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Wilson, v Layne: Bans Press with Police in the Home, but Leaves Media Ride-Alongs Intact

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WILSON v. LAYNE: BANS PRESS WITH POLICE IN THE HOME, BUT LEAVES MEDIA RIDE-ALONGS INTACT

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I. INTRODUCTION

The press is overstepping in every direction the obvious bounds of propriety and decency. . . . The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

More than a century ago, two legal scholars called for more privacy in the

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1 Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV 193, 196 (1890). Brandeis went on to become a United States Supreme Court Justice.
home from the overbearing glare of the press. In 1999, the United States Supreme Court, in Wilson v. Layne, drew a bright line at the front door to keep the media out. The Court’s ruling in Wilson was not designed to hamper the press, but instead was grounded in the protection of privacy in the home. Thus, the Court has made it a violation of the Fourth Amendment for the police to bring the press inside a home while executing a warrant. This does not, however, stop all the so-called media ride-along programs (where the police allow reporters and photographers to accompany police officers on patrol and photograph or videotape them in action). Consequently, the Court issued a narrow ruling, holding only that police cannot bring the press inside a home when executing a warrant.

Although the facts of Wilson tell us media presence in the home is a violation when members of the press are physically present inside the house, a companion case, Hanlon v. Berger, is not so plain regarding where members of the press have to be before a Fourth Amendment violation will occur. In Hanlon, no members of the press were actually inside the home, but were instead present on the curtilage of the home. A recording device (microphone) belonging to the press was attached to a federal agent who entered the home, but the home was not subject to the search warrant. The Court in Hanlon repeated its holding in Wilson and left several questions open for later discussion.

Although the rulings are not generally welcome ones for the press, they

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2 See id.
4 See id. at 613 (holding that the First Amendment is important, but the Fourth Amendment protection of privacy is more important when the media is an uninvited visitor in the home during police action).
5 See id at 614.
7 See Wilson, 526 U.S. at 614. The Court also held that it is a violation for the police to bring along third parties if their presence is not in aid of the execution of the warrant. See id.
8 See id.
10 See id. at 809. The Court cited only minimal facts of the case, including that “officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew . . . accompanied and observed the officers, and the media crew recorded the officers’ conduct in executing the warrant.” Id. Because the Court cited few facts, additional details must be gathered from the appellate decision. See Berger v. Hanlon, 129 F.3d 505, 509 (9th Cir. 1997), aff’d in part and rev’d in part, 526 U.S. 808 (1999).
11 See Berger, 129 F.3d at 509 (“At all times during and immediately prior to the search, USFWS Special Agent Joel Scrafford was wired with a hidden CNN microphone which was continuously transmitting live audio to the CNN technical crew.”) Agent Scrafford wore the microphone inside the Berger home without their permission to do so. See id.
12 See Editor, Our Opinion Court Protects Home From Media, YORK DAILY RECORD, May 27,
need not mean the death of news coverage of the police in areas traditionally open to the press for several reasons. First, the police have an interest in letting the public know of efforts to fight crime, and an effective way to accomplish that goal is through press coverage. Indeed, the press plays an important role in keeping the public informed of police actions, and can not let Wilson or Hanlon curtail its zealosity. Additionally, although the press does not have absolute First Amendment protection in gathering news and can face civil or criminal liability if certain boundaries are crossed, if the police try to stifle press coverage, significant First Amendment issues are raised. Thus, the police should not overreact to the rulings so as to end all media ride-alongs. This Note will discuss these issues in light of the Wilson and Hanlon decisions.

Part II of this Note will give a statement of the Wilson and Hanlon cases, including factual differences. Part III will give the background leading up to these decisions, including the split among the federal circuits on allowing press coverage of the execution of a search warrant inside a home. Parts IV and V will analyze


See, e.g., Florida Publ’g Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976) (holding that the media was not liable for trespass into a private home after a fire to take pictures because there is an implied consent by the custom, usage and practice of traditional media access to scenes of recent emergencies and disasters and because the fire marshal and a police officer requested media to take pictures). See also Wilson v. Layne, 526 U.S. 603, 616 (1999).


See David E. Bond, Note, Police Liability for the Media “Ride-Along,” 77 B.U. L. REV. 825, 826 n.7 (1997) (quoting W. CLINTON TERRY, CRIME AND THE NEWS: GATEKEEPING AND BEYOND, IN JUSTICE AND THE MEDIA 41-42 (Ray Surette ed., 1984) (“[P]olice departments have a vested interest in promoting their public image; consequently they are often selective in what they report to the media. In particular, they report those types of criminal activities with which they have had the most success, that underscores the seriousness of the crime problem, and that demonstrates a social need for their services . . . .”)).

See generally Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that the public gets most of its information about police actions from the press); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (holding that informing the general public about the administration of criminal justice is an important role of the press).

See, e.g., Houchins v. KQED, Inc., 438 U.S. 1 (1978) (holding that reporters have no right to photograph prisoners without government permission); Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that reporters must give testimony to grand jury in a criminal case); Associated Press v. NLRB, 301 U.S. 103 (1937) (holding that the publisher of a newspaper has no special immunity from the laws).

See generally Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (holding that the First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of news gathering).

The First Amendment provides, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” U.S. CONST. amend. I.

Wilson and Hanlon and how the United States Supreme Court reconciled the inconsistencies among the circuits. Finally, Part VI will identify possible implications of Wilson and Hanlon and identify gaps in the rulings and give guidance to the press and the police.

II. STATEMENT OF THE CASES

A. Wilson v. Layne

In early 1992, the U.S. Attorney General’s Office decided to step up its effort to bring in “dangerous” fugitives from justice in a program called “Operation Gunsmoke.”21 The operation focused on arresting armed individuals wanted on state, local, or federal drug charges and violent felonies.22 The U.S. Marshal’s Office hoped to get this job done and gain positive media exposure by letting the public know of its work.23 A reporter and photographer from the Washington Post rode along with one team of officers for two weeks.24 This ride-along was approved by the agent in charge of Operation Gunsmoke, Harry Layne,25 pursuant to a U.S. Marshal’s policy manual provision that allowed media ride-alongs.26

On April 16, 1992, at 6:45 a.m., the marshals and Montgomery County, Maryland, police officers followed by a reporter and photographer for the Post, entered the home of Charles and Geraldine Wilson looking for the Wilson’s son, Dominic.27 The officers knocked on the door and the Wilsons’ nine-year-old granddaughter, at her grandparents’ home waiting for the school bus, let them in.28 The Wilsons were still in bed, but when Charles Wilson heard the noise from the officers’ entrance into the house, he ran into the living room wearing only his underwear.29 Mr. Wilson saw at least five men in street clothes with guns; he wanted to know why they were there, and he repeatedly cursed at them.30 The officers believed he was the man for whom they were searching and forced him to

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21 See Wilson, 526 U.S. at 606.
22 See id.
23 See id. at 626 app. (Stevens, J., dissenting).
26 See Wilson, 526 U.S. at 607.
27 See id.
28 See Respondents’ Brief at 3, Wilson (No. 98-83); see also Petitioners’ Brief at 3, Wilson (No. 98-83).
29 See Wilson, 526 U.S. at 607.
30 See id.
the floor, placing a gun to his head.\textsuperscript{31} Mrs. Wilson came into the room, dressed in a sheer nightgown, and saw the officers restraining her husband.\textsuperscript{32}

During the search, the \textit{Washington Post} photographer took pictures, and the reporter, while in the living room, observed the police take-down of Mr. Wilson and Mrs. Wilson's reaction to it.\textsuperscript{33} The officers learned that the man they had subdued was not the man they wanted.\textsuperscript{34} In fact, Dominic Wilson, the subject of the warrant, was not in the home at all\textsuperscript{35} and did not live there.\textsuperscript{36} The pictures taken that night by the \textit{Washington Post} were never published,\textsuperscript{37} and no mention was made of the Wilsons in the subsequent \textit{Post} story about the success of Operation Gunsmoke.\textsuperscript{38} The Wilsons later sued the federal and state law enforcement officers for bringing the media into their home during the search.\textsuperscript{39}

