

# South Carolina Law Review

---

Volume 50  
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA  
LAW*

---

Article 8

Summer 1999

## Criminal Procedure

Tracey L. Mitchell

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Tracey L. Mitchell, *Criminal Procedure*, 50 S. C. L. Rev. 949 (1999).

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact [digres@mailbox.sc.edu](mailto:digres@mailbox.sc.edu).

# SMILE! YOU'RE ON CANDID CAMERA: MEDIA PRESENCE AND THE EXECUTION OF WARRANTS

## I. INTRODUCTION

In two recent cases, the Fourth and Ninth Circuits split on whether law enforcement officials violate the Fourth Amendment when they permit media representatives to document the execution of warrants and, if so, whether the officials are entitled to a defense of qualified immunity. In *Wilson v. Layne*<sup>1</sup> the Fourth Circuit held that law enforcement officers were entitled to qualified immunity because, at the time of the incident, it was not clearly established that the media could not enter a private residence to observe and photograph the execution of an arrest warrant.<sup>2</sup> However, in *Berger v. Hanlon*<sup>3</sup> the Ninth Circuit held that law enforcement officials violated the Fourth Amendment when the media taped and recorded the execution of a search warrant.<sup>4</sup> Moreover, the Ninth Circuit ruled that the officials were not entitled to qualified immunity because they could not have reasonably believed that their conduct was lawful.<sup>5</sup> Because of the conflict between the circuits, the Supreme Court granted review of both cases during the November 9, 1998 session.<sup>6</sup>

This Note reviews *Wilson* and *Berger* and advocates a resolution to the conflict. Part II of this Note describes the two cases and identifies the differing rationales adopted by the Fourth and Ninth Circuits. Part III presents a framework and analysis for adjudicating this matter. Finally, this Note suggests that the Supreme Court should resolve the conflict by finding that the officials in both the *Wilson* and *Berger* cases violated the Fourth Amendment and were not entitled to a defense of qualified immunity.

## II. BACKGROUND

### A. *Wilson v. Layne*

In *Wilson* federal and state law enforcement officials entered the home of Charles and Geraldine Wilson during the early morning hours in April 1992 to execute an arrest warrant for the couple's son.<sup>7</sup> An angry Mr. Wilson,

---

1. 141 F.3d 111 (4th Cir.) (en banc), cert. granted, 119 S. Ct. 443 (1998).

2. *Id.* at 118-19.

3. 129 F.3d 505 (9th Cir. 1997), cert. granted, 119 S. Ct. 443 (1998).

4. *Id.* at 510.

5. *Id.* at 512.

6. *Wilson v. Layne*, 119 S. Ct. 443 (1998); *Berger v. Hanlon*, 119 S. Ct. 443 (1998).

7. *Wilson*, 141 F.3d at 113.

dressed only in undergarments, met the intruding officials as they entered his home.<sup>8</sup> The officials ultimately wrestled Mr. Wilson to the floor as Mrs. Wilson emerged dressed in a sheer nightgown.<sup>9</sup> The Wilsons' son was not in the home.<sup>10</sup>

Newspaper reporters compounded the Wilsons' humiliation by observing and photographing the entire sequence of events.<sup>11</sup> Although two newspaper reporters accompanied the officials, the warrant did not authorize or mention the reporters' involvement.<sup>12</sup> The reporters' sole purpose was to gather newsworthy material as part of "a two-week, news-gathering activity."<sup>13</sup>

The Wilsons subsequently commenced an action against the officials alleging various violations of their rights under the Fourth and Fourteenth Amendments.<sup>14</sup> Following a motion for summary judgment, the district court dismissed claims regarding the use of excessive force and lack of probable cause.<sup>15</sup> However, the district court held that the officials violated the Wilsons' constitutional rights by permitting the reporters to enter the home without the couple's consent.<sup>16</sup> The district court also rejected the officials' defense of qualified immunity.<sup>17</sup>

On appeal, the Fourth Circuit reversed the district court's decision and ruled that the officers were entitled to qualified immunity.<sup>18</sup> Specifically, the Fourth Circuit determined that it was not clearly established in April 1992 that law enforcement officials violate an individual's constitutional rights by allowing the media to observe and photograph the execution of an arrest warrant.<sup>19</sup> The court did not address whether or not the officials' actions actually violated the Fourth Amendment.<sup>20</sup>

#### B. Berger v. Hanlon

In *Berger* the United States Fish and Wildlife Service (USFWS) received reports that Paul Berger had poisoned or shot eagles on his Montana ranch.<sup>21</sup> After hearing about these allegations, Cable News Network, Inc.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The warrant was specifically addressed to police officers and made no mention of the media or others. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 113-14.

