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THE UNCLEARLY ESTABLISHED RULE AGAINST UNREASONABLE SEARCHES AND SEIZURES

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

I. INTRODUCTION

In *Wilson v. Layne*,¹ the Supreme Court unanimously held that law enforcement officers violate the Fourth Amendment when they allow members of the media to accompany them into a private home during the execution of a search warrant. The Court declared that such actions on the part of law enforcement officers are unreasonable.² Nevertheless, the Court held that the officers in *Layne* were entitled to a defense of qualified immunity because the violated right was not "clearly established" at the time of the violation.³ According to the Court, a reasonable law enforcement officer could have believed, at the time of the violation, that she was not violating any law by allowing the media into a private home during the execution of a warrant.⁴

This Note argues that the Supreme Court correctly held that federal and state law enforcement officers violated the Fourth Amendment when they allowed two members of the media to accompany them into the petitioners' home. This intrusion upon the petitioners' privacy was unreasonable because the media presence went beyond the clearly stated bounds of the warrant.⁵ This Note also argues, however, that the Court erroneously held that the law enforcement officers in *Layne* were entitled to a defense of qualified immunity. The law was "clearly established" at the time of the violation such that a reasonable officer should have known that the actions at issue in

¹ 119 S. Ct. 1692 (1999).

² *Id.* at 1699.

³ *Id.* at 1701. This was an 8-1 decision with Justice Stevens concurring in part and dissenting in part.

⁴ *Id.*

⁵ *Id.* at 1697.

this case would constitute a violation of the well-established principles of the Fourth Amendment.

II. BACKGROUND

A. THE FOURTH AMENDMENT: NO UNREASONABLE SEARCHES AND SEIZURES

The Fourth Amendment to the United States Constitution provides that:

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.⁶

The protection guaranteed in the Fourth Amendment is much older than the Amendment itself and is rooted in the common law of England.⁷ *Semayne's Case*, perhaps the most cited English case in this context, is famous for the statement that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."⁸ This sentiment is echoed in subsequent English cases⁹ as well as in William Blackstone's *Commentaries on the Laws of England*.¹⁰ While the Supreme Court has never held that the Fourth Amendment protects a zone of privacy generally, it has made clear in a long line of cases that one of the central purposes of the Fourth Amendment is to protect a zone of privacy within the home from unwarranted and unreasonable government intrusion.¹¹ To hold that there has been a violation of the Fourth Amendment, a court must find that there was government action,¹² that there was in fact a search or seizure,¹³ and that the

⁶ U.S. CONST. amend. IV.

⁷ *Layne*, 119 S. Ct. at 1697.

⁸ *Semayne v. Gresham*, 77 Eng. Rep. 194, 195 (1604).

⁹ See, e.g., *Entick v. Carrington*, 95 Eng. Rep. 807 (1765).

¹⁰ WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 223 (1765-1769).

¹¹ See, e.g., *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. United States Dist. Court*, 407 U.S. 297 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Silverman v. United States*, 365 U.S. 505 (1961).

¹² *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)

search or seizure was unreasonable.¹⁴ As the first two elements are not at issue in this case, this Note will focus on the third requirement.

A search or seizure can be unreasonable in a number of ways, with perhaps the most obvious being a warrantless search without probable cause.¹⁵ Even with a warrant, however, a search can still be unreasonable. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹⁶ the Supreme Court stated in a footnote that the Fourth Amendment requires that an officer executing a search warrant stay strictly within the bounds set by the warrant.¹⁷ Five years later in *Andresen v. Maryland*,¹⁸ the Court warned that responsible officials must assure that searches and seizures "are conducted in a manner that minimizes unwarranted intrusions into privacy."¹⁹ Thus, the Court began to make clear the proposition that a warrant alone would not suffice to make an intrusion into the privacy of a home reasonable. In *Arizona v. Hicks*,²⁰ the Court held that police actions in the execution of a warrant must be related to the objectives of the authorized intrusion.²¹ Similarly, in *Horton v. California*,²² the Court held that "[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more."²³

Thus, unless otherwise specified by the warrant, police officers may not allow third parties to enter a home if the officers

¹⁵ See Michael N. Levy, Comment, *The Price of Fame: Should Law Enforcement Officers Who Permit Camera Crews to Film the Execution of a Warrant in a Private Home Be Held Liable for Civil Damages?*, 92 NW. U. L. REV. 1153, 1165-67 (1998).

¹⁴ *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Schmerber v. California*, 384 U.S. 757, 768 (1966).

¹⁵ WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.3(b), at 140 (2d ed. 1992). ("The probable cause test . . . is an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man.")

¹⁶ 403 U.S. 388 (1971).

¹⁷ *Id.* at 394 n.7.

¹⁸ 427 U.S. 463 (1976).

¹⁹ *Id.* at 482 n.11.

²⁰ 480 U.S. 321 (1987).

²¹ *Id.* at 325.

²² 496 U.S. 128 (1990).

²³ *Id.* at 140.

do not need third-party assistance.²⁴ Such an action would be unrelated to the objectives of the authorized intrusion and would therefore be in violation of the Fourth Amendment.²⁵ In *Bills v. Aseltine*,²⁶ which was decided only five weeks before the events at issue in *Layne* occurred, the Court of Appeals for the Sixth Circuit held that law enforcement officers violated the Fourth Amendment when they allowed a security guard to enter the plaintiff's home to perform a search that was not authorized by the search warrant. The warrant at issue authorized a search for narcotics only and the security guard was not present for the purposes of aiding in this search.²⁷ Significantly, the holding in *Bills* finds support in a federal statute which details the persons authorized to serve a search warrant.²⁸ That statute, under the heading "Persons authorized to serve search warrant," provides:

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.²⁹

Thus, the presence of the security guard violated the Fourth Amendment because the purpose of his presence was not to aid the officers.³⁰

B. QUALIFIED IMMUNITY GENERALLY

Once a person's rights under the Fourth Amendment have been violated, the next step for a court is to determine the remedy.³¹ In most cases, the person whose right is violated is a criminal defendant and the remedy is typically brought about through the use of the exclusionary rule.³² In a civil case, however, in which a plaintiff brings an action against government

²⁴ *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992).

²⁵ *Id.*; see also *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987).

²⁶ 958 F.2d 697 (6th Cir. 1992).

²⁷ *Id.*

²⁸ 18 U.S.C. § 3105 (1994).

²⁹ *Id.*

³⁰ *Id.*; see also *Bills*, 958 F.2d at 697.

³¹ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 391-92 (1971).

