomery County Police officers were accompanied by a photographer and reporter from the *Washington Post*. See *id.* The media team had been specifically invited by the U.S. Marshals to accompany the officers as part of the Marshals' "ride-along policy," which allowed members of the media to enter private homes with their cameras to observe and record the apprehension of fugitives. See *id.* at 1700.

2. See *Wilson*, 119 S. Ct. at 1695. Operation Gunsmoke, a national fugitive apprehension program, concentrated on the apprehension of "armed individuals wanted on federal and/or state and local warrants for serious drug and other violent felonies." See *id.* at 1694.

3. See *id.* Wilson was on probation after being convicted of felonious robbery, theft, and assault with intent to rob. See *id.* at 1694. In one of the three outstanding warrants,

Unbeknownst to the police officers, the address listed on the warrants was that of Charles and Geraldine Wilson, Dominic Wilson's parents.⁴ When the team of officers and reporters entered the Wilsons' home, the Wilsons were still asleep, but upon hearing the commotion in the house, Charles Wilson ran into the living room to investigate.⁵ He was extremely angry at the intrusion, and began cursing at the officers and demanding explanations from them.⁶ The officers mistakenly thought that Charles Wilson was Dominic Wilson and forcibly restrained him.⁷ Geraldine Wilson came into the living room shortly after her husband and witnessed the police officers physically restraining him.⁸

The police officers conducted a sweep of the house whereupon they discovered that Dominic Wilson was not in residence and they subsequently left the premises.⁹ The photographer and reporter were present in the Wilsons' home during the entirety of the entrance by the police officers, but did not assist in the execution of the warrants.¹⁰

Charles and Geraldine Wilson sued both the federal and local officers in federal district court for damages resulting from the failed attempt to execute the warrant for Dominic Wilson.¹¹

Wilson was again charged with robbery. *See id.* at 1694 n.1. As a result of his previous felony record and several "caution indicators" compiled by the Montgomery County Police Department, Wilson was identified as a "target" of Operation Gunsmoke. *See id.*

4. *See id.* at 1694.

5. *See id.* at 1695.

6. *See id.*

7. *See Wilson*, 119 S. Ct. at 1695. The "caution indicators" listed by the Montgomery County Police Department's computer indicated that Dominic Wilson was likely to be armed, to resist arrest, and to assault police. *See id.* at 1694.

8. *See id.*

9. *See id.*

10. *See id.* at 1695. While in the home, the photographer took several photographs while the reporter observed the unfolding situation. *See id.* at 1696. Neither the photographer nor the reporter directly participated in the execution of the warrant, and the *Washington Post* never published the photographs taken by the photographer. *See id.*

11. *See id.* The Wilsons sued the United States Marshals under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971) (holding that petitioner *Bivens* was entitled to seek monetary damages for injuries that occurred as a result of an improper search under the Fourth Amendment). *See id.* at 1696. The Wilsons sued the Montgomery County Police officers under 42 U.S.C. § 1983 (1994), which in relevant part provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States 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).

Specifically, the Wilsons claimed that the presence of the reporters during the officers' attempted execution of the warrant violated their Fourth Amendment right to be free from unreasonable searches and seizures.¹² Counsel for the defendant officers moved for summary judgment on the grounds of qualified immunity.¹³ The district court denied the motion for summary judgment and the defendants took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit.¹⁴

The appeal was first heard by a panel of the circuit court, which reversed the district court and held that the officers were entitled to summary judgment.¹⁵ The case was then reheard en banc on two separate occasions where the court of appeals, albeit a divided one, upheld the panel's decision.¹⁶ The court of appeals did not decide the constitutional question of whether there was in fact a Fourth Amendment violation; the majority held only that the officers were entitled to qualified immunity because, at the time of their actions, no court had held that bringing reporters into a home during the execution of an arrest warrant was a violation of the Fourth Amendment.¹⁷ Five justices dissented from the majority opinion, reasoning that bringing the reporters along during the attempted execution of an arrest warrant to record and observe the proceedings violated the clearly established protections of the Fourth Amendment.¹⁸

The United States Supreme Court granted the Wilsons' petition

12. See *Wilson*, 119 S. Ct. at 1695. The Fourth Amendment to the United States Constitution in relevant part provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

13. See *Wilson*, 119 S. Ct. at 1695. Qualified immunity is an "[a]ffirmative defense [that] shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which [a] reasonable person would have known." BLACK'S LAW DICTIONARY 752 (6th ed. 1990) (citation omitted).

14. See *Wilson*, 119 S. Ct. at 1695.

15. See *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997).

16. See *Wilson v. Layne*, 141 F.3d 111, 119 (4th Cir. 1998). Five out of the eleven judges on the court of appeals dissented, and in an opinion by Circuit Judge Murnaghan, reasoned that no reasonable police officer could have believed that the reporters' presence was necessary to further "legitimate law enforcement purposes." See *id.* at 120 (Murnaghan, J., dissenting).

17. See *id.* The right that the officers allegedly violated must be "clearly established" at the time of the alleged violation. See *id.* at 114. "Clearly established," for purposes of the United States Supreme Court's opinion, means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right [T]he unlawfulness [of the official's action] must be apparent." *Wilson*, 119 S. Ct. at 1699 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

18. See *Wilson*, 141 F.3d 111, 119 (4th Cir. 1998) (Murnaghan, J., dissenting).

for a writ of certiorari to determine whether the actions of the officers in bringing the reporters into a private residence to observe the execution of an arrest warrant violated the Fourth Amendment, and, if so, whether the officers were entitled to qualified immunity.¹⁹

Chief Justice William Rehnquist, writing for a majority of the Court, affirmed the decision of the court of appeals and held that the officers' actions in bringing the media along to observe and record the execution of the warrant did in fact constitute a violation of the Fourth Amendment, but that the state of the law was unclear at the time of the search and, as such, the officers were entitled to a qualified immunity defense.²⁰

The Court began by stating that, under the doctrine of qualified immunity, governmental agents are generally "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."²¹ Although the Wilsons sued the federal and county officials under different legal authorities, the Court concluded that under both authorities the analysis for qualified immunity was identical.²² The Court recognized that a two part analysis is to be followed whenever any court has before it a claim of qualified immunity for an alleged violation of a constitutional right: first, whether the plaintiff has "alleged the deprivation of an actual constitutional right," and second, whether that right was "clearly established at the time of the alleged violation."²³ The

19. See *Wilson*, 119 S. Ct. at 1696. The United States Court of Appeals for the Ninth Circuit held in 1997 that federal officers who brought along members of the media to videotape a search for entertainment purposes violated the Fourth Amendment and were not entitled to a defense of qualified immunity. See *Berger v. Hanlon*, 129 F.3d 505, 512 (9th Cir. 1997). The United States Supreme Court granted certiorari and consolidated *Hanlon* and *Wilson* because the circuits were split as to two important questions: (1) whether the actions of the law enforcement officers violated the Fourth Amendment, and (2) if there was a violation of the Fourth Amendment, whether the officers were entitled to the affirmative defense of qualified immunity. See *Wilson*, 119 S. Ct. at 1697.