17. *Id.* at 114.

18. *Id.* at 118-19.

19. *Id.*

20. *Id.* at 118.

21. *Berger v. Hanlon*, 129 F.3d 505, 508 (9th Cir. 1997), *cert. granted*, 119 S. Ct. 443 (1998).

(CNN) entered into a written contract with the United States Attorney's Office for the District of Montana to allow CNN to document the USFWS's execution of a criminal search warrant once one had been issued.<sup>22</sup> By entering into this agreement CNN sought to obtain footage for its environmental programs, and the government sought to advertise its efforts in the fight against environmental crime.<sup>23</sup>

One week after the government and CNN entered the contract, a magistrate judge issued a search warrant that authorized the USFWS agents to search the Bergers' ranch and structures.<sup>24</sup> Interestingly, the warrant did not include Bergers' home.<sup>25</sup> Furthermore, the government failed to disclose to the magistrate any information about the contract with CNN and did not request permission to document the execution.<sup>26</sup>

Prior to executing the warrant, law enforcement officials and the CNN crew gathered on a road leading to the Bergers' ranch to discuss the search.<sup>27</sup> CNN taped this gathering and continued to do so as a ten-vehicle caravan approached the ranch.<sup>28</sup> CNN mounted cameras on the exteriors and interiors of the government vehicles, and one USFWS agent wore a hidden microphone in order to transmit live audio to the CNN crew.<sup>29</sup>

Mr. Berger intercepted the caravan and was informed by a USFWS agent about the search warrant.<sup>30</sup> Mr. Berger then drove the agent back to the house and allowed the agent to enter so the agent could explain the situation to Mrs. Berger.<sup>31</sup> The Bergers were never told that the agent was wearing a wire or that the cameras belonged to CNN.<sup>32</sup> CNN obtained audio and visual recordings totaling more than eight hours.<sup>33</sup>

Following the search, Mr. Berger was found guilty on one misdemeanor charge involving the improper use of a registered pesticide.<sup>34</sup> Subsequently, the Bergers filed claims alleging violations of their constitutional rights in connection with the search.<sup>35</sup> However, the district court ruled that the Bergers were collaterally estopped because the constitutionality of the search had been litigated in the criminal proceeding against Mr. Berger.<sup>36</sup>

On appeal, the Ninth Circuit reversed the district court's decision as

---

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 508-09.

27. *Id.* at 509.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 507.

35. *Id.*

36. *Id.*

to the issue of whether the search was unreasonable because of CNN's involvement, which was not raised in the criminal proceeding.<sup>37</sup> The Ninth Circuit held that the search was unreasonable because the joint action of the federal officials and CNN served no legitimate law enforcement purpose, thus violating the express language and intent of the Fourth Amendment.<sup>38</sup> Additionally, the Ninth Circuit held that the officials were not entitled to a defense of qualified immunity.<sup>39</sup>

### III. ANALYSIS

Given the number of real-life police dramas on television, courts will increasingly encounter instances in which law enforcement officials have invited the media to partake in the execution of warrants. As *Wilson* and *Berger* indicate, cases of this nature raise two critical issues. The first is whether law enforcement officials violate the Fourth Amendment when they permit the media to accompany them in order to observe and record the execution of warrants. If this issue is answered in the affirmative, the second issue is whether or not law enforcement officials are entitled to a defense of qualified immunity.

#### A. *Fourth Amendment*

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>40</sup>

Pursuant to the Fourth Amendment, a search occurs when officials violate an individual's subjective interest and the interest is one that society would accept as "reasonable."<sup>41</sup> For purposes of the *Wilson* and *Berger* cases, the expectation of privacy in the home is the subjective interest. Therefore, in order for a search to have occurred under the Fourth Amendment, the court must discern whether society is prepared to accept the privacy interest asserted by the Wilsons and

---

37. *Id.* at 510.

38. *Id.*

39. *Id.*

40. U.S. CONST. amend. IV.

41. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Bergers.