³² See *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence seized in violation of the Constitution is inadmissible in court).

actors for violation of her Fourth Amendment right against unreasonable searches and seizures, the remedy obviously must be quite different. In such cases, the admissibility of evidence is not an issue.³³ The codification of the Civil Rights Act of 1871, 42 U.S.C. § 1983, creates a federal cause of action against state actors who have violated federal law,³⁴ while *Bivens* creates an analogous cause of action against federal actors.³⁵ In *Layne*, petitioners sought damages from state respondents under § 1983 and from federal respondents under *Bivens*.³⁶ Petitioners were not seeking to challenge the admissibility of any evidence. Rather, they were seeking redress in the form of monetary damages for the invasion of their privacy.

Defendants in a § 1983 or a *Bivens* action are, however, entitled to a defense of qualified immunity if the allegedly violated right was not "clearly established" at the time of the violation.³⁷ The first recognition by the Supreme Court of this right of qualified immunity for ordinary government employees came in *Harlow v. Fitzgerald*.³⁸ The Court held that government officials performing discretionary functions 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."³⁹ The Court further refined this standard five years later in *Anderson v. Creighton*,⁴⁰ a case in which a homeowner brought an action against an FBI

³³ Plaintiffs in such cases do not seek the exclusion of evidence because there is usually no evidence to be excluded. A search can be unreasonable even if it does not result in the production of incriminating evidence.

³⁴ Section 1983 provides:

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

³⁵ *Bivens*, 403 U.S. at 388.

³⁶ See *Wilson v. Layne*, 119 S. Ct. 1692, 1696 (1999).

³⁷ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

³⁸ *Levy*, *supra* note 13, at 1171 (citing *Harlow*, 457 U.S. at 813).

³⁹ See *Harlow*, 457 U.S. at 818 (plaintiff filed suit against presidential aides alleging the existence of a conspiracy to discharge plaintiff unlawfully from employment in the Department of Air Force).

⁴⁰ 483 U.S. 635 (1987).

agent because of a warrantless search. The Court held that a defense of qualified immunity will fail if the right allegedly violated was "clearly established" at the time of the violation such that a reasonable official could have believed that her actions were within the bounds of the law.⁴¹ However, the Court added: "[t]his is not to say that an official action is protected by qualified immunity unless the very act in question has been previously held unlawful, but it is to say that in light of preexisting authority the unlawfulness must be apparent."⁴² This holding was reinforced in *United States v. Lanier*,⁴³ in which the Court explained that the qualified immunity test is essentially the same as the "fair warning" test in criminal proceedings.⁴⁴ The purpose of the defense is to give the defendant fair warning that his action will result in liability.⁴⁵ However, the Court also explained that fair warning does not necessarily require that a factually indistinguishable case must have already come before the adjudicating court.⁴⁶ According to the Court, a right that has been defined in general terms can still clearly establish the law.⁴⁷

C. QUALIFIED IMMUNITY IN THE CONTEXT OF MEDIA ENTRY INTO HOMES

Only three federal appellate court cases prior to *Layne* dealt with the question of qualified immunity in the context of media entry into private homes during the execution of a warrant.⁴⁸ In the first case, *Ayeni v. Mottola*, the Court of Appeals for the Second Circuit held that an objectively reasonable officer could not have concluded that inviting a television crew to participate in

⁴¹ *Id.* at 638.

⁴² *Id.* at 640.

⁴³ 520 U.S. 259 (1997).

⁴⁴ *Id.* at 265. The "fair warning" test in criminal proceedings requires that courts resolve ambiguity in a criminal statute by applying it only to conduct clearly covered. *Id.*

⁴⁵ *Id.* at 270.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997); *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994). The Supreme Court denied certiorari to review the holdings of *Parker* and *Ayeni*, but granted certiorari to review the holding of *Berger*. In *Hanlon v. Berger*, 119 S. Ct. 1706 (1999), which was decided the same day as *Layne*, the Supreme Court held that the officers in *Hanlon* were not entitled to qualified immunity. The Court's brief opinion relied upon its opinion in *Layne*.

the search of a home was lawful and that any officer engaging in such conduct was not entitled to qualified immunity.⁴⁹ In *Ayeni*, law enforcement officers entered the apartment of the plaintiff to search for specified evidence of credit card fraud pursuant to a warrant.⁵⁰ In doing so, the officers permitted a CBS television crew from "Street Stories," a weekly news magazine program, to enter the home and videotape the search.⁵¹ The court of appeals emphasized the importance of the privacy right protected by the Fourth Amendment and held that "clearly established" law prohibited the conduct of the officers.⁵² The court explained that the absence of a prior case that answered the precise question at issue in *Ayeni* did not necessitate the conclusion that the violated right was not "clearly established."⁵³ In the second case, *Parker v. Boyer*,⁵⁴ the Court of Appeals for the Eighth Circuit reached the opposite conclusion in a case involving the entry of a television news crew into a private home during a search for weapons.⁵⁵ The court of appeals emphasized that the absence of caselaw precluded a finding that the law was "clearly established" at the time of the violation.⁵⁶ The court added that most courts had rejected the argument that a constitutional right is violated when the media enter a home during a search.⁵⁷ Finally, in *Berger v. Hanlon*⁵⁸ which involved similar factual circumstances, the Court of Appeals for the Ninth Circuit held that the law against media entry into homes during the execution of a warrant was "clearly established" and that officers violating this right were not entitled to qualified immunity.⁵⁹

Turning more specifically to the facts involved in *Layne*, the parties to the case were able to cite only three cases prior to April 1992, which involved the permissibility of media entry into

⁴⁹ *Ayeni*, 35 F.3d at 686.

⁵⁰ *Id.* at 683.

⁵¹ *Id.*

⁵² *Id.* at 686.

⁵³ *Id.*

⁵⁴ 93 F.3d 445 (8th Cir. 1996).

⁵⁵ *Id.* at 447.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 129 F.3d 505 (9th Cir. 1997).

⁵⁹ *Id.* at 511-12.

homes during the execution of a search warrant.⁶⁰ Two of the cases were unpublished and the district courts in each case held that media entry into a home was permissible. However, neither case involved a discussion of the Fourth Amendment question at issue in *Layne*.⁶¹ The only published decision on point arose out of a state intermediate appellate court which held that members of a news crew did not violate plaintiff's constitutional rights when they entered his home during the execution of a search warrant.⁶² However, the court also held that the law enforcement officers who permitted the news crew to enter plaintiff's home were guilty of trespass.⁶³

Thus, at the time of the alleged violation in *Layne*, no prior case had dealt with the same set of factual circumstances involved in *Layne*.⁶⁴ However, the prior caselaw did demonstrate that the Fourth Amendment prohibited police actions unrelated to the objective of a warrant.⁶⁵

III. FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

In early 1992, the United States Marshals Service established "Operation Gunsmoke," ("Gunsmoke") a nationwide fugitive apprehension program operated in conjunction with state and local law enforcement agencies.⁶⁶ This nationwide program, created to apprehend dangerous criminals, resulted in 3,313 arrests in 40 metropolitan areas.⁶⁷ Pursuant to the program, the Marshals Service entered into a Memorandum of Understand-

⁶⁰ *Moncrief v. Hanton*, 10 Media L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980).