20. See *Wilson*, 119 S. Ct. at 1697. Justice Stevens dissented. See *id.* at 1701 (Stevens, J., concurring in part and dissenting in part).

21. *Id.* at 1696 (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

22. See *id.* at 1696. The federal marshals were sued under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and the county officers were sued under 42 U.S.C. § 1983 (1994). See *id.* at 1695.

23. *Id.* The standard for analysis was set forth by the Court in *Conn v. Gabbert*, 119 S. Ct. 1292, 1295 (1999). In *Wilson*, Chief Justice Rehnquist writes that the reason for this two-prong analysis is to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit." *Id.* (quoting

Court then proceeded to examine whether the Fourth Amendment was violated by the actions of the officers in allowing the reporters to accompany them on the execution of the warrant.²⁴

Chief Justice William Rehnquist began by exploring the history of the Fourth Amendment's protections against unreasonable searches and seizures.²⁵ The majority opinion noted that protection against invasion of one's home is a fundamental principle embodied in the ancient law of both the United States and England.²⁶ Chief Justice Rehnquist explored the Court's holding in *Payton v. New York*,²⁷ in which the Court held that the "overriding respect for the sanctity of the home" meant that officers could not enter a home to make an arrest without a warrant or exigent surrounding circumstances.²⁸ In *Payton*, the Court also found that a warrant implicitly gave police the authority to enter a home when there was reason to believe that the suspect was within, but the authority is limited by the scope of the warrant.²⁹

The *Wilson* Court noted that the arrest warrant for Dominic Wilson gave the officers the authority to enter the home, but it did not necessarily give the officers the authority to bring along members of the media to witness the proceedings.³⁰ The Court relied upon *Arizona v. Hicks*³¹ and *Maryland v. Garrison*³² for the

Siegert v. Gilley, 500 U.S. 226, 232 (1991)).

24. See *Wilson*, 119 S. Ct. at 1696.

25. *Id.* The Fourth Amendment provides:

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.

26. *Wilson*, 119 S. Ct. at 1696. In 1604, the court in the English case of *Semayne v. Gresham* held that "the house of every one is to him as his castle and fortress, as well as for his defense against injury and violence, as for his repose" Brief for Petitioner at 15, *Wilson v. Layne*, 119 S. Ct. 1692 (1999) (No. 90-1778). Expanding on the same theme, Sir William Blackstone, in his commentaries on English Law, wrote:

[a]n arrest must be by corporal seising or touching the defendant's body; after which the bailiff may justify breaking open the house in which he is; to take him: otherwise, he has no such power; but must watch his opportunity to arrest him. For every man's house is looked upon by the law to be his castle of defence [sic] and asylum, wherein he should suffer no violence. . . .

SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 288 (St. George Tucker, ed., Augustus M. Kelly 1969) (1803).

27. 445 U.S. 573, 602 (1980).

28. See *Wilson*, 119 S. Ct. at 1697.

29. *Payton*, 445 U.S. at 604.

30. *Wilson*, 119 S. Ct. at 1697.

31. 480 U.S. 321, 325 (1987).

proposition that police actions during the execution of a warrant must be related to the ultimate objectives of the warrant in order to ensure that the officers do not exceed the scope of the warrant.³³ The majority concluded that because the reporters did not aid in the execution of the warrant, their presence was not related to the objective of the intrusion into the Wilsons' home; that objective being the apprehension of Dominic Wilson.³⁴

The *Wilson* Court next addressed three arguments by the respondent officers in support of the reporters' presence.³⁵ First, the officers argued that the presence of the media was justified because it "further[ed] their law enforcement mission."³⁶ The Court responded rather tersely by stating, "[w]ere such generalized 'law enforcement objectives' themselves sufficient to trump the Fourth Amendment, the protections guaranteed by that Amendment's text would be significantly watered down."³⁷ The officers next argued that the media presence would serve to accurately record the proceedings, which could in turn serve two purposes: (1) aid in developing good public relations for the police and (2) reduce the possibility of abuses of power by the police while providing a degree of protection for the officers.³⁸ The Court dismissed both of these arguments, stating that "even the need for accurate reporting on police issues in general bears no direct relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant."³⁹ The Court also stated that although there are certain circumstances in which the presence of third parties during the execution of a warrant is proper, the facts of *Wilson* did not present such a case.⁴⁰ Consequently, the Court held that the reporters' presence during the execution of the warrants was a violation of the Wilsons'

32. 480 U.S. 79, 87 (1987).

33. *Wilson*, 119 S. Ct. at 1697.

34. *Id.*

35. *Id.* at 1698.

36. *See id.*

37. *Id.*

38. *See Wilson*, 119 S. Ct. at 1698-99.

39. *Id.* at 1698.

40. *Id.* at 1698. According to Chief Justice Rehnquist, it is proper for the owner of stolen property to accompany police officers during the execution of a search warrant to facilitate the identification of the property. *Id.* at 1697. The Court, relying on its decision in *Ohio v. Robinette*, 519 U.S. 33, 35 (1996), also noted that it might have been reasonable for the officers to have videotaped the execution of the warrant themselves for official use, but it was not reasonable to bring members of the media along to record the proceedings for purely entertainment purposes. *Id.* at 1998.

Fourth Amendment rights.⁴¹

Having satisfied the first prong of the qualified immunity analysis by determining that the presence of the reporters during the execution of the search warrant violated the Wilsons' Fourth Amendment rights, the Court proceeded to discuss the second part of the analysis: whether this right was "clearly established at the time of the search."⁴² The Court began by noting that "government officials performing discretionary functions generally are granted qualified immunity."⁴³ According to the *Wilson* majority, despite the fact that the officers had violated the Wilsons' Fourth Amendment rights, the officers would be protected by qualified immunity unless it could be shown that the police actions were objectively unreasonable in light of then existing "clearly established" rules of law.⁴⁴ Chief Justice Rehnquist turned to the Court's opinion in *Anderson v. Creighton*⁴⁵ for his discussion of the meaning of "clearly established" with respect to the right violated by the officer's conduct.⁴⁶

The *Anderson* Court found that the right allegedly violated must have been defined to a level of specificity such that a reasonable officer would be aware that his conduct was a violation of that right.⁴⁷ Furthermore, the *Wilson* Court determined that it is not enough to say that a right is clearly established simply because it falls under the protection of the Fourth Amendment.⁴⁸ Instead, Chief Justice Rehnquist relied on the *Anderson* Court's language when he stressed that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."⁴⁹ The majority concluded that although the police actions in allowing the members of the media to accompany them into the Wilsons' home during the execution of the arrest warrant was a violation of the Fourth Amendment, the law was not clearly established at the time of the search and, as

41. *Id.* at 1698.