\section{Hanlon v. Berger}

In March of 1993, the United States Fish and Wildlife Service (USFWS) obtained a search warrant for Paul W. Berger's 75,000 acre ranch, including "appurtenant structures, excluding the residence."\textsuperscript{40} Federal agents hoped to find evidence of "the taking of wildlife in violation of the law,"\textsuperscript{41} specifically that Mr. Berger was poisoning eagles.\textsuperscript{42}

Unlike \textit{Wilson}, in \textit{Hanlon} members of the media from CNN entered into an agreement with an Assistant United States Attorney.\textsuperscript{43} This contract allowed CNN to accompany the Fish and Wildlife Service agents as they executed the

\begin{footnotesize}
\begin{itemize}
\item[31] See Petitioners' Brief at 5, \textit{Wilson} (No. 98-83).
\item[32] \textit{See id.}
\item[33] \textit{See id. at 4-5.}
\item[34] \textit{See Wilson}, 526 U.S. at 607.
\item[35] \textit{See id.}
\item[36] \textit{See Petitioners' Brief at 3, \textit{Wilson} (No. 98-83). But see Brief for Respondents at 2, \textit{Wilson} v. \textit{Layne}, 526 U.S. 603 (1999) (No. 98-83), available in 1999 WL 38593 (stating that Dominic Wilson had listed the address the police entered as his own on several occasions).}
\item[37] \textit{See Wilson}, 526 U.S. at 608.
\item[38] \textit{See Respondents' Brief at 4, \textit{Wilson} (No. 98-83); see also \textit{Wilson}, 526 U.S. at 606 (stating that the program was effective, resulting in more than 3,000 arrests in 40 metropolitan areas).}
\item[41] \textit{id.} at 809.
\item[42] \textit{See Berger v. Hanlon}, 129 F.3d 505, 507 (9th Cir. 1997), \textit{aff'd in part and rev'd in part}, 526 U.S. 808 (1999) (the Supreme Court opinion recited few facts in its holding, so details must be gathered from \textit{Berger}).
\item[43] \textit{See Berger}, 129 F.3d at 508.
\end{itemize}
\end{footnotesize}
search warrant on Mr. Berger’s ranch in Jordan, Montana. The contract gave CNN complete editorial control over any footage shot, did not obligate the use of the video footage, and did not waive any rights or privileges CNN had with respect to the footage. In exchange, CNN agreed not to air the footage until after a determination of Mr. Berger’s guilt or innocence. The search warrant was issued by a magistrate who had no knowledge of this contract. The warrant contained no language allowing the videotaping of the search.

On the morning of the search a pre-search briefing was held, CNN was there and shot videotape of the meeting. CNN also mounted a small camera on the hood of one of the government vehicles, facing into the vehicle. The lead agent, USFWS Special Agent Joel Scrafford, was wired with a hidden microphone which continuously transmitted live audio to the CNN technical crew. The broadcast team, in private vehicles, then proceeded with federal agents in a caravan of about ten government vehicles to a point just outside the Berger ranch. Mr. Berger drove his truck to meet the caravan. He agreed to allow Agent Scrafford to ride with him back to his home to explain the search. Mr. Berger agreed to allow Agent Scrafford into his home, but at no time did Agent Scrafford inform the Bergers that he was wearing a live microphone or that the cameras, visible outside the home, belonged to CNN. It is disputed as to whether agents who entered the home searched it for incriminating evidence. However, it is undisputed that all conversations with the Bergers, inside their home, were recorded.

The agents were able to execute the warrant and throughout the course of the day agents searched the ranch and its outbuildings while the media crew recorded eight hours worth of the officers’ conduct in executing the warrant. At

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44 See id.
45 See id.
46 See id.
47 See id. at 508-09.
48 See Berger, 129 F.3d at 509.
49 See id.
51 See Berger, 129 F.3d at 509.
52 See Respondents’ Brief at 4, Hanlon (No. 97-1927).
53 See Berger, 129 F.3d at 509.
54 See id.
55 See id.
56 See id.
57 See id.
no time did CNN help in the search.\textsuperscript{59}

Mr. Berger was convicted of applying pesticide to sheep carcasses with the intent to kill predators, including eagles.\textsuperscript{60} He was acquitted of other charges.\textsuperscript{61} Nearly two months after Mr. Berger’s conviction, CNN aired part of the footage.\textsuperscript{62} Part III explains how the cases reached the U. S. Supreme Court.

III. BACKGROUND: Why Now?

For decades the media has been invited by the police to take pictures of police events.\textsuperscript{63} In the late 1920's and early 1930's, Elliott Ness, a United States prohibition agent, used the media to get a psychological edge over his nemesis, Al Capone.\textsuperscript{64} Ness often topped off the press so photographers could be there to take pictures when he busted up Capone’s breweries.\textsuperscript{65} More daring media ride-alsongs, where the press actually rode in the car with the police, came into vogue in the late 1980's.\textsuperscript{66} It was not until the early and mid-1990's that the federal circuit courts began to hear appeals of cases involving Fourth Amendment violations by the police when the media rode along with them and entered private homes.\textsuperscript{67} The circuits were split on the effect of media presence on Fourth Amendment rights. The Second and Ninth Circuits held that media presence during a search violated the Fourth Amendment.\textsuperscript{68} The Eighth and Fourth Circuits found that it did not


\textsuperscript{60} See id. at 5-6.

\textsuperscript{61} See id. at 6.

\textsuperscript{62} See id.


\textsuperscript{65} See id.


\textsuperscript{67} See Henry H. Rossbacher & Tracy W. Young, Law Enforcement Theatricals: Privacy in Peril, 522 PLI/PAT 45 (1998). Lawsuits were filed earlier, and some settled for millions. See Bond, supra note 15, at 827 n.8 (citing Geraldo Settles $30- Million Suit by Woman Filmed in TV Raid, L.A. TIMES, July 22, 1990, at A12 (reporting the settlement of a libel suit arising out of Geraldo Rivera’s American Vice: The Doping of a Nation)). Geraldo Rivera’s two-hour television special, American Vice, first aired in December 1986; it was one of the first televised ride-alongs. See Bond, supra note 15, at 872.

\textsuperscript{68} See Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997) (holding that the Fourth Amendment was violated and that officers did not have qualified immunity) aff’d in part and rev’d in part, 526 U.S. 808 (1999), (holding that the Fourth Amendment was violated, but that officers did have qualified immunity); Ayeni v. Mottola, 35 F.3d 680, 686 (2d Cir. 1994), cert. denied, 514 U.S. 1062 (1995) (holding that “an
violate the Fourth Amendment.69 The circuits reached their conclusions based on different analyses. The Second Circuit ruled in Ayeni v. Mottola,70 and the Ninth Circuit followed in Berger v. Hanlon,71 that the presence of media during the execution of a search warrant was prohibited under the Fourth Amendment’s reasonableness clause.72 The Second and Ninth Circuits also agreed that because a "clearly established" right had been violated by the officers, they were not entitled to qualified immunity.73 The Eighth Circuit, in Parker v. Boyer,74 agreed that there was a violation of the Fourth Amendment, but ruled that no "clearly established" right existed,75 and therefore, agents were entitled to qualified immunity in a Section 1983 suit.76

The Fourth Circuit, in Wilson v. Layne,77 ruled that not enough authority existed to find that the police violated the Fourth Amendment when they brought the press inside a home.78 The facts of Ayeni and Parker are similar to the facts of Wilson – in each case members of the media were either invited by the police or allowed by the police to come into the home.79 In Berger, members of the press did not come inside the home, but a microphone, for the purposes of recording conversation, was attached to a federal agent who did go inside the house.80 The

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69 See Wilson v. Layne, 110 F.3d 1071 (4th Cir. 1997) (holding that authorities had qualified immunity, pursuant to a department policy, to bring along a reporter and photographer into a private home), rev’d, 526 U.S. 603 (1999); Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), cert. denied, 519 U.S. 1148 (1997) (holding that officers had immunity in permitting a television crew to be inside a house during a search, because there was no “clearly established constitutional principle” offended by the officer’s conduct).