⁶¹ *Moncrief*, 10 Media L. Rptr. at 1620; *Higbee*, 5 Media L. Rptr. at 2372.

⁶² *Prahl*, 295 N.W.2d at 768.

⁶³ *Id.* at 782.

⁶⁴ *Wilson v. Layne*, 119 S. Ct. 1692, 1700 (1999).

⁶⁵ *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁶⁶ *Layne*, 119 S. Ct. at 1695.

⁶⁷ Brief for Federal Respondents at 2, *Wilson v. Layne*, 119 S. Ct. 1692 (1999) (No. 98-83).

ing with the Montgomery County (Md.) Sheriff's Office on February 12, 1992.⁶⁸

One of the targets of the program was Dominic Jerome Wilson, the son of petitioners Charles and Geraldine Wilson.⁶⁹ Dominic Wilson had violated his probation on previous convictions of robbery, theft, and assault with intent to rob and was considered by the program's standards to be a violent offender likely to resist arrest.⁷⁰ On April 14, 1992, the Circuit Court for Montgomery County, Maryland issued three bench warrants for the arrest of Dominic Wilson, one for each of his probation violations.⁷¹ Each of the warrants was addressed to "any duly authorized peace officer" and was identical aside from mention of the specific probation violation at issue.⁷² None of the warrants made any mention of media presence or participation.⁷³ However, the Marshals Service had earlier adopted a written media "ride-along" policy which contemplated media presence in homes during the execution of a warrant.⁷⁴ The policy had been prepared by an employee in the public relations office of the Marshals Service.⁷⁵

Early in the morning of April 16, 1992, Gunsmoke officials assembled a team of United States Marshals and Montgomery County Police officers to raid the home of petitioners in search of Dominic Wilson.⁷⁶ The respondent deputy, U.S. Marshal

⁶⁸ Brief for Petitioners at 2, *Wilson v. Layne*, 119 S. Ct. 1692 (1999) (No. 98-83). The Memorandum stated: "It is agreed that no mention will be made to the press about 'Operation Gunsmoke' until a joint press statement can be prepared at the culmination of the operation." *Id.*

⁶⁹ Federal Respondents' Brief at 2, *Layne* (No. 98-83).

⁷⁰ *Id.*

⁷¹ *Layne*, 119 S. Ct. at 1695.

⁷² *Id.* at 1695 n.1. For example, one of the warrants read:

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

Id.

⁷³ *Id.* at 1695.

⁷⁴ Federal Respondents' Brief at 2, *Layne* (No. 98-83).

⁷⁵ *Layne*, 119 S. Ct. at 1704.

⁷⁶ Petitioners' Brief at 2, *Layne* (No. 98-83).

Harry Layne, the Washington, D.C. area site supervisor of Gunsmoke, assigned a reporter and photographer from the Washington Post to accompany the Gunsmoke team.⁷⁷ Marc Wilson, Dominic Wilson's brother, had informed the law enforcement officers that Dominic Wilson resided with their parents at 909 North Stone Street Avenue in the Lincoln Park neighborhood of Rockville.⁷⁸ Thus, at approximately 6:45 A.M., the Gunsmoke team, accompanied by the reporter and photographer from the Washington Post, raided the home at that address.⁷⁹

Charles and Geraldine Wilson, the petitioners, were lying in bed when they heard a loud knocking on their front door.⁸⁰ Valencia Snowden, their nine year-old granddaughter, answered the door and was promptly removed by the officers to a safe location.⁸¹ Mr. Wilson called out to Valencia.⁸² When she did not respond, Mr. Wilson got out of bed and walked into the living room where he was confronted by three gun-wielding, plain clothes law enforcement officers accompanied by the reporter and photographer from the Washington Post.⁸³ Mr. Wilson, who was wearing only his underpants, repeatedly cursed the officers and demanded that they explain their presence.⁸⁴ He raised his hands in the air and was quickly ordered to the ground by the officers.⁸⁵ Mrs. Wilson, who was wearing only a sheer nightgown, entered the room to find her husband face-down on the floor with a police officer's knee in his back and a gun to his head.⁸⁶ In response to the officers' questions about the whereabouts of Dominic Wilson, Mr. Wilson told the officers that he was not Dominic, that Dominic did not live there, and that he had not seen Dominic for at least two weeks.⁸⁷ Mrs.

⁷⁷ *Id.* The record does not make clear the reason for this assignment.

⁷⁸ Federal Respondents' Brief at 3, *Layne* (No. 98-83); *Layne*, 119 S. Ct. at 1696.

⁷⁹ Petitioners' Brief at 3, *Layne* (No. 98-83).

⁸⁰ *Id.*

⁸¹ Federal Respondents' Brief at 3, *Layne* (No. 98-83); Petitioners' Brief at 3, *Layne* (No. 98-83).

⁸² Petitioners' Brief at 3, *Layne* (No. 98-83).

⁸³ *Id.* at 3-4.

⁸⁴ *Layne*, 119 S. Ct. at 1696.

⁸⁵ Petitioners' Brief at 4, *Layne* (No. 98-83).

⁸⁶ *Id.* at 4-5.

⁸⁷ *Id.* at 4. Mr. Wilson was visibly angry throughout the encounter and repeatedly cursed at the officers.