42. *Id.* at 1699.

43. *Wilson*, 119 S. Ct. at 1699.

44. *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)).

45. 483 U.S. 635, 639 (1987).

46. *Wilson*, 119 S. Ct. at 1699.

47. *See Anderson*, 483 U.S. at 640. The *Anderson* Court was careful to point out that its decision did not mean that an officer would automatically be protected unless the conduct in question had previously been found to be unlawful. *Id.* Rather, the Court stressed that qualified immunity would be unavailable to the officer if "in light of pre-existing law the unlawfulness [of the action in question] [is] apparent." *Id.* (internal citations omitted).

48. *Wilson*, 119 S. Ct. at 1699.

49. *Id.* (quoting *Anderson*, 483 U.S. at 640).

such, the officers' conduct was not objectively unreasonable.⁵⁰

The Court considered it significant that, at the time of the search, it had become commonplace for members of the media to accompany police on executions of warrants and that no court had definitively held that such a practice was unlawful.⁵¹ The Court acknowledged that *Bills v. Asetline*,⁵² a circuit court opinion decided five weeks before the events in the Wilsons' home took place, anticipated the conclusion that the presence of a third party during the execution of a warrant in a home violated the Fourth Amendment unless the third party was aiding the police.⁵³ At the time of the intrusion into the Wilsons' home, however, the majority noted that *Bills* was the only federal case to address whether the presence of third parties during the execution of a warrant was unlawful when their presence was not in furtherance of law enforcement aims.⁵⁴ As a result, the Court concluded that, at the time of the attempted execution of the warrant in *Wilson*, it was not clearly established that the presence of reporters during the execution of an arrest warrant in a private home was a violation of the Fourth Amendment.⁵⁵

In stating that the officers' actions were not objectively unreasonable, the Court also mentioned that, at the time of the events in *Wilson*, both the United States Marshals and the Montgomery County Sheriff's Department had media "ride-along" policies in force.⁵⁶ Chief Justice Rehnquist further noted that between the events of *Wilson* and the arguments before the Court pursuant to the grant of certiorari, there arose a split in the circuits as to whether conduct such as that of the police in *Wilson* violated the Fourth Amendment.⁵⁷ The Court concluded that the state of the law when the intrusion occurred was "at best undeveloped" and that the officers' conduct was not objectively unreasonable in light of established law.⁵⁸ Accordingly, the Court affirmed the court of

50. *Id.* at 1699.

51. *Id.*

52. 958 F.2d 697 (6th Cir. 1992).

53. *Bills*, 958 F.2d at 706. The police in *Bills* brought a security guard along to participate in a search for and to identify stolen property that was not named in the warrant. *Id.* at 709.

54. *See Wilson*, 119 S. Ct. at 1700.

55. *Id.*

56. *Id.* The Court referenced a booklet given to the Deputy Marshals that stressed "fugitive apprehension cases normally offer the best possibilities for ride-alongs." *Id.* at 1700 n.4.

57. *Id.*

58. *Id.* at 1701. In discussing the reasonableness of the officers' conduct and the

appeals and held that the officers were entitled to a defense of qualified immunity.⁵⁹

Justice John Paul Stevens filed an opinion concurring in part with the majority opinion and dissenting in part.⁶⁰ Justice Stevens agreed with the majority view that the presence of the reporters during the officers' attempt to execute the arrest warrant for Dominic Wilson was a violation of the Fourth Amendment.⁶¹ He dissented, however, with respect to whether the Wilsons' right to be protected from the type of intrusion that occurred during the attempt was clearly established at the time of the attempt.⁶² The dissent argued that it should have been obvious to the officers that allowing the reporters to enter the Wilsons' home without their consent was a clear violation of their Fourth Amendment rights.⁶³ Additionally, Justice Stevens pointed out that the majority had failed to identify even one case where the presence of the media in a private home during an execution of a warrant was found to be a "reasonable" invasion of privacy.⁶⁴ Finally, Justice Stevens attacked the majority's reliance on a booklet distributed to the United States Marshals regarding the Marshals' media ride-along policy by stating that "[t]he notion that any member of that well-trained cadre of professionals would rely on such a document . . . is too farfetched to merit serious consideration."⁶⁵

That the Justices of the Supreme Court disagree on whether the officers' conduct in *Wilson* was reasonable in light of the Fourth

considerable split of judicial opinions regarding the issue, Chief Justice Rehnquist ended his opinion with the following observation: "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.*

59. *Wilson*, 119 S. Ct. at 1701.

60. *Id.* at 1701 (Stevens, J., concurring in part and dissenting in part).

61. *Id.* at 1701 (Stevens, J., concurring in part and dissenting in part). Justice Stevens noted that *Wilson* was an example of one of those rare cases when the Court unanimously found a violation of the Fourth Amendment. *Id.* at 1702 (Stevens, J., concurring in part and dissenting in part).

62. *Id.* (Stevens, J., concurring in part and dissenting in part).

63. *Id.* (Stevens, J., concurring in part and dissenting in part). Justice Stevens declared that his "sincere respect for the competence of the typical member of the law enforcement profession precludes my assent to the suggestion that 'a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful.'" *Id.* (Stevens, J., concurring in part and dissenting in part) (quoting the majority opinion).

64. *Wilson*, 119 S. Ct. at 1702 (Stevens, J., concurring in part and dissenting in part).

65. *Id.* at 1704 (Stevens, J., concurring in part and dissenting in part). To emphasize this point, Justice Stevens quoted the Sheriff of Montgomery County, who said during his testimony, "[w]e would never let a civilian into a home . . . that's just not allowed." *See id.* at 1704 (Stevens, J., concurring in part and dissenting in part).

Amendment is no surprise, considering the Court's historical struggle to define the parameters of the rights set forth therein.⁶⁶ Although the right to privacy is not specifically guaranteed by the Fourth Amendment, the Supreme Court has consistently found that "the rights of privacy and personal security . . . [under] the Fourth Amendment . . . are to be regarded as the very essence of constitutional liberty."⁶⁷ To help delineate the contours of the Fourth Amendment's protections of individual privacy against unfounded governmental intrusion, the Court has consistently looked to the intent of the framers in drafting the Fourth Amendment.⁶⁸

In the 1886 case of *Boyd v. United States*,⁶⁹ the Court considered whether a compulsory production of a person's private papers in a forfeiture proceeding constituted an unreasonable search and seizure under the Fourth Amendment.⁷⁰ A majority of the Court held that such a compulsory production, in a criminal or quasi-criminal case, was the equivalent of an unreasonable search and seizure, and, as such, was within the protections of the Fourth Amendment.⁷¹ Justice Joseph Bradley, writing for the Court, explored in detail the then recent history in both England and the United States surrounding the drafting of the Fourth Amendment.⁷² The *Boyd* Court recognized that the Fourth Amendment was drafted to protect United States citizens from the abuses and

66. See, e.g. *Boyd v. United States*, 116 U.S. 616, 622 (1886) (compulsory production of a person's papers to be used against him in a criminal proceeding is an unreasonable seizure under the Fourth Amendment); *Weeks v. United States*, 232 U.S. 383, 389-90 (1914) (search and seizure constituted an unreasonable invasion of privacy when federal officials performed search under color of authority but without a valid warrant); *Harris v. United States*, 331 U.S. 145, 150-51 (1947) (Fourth Amendment permits searches and seizures incidental to lawful arrest, even without a warrant).