70 35 F.3d 680 (2d Cir. 1994).

71 129 F.3d 505 (9th Cir. 1997).

72 See id. at 510-11 (holding also that the warrant was obtained under false pretenses because law enforcement failed to inform the magistrate that a written contract had been entered into with CNN; Ayeni, 35 F.3d at 686 (holding that the unreasonableness of the agent’s conduct in bringing the television crew was heightened by the fact that the crew served no legitimate need of law enforcement and the act was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect, that of privacy).

73 See Berger, 129 F.3d at 512; Ayeni, 35 F.3d at 686-87. The right that was “clearly established” in both cases was the right against unreasonable searches. See Berger, 129 F.3d at 512; Ayeni, 35 F.3d at 686-87.

74 93 F.3d 445 (8th Cir. 1996), cert. denied, 519 U.S. 1148 (1997).

75 See id. at 448 (Rosenbaum, J., concurring specially) (finding that the first step in qualified immunity analysis must be a determination of whether the claimed constitutional right exists).

76 See id. at 447.


78 See id. at 1075 (ruling that the lack of Supreme Court direction on the question allowed for a finding of no Fourth Amendment violation).

79 See Parker, 93 F.3d at 446-47; Ayeni v. Mottola, 35 F.3d 680, 683 (2d Cir. 1994).

80 See Berger v. Hanlon, 129 F.3d 505, 509 (9th Cir. 1997) (cameras were outside the home
warrant in *Berger* excluded the home, but it was disputed as to whether any search for evidence was done inside the home.\(^81\) The larger issue for the Ninth Circuit in *Berger* was that law enforcement and the media (CNN) jointly planned this search and had even entered into a written contract, none of which was disclosed to the magistrate issuing the warrant.\(^82\)

With such a split among the circuits, the time was ripe for the United States Supreme Court to take up the issue of media-ride alongs; the Court therefore granted certiorari in *Wilson v. Layne*\(^83\) and *Hanlon v. Berger*.\(^84\)

### IV. Analysis of *Wilson*: Unwelcome Visitors

The events in *Wilson* happened long before any circuits, as discussed in Part III, made their rulings.\(^85\) The line of reasoning from those circuit decisions was varied, so the United States Supreme Court in *Wilson* set out to clarify the analysis to be used to address qualified immunity\(^86\) and to state a rule for what constitutes a Fourth Amendment violation concerning press presence in the home during a police search.\(^87\) The Court engaged in a two-step analysis: (1) determining if a constitutional right was violated and then (2) addressing the qualified immunity question.\(^88\)

#### A. Constitutional Violation

The Court relied heavily on the "a man's home is his castle" language from English casgs and commentaries\(^89\) to assert that "[t]he Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."\(^90\) The Court then relied on its own rulings that the Fourth Amendment exists to protect citizens from police entry into the home\(^91\) without a valid warrant or without

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\(^81\) See id.

\(^82\) See id. at 510-11 (holding that non-disclosure meant the warrant was obtained under false pretenses).

\(^83\) 526 U.S. 603 (1999).

\(^84\) 526 U.S. 808 (1999).

\(^85\) See id. at 607 (holding that a "violation of the Fourth Amendment for police to bring members of the media... into a home during the execution of a warrant").

\(^86\) See id. at 609.

\(^87\) See id. at 614 (holding that it is a "violation of the Fourth Amendment for police to bring members of the media... into a home during the execution of a warrant").

\(^88\) See id. at 609.

\(^89\) See id. at 609-10 (citing Semayne's Case, 77 Eng. Rep. 194 (K.B. 1604); WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 223 (1765-69)).

\(^90\) *Wilson*, 526 U.S. at 610.

exigent circumstances.  Although the police had a valid warrant, the Court reasoned that the presence of the reporter and photographer nevertheless exceeded the terms of the search warrant.  The Court did acknowledge that not every police action while inside a home need be "explicitly authorized by the text of the warrant."  Officers may take such further actions as are reasonably related to accomplishing the search authorized by the warrant or that accomplish additional legitimate law enforcement objectives.  The Wilson Court further determined that the Fourth Amendment requires that police actions in execution of a warrant be "related to the objectives of the authorized intrusion."  

The respondents conceded "that the reporters did not engage in the execution of the warrant."  The Court found that the reporters were not there to identify property, a common-law exception to third party presence in a police search.  The respondents claimed that the media's presence did serve a legitimate law enforcement purpose, to let the public know about crime-fighting measures; and that officers should have discretion to bring along the press.  The Court dismissed that argument, ruling that if officers had unlimited discretion to find when it would further some general law enforcement mission to bring along the press, it would water down the core of residential privacy within the Fourth Amendment's text.

Next, respondents argued a First Amendment right, stating that the press's presence "publicize[d] the government's efforts to combat crime, and facilitate[d] accurate reporting on law enforcement activities."  The Court agreed that past rulings held that the press has certain First Amendment rights to inform "the

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92 See id. at 610-11 (citing Payton v. New York, 445 U.S. 573, 602, 603-604 (1980) (ruling that absent a warrant or exigent circumstances, police could not enter a home to make an arrest, but a warrant "founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within").

93 See id. at 611 (quoting Horton v. California, 496 U.S. 128, 140 (1990)).

94 Id. (citing Michigan v. Summers, 452 U.S. 692, 705 (1981)).


97 Id.

98 See id. at 612 (citing Entick v. Carrington, 19 How. St. Tr. 1029, 1067 (K.B. 1765) (holding that a third party may help in the search of stolen goods, but he "must swear that the goods are lodged in such a place. He must attend at the execution of the warrant to show them to the officer, who must see that they answer the description") (quoted with approval in Boyd v. United States, 116 U.S. 616, 628 (1886)).

99 See id.

100 See id.

101 Wilson, 526 U.S. at 612.
general public about the administration of criminal justice” and that the public relies on the press for such information. However, the Court concluded that First Amendment intrusion would be limited if the press was barred from the home, but if allowed to come in privacy concerns of those inside would be great. In other words, the Fourth Amendment privacy rights far outweigh the First Amendment right to get the story, and it was in that light that the media ride-along was judged. The Court also rejected an argument that media presence would cut down on police abuse or protect suspects or officers; the media was working on the story for its own purposes, not on behalf of the police and certainly not on behalf of the Wilsons.

The Court also stated that the First Amendment was not violated because the press could still cover the story without going inside the home. The Court concluded that press presence inside the home was not warranted, for police purposes, and by inviting the press into the home the police had violated the Fourth Amendment rights of those inside.