Wilson confirmed Mr. Wilson's statements.⁸⁸ The reporter and photographer, who took several pictures of the Wilsons, were present in the Wilsons' home during the entire encounter without their consent.⁸⁹ The District Court found that the reporters "were in the house, snooping around, looking around, participating in one fashion or another with both the search of the premises for the individual, who was not found, and the seizure of the Wilsons, who were detained and actually photographed by the photographer."⁹⁰ After determining that Dominic Wilson was not in petitioners' home, the officers left with the reporter and photographer.⁹¹ At no point during the encounter were the Wilsons permitted to clothe themselves decently.⁹² None of the pictures were ever published by the Washington Post.⁹³

B. PROCEDURAL HISTORY

Petitioners brought a lawsuit in the District Court of Maryland against the federal law enforcement officers in their personal capacities under *Bivens*,⁹⁴ and against the state law enforcement officers in their personal capacities under 42 U.S.C. § 1983.⁹⁵ Petitioners claimed that their rights under the Fourth and Fourteenth Amendments⁹⁶ were violated because the officers (1) used excessive force; (2) lacked probable cause to believe that Dominic Wilson would be present at petitioners' address; and (3) allowed members of the media into their home during the execution of the warrants.⁹⁷ The district court granted summary judgment to the respondents on the first two points because the evidence, "when viewed in the light most favorable to petitioners," demonstrated that the amount of force used was reasonable and that the officers had probable cause to believe that Dominic Wilson would be found in petitioners'

⁸⁸ *Id.*

⁸⁹ *Id.* at 5.

⁹⁰ *Id.* at 4-5.

⁹¹ *Layne*, 119 S. Ct. at 1696.

⁹² Petitioners' Brief at 5, *Layne* (No. 98-83).

⁹³ *Layne*, 119 S. Ct. at 1696.

⁹⁴ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁹⁵ *Layne*, 119 S.Ct. at 1696.

⁹⁶ U.S. CONST. amend. XIV provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

⁹⁷ Federal Respondents' Brief at 4, *Layne* (No. 98-83).

home.⁹⁸ The court, however, ruled in petitioners' favor on the third point holding that the actions of the officers in allowing members of the media into the petitioners' home during the execution of a warrant violated petitioners' Fourth Amendment right.⁹⁹ Further, the court denied respondents' motion for summary judgment on qualified immunity grounds because, according to the court, at the time of violation in April 1992, the violated Fourth Amendment right was "clearly established."¹⁰⁰ The district court argued that the "core constitutional right" had been "clearly established" despite the absence of a prior factually indistinguishable case.¹⁰¹

The respondents brought an interlocutory appeal and, in a 2 to 1 decision, a panel of the Court of Appeals for the Fourth Circuit reversed the district court's denial of summary judgment for the respondents. The court held that the officers were entitled to a defense of qualified immunity because a reasonable officer could have believed she was not violating any "clearly established" right.¹⁰² The court held that the few cases dealing with the subject precluded a finding that the law was "clearly established."¹⁰³ The court, however, declined to decide whether the officers' actions actually constituted a violation of the Fourth Amendment.¹⁰⁴

The court of appeals granted petitioners' motion for rehearing before an *en banc* court and reversed the district court in a 6 to 5 decision.¹⁰⁵ Once again the court declined to decide whether there was a violation of the Fourth Amendment but held that the officers were nonetheless entitled to qualified immunity because the officers did not violate any "clearly established" right of petitioners.¹⁰⁶ The majority found that even if it was "clearly established" in April 1992, that the Fourth Amendment prohibited unwarranted third party entry into homes, it could not conclude that the actions of the officers in this case

⁹⁸ *Wilson v. Layne*, 141 F.3d 111, 113 (4th Cir. 1998) (*en banc*).

⁹⁹ *Id.* at 113-14.

¹⁰⁰ *Id.* at 114.

¹⁰¹ Petitioners' Brief at 63a-64a, *Layne* (No. 98-83).

¹⁰² *Wilson v. Layne*, 110 F.3d 1071, 1074-76 (4th Cir. 1997).

¹⁰³ *Id.* at 1074.

¹⁰⁴ *Id.* at 1075-76.

¹⁰⁵ *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998) (*en banc*).

¹⁰⁶ *Id.* at 118-19.

would fall under such a rule.¹⁰⁷ The dissenting opinion, agreeing with the district court, argued that respondents were not entitled to qualified immunity because it had long been "clearly established" that the actions of police officers in the execution of a warrant are strictly limited by the bounds set by the warrant.¹⁰⁸ Furthermore, the dissenting opinion argued that any reasonable officer should have known that the actions at issue in this case would constitute a violation of the Fourth Amendment.¹⁰⁹

The Supreme Court granted certiorari to the court of appeals on November 9, 1998, limited to the following two questions: "1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant? 2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to defense of qualified immunity?"¹¹⁰

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

Writing for the majority, Chief Justice Rehnquist affirmed the decision of the Court of Appeals for the Fourth Circuit and argued in Part II of his opinion that respondents violated the Fourth Amendment when they allowed members of the media to accompany them into petitioners' home during the execution of a warrant.¹¹¹ Chief Justice Rehnquist argued in Part III of his opinion that the officers in this case were nonetheless entitled to a defense of qualified immunity because the state of the law on this issue was not "clearly established" in April 1992, when the violation took place.¹¹² In Part II of the opinion, the Court began by determining that the qualified immunity analysis is identical under either a § 1983 or a *Bivens* cause of ac-

¹⁰⁷ *Id.* at 115-16.

¹⁰⁸ *Id.* at 119-20 (Murnaghan, J., dissenting).

¹⁰⁹ *Id.* at 120 (Murnaghan, J., dissenting).

¹¹⁰ *Wilson v. Layne*, 119 S. Ct. 443 (1998).

¹¹¹ *Wilson v. Layne*, 119 S. Ct. 1692, 1698-99 (1999). Part II of Chief Justice Rehnquist's opinion was joined by the other eight Justices.

¹¹² *Id.* at 1699-1701. Part III of Chief Justice Rehnquist's opinion was joined by Scalia, J., O'Connor, J., Ginsburg, J., Souter, J., Thomas, J., Kennedy, J., and Breyer, J.

tion.¹¹³ In order to evaluate a defense of qualified immunity, a court must first determine the existence of a constitutional violation, and then proceed to determine whether the violated constitutional right was "clearly established" at the time of the alleged violation.¹¹⁴ The purpose of this order of procedure is to "spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit."¹¹⁵ Another benefit of this order is that it "promotes clarity in the legal standards of both the officers and the general public."¹¹⁶

Thus, the Court first determined whether there had in fact been a violation of the Fourth Amendment.¹¹⁷ Chief Justice Rehnquist began with a discussion of the "centuries-old principle of respect for the privacy of the home" which was recognized in England long before the founding of the nation and which was the basis for the Fourth Amendment.¹¹⁸ This respect for the sanctity of the home entailed the principle that police cannot enter a home without a warrant.¹¹⁹ Furthermore, the scope of the search must not exceed the bounds set by the warrant.¹²⁰ Although this does not mean that every police action must be explicitly authorized by the warrant,¹²¹ it does mean that every police action must be related to the objectives that justified the issuance of the warrant.¹²²

The Court then held that the presence of the reporter and photographer in the home of petitioners "was not related to the objectives of the authorized intrusion" and was therefore in violation of the Fourth Amendment.¹²³ Respondents admitted that the reporters did not assist the police in the execution of the warrant and that the objectives of the intrusion did not necessi-

¹¹³ *Id.* at 1696-97 (citing *Graham v. Connor*, 490 U.S. 386, 394 n.9 (1989); *Malley v. Briggs*, 475 U.S. 335, 340 n.2 (1986)).