67. *Harris v. United States*, 331 U.S. 145, 150 (1947) (quoting *Gouled v. United States*, 282 U.S. 344, 357 (1931)).

68. See, e.g. *Boyd v. United States*, 116 U.S. 616, 622 (1886) (constitutional protections of persons and property should be liberally construed); *Weeks v. United States*, 232 U.S. 383, 389-90 (1914) (the framers of the Fourth Amendment sought to secure for the people protection against unreasonable searches and seizures); *Harris v. United States*, 331 U.S. 145, 150-51 (1947) (the right of privacy guaranteed by the Fourth Amendment is the very essence of constitutional liberty).

69. 116 U.S. 616 (1886).

70. See *Boyd*, 116 U.S. at 622.

71. *Id.* at 634-35. In a familiar substance-over-form analysis, the Court emphasized that the forfeiture case in *Boyd* was quasi criminal in nature, and that by compelling *Boyd* to produce papers against his will the government was subjecting him to an unreasonable seizure for purposes of the Fourth Amendment and was also compelling him to be a witness against himself in violation of the Fifth Amendment. *Id.*

72. *Id.* at 624-27.

governmental invasions countenanced at the time by Great Britain and evidenced by such practices as the issuing of general warrants and writs of assistance.⁷³ Justice Bradley recalled the general outcry in America surrounding the Crown's use of writs of assistance to empower revenue officers to search for smuggled goods, and the almost unlimited discretion the writs gave to such officers to conduct arbitrary searches and seizures.⁷⁴ The majority emphasized that it was against this backdrop of egregious invasions of privacy by governmental officials acting under almost unlimited authority that the drafters of the Bill of Rights composed the Fourth Amendment.⁷⁵ Although the *Boyd* Court did not specifically mention a constitutional right of privacy, it stressed that the Fourth Amendment was intended by the drafters to protect against all governmental invasions into "the sanctity of a man's home and the privacies of life."⁷⁶

Having established that the Fourth Amendment's protections extended to seizures of a person's private papers and effects, the

73. *Id.* at 625. In the 1700s, the practice of issuing general warrants, which named neither the person to be arrested nor the particular items to be searched for, became a common one in England. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 42 (1937). In 1762, John Wilkes, a member of Parliament, anonymously wrote *The North Briton Number 45*, a pamphlet that criticized the workings of the English government. *Id.* at 43. In response, Lord Halifax, the Secretary of State, issued a general warrant to search for the authors, printers, and publishers of the pamphlet. *Id.* at 43. Wilkes was arrested, along with forty-nine others, and brought suit against the government challenging the legality of the general warrant. *Id.* at 44-45. In a series of decisions, Chief Justice Pratt held that the general warrant was illegal. *Id.* at 44-47. In 1766, William Pitt undertook a personal mission to have general warrants deemed illegal in the House of Commons, which had previously declined to address the issue. *Id.* at 49. He was successful in getting the House of Commons to declare general warrants universally invalid, except as specifically provided for by Parliament. *Id.* at 49. During the debates on this issue, Pitt made the following remarks:

The poorest man may, in his cottage, bid defiance to all the forces 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 may not enter; all his force dare not cross the threshold of the ruined tenement.

Id. at 49-50.

74. *Boyd*, 116 U.S. at 625. The controversy surrounding the Crown's use of writs of assistance was especially pronounced in Boston around 1761. LASSON, *supra* note 73, at 51. Historians generally agree that the famous controversy in Boston was the impetus for the colonies' resistance and eventual revolt against the oppressions and tyranny of England. *Id.*

75. *Boyd*, 116 U.S. at 625.

76. *Id.* at 630. Regarding the seizure of private papers, the Court noted that [i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense

Id. at 630.

Court next addressed the treatment of evidence procured in such a fashion in the 1914 case of *Weeks v. United States*.⁷⁷ In *Weeks*, the Court was faced with a circumstance where certain papers and effects belonging to Weeks were seized by U.S. Marshals who conducted a warrantless search of his apartment to collect evidence tending to show that he was involved in mail fraud.⁷⁸ The Court had to decide whether the papers seized during the search, which were used by prosecutors against Weeks at his trial, were properly admitted into evidence.⁷⁹

Justice William Rufus Day, writing for the majority, relied extensively on *Boyd* to support the holding that the papers were collected as the result of an unconstitutional search by the U.S. Marshals.⁸⁰ In reaching the holding, the Court took particular notice of the fact that the U.S. Marshals acted in *Weeks* under color of authority but without a properly sworn warrant based on probable cause.⁸¹ The Court distinguished the holding in *Weeks* from those cases in which it was held that, when engaged in a criminal trial, a court will not take into account the manner in which evidence is procured when the same is *properly* offered into evidence at trial.⁸² In *Weeks*, the Court found that the evidence was gathered as a result of an unconstitutional search by the federal marshals, and, as such, could not properly be offered into evidence.⁸³ The holding in *Weeks* established the exclusionary rule for federal searches, which

77. 232 U.S. 383 (1914).

78. *Weeks*, 232 U.S. at 386. Weeks was arrested by local police at his place of employment. *See id.* at 386. Other policemen entered his home, without a warrant, and searched it, eventually taking from it the papers and effects later in issue at his trial. *See id.* The local police then gave the seized items to the U.S. Marshals, who went back, also without a warrant, and conducted another search of Weeks' home. *See id.*

79. *See id.* at 389.

80. *Id.* at 393-94. In discussing the Fourth Amendment and the courts' duty to enforce its protections, the Court stated:

[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

Id. at 393.

81. *Id.* at 397.

82. *Id.* at 396 (emphasis added).