Historically, the Fourth Amendment has been characterized as “an American extension of the English tradition that a man’s house [is] his castle.”<sup>42</sup> Judge Frank supported the idea that one’s castle should be protected under the Fourth Amendment when he wrote:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.<sup>43</sup>

The Supreme Court concurred with this proposition when it opined that “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>44</sup> The Supreme Court later reaffirmed this view when it stated that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”<sup>45</sup>

The historical underpinnings and the Supreme Court’s Fourth Amendment jurisprudence indicate that society is not only willing to accept but has already accepted an expectation of privacy in the home. Because society considers this privacy interest legitimate, a “search” has occurred in both *Wilson* and *Berger* for purposes of the Fourth Amendment. Nevertheless, the mere presence of a “search” is not determinative of whether or not law enforcement officers violated the parties’ Fourth Amendment rights. Instead, this finding triggers the Fourth Amendment protections against “unreasonable searches and seizures.”<sup>46</sup> Therefore, a constitutional violation can occur only

42. William Cuddihy & B. Carmon Hardy, *A Man’s House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 400 (1980).

43. *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting) (footnote omitted).

44. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

45. *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972).

46. In order to trigger the Fourth Amendment protections against “unreasonable searches and seizures,” a court needs only to find conduct that equates to a search or seizure. *See, e.g., Texas v. Brown*, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring) (explaining that because searches and seizures implicate different interests they are independently regulated by

if the requirements of the Fourth Amendment have not been satisfied.

In order to comply with the strictures of the Fourth Amendment, a search must be executed pursuant to a valid search warrant or supported by a narrow exception to the warrant clause.<sup>47</sup> If neither requirement is satisfied, the search is *per se* unreasonable and unconstitutional under the Fourth Amendment.<sup>48</sup> Because a valid warrant was issued in both *Wilson* and *Berger*, the searches conducted by the law enforcement officials cannot be characterized as *per se* unreasonable and unconstitutional.

However, the actual execution of a valid warrant may render a search unconstitutional. Pursuant to executing a valid warrant, law enforcement officials are confined to those actions the warrant specifically authorizes.<sup>49</sup> Nevertheless, law enforcement officials may employ some warrantless actions only if they are impliedly authorized or reasonably necessary.<sup>50</sup> In both *Wilson* and *Berger*, the law enforcement officials engaged in activity outside the express language of the warrants. In *Wilson* the warrant was addressed to police officers and made no mention of the media.<sup>51</sup> However, the officials allowed reporters to participate in the execution of the arrest warrant.<sup>52</sup> By doing so, the officials violated the warrant's clear language. In *Berger* the warrant did not authorize CNN to participate in executing the search warrant.<sup>53</sup> Moreover, in obtaining the warrant, the Government knowingly withheld the fact that CNN would participate in the search pursuant to a written contract between the two parties.<sup>54</sup>

Clearly, in neither case was the media's presence reasonably necessary for the warrant's execution. The media's presence simply did not further a legitimate law enforcement purpose.<sup>55</sup> The media representatives were present

the Fourth Amendment—searches implicate the right to personal privacy while seizures implicate the right to possess property).

47. *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971).

48. *Id.*

49. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971) (indicating that “the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant”).

50. See *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (holding that a search warrant for a home carried the implied authority to detain its occupants); *Payton v. New York*, 445 U.S. 573, 602-03 (1980) (holding that an arrest warrant carries the implied authority to enter a dwelling where the suspect lives if the person is thought to be inside).

51. *Wilson v. Layne*, 141 F.3d 111, 113 (4th Cir.) (en banc), *cert. granted*, 119 S. Ct. 443 (1998).

52. *Id.*

53. *Berger v. Hanlon*, 129 F.3d 505, 508-09 (9th Cir. 1997), *cert. granted*, 119 S. Ct. 443 (1998).

54. *Id.*

55. The idea that the media's presence must facilitate a legitimate law enforcement purpose is supported by the following congressional language:

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

at the execution of warrants with the sole intention of gathering information exclusively for entertainment purposes.<sup>56</sup> And, in both instances, the law enforcement officials knew about the media's commercial motives and endeavors.<sup>57</sup> As Judge Murnaghan argued in his dissenting opinion in *Wilson*:

Police officers cannot justify exceeding the clear bounds of a warrant by asserting that their actions *might fortuitously* have served some legitimate purpose despite being *designed* with no such purpose in mind. The reporters might also have helped by carrying the warrant while the officers handcuffed suspects, or by holding the door open for an officer while he was carrying contraband; but to uphold police actions because of the *potential for fortuitous assistance*, despite clearly not being designed to serve law enforcement, would make a mockery of the rule that an officer's actions are limited to the scope authorized by the warrant.<sup>58</sup>