¹¹⁴ *Id.* at 1697.

¹¹⁵ *Id.* (quoting *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)).

¹¹⁶ *Id.* (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 840-42 (1998)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* (citing *Payton v. New York*, 445 U.S. 573, 603-04 (1980)).

¹²⁰ *Id.* (citing *Horton v. California*, 496 U.S. 128, 140 (1990)).

¹²¹ *Id.* at 1697-98 (citing *Michigan v. Summers*, 452 U.S. 692, 705 (1981)).

¹²² *Id.* at 1698 (citing *Arizona v. Hicks*, 480 U.S. 321, 325 (1987)).

¹²³ *Id.* at 1698.

tate their presence.¹²⁴ However, respondents argued that the presence of the reporters in petitioners' home served various important law enforcement purposes.¹²⁵ Respondents argued first, that the police should have reasonable discretion to determine the appropriateness of media "ride-alongs."¹²⁶ Second, respondents claimed that media presence helps keep the public in touch with police activities.¹²⁷ Finally, respondents asserted that media presence could help protect the safety of both homeowners and the police.¹²⁸ The Court discussed and dismissed each of these arguments.¹²⁹

First, respondents argued that law enforcement officers should be permitted to exercise reasonable discretion in determining when it would "further their law enforcement mission to permit members of the news media to accompany them in executing a warrant."¹³⁰ The Court rejected this claim because it "ignor[ed] the importance of the right of residential privacy"¹³¹ and because it failed to appreciate the distinction between law enforcement objectives generally and the more specific objectives of a search.¹³² The Court stated that whether or not media "ride-alongs" further law enforcement objectives generally, it does not follow that they also further the specific objectives of an authorized intrusion into a private home.¹³³

Second, the respondents claimed that media presence during the execution of a warrant helps publicize government efforts to combat crime and promotes accurate reporting of police activities.¹³⁴ Although the Court noted that some of its First Amendment opinions acknowledge the importance of these objectives,¹³⁵ it nonetheless asserted that "the possibility of

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1699.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1698 (quoting Federal Respondents' Brief at 15, *Layne* (No. 98-83)).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980)).

good public relations is simply not enough, standing alone, to justify the 'ride-along' intrusion into a private home."¹³⁶

Finally, respondents asserted that the presence of the media could help protect the safety of both homeowners and police officers because all parties involved would be hesitant to misbehave in front of the camera.¹³⁷ The Court, however, dismissed this argument because the reporters from the Washington Post were not invited to serve these purposes.¹³⁸ The reporters were present for their own private purposes only.¹³⁹

Chief Justice Rehnquist then turned to the question of qualified immunity and explained that in order for respondents to be liable, the violated right must have been "clearly established" at the time of the violation.¹⁴⁰

"Clearly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. 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."¹⁴¹

The Court further explained that the allegedly violated right must be established at the "appropriate level of specificity before a court can determine whether it was 'clearly established'" at the time of the violation.¹⁴² According to the Court, the question in this case was "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of 'clearly established' law and the information the officers possessed."¹⁴³ Using this standard, the Court held that a reasonable officer could have believed that the actions of the officers in this case did not violate any "clearly established" right.¹⁴⁴

¹³⁶ *Id.*

¹³⁷ *Id.* at 1699.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

¹⁴¹ *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

¹⁴² *Id.* at 1699-1700 (citing *Anderson*, 483 U.S. at 641).

¹⁴³ *Id.* at 1700.

¹⁴⁴ *Id.*

First, Chief Justice Rehnquist argued that "the constitutional question is by no means open and shut" and that "accurate media coverage of police activities serves an important public purpose."¹⁴⁵ Thus, the Court found that the general principles of the Fourth Amendment did not make it obvious that the officers in this case behaved unreasonably.¹⁴⁶

Second, the majority argued that at the time of the violation, the caselaw did not clearly establish that the common practice of allowing members of the media to "ride along"¹⁴⁷ violated the Fourth Amendment.¹⁴⁸ The only published decision directly on point held that such conduct was not unreasonable,¹⁴⁹ while the two unpublished decisions cited by the parties upheld searches involving media entry into homes based upon non-Fourth Amendment analyses.¹⁵⁰ The Court rejected petitioners' reliance upon *Bills v. Aseltine* for the proposition that police may not allow third parties to enter a home during the execution of a warrant unless third party assistance is required.¹⁵¹ First, *Bills* was decided only five weeks before the events in *Layne*, and second, *Bills* arose out of a different jurisdiction, and thus could not clearly establish the question at issue here.¹⁵² The Court then pointed out that petitioners had neither cited any controlling authority in their jurisdiction, nor identified a consensus of persuasive authority sufficient to show that the violated law in this case was "clearly established" in April 1992.¹⁵³

Finally, the majority emphasized the importance of the reliance by the United States Marshals on the media "ride-along" policy which explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests.¹⁵⁴ According to the Court, in light of the fact that the caselaw on the subject was unclear, it

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (citing *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914, 918 (Fla. 1976)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citing *Prahl v. Brosamle*, 295 N.W.2d 768, 782 (Wis. Ct. App. 1980)).

¹⁵⁰ *Id.* (citing *Moncrief v. Hanton*, 10 Media L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (S.D. Cal. 1980)).

¹⁵¹ *Id.* (citing *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992)).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

was reasonable for officers to rely upon their media "ride-along" policy.¹⁵⁵

B. JUSTICE STEVENS' CONCURRENCE AND DISSENT

Justice Stevens concurred with the majority that the officers violated the Fourth Amendment in bringing the reporters from the Washington Post into petitioners' home.¹⁵⁶ However, he dissented from the majority holding that the officers in this case were entitled to a defense of qualified immunity on the grounds that the violated law was "clearly established" in April 1992.¹⁵⁷

The clarity of the constitutional rule, a federal statute (18 U.S.C. § 3105), common-law decisions, and the testimony of the senior law enforcement officer all support my position that it has long been clearly established that officers may not bring third parties into private homes to witness the execution of a warrant.¹⁵⁸

Justice Stevens pointed out that the Court's holding that the Fourth Amendment was violated was in agreement with the holdings of every federal appellate court judge who had addressed the same question.¹⁵⁹ Thus, he asserted that any reasonable officer should have known that the actions involved in this case violated "clearly established" law.¹⁶⁰ He went on to argue that the absence of judicial opinions expressly holding that the actions of the respondents violated the Fourth Amendment did not show that the law was not "clearly established."¹⁶¹ According to Justice Stevens, "[t]he easiest cases don't even arise."¹⁶² Furthermore, while the practice of media "ride-alongs" may have been common, Justice Stevens pointed out that this did not mean that the practice of allowing third parties into homes during the execution of a warrant was common.¹⁶³ The case cited by the majority involved the practice of firefighters allowing

¹⁵⁵ *Id.* at 1701.