83. *Weeks*, 232 U.S. at 396. The Court stressed the difference between evidence incidentally acquired as a result of the execution of a legal warrant and evidence acquired illegally in a warrantless search, as in *Weeks*. *Id.* at 396.

prohibits in a criminal trial the introduction of evidence that was obtained by means of an unconstitutional search and seizure.⁸⁴

After clearly holding that evidence obtained during a warrantless search is excludable at trial in *Weeks*, the next major step in the Court's recognition of a constitutional right to privacy embedded within the Fourth Amendment came in 1947 when the Court decided *Harris v. United States*.⁸⁵ In *Harris*, the Court clarified its stance on incidental searches performed under authority of a valid warrant.⁸⁶ The *Harris* Court addressed the question of whether a search of a home made incidental to the execution of a valid arrest warrant violated the Fourth Amendment.⁸⁷ In *Harris*, federal agents conducted an incidental search of Harris' home in conjunction with the execution of a valid arrest warrant.⁸⁸ During the search, the agents uncovered specific evidence of an unrelated crime.⁸⁹ The *Harris* majority declined to extend the Fourth Amendment's protections against unreasonable search and seizures to searches incident to the execution of a valid arrest warrant, even though the evidence obtained thereby was in no way related to the crimes for which the accused was arrested.⁹⁰ In addressing the search, Chief Justice Frederick Vinson, writing for the Court, stressed that the Fourth Amendment protects an individual's right of privacy and personal security.⁹¹ While acknowledging that unauthorized governmental intrusions and abuses are the chief evils to which the guarantees of the Fourth Amendment are directed, the *Harris* Court concluded that the FBI's search of Harris' home as an incident of his arrest was not an unreasonable invasion of his

84. Kevin E. Lunday, Note, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis*, 65 GEO. WASH. L. REV. 278, 282-83 n.35 (1997).

85. 331 U.S. 145 (1947).

86. *Harris*, 331 U.S. at 150-51.

87. *Id.* at 150. In *Harris*, the FBI agents executed a valid arrest warrant for mail fraud in the home of the defendant, Harris. *See id.* at 148. They proceeded, as an incident of the arrest, to thoroughly search the entire home. *See id.* at 149. The search yielded an envelope containing draft cards, which the agents seized. *See id.* The agents were specifically looking for two stolen checks and other evidence of mail fraud, and were unable to locate them in the home; however, Harris was later indicted and convicted of sixteen counts of possession, concealment, and alteration of the draft cards found during the search. *Id.* at 146-47.

88. *Harris*, 331 U.S. at 148.

89. *See id.* at 148-49.

90. *Id.* at 155. The Court acknowledged that the draft cards were not related to the crime listed on the arrest warrant, mail fraud, and that the search was not conducted under authority of a search warrant. *Id.* at 149.

91. *Id.* at 150. Chief Justice Vinson characterized the rights protected by the Fourth Amendment as "the very essence of constitutional liberty." *Id.*

privacy.⁹²

In its 1967 decision in *Katz v. United States*,⁹³ the Supreme Court again expanded the parameters of the constitutional right to privacy by emphasizing that the Fourth Amendment was designed to protect people and not places.⁹⁴ In *Katz*, FBI agents attached an electronic listening device to the outside of a public phone booth, which they used to record certain phone calls made by the defendant, Katz.⁹⁵ The *Katz* Court declined to adopt the formulation of the issues as presented by the petitioner because those formulations centered on the phone booth as a "constitutionally protected area."⁹⁶ Instead, the majority stressed that the real question in the case was whether Katz had a reasonable expectation of privacy while placing the calls from the phone booth.⁹⁷ The Court held that the electronic surveillance in *Katz* was an unreasonable search and seizure within the meaning of the Fourth Amendment because it was clear that Katz had expected privacy within the phone booth, and that the FBI agents did not follow proper procedure by obtaining a warrant.⁹⁸

The *Katz* Court rejected various arguments by the government, including one in which the government claimed that the agents acted with restraint by constraining their actions to the least intrusive method available of searching the phone booth.⁹⁹ The

92. *Id.* at 155. Because the Court found no violation of Harris' constitutional rights, it found that the district court was correct in refusing to suppress the evidence obtained by the FBI search, and affirmed Harris' conviction. *Id.*

93. 389 U.S. 347 (1967).

94. *Katz*, 389 U.S. at 351.

95. *Id.* at 348. The FBI recorded Katz's end of phone conversations which tended to show that he was involved in transmitting wagering information across state lines. *See id.* The trial court permitted the prosecution to enter the recordings into evidence and Katz was convicted of eight counts of transmitting wagering information by telephone in violation of a federal statute. *See id.* The United States Court of Appeals for the Ninth Circuit affirmed the conviction, holding that the FBI's conduct did not amount to a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures because there was no physical invasion of the phone booth. *See Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966).

96. *Id.* at 350.

97. *See id.* at 351-52. In replying to the Government's argument that Katz was completely visible in the phone booth and could not have reasonably expected privacy, the Court stated clearly that "what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen." *Id.* at 352.

98. *Id.* at 359.

99. *Katz*, 389 U.S. at 356-57. The electronic surveillance equipment was placed on top of the outside of the phone booth. *See id.* at 348. The Government argued that because there was no physical invasion of the phone booth, the agents committed no trespass during the

Court ruled that, despite the restraint displayed by the officers, the type of surveillance employed necessitated the safeguards of a properly issued warrant as a precondition to constitutionality.¹⁰⁰ The majority reaffirmed the existence of several exceptions to the necessity of a warrant, including when a search is conducted as an incident to arrest, but maintained that the general rule is that searches and seizures conducted without the authority of a properly issued warrant are per se unreasonable for purposes of the Fourth Amendment.¹⁰¹

Six months after the Court handed down its decision in *Katz*, the case of *Terry v. Ohio*¹⁰² presented the Court with a question of whether a search and seizure, in this case a "stop and frisk," made without the probable cause necessary for the issuance of a warrant, was unreasonable.¹⁰³ In *Terry*, the Court was confronted with a case where a policeman stopped Terry on the street after observing suspicious behavior and subjected him to a pat down to search for weapons before the policeman had probable cause to effectuate an arrest.¹⁰⁴ Chief Justice Earl Warren delivered the opinion of the Court, in which he noted that the question before it was a very narrow one: whether it is always unreasonable for an officer to stop and search a person for weapons before probable cause to make an arrest exists.¹⁰⁵

The *Terry* majority held that an officer who reasonably suspects a person of being involved in a criminal action and who fears that the person is armed and dangerous may stop him and subject him to a limited search for weapons, even in the absence of probable

surveillance. *See id.* at 352-53. The Court rejected the argument, stressing that the Fourth Amendment protects people, not places; and in light of the new listening technology, it was clear that whether there was a constitutional violation of a person's privacy could not turn on "the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

100. *Id.* at 358-59.

101. *Id.* at 357 n. 19.

102. 392 U.S. 1, (1968).

103. *Terry*, 392 U.S. at 15.