B. Qualified Immunity

Once the Court found a violation of a constitutional right, it moved to the question of qualified immunity to determine whether that right was “clearly established” at the time of the offense. The Court held that “clearly established,” for purposes of qualified immunity, means that “the right allegedly violated must be defined at the appropriate level of specificity.” Thus, the question here was would reasonable officers know or should they have known that bringing the press

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102 See id. at 612-13 (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92 (1975); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980)).
103 See id. at 613.
104 See id.
105 See id.
106 See supra note 102 and accompanying text.
107 See Wilson at 610.
108 See Wilson, 526 U.S. at 614 n.2 (ruling that “[e]ven though such actions might violate the Fourth Amendment, if the police are lawfully present, the violation of the Fourth Amendment is the presence of the media and not the presence of the police in the home”).
109 Plaintiffs may sue state or local police officers under 42 U.S.C. § 1983, while federal officers can be sued under the doctrine advanced in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). See Wilson, 526 U.S. at 609. The qualified immunity analysis is identical in suits under § 1983 and Bivens. See id. (citing Graham v. Connor, 490 U.S. 386, 394 n.9 (1989); Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986)). “[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'” Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
110 Wilson, 526 U.S. at 615 (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987)).
inside a home, while executing a warrant, was a constitutional violation? The Court asserted that the constitutional question presented in this case was "by no means open and shut." The Court then examined the body of law on point and found only one decision from a state intermediate level court. That case found that media presence inside the home was reasonable. On the federal level, only two unpublished opinions were found, both upheld a search with the media present. The Court then looked at cases that involved third-party presence in general and found one case that the Sixth Circuit had ruled on five weeks prior to the events of Wilson. In Bills v. Aseltine, the Sixth Circuit found that police may not bring along a third party inside a home with a warrant when that third party's purpose is unrelated to the purposes of the warrant.

Finally, the Court looked at the reliance of the officers, both United States marshals and Montgomery County deputies, on their own media ride-along programs. The Marshals Service policy "explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests." The Montgomery County Sheriff Department's

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111 See id.

112 Id. The Court seems to be arguing with itself on the constitutional question, stating "[a]ccurate media coverage of police activities serves an important public purpose, and it is not obvious from the general principles of the Fourth Amendment that the conduct of the officers in this case violated the Amendment." Id. at 615-16.

113 See id. at 616. "The only published decision directly on point was a state intermediate court decision which, though it did not engage in an extensive Fourth Amendment analysis, nonetheless held that such conduct was not unreasonable." Id. (citing Prahl v. Brosamele, 295 N.W.2d 768, 782 (Wis. Ct. App. 1980)).

114 See id.

115 See Wilson, 526 U.S. at 616 (citing Moncrief v. Hanton, 10 Media L. Rptr. 1620 (N.D. Ohio 1984); Higbee v. Times-Advocate, 5 Media L. Rptr. 2371 (S.D. Cal. 1980)). These cases dealt with media entry into homes and both "upheld the search on unorthodox non-Fourth Amendment right to privacy theories." Id.

116 See id. (finding that these cases "can not 'clearly establish' that media entry into homes during a police ride-along violates the Fourth Amendment?").

117 See id. (citing Bills v. Aseltine, 958 F.2d 697, 709 (6th Cir. 1992) (holding that there were material issues of fact precluding summary judgment on the question of whether police exceeded the scope of a search warrant by allowing a private security guard to participate in the search to identify stolen property other than that described in the warrant)).

118 958 F.2d 697, 709 (6th Cir. 1992).

119 See id. at 706, cited in Wilson, 526 U.S. at 617. The Wilson Court stated this was still not enough information to give the officers notice of a constitutional violation of media presence inside the home when executing a warrant. See Wilson, 526 U.S. at 617.

120 See Wilson, 526 U.S. at 617.

121 Id. at n.4 (citing UNITED STATES MARSHALS SERVICE POLICY MANUAL App. 4-5 (stating that "fugitive apprehension cases . . . normally offer the best possibilities for ride-alongs").
ride-along program “did not expressly prohibit media entry into private homes.”

The Court concluded that because the state of the law was undeveloped and because the officers’ own departments’ ride-along programs encouraged media presence, it was reasonable for officers to believe that bringing the media inside a home was not a constitutional violation. Therefore, although the Court found a Fourth Amendment violation, it did not find the Wilson defendants liable for civil damages because there was no “clearly established” rule at the time of the search. Police were bringing along the press to try to bolster their public image. This ruling now means bringing along the press carries a burden. It could cost the police damages. The police now have a black-and-white rule that tells them when they bring the press inside the home it will be an invasion of the privacy of the people inside.

V. ANALYSIS OF HANLON: WHAT DOES BEING IN THE HOME MEAN?

The Court in Hanlon issued a short, per curiam opinion with little analysis. In the two-page opinion, the Court restated its position from Wilson that “police violate the Fourth Amendment rights of homeowners when they allow members of the media to accompany them during the execution of a warrant in their home.” This brief opinion leaves open questions about what is meant by “in the home,” because the press were not present in the home and the home was not subject to search pursuant to the warrant. However, the original Ninth Circuit case of Berger v. Hanlon held that “[t]he television cameras invaded the residential property of the plaintiffs and the microphone invaded their home.” The Ninth Circuit held in Berger that there was evidence that the outbuildings on the ranch were places where the Bergers had a “reasonable expectation of privacy, in that they were located close to the house and guarded by a dog.”

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122 Id. at 617 (quoting Deposition of Sheriff Raymond M. Kight at 8, Wilson v. Layne, 526 U.S. 603 (1999) (No. PJM-94-1718)).
123 See id. at 618 (Stevens, J., dissenting on the “clearly established” issue).
124 See id.
125 See Wilson, 526 U.S. at 626 (“Media ‘ride-alongs’ are one effective method to promote an accurate picture of Deputy Marshals at work.”).
126 See id. at 614.
128 Hanlon, 526 U.S. at 810.
129 See Berger, 129 F.3d at 508.
130 129 F.3d 505 (9th Cir. 1997).
131 Id. at 510.
132 Id. at 512-13. An expectation of privacy in curtilage “should be resolved with particular reference
A federal agent was wearing a microphone and all conversations with the 
Bergers, both outside and inside their home, were recorded. The Bers did not 
give permission to record the conversations and were not informed of such 
recording. The district court in Berger also found that the presence of the 
microphone, attached to Agent Scrafford, to be a violation of the Bers’ 
constitutional rights, because the recording was not done for legitimate law 
forcement reasons, but used to assist commercial television.

Wilson is very clear about which right is being protected from the police. 
Chief Justice Rehnquist stated that the Fourth Amendment right being protected, 
when the media are present with the police, is the right of privacy “inside the 
home.” However, Berger stands for the proposition that curtilage can also be 
an area where the expectation of privacy is high and therefore it is not just “inside 
that home” that is protected, but also the area close to the home that falls under 
these same privacy protections. Curtilage is hard to define, but the Court has long 
relied on Justice Harlan’s two-pronged test developed in Katz v. United States: 
first, a person must have a subjective expectation of privacy and, second, society 
must be willing to recognize that expectation as reasonable. Curtilage is defined

to the following four factors . . . (1) the proximity of the area to the home; (2) whether the area is within an 
enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by 
the resident to protect the area from observation by passersby.” United States v. Dunn, 480 U.S. 294, 294-95 

See Berger, 129 F.3d at 509.

See id.

See id. at 513 (the invited informer doctrine does not shield the media from liability). See also United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (holding that the invited informer doctrine justifies the 
use of undercover agents and informers, as long as their use is part of a good faith government investigation); 
Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (holding that eavesdropping by the media for public 
broadcast, even in conjunction with law enforcement, violates important privacy interests).


Black’s Law Dictionary defines curtilage as “any land or building immediately adjacent to a 
dwelling, and usually it is enclosed some way by a fence or shrubs. For search and seizure purposes, includes 
those outbuildings which are directly and intimately connected with the habitation and in proximity thereto 
and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for 

Determining where curtilage begins and ends is not black and white. See Oliver v. United States, 
466 U.S. 170, 178 (1984) (ruling that a marijuana patch a mile away from the defendant’s home was subject 
to the “open field” doctrine and not curtilage, and that the only area subject to legitimate privacy concerns 
was the area immediately surrounding the home); see also United States v. Dunn, 480 U.S. 294 (1987) 
(holding that a barn fifty yards from the house was not being used for intimate activities associated with the 
home, and little was done to protect the barn from observation); United States v. Santana, 427 U.S. 38 (1976) 
(holding that the entrance to the home was not protected by the Fourth Amendment because it was clearly 
visible from the street and there was no expectation of privacy).