¹⁵⁶ *Id.* (Stevens, J., concurring in part and dissenting in part). No other Justices joined in the opinion.

¹⁵⁷ *Id.* (Stevens, J., concurring in part and dissenting in part).

¹⁵⁸ *Id.* (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).

¹⁶¹ *Id.* (Stevens, J., concurring in part and dissenting in part).

¹⁶² *Id.* at 1701 (Stevens, J., concurring in part and dissenting in part) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)).

¹⁶³ *Id.* at 1702 (Stevens, J., concurring in part and dissenting in part).

photographers into disaster areas and involved the doctrine of implied consent, a doctrine inapplicable to this case.¹⁶⁴

Justice Stevens next claimed that the three main cases discussed by the majority could not support its holding.¹⁶⁵ The two federal decisions did not even address the Fourth Amendment question and were, moreover, unpublished.¹⁶⁶ Furthermore, although the one published decision held that the media's actions in filming and broadcasting a reasonable search and seizure were not unreasonable, Justice Stevens emphasized that the court also held that the officers in that case committed a trespass by allowing third parties to enter the plaintiff's home.¹⁶⁷

As further support for his argument that a reasonable officer should have known that the law violated in this case was "clearly established," Justice Stevens pointed to the understanding of the police themselves.¹⁶⁸ The Sheriff of Montgomery County, the commanding officer of three of the respondents stated: "We would never let a civilian into a home That's just not allowed."¹⁶⁹

Finally, Justice Stevens strongly criticized the majority's reliance upon the media "ride-along" policy.¹⁷⁰ The policy contained very little direction in how and when members of the media may enter a private home and "[t]he notion that any member of that well-trained cadre of professionals would rely on such a document for guidance in the performance of dangerous law enforcement assignments is too farfetched to merit serious consideration."¹⁷¹ According to Justice Stevens, the policy was intended to serve as propaganda to bolster the image of

¹⁶⁴ *Id.* at 1702-03 (Stevens, J., concurring in part and dissenting in part) (citing *Florida Publ'g Co. v. Fletcher*, 340 So.2d 914, 918 (Fla. 1976)). The doctrine of implied consent is based on the premise that consent can be presumed in the presence of certain circumstances, even if explicit verbal or written consent is absent. BLACK'S LAW DICTIONARY 305 (6th ed. 1990).

¹⁶⁵ *Layne*, 119 S. Ct. at 1703 (Stevens, J., concurring in part and dissenting in part).

¹⁶⁶ *Id.* (Stevens, J., concurring in part and dissenting in part).

¹⁶⁷ *Id.* at 1703 n.6 (Stevens, J., concurring in part and dissenting in part) (citing *Prahl v. Brosamle*, 295 N.W.2d 768, 782 (Wis. Ct. App. 1980)).

¹⁶⁸ *Id.* at 1704 (Stevens, J., concurring in part and dissenting in part).

¹⁶⁹ *Id.* (Stevens, J., concurring in part and dissenting in part) (quoting Petitioners' Brief at 41, *Layne* (No. 98-83)).

¹⁷⁰ *Id.* at 1704 (Stevens, J., concurring in part and dissenting in part).

¹⁷¹ *Id.* (Stevens, J., concurring in part and dissenting in part).

law enforcement, and not as a guide for the conduct of police officers.¹⁷²

V. ANALYSIS

A. THE LAW ENFORCEMENT OFFICERS VIOLATED THE FOURTH AMENDMENT

The Supreme Court correctly concluded that the Fourth Amendment's protection against unreasonable searches and seizures prohibits law enforcement officers from allowing the media to enter a home during the execution of a search warrant.¹⁷³ The unanimous opinion, authored by Chief Justice Rehnquist, properly emphasized that the notion of the home as a person's castle, the one sure place to which a person may retreat from the outside world, has been an important part of the American legal tradition since the founding of the nation.¹⁷⁴ The Fourth Amendment was written in order to preserve the overriding importance of the privacy of the home¹⁷⁵ and the Supreme Court has expounded upon the importance of the Fourth Amendment and the sanctity of the home in countless opinions.¹⁷⁶ *Layne* should therefore, be analyzed within this context and tradition.

Although the Court has never previously decided a case involving media entry into homes during the execution of a warrant, it has clearly held in several cases that the Fourth Amendment prohibits officers executing a warrant from performing actions unrelated to the objectives of the warrant.¹⁷⁷ Furthermore, 18 U.S.C. § 3105 permits execution of a search warrant only by authorized officers or any person required to aid the authorized officers.¹⁷⁸ In *Layne*, the law enforcement of-

¹⁷² *Id.* (Stevens, J., concurring in part and dissenting in part).

¹⁷³ *Id.* at 1699.

¹⁷⁴ *Id.* at 1697.

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g.*, *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. United States District Court*, 407 U.S. 297 (1972); *Wyman v. James*, 400 U.S. 309 (1971); *Silverman v. United States*, 365 U.S. 505 (1961).

¹⁷⁷ *See, e.g.*, *Maryland v. Garrison*, 480 U.S. 79 (1987); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁷⁸ 18 U.S.C. § 3105 (1994).

ficers admitted that the reporter and photographer from the Washington Post were not present in the petitioners' home to aid the officers and did not participate in the execution of the warrant.¹⁷⁹ The three arguments of respondents regarding the benefits of media involvement are too general to be taken seriously in this context.¹⁸⁰ While media presence during the execution of a search warrant may serve certain important functions, assisting police in the execution of a warrant is not among them.¹⁸¹ Also, the three warrants made no mention of media involvement.¹⁸² Thus, by permitting the media to enter petitioners' home, the officers were performing actions unrelated to the objectives of the authorized intrusion.¹⁸³

One of the most important functions served by a warrant is to ensure that an intrusion into a private home is strictly necessary.¹⁸⁴ Thus, warrants not only specify who may perform the search, but also what area may be searched, and what may be searched for.¹⁸⁵ This function, however, is undermined when officers stray outside the boundaries set by the warrant by performing actions unrelated to the objectives of the authorized intrusion.¹⁸⁶ The Fourth Amendment protection is weakened if police are not bound by the terms of the warrant.¹⁸⁷ One need not look any further than the case at issue for a specific example of the kind of harm likely to result from police action unauthorized by a warrant.¹⁸⁸ As if the encounter was not humiliating enough, the Wilsons were forced to submit to the presence of two additional strangers in their living room.¹⁸⁹ One of these strangers was busy scribbling notes while the other was snapping photographs of the half-naked couple.¹⁹⁰ If the Fourth Amend-

¹⁷⁹ Petitioners' Brief at 5, *Layne* (No. 98-83).