104. *Id.* at 7-8. In *Terry*, the officer observed Terry and a companion "casing" a store and became suspicious that both men were armed. *See id.* at 6. The officer approached the men, identified himself as a police officer, and asked them a few questions. *See id.* at 6-7. After they responded, the officer grabbed Terry and subjected him to a pat-down, upon which he discovered Terry was armed with a .38 caliber revolver. *See id.* at 7. Terry was arrested and charged with carrying a concealed weapon. *See id.* At trial, Terry made a motion to suppress the gun as being the product of an unreasonable search and seizure in violation of his Fourth Amendment rights. *See id.* The trial court denied the motion and Terry plead guilty to the offense. *See id.* at 8.

105. *See id.* at 15.

cause, without violating the Fourth Amendment.¹⁰⁶ In so holding, the majority carefully balanced the legitimate interests of the government in seeking to prevent crime and to secure the safety of both police officers and the public against the competing interest of the individual and his right to be free from invasions of his privacy.¹⁰⁷ The *Terry* Court emphasized that, because the Fourth Amendment protects people and not places, a person has as much a right to be free from unwarranted governmental invasions on the streets as he does in his home.¹⁰⁸ Nevertheless, the Court concluded that, under extremely restricted circumstances, an individual's right to privacy must yield when a police officer performs a limited search of his person in light of the officer's objectively reasonable fear that he is engaged in criminal activity and is armed and dangerous to the public.¹⁰⁹

In the 1971 case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹¹⁰ the Court addressed the novel question of whether federal officers could be held personally liable for an unconstitutional search and seizure conducted in an individual's home.¹¹¹ In *Bivens*, federal narcotics agents entered the Bivens' home without an arrest warrant, proceeded to arrest Webster Bivens, and made a thorough search of his home as an incident to the arrest.¹¹² Having previously narrowed the Fourth Amendment protections of individual privacy with respect to "stop and frisks," the *Bivens* Court again expanded those protections with respect to warrantless searches of an individual's home.¹¹³ The *Bivens* Court held that an individual is entitled to seek monetary damages from federal officers who, while acting under color of

106. *Id.* at 30-31. The Court carefully reiterated that the determination of reasonableness in cases such as *Terry* would turn on the precise facts of the case. *Id.* at 30. The Court also re-emphasized, as a general rule, the holding in *Katz* that the police must obtain a warrant based upon sworn oath and probable cause in every practical instance to avoid violating the individual's Fourth Amendment rights. *Id.*

107. *Id.* at 24-25.

108. *Id.* at 9.

109. *Terry*, 392 U.S. at 30. The Court stressed that the suspicions of the officer must be based on not on subjective "hunches," but on objectively observable events which would cause a reasonable person to believe the person was armed and presented a threat to the safety of the officer or others. *See id.* at 27.

110. 403 U.S. 388 (1971).

111. *Bivens*, 403 U.S. at 389. In this case, federal narcotics agents entered Bivens' home in their official capacity and arrested him for narcotics violations. *See id.* The agents did not have an arrest warrant; nonetheless, they manacled Bivens in front of his family, and made a thorough search of his home as an incident to the arrest. *See id.*

112. *See id.*

113. *Id.*

their federal authority, violate the individual's Fourth Amendment rights by conducting an unconstitutional search and seizure.¹¹⁴ Moreover, the Court rejected the government's argument that a right to privacy is generally the province of state law rather than federal; and, in so doing, stressed that the Fourth Amendment provided for limitations on the power of federal authorities to conduct their activities independently of the applicable state laws.¹¹⁵ The majority noted that a federal officer acting under a claim of federal authority to enter a home and conduct a search poses a far greater threat to a person's right to privacy than does an ordinary individual attempting the same.¹¹⁶ The *Bivens* Court concluded that an individual whose constitutional rights have been violated in this manner by federal officials has the right to seek redress in the form of money damages, but declined to address when those same officials might be immune from liability by virtue of their official position.¹¹⁷

In 1982, the Court visited the immunity question and clarified the applicability of a qualified immunity defense in a *Bivens* action when it decided *Harlow v. Fitzgerald*.¹¹⁸ The *Harlow* Court was presented with the issue of whether the defendants, who were presidential aides to former President Richard Nixon and who allegedly conspired to have Fitzgerald removed from the Air Force after he gave unfavorable testimony to Congress, were entitled to a qualified immunity defense in a *Bivens* action for civil damages.¹¹⁹ The Court held that the defendants were entitled to the protections of qualified immunity.¹²⁰

114. *Id.* at 397. The Court reasoned that the federal officers should be personally liable for violations of a person's Fourth Amendment rights in light of the historic tendency of the courts to provide for personal liability and monetary damages for an "invasion of personal interests in liberty." *Id.* at 395.

115. *See id.* at 392.

116. *See Bivens*, 403 U.S. at 392. The Court reasoned that a person can more readily protect himself against an individual trespasser's invasion of his home than he can against a federal officer demanding entrance by claiming federal authority to do so. *See id.* at 394. In support of this contention, the Court stated, "[t]he mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well." *Id.*

117. *Id.* at 397-98.

118. 457 U.S. 800 (1982).

119. *Harlow*, 457 U.S. at 806. The defendants in *Harlow* were alleged to have participated in a conspiracy to have Fitzgerald dismissed from his position in the Air Force in unlawful retaliation for his negative testimony in front of Congress regarding the development and cost of a particular airplane. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

120. *Harlow*, 457 U.S. at 818.

In a majority opinion by Justice Lewis Powell, the Court emphasized that the traditional reasoning behind extending qualified immunity to government officials performing discretionary functions was to spare them the costs and expense of defending often insubstantial and unwarranted claims.¹²¹ Furthermore, the Court broadened the applicability of qualified immunity by eliminating the subjective aspect of the test as it had evolved and redefining the immunity defense in purely objective terms.¹²² As noted by the *Harlow* majority, the subjective element of the test had too often trumped the aims of the courts in recognizing qualified immunity, to prevent insubstantial claims from going to trial, by presenting an issue of fact for the jury to determine.¹²³ The Court concluded that federal officials are to be held to an objective standard and are entitled to claim qualified immunity if their actions do not violate "clearly established" rights of which a reasonable person would have known.¹²⁴

In 1987, the Court demonstrated the application of the objective standard when it decided *Maryland v. Garrison*.¹²⁵ In *Garrison*, police officers mistakenly performed a search of Garrison's apartment pursuant to a valid search warrant.¹²⁶ Based on information they had collected and sworn to in the warrant, the officers believed that there was only one apartment on the third floor of the building in which Garrison lived; in reality, there were two.¹²⁷ Before the officers realized that there were two apartments

121. *Id.* at 808. The Court reasoned that "insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss." *Id.*

122. *See id.* at 815-18. Prior to the *Harlow* decision, the qualified immunity defense had both an objective and a subjective prong: a federal official would not have been entitled to qualified immunity if he "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* at 815.