See id. at 361. The Court relied on the Harlan reasonableness test in Oliver v. United States, 466 
U.S. 170 (1984) (holding that an individual reasonably may expect that an area immediately adjacent to the 
home will remain private). Cf. Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (holding that an 
aerial view of the area surrounding the Dow plant was not a violation of the Fourth Amendment); California 
v. Ciraolo, 476 U.S. 207 (1986) (holding that a fenced-in backyard met the first prong of the Katz test, but not
on a case-by-case basis, and many commentators believe it is little more than a "buzzword."\(^{141}\)

The easiest way for a lay person to understand curtilage is to tell them it is the area of private property "immediately adjacent to the home,"\(^{142}\) but what is "immediate" depends on the four factors from Dunn.\(^{143}\) Therefore, because determining what is curtilage is so tough it seems likely the police will not invite the media onto private property while a warrant is being executed.

VI. WHAT ARE THE IMPLICATIONS OF \textit{WILSON} AND \textit{HANLON}?\(^{144}\)

The press is not allowed inside the home or on the protected curtilage, if invited there by the police, when a warrant is being served.\(^{144}\) However, it could be argued if the members of the press do not ride along, but show up on their own and initiate coverage, no Fourth Amendment violation occurs. The Fourth Amendment\(^{145}\) protects the rights of private citizens to be free from unreasonable intrusions by government officials when the individual has a reasonable expectation of privacy.\(^{146}\) However, it may be difficult to gain access to the inside of a home or protected curtilage when the police are on the premises to conduct a search.\(^{147}\) Because of the ruling in \textit{Wilson}, police are on notice when executing a search, with or without a warrant, that an invitation to the press will trigger a Fourth Amendment violation.\(^{148}\)

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the second prong). The \textit{Cirolo} Court held that the area was curtilage, but society was not prepared to recognize the privacy interest; anyone looking down from an airplane could observe the marijuana plants. \textit{See id.} at 211.

\(^{141}\) \textit{See}, \textit{e.g.}, Robert F. Livergood, California v. Cirolo: Blanketing the Curtilage, 32 St. Louis U. L.J. 247, 261 (1987) (writing that "[p]rivacy will be defended only for those who jealously protect a particular area from intrusion by blanketing the curtilage and its boundaries").

\(^{142}\) \textit{Oliver}, 466 U.S. at 180.

\(^{143}\) \textit{See supra} note 132.


\(^{145}\) 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 particularity describing the place to be searched, and the persons or things to be seized.

\textit{U.S. Const. amend. IV.}


\(^{147}\) Many police departments have policies against allowing civilians to watch a search. \textit{See}, \textit{e.g.}, \textit{Wilson}, 526 U.S. at 624 (Stevens, J., dissenting) (quoting Brief for Petitioners at 41, Wilson v. Layne, 526 U.S. 603 (1999) (No. 98-83), \textit{available} in 1998 WL 901778 ("[T]he Sheriff of Montgomery County, the commanding officer of three of the respondents: 'We would never let a civilian into a home. . . . That's just not allowed.'"))).

\(^{148}\) \textit{See id.} at 614 (ruling "that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the
A. Is There an Opening?

In covering news, reporters listen to police scanners and hear radio traffic that indicate when a newsworthy event might be unfolding. In *Prahl v. Brosamle*, police stormed a biochemist’s home and laboratory after a standoff. They had no warrant, but they did have probable cause. A television reporter arrived on the scene after monitoring the events on a police scanner. The reporter, Brosamle, was told by police that he “could come forward when the situation was under control.” Brosamle rode to the home with a police officer and did come forward into Prah’s home. The reporter, Brosamle, filmed the officers as they confiscated guns and interviewed Prah. Prah saw the reporter, but thought that he was an officer or a deputy, and did not tell him to stop or leave. The facts of *Prahl* are similar to *Wilson* in that Brosamle was invited into the home by police and not the home owner and is a situation where the police did not have a warrant. Therefore, it stands to reason that warrant or not, if the police invite the media inside, there is a Fourth Amendment violation.

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third parties in the home was not in aid of the execution of the warrant” (emphasis added); see also Payton v. New York, 445 U.S. 573 (1980) (holding that absent exigent circumstances, no home may be entered without a warrant). But see U.S. v. Santana, 427 U.S. 38 (1976) (holding that no warrant was needed when suspect sought refuge in a home when she saw the police coming); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (holding that there are exceptional circumstances for assessing when an arrest can be made in the home without a warrant: 1) that a grave offense is involved, particularly one that is a crime of violence; 2) that the suspect is reasonably believed to be armed; 3) that there exists not merely the minimum of probable cause, that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including “reasonably trustworthy information,” to believe that the suspect committed the crime involved; 4) that there exists a strong reason to believe that the suspect is in the premises being entered; 5) that there is a likelihood the suspect will escape if not swiftly apprehended; and 6) that the circumstance that the entry, though not consented, is made peacefully); Warden v. Hayden, 387 U.S. 294 (1967) (holding that no warrant is required to enter a home if the police are in hot pursuit of a suspect).

150 295 N.W.2d 768 (Wis. Ct. App. 1980).
151 See id. at 773.
152 See id. at 772-73.
153 See id at 773.
154 Id.
155 See *Prahl*, 295 N.W.2d at 773.
156 See id.
157 See id.
158 See id.
159 See id. at 772.
1. Custom and Usage

What the media has done in the past may no longer hold up after Wilson. Across the country it has been a "longstanding custom and practice . . . for representatives of the news media to enter upon private property where disaster of great public interest has occurred." In Florida Publishing Co. v. Fletcher, the Florida Supreme Court ruled that it was not trespass for the media, without permission from the home owner, to come inside a burned out home to photograph the spot where a person died. Florida Publishing did not deal with police action or forced entry into a home in connection with the execution of a warrant, and Justice Stevens distinguished it as such in Wilson. But such an entry, not in aid of the search, after a fire, may intrude on an individual's right to privacy and therefore may trigger a Fourth Amendment violation.

Entering a building or home to fight a fire and searching for evidence after the fire are distinguishable. The emergency nature of a fire does not require firefighters to obtain a warrant, and officials may even stay inside the burned out structure "for a reasonable time to investigate the cause of the blaze." However, a search for evidence sometime after the fire has been extinguished will require a warrant. The question then becomes, during that "reasonable" time when no warrant is needed, can the media be invited inside the burned out structure to take pictures and video of the newsworthy event and not create a Fourth Amendment violation for the firefighters or police?

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161 Florida Publ'g Co. v. Fletcher, 340 So. 2d 914, 918 (Fla. 1976) (holding that the media was not liable for entering a private home after a fire to take photographs because of the custom, usage and practice of media access to scenes of recent emergencies and disasters).

162 340 So. 2d 914 (Fla. 1976).

163 See id.

164 See Wilson, 526 U.S. at 622 n.2 (Stevens, J., dissenting). The majority uses Florida Publ'g to show the widespread practice of media accompanying officers into homes. Id. at 616 n.3.

165 See, e.g., Steigler v. Anderson, 496 F.2d 793 (3d Cir. 1974) (holding that firemen have a right to enter a premises to fight a fire, to rescue trapped occupants, to ventilate the building after the fire has been brought under control, to search for any smoldering fires and to clean up prior to departing all without obtaining a warrant). The Steigler Court also held that any evidence of arson seen by the firemen in plain view while performing their functions may be seized without first obtaining a warrant. See id.; see also Michigan v. Tyler, 436 U.S. 499 (1978) (holding that a burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable," as it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze). The Tyler Court also ruled that fire victims do have expectations of privacy in whatever remains of their property. See id.