¹⁸⁰ *Layne*, 119 S. Ct. at 1698-99.

¹⁸¹ *Id.*

¹⁸² Petitioners' Brief at 3, *Layne* (No. 98-83).

¹⁸³ *Layne*, 119 S. Ct. at 1698-99.

¹⁸⁴ *LAFAYE & ISRAEL*, *supra* note 15, § 3.3(a), at 138.

¹⁸⁵ *Id.* § 3.4(e)-(f); *see also* 18 U.S.C. § 3105 (1994).

¹⁸⁶ *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁸⁷ *Horton*, 496 U.S. 128; *Hicks*, 480 U.S. 321; *Bivens*, 403 U.S. 388.

¹⁸⁸ *Layne*, 119 S. Ct. 1692.

¹⁸⁹ Petitioners' Brief at 5, *Layne* (No. 98-83).

¹⁹⁰ *Id.*

ment truly protects the privacy of the home and prohibits warrantless police action, it is difficult to imagine circumstances more in violation of the amendment than what occurred in the Wilson home.¹⁹¹

The unanimous Court correctly dismissed respondents' arguments that media presence during the execution of a warrant serves a number of important and socially valuable purposes.¹⁹² The determination of whether police violated the Fourth Amendment while executing a warrant does not turn on whether or not the police actions were beneficial.¹⁹³ Rather, a court must look to the relevant caselaw and to the general principles of the Fourth Amendment.¹⁹⁴ In this instance, both demonstrate that regardless of the benefits of media presence, the Fourth Amendment simply does not permit police actions unrelated to the objectives of the warrant.¹⁹⁵ Because the actions of the officers in *Layne* were unrelated to the objectives of the warrant, the Supreme Court was correct in holding that they violated petitioners' Fourth Amendment rights.¹⁹⁶

Despite the concerns of fans of police-drama television shows (e.g., *Cops* and *L.A.P.D.*), such shows will most likely not be affected by the Court's ruling in *Layne*.¹⁹⁷ According to John Langley, executive producer of the Fox program "COPS," his television show should remain "unaffected by the decision because we obtain releases from everyone involved in our program. Moreover, we do not, under any circumstances, violate rights of privacy."¹⁹⁸ Mr. Langley's statement is correct insofar as it applies to the instances not involving surprise raids into private homes.¹⁹⁹ Receiving consent to broadcast a person's image after the unannounced and unwarranted intrusion into a home

¹⁹¹ *Layne*, 119 S. Ct. at 1696.

¹⁹² *Id.* at 1698-99.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁹⁶ *Layne*, 119 S. Ct. at 1699.

¹⁹⁷ Joan Biskupic & Howard Kurtz, *Police Can Be Sued for Letting Media See Raids*, WASH. POST, May 25, 1999, at A8.

¹⁹⁸ *Id.*

¹⁹⁹ *Layne*, 119 S. Ct. at 1692.

could not retroactively erase a Fourth Amendment violation.²⁰⁰ Regardless of whether the homeowners' image is published, police violate the Fourth Amendment when they allow members of the media to accompany them into a private home.²⁰¹

B. QUALIFIED IMMUNITY SHOULD NOT HAVE BEEN GRANTED

The officers in *Layne* were not entitled to a defense of qualified immunity.²⁰² In holding that the officers were entitled to such a defense, the Court implicitly rejected important portions of the holdings of two of its previous cases, one of which was decided only two years prior to *Layne*.²⁰³ In both *Anderson v. Creighton* and *United States v. Lanier*, the Court held that a right can be "clearly established" even in the absence of a prior factually indistinguishable case holding the conduct at issue unlawful.²⁰⁴ Although no court prior to April 1992, held that officers violate the Fourth Amendment when they allow the media into a home during the execution of a warrant, the Supreme Court had held on several occasions that the actions of officers in the execution of a warrant must be related to the objectives of the warrant.²⁰⁵ Thus, it should have been clear to a reasonable officer in April 1992, that allowing members of the media to enter a home during the execution of a warrant violated the Fourth Amendment when such actions were unrelated to the objectives of the authorized intrusion.²⁰⁶ The majority improperly focused its analysis on the scant caselaw involving media intrusion into the home²⁰⁷ and the result was an analysis of cases that did not even

²⁰⁰ *Id.*

²⁰¹ *Id.* In any event, according to Mr. Langley, "Most of what we show happens on the street or in cars." *Media "Ride-Alongs" Breach Privacy Rights*, FACTS ON FILE WORLD NEWS DIGEST, June 3, 1999, at 397, B3.

²⁰² See *Layne*, 119 S. Ct. at 1701-04.

²⁰³ See *United States v. Lanier*, 520 U.S. 259 (1997); see also *Anderson v. Creighton*, 483 U.S. 635 (1987).

²⁰⁴ *Lanier*, 520 U.S. at 271; *Anderson*, 483 U.S. at 635. See *supra* notes 40-46 and accompanying text.

²⁰⁵ See, e.g., *Maryland v. Garrison*, 480 U.S. 79 (1987); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁰⁶ *Horton v. California*, 496 U.S. 128 (1990); *Hicks*, 480 U.S. at 321; *Bivens*, 403 U.S. at 388.