123. *Id.* at 816. Malicious intent, as part of the subjective aspect of the test for qualified immunity, would ordinarily be an issue of fact for the trier of fact to determine. *See id.* at 816. As such, an allegation of malicious intent by the plaintiff was often sufficient to preclude summary judgment in suits against governmental officials claiming qualified immunity. *See id.*

124. *Id.* at 818.

125. 480 U.S. 79, 86-87 (1987).

126. *Garrison*, 480 U.S. at 80.

127. *See id.* The officers examined the exterior of the building, checked with a utility company, and spoke to a reliable informant before securing the warrant. *See id.* at 81. All of the information in the officers' possession led them to believe that there was only one apartment on the third floor of the building and that the apartment belonged to a man

and that they were in the wrong one, they discovered heroin and drug paraphernalia within Garrison's apartment.¹²⁸

Justice John Paul Stevens authored the majority opinion, in which the Court addressed whether the search was unconstitutional under the Fourth Amendment. Justice Stevens noted that the "scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found.'"¹²⁹ The *Garrison* majority stressed that a search must be "carefully tailored to its justifications" in order to avoid the "character of the wide-ranging exploratory searches the Framers intended to prohibit."¹³⁰ The Court found that the mistake on the part of the officers was objectively reasonable in light of the situation they faced and the facts they possessed at the time of the search and upheld the validity of both the warrant and the search.¹³¹

In *Anderson v. Creighton*,¹³² the Supreme Court addressed the application of qualified immunity in the context of a *Bivens* suit against an FBI agent who allegedly violated the Creightons' Fourth Amendment rights by conducting an unwarranted search of their home because he mistakenly believed a bank robbery suspect was hiding inside.¹³³ Justice Antonin Scalia, writing for the Court, considered whether a federal agent could be held personally liable in a *Bivens* action for civil damages for participating in a warrantless search if he reasonably believed the search complied with the Fourth Amendment.¹³⁴ In holding that Anderson was entitled to qualified immunity, the majority placed particular emphasis on the "clearly established" language from *Harlow*.¹³⁵ In

named McWebb, against whom they secured the search warrant. *See id.* at 80.

128. *See id.* at 81.

129. *See id.* at 84.

130. *Id.*

131. *See Garrison*, 480 U.S. at 86-87. In elaborating on the holding, Justice Stevens wrote, "[w]hile the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing warrants." *Id.* at 87.

132. 483 U.S. 635 (1987).

133. *Anderson*, 483 U.S. at 636-37. The FBI agent in *Anderson* conducted a warrantless search of the Creightons' home because he mistakenly thought a suspect in a bank robbery that occurred earlier in the day was present in the home. *See id.* at 637.

134. *Id.* at 636-37.

135. *Id.* at 639. In discussing the contours of a clearly established right, the Court worried that if the right was defined too generally, "[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*

order to be clearly established, Justice Scalia reasoned that the right alleged to have been violated must have been previously defined by law to a degree of specificity such that a reasonable officer would know that his conduct was improper.¹³⁶ The Court recognized that law enforcement officers can mistakenly but reasonably believe that their actions in conducting a search are lawful under the Fourth Amendment.¹³⁷ The *Anderson* Court concluded that in such cases, where an officer reasonably believes there is probable cause to search and exigent circumstances exist, the officer should not be held personally liable if at some later time it is determined that he was mistaken.¹³⁸

Five weeks before the events in *Wilson v. Layne*¹³⁹ took place, the United States Court of Appeals for the Sixth Circuit, in deciding *Bills v. Aseltine*,¹⁴⁰ confronted the issue of whether the presence of a third party at the execution of a search warrant offended the Fourth Amendment when the third party did not assist the police in the search.¹⁴¹ The officers in *Bills* invited a security guard to observe the execution of a search warrant in Bills' home and allowed him to take pictures of the contents of the home.¹⁴² The court of appeals in *Bills* reversed the trial court's grant of summary judgment in favor of the defendant officers, holding that whether the officers exceeded the scope of the warrant by inviting a third party to accompany them during its execution was a material issue of fact to be resolved by the jury.¹⁴³ In dicta, however, the court

136. *Id.* at 640.

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (internal citations omitted).

137. *Anderson*, 483 U.S. at 641.

138. *Id.*

139. 119 S. Ct.1692 (1999).

140. 958 F.2d 697 (6th Cir. 1992).

141. *Bills* at 697. In *Bills*, police officers invited a private security guard to accompany them while searching the Bills' home. *Id.* at 700. The guard, who worked for General Motors, was brought along because he helped to identify suspected stolen property belonging to General Motors that was not specified in the search warrant. *See id.* at 699-700. The guard observed the proceedings without assisting the officers in conducting the search, but took 231 pictures of certain parts and equipment located in the home. *See id.* at 700. The pictures were later used to procure another search warrant for the photographed items. *See id.*

142. *Id.* at 699-700.

143. *Id.* at 705.

acknowledged that because the third party was not present to assist the police, his presence and activity within the home was not condoned by any known legal doctrine.¹⁴⁴ The court remanded the case specifically to determine whether the officers' conduct in inviting a private citizen into the home to view the execution of the warrant was an unconstitutional invasion of the Bills' Fourth Amendment rights.¹⁴⁵

In 1994, the United States Court of Appeals for the Second Circuit was faced with similar circumstances in *Ayeni v. Motolla*.¹⁴⁶ The issue in *Ayeni* was whether an officer unconstitutionally invaded the Ayenis' privacy by bringing members of the media into their home to videotape the execution of a search warrant.¹⁴⁷ The court concluded that the officer had exceeded the scope of the search warrant by allowing persons unauthorized by the warrant to observe its execution.¹⁴⁸ In so concluding, the court emphasized that the sole reason the media personnel were present in the home was to videotape the proceedings for public broadcast, and that such an invasion of privacy was the very harm the Fourth Amendment strives to prevent.¹⁴⁹ The court also addressed whether the officer could have reasonably believed his conduct in inviting media participation in the search did not violate clearly established law such that he would be entitled to qualified immunity.¹⁵⁰ The majority answered negatively, holding that the Ayenis' right to be protected from unwarranted invasions of the media into their home was clearly established at the time of the search and, as such, the officer was not entitled to qualified immunity because he could not have reasonably believed his conduct in bringing the camera crew into the home was lawful.¹⁵¹

144. *Id.* at 703.

145. *Id.* at 704-05. According to the court, "[t]he critical question in this case is whether the police officers engaged in any constitutionally unreasonable act in permitting or facilitating [the security guard's] presence in plaintiff's home." *Id.* at 704.

146. 35 F.3d 680 (2d Cir. 1994).

147. *Ayeni*, 35 F.3d at 684.