166 See Tyler, 436 U.S. at 511 (holding that entry to fight a fire requires no warrant and officials may remain there for a reasonable time to investigate the cause of the blaze, but additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches); see also See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Munic. Ct. of San Francisco, 387 U.S. 523 (1967).

167 Tyler, 436 U.S. at 511.

168 See id.
Because Wilson turned on protection of privacy and the Court has long held that a privacy interest exists, even in burned out property, it seems press presence would only be allowed, as in Fletcher, if its purpose was in aid of the search or preserving evidence.\(^\text{169}\)

2. Duty to Keep the Press Out

This, in fact, raises the question of the duty of the police to keep the press out during a lawful search. Police departments do have policies forbidding civilians inside a home when a search is underway.\(^\text{171}\) Wilson read broadly implies a duty for police to refuse the press entry inside a home if a warrant or warrantless search is underway,\(^\text{172}\) unless the press presence is necessary to aid in the search.

B. Will Wilson Prevent the Press from Other Ride-Alongs?

It is not just the home that has high Fourth Amendment protection. Commercial structures, that are not open to the public, are also afforded high protection.\(^\text{173}\) However, Chief Justice Rehnquist explained in Minnesota v. Carter\(^\text{174}\) that “[p]roperty used for commercial purposes is treated differently for Fourth Amendment purposes”\(^\text{175}\) and quoted New York v. Burger\(^\text{176}\) for the proposition that “[a]n expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual’s home.”\(^\text{177}\)

Although a warrant is required most of the time for a commercial structure,

\(^{169}\) See Florida Publ’g Co. v. Fletcher, 340 So. 2d 914, 916 (Fla. 1976) (the fire investigator requested that the newspaper photographer take a picture of the charred outline where the body was discovered, and the photo was published by the newspaper the next day).

\(^{170}\) See id. It is likely no constitutional violation will occur when the press is present to aid in the search. Cf. Wilson v. Layne, 526 U.S. 603, 614 (1999) (holding that it is a violation to bring third parties when their presence is not in aid of the execution of the warrant).

\(^{171}\) See supra note 147; see also Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1971) (establishing a cause of action against federal employees who violate a citizen’s individual civil rights). A Bivens action can now be brought under Wilson against any government agent who invites the media into a home during the execution of a search. See Wilson, 526 U.S. at 614.

\(^{172}\) See Wilson, 526 U.S. at 614.

\(^{173}\) See Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Amos v. United States, 255 U.S. 313 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (criminal searches of commercial property without a warrant held unreasonable); see also See v. City of Seattle, 387 U.S. 541 (1967) (holding that just like the home a warrant is required for an administrative search of commercial premises which are not open to the public).


\(^{175}\) Id. at 90.

\(^{176}\) 482 U.S. 691 (1987).

\(^{177}\) Id. at 700 (citing Donovan v. Dewey, 452 U.S. 594, 598-99 (1981)), quoted in Carter, 525 U.S. at 90.
some warrantless searches are legal. Those include administrative searches of businesses or industries that have a long history of regulation.\textsuperscript{178} Examples include the liquor and gun trades,\textsuperscript{179} which are subject to "unannounced, even frequent, inspections."\textsuperscript{180}

Even if the expectation of privacy inside a business is not as high as the expectation of privacy inside a home,\textsuperscript{181} it is not clear if the press can be invited by government agents into an area of the business that does not allow public access, without triggering Fourth Amendment violations.\textsuperscript{182} Directly to that point, Justice Rehnquist wrote in \textit{Wilson} that it is the home and owner or inhabitant being protected against the media intrusion.\textsuperscript{183}

Although an office that does not allow public access may get the same level of Fourth Amendment protection as a home,\textsuperscript{184} the public access area of a business may not.\textsuperscript{185} Therefore, it is reasonable to assume that if the police are searching an area of a business usually off limits to the public, with or without a warrant, an invitation from an officer to allow the press inside would be a violation. However, if the area of the business being searched, with or without a warrant, is open to the public no violation would occur if the press is present.

\textbf{C. Ride-Alongs on Routine Patrols}

The media can still ride along with the police when they remain in public places\textsuperscript{186} or get permission to come onto the private property or into the home. The


\textsuperscript{179} See Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (holding that an exception to the warrant requirement is given when dealing with the liquor industry which has a long history of regulation); see also United States v. Biswell, 406 U.S. 311 (1972) (holding that in certain situations Congress can statutorily define a reasonable search, thereby waiving the warrant requirement).

\textsuperscript{180} \textit{Biswell}, 406 U.S. at 316.

\textsuperscript{181} See Payton v. New York, 445 U.S. 573, 589-90 (1980) (holding that the home is afforded the highest degree of Fourth Amendment protection).

\textsuperscript{182} See \textit{Wilson} v. Layne, 526 U.S. 603, 614 (1999) (this is the only Supreme Court ruling on media ride-alongs and it pertains only to the home). \textit{But see} Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the general public); Associated Press v. NLRB, 301 U.S. 103 (1937) (ruling that a publisher of a newspaper has no special immunity from the application of general laws).

\textsuperscript{183} See \textit{Wilson}, 526 U.S. at 610.

\textsuperscript{184} See Michael Adler, \textit{Cyberspace, General Searches and Digital Contraband: The Fourth Amendment and the Net-Wide Search}, 105 YALE L.J. 1093 (1996) ("[T]he balancing standard developed in \textit{Katz}, \textit{Camara} and \textit{Terry} continued to provide the home and office with an exceptionally high level of protection.").

\textsuperscript{185} See Oliver v. United States, 466 U.S. 170, 179 (1984) (the court distinguished an open field as "usually . . . accessible to the public and the police in ways that a home, an office or a commercial structure would not be"); see also O'Connor v. Ortega, 480 U.S. 709, 718 (1987) (plurality opinion) (the plurality suggests that some government offices may have no expectation of privacy because they are "so open to fellow employees or to the public").

\textsuperscript{186} See Branzburg v. Hayes, 408 U.S. 665, 684 (1972) (holding the press has no special access to
executive producer of the reality-based television show “COPS.”\footnote{This is a television show aired on the Fox Network featuring real-life footage of police in action. See David Zarwik, High Court Ruling is Harsh Reality; TV: Producer of Fox’s ‘COPS’ Says He’s Unconcerned, but Edict that Police Can Be Sued for Letting Media Tag Along Chills, Baffles the Industry, BALTIMORE SUN, May 25, 1999, at 1E, available in 1999 WL 5187472.} John Langley said the decision in Wilson would not affect his program.\footnote{See id. (quoting Langley as saying, “we are unaffected by the decision because we obtain releases from everyone involved in our program”).}

Although some police departments have suspended their ride-along policies,\footnote{See Doug Halonen, High Court Shuts Door on Cameras, ELECTRONIC MEDIA, May 31, 1999, at 4, available in 1999 WL 8766415 (stating that the FBI and the Washington Metropolitan Police Department have scrapped ride-alongs).} others have not.\footnote{See id. (stating that the Los Angeles Police Department has tightened its ride-along policy to comply with the new ruling); see also Lawrence Messina, Ride-Alongs Long a Battle for Police Right v. Wrong, CHARLESTON GAZETTE, May 27, 1999, at 1C, available in 1999 WL 6728322 (reporting that just two days after the Wilson decision, a television reporter was riding along with the police to track down suspects to serve old arrest warrants).} Even if the media cannot ride along in the police car, the media is entitled to venture anywhere that the public is allowed.\footnote{See Branzburg, 408 U.S. at 684.} The media could observe car chases because they are on public highways and could watch searches of vehicles because of the near non-existence of an expectation of privacy.\footnote{See Colorado v. Bertine, 479 U.S. 367 (1987) (holding that the police can do an inventory search of a vehicle even after it is impounded at the police station); New York v. Belton, 453 U.S. 454 (1981) (holding that the interior of a vehicle can be searched as well as any containers found subject to an arrest); see also California v. Carney, 471 U.S. 386 (1985) (holding that a motor home may be searched without a warrant, because it is mobile and subject to extensive regulation and inspection).}