²⁰⁷ See *Layne*, 119 S. Ct. at 1700.

address the Fourth Amendment question involved here.²⁰⁸ Although the three cases cited by the majority did involve media entry into homes,²⁰⁹ the two unpublished decisions did not cite to a single Fourth Amendment search and seizure case while the holding of the one published decision did not even involve the question of police liability.²¹⁰ As pointed out by the dissent, the absence of caselaw specifically addressing the question involved in *Layne* does not show that the violated right had not been "clearly established."²¹¹ The clearest cases of Fourth Amendment violations typically do not need to be adjudicated.²¹² If the Court had focused on the more general right limiting police action to the objectives of a warrant, it would have been clear that the officers in *Layne* violated this "clearly established" right.²¹³ By allowing members of the media to enter the Wilsons' home, the officers performed actions completely unrelated to the objectives of the warrant.²¹⁴ Thus, they should have realized that their unauthorized actions violated the Wilsons' Fourth Amendment rights.²¹⁵

Additionally, the officers' understanding of the law is an appropriate place to look when determining whether a reasonable officer could have believed that the police conduct in *Layne* did not violate the Fourth Amendment.²¹⁶ The Sheriff of Montgomery County, the commanding officer for three of the respondents, clearly stated that third parties are never allowed into a home.²¹⁷ A reasonable officer, therefore, could not have

²⁰⁸ See *id.* The two unpublished district court opinions, *Moncrief v. Hanton* and *Higbee v. Times-Advocate*, did not even address the Fourth Amendment. 10 Media L. Rptr. 1620 (N.D. Ohio 1984); 5 Media L. Rptr. 2372 (S.D. Cal. 1980). The Fourth Amendment issue in *Prahl v. Brosamle* involved a claim against the newscaster and not against the police. 295 N.W.2d 768 (Wis. Ct. App. 1980).

²⁰⁹ See *supra* notes 60-62, 149-50, 165-67 and accompanying text.

²¹⁰ Petitioners' Brief at 42-43, *Layne* (No. 98-83).

²¹¹ *Layne*, 119 S. Ct. at 1702 (Stevens, J., concurring in part and dissenting in part).

²¹² *Id.* (Stevens, J., concurring in part and dissenting in part).

²¹³ *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

²¹⁴ *Horton*, 496 U.S. 128; *Hicks*, 480 U.S. 321; *Bivens*, 403 U.S. 388.

²¹⁵ *Horton*, 496 U.S. 128; *Hicks*, 480 U.S. 321; *Bivens*, 403 U.S. 388.

²¹⁶ *Layne*, 119 S. Ct. at 1704 (Stevens, J., concurring in part and dissenting in part).

²¹⁷ Petitioners' Brief at 41, *Layne* (No. 98-83).

believed that the actions of the officers in *Layne* were permissible.²¹⁸

The majority, nevertheless, emphasized the significance of the media "ride-along" policy which contemplated the presence of the media in private homes during the execution of warrants.²¹⁹ This emphasis, however, was misguided because testimony of the respondents revealed that they were unaware of the policy.²²⁰ Also, as argued by the dissent, the policy contained very little direction as to how and when members of the media may enter a private home.²²¹ This is unsurprising in view of the strong probability that the policy was written as a public relations tool designed to improve the image of the Marshals Service.²²² Thus, the idea that law enforcement officers would rely upon such an undetailed policy is simply unbelievable.²²³ In any event, reliance upon the media "ride-along" policy would have directly contradicted the Memorandum of Understanding between the United States Marshals Service and the Montgomery County (Md.) Sheriff's Office which specifically provided that the press were not to be informed of "Operation Gunsmoke" until its culmination.²²⁴ The Marshals Service could not have entered an agreement which specifically ruled out the possibility of media involvement if it was at the same time relying upon a policy that contemplated media involvement.

Finally, it is important to note that two of the three federal appellate courts that addressed the same questions before the Court in *Layne* held that law enforcement officers violate the Fourth Amendment when they allow members of the media to enter a private home during the execution of a warrant.²²⁵ They also held that officers violating this right are not entitled to a defense of qualified immunity because this right has been

²¹⁸ *Id.*

²¹⁹ *Layne*, 119 S. Ct. at 1700-01.

²²⁰ Petitioners' Brief at 45, *Layne* (No. 98-83).

²²¹ *Layne*, 119 S. Ct. at 1704 (Stevens, J., concurring in part and dissenting in part).

²²² *Id.* (Stevens, J., concurring in part and dissenting in part).

²²³ *Id.* (Stevens, J., concurring in part and dissenting in part).

²²⁴ Petitioners' Brief at 2, *Layne* (No. 98-83). ("The memorandum provided: 'It is agreed that no mention will be made to the press about 'Operation Gunsmoke' until a joint press statement can be prepared at the culmination of the operation.'")

²²⁵ *Ayeni v. Mottola*, 35 F.3d 680 (2d. Cir. 1994); *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997).

"clearly established."²²⁶ Both courts focused on the importance of the Fourth Amendment's protection of the privacy of the home and the caselaw demonstrating that police officers cannot perform actions unrelated to the objectives of a search warrant.²²⁷

The Supreme Court erroneously held that the police officers in *Layne* were entitled to a defense of qualified immunity.²²⁸ At the time of the violation, "clearly established" law prohibited police action unrelated to the objectives of a search warrant.²²⁹ In *Layne*, the officers violated this "clearly established" law when they allowed police officers to accompany them into the Wilsons' home.

VI. CONCLUSION

In a unanimous decision, the Supreme Court properly held that law enforcement officers violate the Fourth Amendment when they allow members of the media to enter a private home during the execution of a warrant.²³⁰ The historical importance of the Fourth Amendment's protection of the privacy of the home and the Court's past decisions holding that law enforcement officers must perform only those actions related to the objectives of an authorized intrusion commanded this result.²³¹

However, the Court incorrectly held that the officers in *Layne* were nonetheless entitled to qualified immunity because, according to the majority, the violated right was not "clearly established" at the time of the violation.²³² First, the Court ignored its previous holdings that a right can be "clearly established" even in the absence of a prior factually indistinguishable case holding the conduct at issue unlawful.²³³ Second, testimony of the respondents made apparent their knowledge

²²⁶ *Ayeni*, 35 F.3d 680; *Berger*, 129 F.3d 505.

²²⁷ *Ayeni*, 35 F.3d 680; *Berger*, 129 F.3d 505.

²²⁸ *Layne*, 119 S. Ct. at 1692.

²²⁹ *Horton v. California*, 496 U.S. 128 (1990); *Arizona v. Hicks*, 480 U.S. 321 (1987); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

²³⁰ *Layne*, 119 S. Ct. at 1692.

²³¹ *Id.*

²³² *Id.*

²³³ *United States v. Lanier*, 520 U.S. 259, 271 (1997); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

that civilian entry into homes is simply "not allowed."²³⁴ Finally, two of the three federal appellate courts that decided this same question of qualified immunity came to the opposite conclusion that the majority came to in *Layne*.²³⁵

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²³⁴ Petitioners' Brief at 41, *Layne* (No. 98-83).

²³⁵ *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994); *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997).