148. *Id.* at 686. After observing that the officer had exceeded the scope of the authority granted him by the warrant in bringing the camera crew into the Ayenis' home, the court succinctly stated that "[a] private home is not a soundstage for law enforcement theatricals." *Id.*

149. *Id.*

150. *Id.*

151. *Id.* Although the court grounded its holdings on well-established Fourth Amendment principles, it re-enforced its conclusions with a federal statute, which reads: [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

In light of the ever-encroaching presence of the media in almost every aspect of daily life, the issues addressed by the Supreme Court of the United States in *Wilson v. Layne*¹⁵² were long overdue for analysis and clarification. The *Wilson* Court properly realized that the determination of whether a law enforcement official exceeds the scope of a warrant or abuses his official authority, thereby violating an individual's Constitutional rights and exposing himself to liability, is a function of the circumstances in which he acts, the time of his action, and the prevailing law *at that time*. When faced with such a claim against a law enforcement officer, the Court must carefully analyze the claim within the specific timeframe and context of the factual circumstances it presents, keeping in mind that the ultimate goal is the preservation of the fundamental guarantees of the Constitution.

The Court has consistently and vehemently protected the rights of individuals against unwarranted governmental intrusion into the privacies of life.¹⁵³ At the same time, the Court has struggled to balance the legitimate interests of the government in preventing crime, securing the safety of its officers, and instilling public confidence in law enforcement against the very fundamental right to privacy embodied in the Constitution. In very specific instances, as it did in *Terry v. Ohio*,¹⁵⁴ the Court has deemed it appropriate for the right to privacy to yield to the countervailing concerns of the safety of police officers or of the general public.¹⁵⁵ More often, though, the Court has faithfully protected the aims of the Fourth Amendment by recognizing a Constitutional right to privacy and by expanding the contours of that right so as to insulate individuals from unwarranted governmental intrusions into the most personal areas of their lives.¹⁵⁶

its execution.

18 U.S.C. § 3105 (1994).

152. 119 S. Ct. 1692, 1696 (1999).

153. See, e.g., *Boyd v. United States*, 116 U. S. 616 (1886) (holding that a compulsory production of a person's private papers in a criminal case is an unreasonable search and seizure within the meaning of the Fourth Amendment); *Katz v. United States*, 389 U.S. 347 (1967) (stating that the government's actions in recording a private conversation in a public phone booth without a warrant was a violation of Fourth Amendment right to privacy); and *Payton v. New York*, 445 U.S. 573 (1980) (concluding that the Fourth Amendment prohibits police from entering a suspect's home without a warrant or consent).

154. 392 U.S. 1 (1968).

155. *Terry*, 392 U.S. at 27.

156. See, e.g., *Weeks v. U.S.*, 232 U. S. 383 (1914) (establishing the exclusionary rule for evidence obtained by means of an unreasonable search or seizure); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that federal

At first glance, the deceptively simple analysis of Justice Stevens in his *Wilson* dissent is tempting. Of course, the right to be free from unreasonable searches and seizures is clearly established by the Fourth Amendment to the Constitution. In his *Wilson* dissent, Justice Stevens stressed that it was well settled at the time of the events in *Wilson* that an officer committed a trespass when he allowed a civilian to enter another's property without the owner's consent.¹⁵⁷ Justice Stevens maintained, therefore, that no competent law enforcement official could have reasonably believed that bringing members of the media into a home without its owners' consent was lawful in light of the Fourth Amendment.¹⁵⁸ In hindsight, upon calm and reflective analysis, and years after the events took place, it may seem elementary that the officers' actions in bringing the media into the Wilsons' home violated the mandate of the Fourth Amendment. However, at the time of the events in *Wilson*, in the circumstances confronting the officers, in the prevailing law enforcement climate and in light of the media ride-along policies in force, the violation was considerably less apparent.

The dissenting Justice Stevens concentrated his analysis on what he deemed a "well established principle" that "police action in the execution of a warrant must be strictly limited to the objectives of the authorized intrusion."¹⁵⁹ Because the *Wilson* majority agreed and expressly held that the presence of the media in the Wilsons' home did not further any legitimate law enforcement goal, and so was not related to the objectives of the search, Justice Stevens found that it was "clearly established" that the police conduct was objectively unreasonable.¹⁶⁰

The major disagreement between the majority and the dissent, then, is over the meaning of "objectively reasonable." The majority focused on the dearth of federal opinions on point, and the media ride along policies in force at the time of the search for its holding that the police conduct was not objectively unreasonable. Justice Stevens, in turn, relied upon a federal statute and noted that the Montgomery County Sheriff, who was a supervisor of the local police officers but was not present for the search, admitted that he

law officials can be held civilly liable for violations of individual's Constitutional rights).

157. *Wilson*, 119 S. Ct. at 1703-04 (Stevens, J., concurring in part and dissenting in part).

158. *Id.* at 1701 (Stevens, J., concurring in part and dissenting in part).

159. *Id.* at 1702. (Stevens, J., concurring in part and dissenting in part).

160. *Id.* (Stevens, J., concurring in part and dissenting in part).

would never have let a civilian into the Wilsons' home.¹⁶¹ Justice Stevens maintained that the Sheriff's statement was better evidence of the officers' reasonable understanding than that relied upon by the majority.¹⁶² The subjective prong of the qualified immunity analysis was abandoned in *Harlow v. Fitzgerald*, however, and the majority correctly applied an *objective* standard to assess the reasonableness of the federal and state officers' conduct during the execution of the search warrant in *Wilson*.

Justice Stevens' argument is flawed in that it appears to assume that many police actions later found to be violative of the Fourth Amendment are necessarily objectively unreasonable at the time they are performed. If that were indeed the case, the doctrine of qualified immunity would have almost no applicability in Fourth Amendment violations, as the finding of a violation would practically necessitate the finding of unreasonableness of the officers' prior actions, thereby routinely depriving them of qualified immunity that turns on "objective legal reasonableness."¹⁶³ The *Wilson* majority properly rejected the invitation to reason from hindsight, recognizing that the objective reasonableness of official action is a function of clearly established law in place *at the time the action takes place*, which may or may not be reconsidered and found unreasonable at a later point in time. To have held otherwise, the Court would have required law enforcement officers to accurately predict future trends in Constitutional law while in the midst of performing their duties, and, in instances where they are unfortunately but reasonably mistaken, to suffer the consequences.

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161. See *id.* at 1704. (Stevens, J., concurring in part and dissenting in part) (relying on 18 U.S.C. § 3105 (1994)).

162. *Id.* (Stevens, J., concurring in part and dissenting in part).

163. *Wilson*, 119 S. Ct. at 1699. Ironically, in *Maryland v. Garrison*, a majority opinion authored by Justice Stevens, he wrote, "[w]hile the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing warrants." *Maryland v. Garrison*, 480 U.S. 79, 87 (1987).