D. Get it in Writing

The media may be allowed to follow police into a home if such permission is granted in express terms in the warrant, but chances of getting that wording into a warrant since Wilson may be difficult. In Stack v. Killian,\footnote{96 F.3d 159 (6th Cir. 1996).} a news reporter and camera crew were present during the search of the plaintiff’s business, an animal shelter.\footnote{See id. at 161.} The warrant obtained by the police authorized “videotaping and photographing” during the execution of the search.\footnote{See id. at 163.} The warrant did not say the local press could come along, but the court found that the express wording of the warrant which stated that “videotaping and photographing” were permitted, allowed the actions of the press.\footnote{See id.}
Such express language of “videotaping and photographing” seems rare. In *Ayeni v. Mottola*, the warrant authorizing the search stated “James Mottola and any Authorized Officer of the United States.” The warrant did not expressly say anything about allowing a CBS camera crew to record sound and pictures. The Second Circuit ruled that there was no implied authorization because there was no claim that the “presence of the CBS camera crew served any legitimate law enforcement purpose.” Therefore, the *Ayeni* Court ruled that the police were wrong to bring in CBS cameras, stating “[a] private home is not a soundstage for law enforcement theatricals.”

In *Wilson*, the Court noted that the police had a valid warrant to enter the home to execute the arrest warrant, “but that does not necessarily follow that they were entitled to bring a newspaper reporter and photographer with them.” By using the qualifying language of “not necessarily,” the Court left open the possibility that a warrant with express language allowing press presence might not be a violation.

However, this ruling from *Wilson* that it is a violation for the police to invite media into a home without a legitimate law enforcement purpose, has given magistrates notice. Magistrates will have to make sure that the warrant is not overbroad and that it is carefully tailored to its justifications.

### E. Press Presence as a Necessary Action

It is possible that the police can invite the media inside a home while executing a search warrant if the media’s presence is related to the objectives of the search. However, that justification might put the press and police at cross purposes. The police could argue that press presence is needed to record or photograph some destructible evidence. Courts have ruled on numerous occasions that third party presence necessary for the execution of a warrant is permissible.

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197 35 F.3d 680 (2d Cir. 1994).
198 *Id.* at 686.
199 *See id.*
200 *Id.*
201 *Id.*
202 *See Wilson v. Layne, 526 U.S. 603, 611 (1999).*
203 *Id.* at 611.
204 *See Maryland v. Garrison, 408 U.S. 79 (1987)* (ruling that the purposes justifying a police search strictly limit its extent).
205 *See Florida Publ’g Co. v. Fletcher, 340 So. 2d 914, 916 (Fla. 1976)* (the fire marshal ran out of film and asked a newspaper photographer to take a picture of the silhouette of the body; the picture was given to officials for use in the investigation and published by the newspaper).
206 *See 18 U.S.C. § 3105 (1994).* That section provides:

A search warrant may in all cases be served by any of the officers mentioned in its
For instance, in *Florida Publishing Co. v Fletcher*, a Fire Marshal ran out of film and the newspaper photographer was asked to come inside and take a picture which became a part of the official investigation file. The photographer was not prohibited from using the pictures for the newspaper’s own purposes and the pictures appeared in the newspaper the next day.

A hypothetical situation will demonstrate this theory. Assume that the Los Angeles Police plan to execute a search, with an authorized warrant, of Rodney King’s home. The problems the police had when they arrested King on a public highway have been well documented, so they want to bring along a neutral observer to record all events. Would the police be justified in requesting a magistrate to authorize in the warrant the presence of one media photographer and would the magistrate be authorized in granting the warrant? The press presence would be in aid of the search by recording the activities to protect the police and Mr. King from unwarranted allegations.

The media would give a copy of the videotape or still photos to the police and still be allowed to use the video or pictures for news purposes. The police would require the one photographer to “pool” the videotape or photographs; in other words, the search footage or photographs would be available to all media outlets.

The language of *Wilson* states the photographer was not present, in that

direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

Id.; see also United States v. Clouton, 623 F.2d 485, 486-87 (6th Cir. 1980) (per curiam) (holding that a telephone company employee can assist police in a search); In re Southeastern Equip. Co. Search Warrant, 746 F. Supp. 1563, 1577 (S.D. Ga. 1990) (holding that a customs agent has the right to ask a defense department investigator to assist in a search); United States v. Gambino, 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990) (holding that a confidential informant may assist in a search); United States v. Schwimmer, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988) (holding that a computer expert may assist in a search).

See Gregory Howard Williams, *Controlling the Use of Non-Deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER J. 79 (1993) (citing the REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) [hereinafter LAPD REPORT] (the Commission found that there is a significant number of LAPD officers who repetitively misuse force and persistently ignore the written policies and guidelines of the department regarding force)).

See United States v. Leon, 468 U.S. 897 (1984) (holding that the exclusionary rule is used to punish the police and not magistrates, if the officer has a “good faith” belief in the probable cause he has presented to the magistrate the evidence will not be excluded); see also Wilson v. Layne, 526 U.S. 603, 614 n.2 (1999) (the Court had no occasion in this case to decide if the exclusionary rule would apply to any evidence discovered or developed by the media representatives).

See Williams, supra note 210, at 104 n.14 (citing the LAPD REPORT, supra note 210, at 31-39 (extensively discussing how racist, sexist and ethnic biases within the LAPD contribute to the excessive use of force against Los Angeles citizens)). As a result of the Commission’s review of Mobile Digital Terminal Transmissions, as well as a survey conducted by the LAPD, the Commission concluded that at least a quarter of LAPD officers based their decisions to use force upon some degree of bias. See Williams, supra note 210, at 104 n.14 (citing the LAPD REPORT, supra note 210, at 31-39).
case, for any purpose but his own.\textsuperscript{213} In the above hypothetical the photographer would be present to protect the safety of the police and the suspect and to reduce the liability of the officers.

The Court also ruled in \textit{Wilson} that gaining public relations from media coverage is not the same as the media aiding in the execution of a warrant.\textsuperscript{214} In the above scenario, although the videotape or photos might make the police look good to the public, that is not the intended purpose for bringing the press inside. The purpose is to provide a neutral observer for "quality control"\textsuperscript{215} and that could not be accomplished by using one of LAPD'S own officers.

Even if this would be legally acceptable, this dual function of assisting the investigation and covering the news could hurt the perception of press objectivity and the public might view the news media, in the same light as the entertainment media, as an agent of the police.\textsuperscript{216} If the photographer and her employer are willing to take that professional risk and the police wanted to invite her along, it could be argued, that under \textit{Wilson}, it would be justified to do so and would be considered in aid of the execution of the warrant.\textsuperscript{217}

\textbf{F. Media Avoidance of Color of Law}

The news media’s credibility is maintained if it is viewed as objective by not taking sides.\textsuperscript{216} That is one reason the media wants to avoid being found to be "joint actors" with government agents. The other reason is to avoid being sued for

\textsuperscript{213} See \textit{Wilson}, 526 U.S. at 613.

\textsuperscript{214} See id. at 612.

\textsuperscript{215} This is the same term the \textit{Wilson} Court uses, noting that police officers "themselves could videotape home entries as part of a 'quality control' effort to ensure that the rights of homeowners are being respected, or even to preserve evidence." \textit{Id.} at 613 (citing Ohio v. Robinette, 519 U.S. 33, 35 (1996) (noting the use of a "mounted video camera" to record the details of a routine traffic stop)). Presumably, Rodney King would not trust the police to record what happens inside his home when the police are executing a warrant.

\textsuperscript{216} Even though the line is sometimes blurred, news programs are different from entertainment shows. See David A. Logan, "Stunt Journalism," \textit{Professional Norms, and Public Mistrust of the Media}, 9 U. FLA. J.L. & PUB. POL’Y 151, 173 (1998) (calling for media self-regulation and the formation of a national "news council" to bring stricter standards to journalism); see also Associated Press, \textit{Fox Television, Family Settle Chase-Death Case}, CHARLESTON GAZETTE, Sept. 2, 1998, at PO8A, \textit{available in 1998 WL 5971214}. The West Virginia State Police changed its media ride-along policy after a high-speed chase killed a 21-year-old woman. \textit{See id.} A Real Stories of the Highway Patrol television cameraman was riding along with a trooper that night. \textit{See id.} The state police settled a lawsuit with the girl's family for $775,000. \textit{See id.} The state police spokesman at the time told the press: "[W]e will have any of those reality-based programs in our cruisers. They're not riding with us... Those cameras are there purely for entertainment value." \textit{Id;} see also \textit{WEST VIRGINIA STATE POLICE RIDE-ALONG PROGRAM POLICY} (definition of news media representative specifically excludes employees of police documentary or re-enactment companies).

\textsuperscript{217} See \textit{Wilson}, 526 U.S. at 612 (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 1067 (K.B. 1765) (in search for stolen goods case, "[t]he owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant to show them to the officer, who must see that they answer the description"')).

\textsuperscript{216} See \textit{Logan, supra} note 216, at 170.
damages like the police now under Wilson. The Ninth Circuit, in Berger v. Hanlon, ruled that members of the media were state actors working in conjunction with federal agents. The media defendant, CNN, appealed that decision to the United States Supreme Court, but was denied certiorari. Now the suit against CNN can go forward on the issue of CNN reporters in the role of “joint actors” with the government. CNN may therefore be held liable for Fourth Amendment violations.

This ruling can have at least two dangerous implications. First, it will be harder for the media to defend against a constitutional tort, if found to be “joint actors” with the government. And second, such a charge takes away the separation between government and the media.

The Ninth Circuit is not the first court to rule that the media was acting in concert with government agents while doing its job. The Second Circuit in Ayeni v. Mottola, as discussed supra in Part III, also ruled the media was acting in concert with the police when they entered Mrs. Ayeni’s home. The dissent in Parker v. Boyer, from the Eighth Circuit, also discussed supra in Part III, agreed that the media were “willful participants in joint activity with the State or its Agents.”

The best way for the media to avoid being ruled as “joint actors” is to maintain independence and avoid being invited by police or government agents into areas of high privacy.

219 See Wilson, 526 U.S. at 618.
220 129 F.3d 505 (9th Cir. 1997).
221 See id. at 515, 516.
223 See Berger, 188 F.3d at 1157.
224 See id. (summary judgment for CNN denied on issue of “joint actors” and CNN not entitled to assert qualified immunity as a defense) (citing Wyatt v. Cole, 504 U.S. 158 (1992); Kimes v. Stone, 84 F.3d 1121, 1128 (9th Cir. 1996)).
225 35 F.3d 680 (2d Cir. 1994).
226 See Ayeni v. CBS, 848 F. Supp. 362 (E.D.N.Y. 1994) (no wording in the ruling called CBS “joint actors” but the court held that CBS’s photographing inside the home was a Fourth Amendment violation and held that CBS could not be granted qualified immunity). After this ruling, CBS reached a confidential settlement with the Ayenis. See Ayeni v. Mottola, 35 F.3d 680, 684 n.2 (2d Cir. 1994).
227 93 F.3d 445 (8th Cir. 1996), cert. denied, 519 U.S. 1148 (1997).
228 Id. at 449 (Arnold, J., dissenting) (citations omitted).
G. Consent

Consent\textsuperscript{230} from the homeowner or occupant is one of the media’s best tools for entering a home without risking liability. Police officers may also seek consent to allow media presence during a search,\textsuperscript{231} but courts might rule that would be coercion.\textsuperscript{232} Sometimes people just want to be photographed.\textsuperscript{233} For instance, those being searched may want the protection a camera could provide. They may be afraid of police abuse\textsuperscript{234} and feel media presence is in their best interest.

VII. Conclusion

The Court, in Wilson v. Layne,\textsuperscript{235} unanimously announced a new rule of constitutional law.\textsuperscript{236} A rule that says police violate the Fourth Amendment when

\textsuperscript{230} Consent is defined as “voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another.” Black’s Law Dictionary 210 (6th ed. 1990).

\textsuperscript{231} See Lunday, supra note 14, at 308 n.204 (writing that consent may be obtained by the police) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 223-25 (1973) (requiring a standard of voluntariness to determine whether consent was valid)). A search made by police after the subject of the search has freely and intelligently given consent will validate a warrantless search. See Washington v. Chrisman, 455 U.S. 1, 9-10 (1982) (holding that the seizure of drugs pursuant to the defendant’s valid consent did not violate the Fourth Amendment).

\textsuperscript{232} See Lunday, supra note 14 at 308 n.205 (claiming police can get into trouble for asking if the media may come along):

If police coercion is present, a court may find that consent was not given freely and voluntarily. See Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968). The issue of whether duress or coercion was a factor in obtaining consent is determined by a totality of the circumstances analysis. See United States v. Mendenhall, 446 U.S. 544, 557 (1980). Another Fourth Amendment issue is whether the person giving consent had the authority to do so. See Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) (holding consent to search valid where an officer reasonably believed that the person giving consent had authority to do so, even if the person did not).

\textsuperscript{233} See Svetkey, supra note 6, at 32 (quoting Cops executive producer Bertram van Munster: “We once taped a hooker performing oral sex on a man in a church parking lot. . . . Both of them gladly signed releases. We couldn’t use the footage, of course, but after that we knew we could get anyone to sign”).


\textsuperscript{235} 526 U.S. 603 (1999).

\textsuperscript{236} See id. at 614. Justice Stevens disagrees that it is a new rule of constitutional law. Stevens writes: “Rather, it has refused to recognize an entirely unprecedented request for an exception to a well-established principle. Police action in the execution of a warrant must be strictly limited to the objectives of the
they bring the media with them into a home while executing a search when the media's presence is neither consented to nor directly related to some specific law enforcement purpose. It is a narrow ruling. The issues raised by the different facts in Hanlon make it difficult to know exactly what is meant by in the home and the definition of curtilage is hard to nail down.

The journalism community is concerned that these rulings will mean a halt to police cooperation in areas where the press is traditionally allowed. However, the rulings do not outlaw all media ride-alongs nor should they stop the press from vigorously pursuing information about police actions. Any police reliance on Wilson or Hanlon for excluding the press from most aspects of investigative work is an overreaction.

The press plays an important role in keeping the public informed about police and government actions. Likewise, police have an interest in keeping the public informed of its work. Therefore, the rulings in Wilson v. Layne and Hanlon v. Berger, although protecting an individual right to privacy in the home, should not be viewed as a wall between the press and the police.

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237 See Wilson, 526 U.S. at 614.

238 See Zurawik, supra note 187, at 1E (quoting Joe DeFeo, news director at WBFF and WNUV: "It's getting increasingly hard to get information out of the police, and my fear is that this is another chance for them to keep us out"); see also Mauro, supra note 12.

239 See Houchins v. KQED, Inc., 438 U.S. 1, 8-9 (1978) (stating that "[w]e must not confuse the role of the media with that of government; each has special, crucial functions, each complementing – and sometimes conflicting with – the other").

240 See Lunday, supra note 14.

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