Characterizing the officials' actions as impliedly authorized or reasonably necessary would undermine the warrant's validity. The Fourth Amendment's protection is premised on the fundamental idea that officials obtain permission from a neutral decisionmaker via a warrant before invading the privacy of an individual's home.<sup>59</sup> Thus, if the media's presence is reasonably necessary in the execution of a warrant, then officials may explain so to the neutral decisionmaker.<sup>60</sup> In *Wilson* and *Berger*, the law enforcement

---

by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1994). In finding that a Fourth Amendment violation occurred when the media participated in the execution of a search warrant, the Second Circuit reinforced its decision with the statutory language and purpose of 18 U.S.C. § 3105. *See Ayeni v. Mottola*, 35 F.3d 680, 687 (2d Cir. 1994) (indicating that "[t]hrough the statute is not determinative of the scope of the Fourth Amendment, it provides some basis for giving content to the Amendment's generalized standard of reasonableness").

56. *Wilson*, 141 F.3d at 113; *Berger*, 129 F.3d at 508.

57. *Id.*

58. *Wilson*, 141 F.3d at 126 (Murnaghan, J., dissenting).

59. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

60. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996) (holding that the presence of a television crew in executing a search warrant was constitutional because "the warrant at issue authorized 'videotaping and photographing' during the execution of the search").

officers had ample opportunity to obtain authorization for the media's presence via a warrant, but the officers chose not to do so. As a result, the officers violated the Wilsons' and Bergers' Fourth Amendment rights. A decision to the contrary would permit "police unilaterally to invite a reporter or anyone else to accompany them whenever entering a house, even if the warrant says absolutely nothing about allowing other parties to enter, so long as their presence might fortuitously produce some benefit to the police."<sup>61</sup>

Moreover, the Supreme Court has asserted that law enforcement officers must conduct searches "in a manner that minimizes unwarranted intrusions upon privacy."<sup>62</sup> By inviting the media into the Wilsons' and Bergers' homes, the law enforcement officials did not minimize the intrusions upon the parties' right to privacy; rather, quite the opposite is true. In *Wilson* the police permitted reporters to take pictures of the half-naked Wilsons, and in *Berger* a CNN crew surreptitiously recorded a private conversation in the Bergers' home. Clearly, less intrusive means could have been utilized to execute the warrants.

### B. *Qualified Immunity*

According to the Supreme Court, "government officials performing discretionary functions, generally 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."<sup>63</sup> As the rule suggests, qualified immunity encompasses all officials except those who are simply incompetent or those who "knowingly violate the law."<sup>64</sup> Essentially, the rule serves to protect decisions made in gray areas by imposing liability only when officials cross bright lines.<sup>65</sup>

For purposes of the *Wilson* and *Berger* cases, the qualified immunity test focuses on two key words—"clearly established." In determining whether an official's conduct crosses a bright line, courts consider the right to be "clearly established" when it has "been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state."<sup>66</sup> However, the constitutional right asserted by the Wilsons and

61. *Wilson*, 141 F.3d at 126 (Murnaghan, J., dissenting).

62. *Andersen v. Maryland*, 427 U.S. 463, 482 n.11 (1976).

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

64. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

65. *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

66. *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980); *see also Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997) (stating that "in determining whether a right is 'clearly established' this court will not look beyond Supreme Court and Sixth Circuit precedent"); *Jenkins v. Talledega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir. 1997) (en banc) (asserting that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose").

Bergers has never been authoritatively decided by any court. Specifically, the Wilsons and Bergers contend that the Fourth Amendment's protection against unreasonable searches and seizures prohibits law enforcement officials from allowing the media to enter a private residence in order to observe and document the execution of a warrant.<sup>67</sup>

Despite the absence of authoritative law in this specific area, the Supreme Court in *Anderson v. Creighton*<sup>68</sup> articulated a test indicating when a right may be considered clearly established. In *Anderson* a Federal Bureau of Investigation (FBI) agent along with other state and federal officials searched the Creightons' home without a warrant.<sup>69</sup> Agent Anderson believed a suspected bank robber was in the home; however, the search proved otherwise.<sup>70</sup> Following the search, the Creightons sued Anderson alleging Fourth Amendment violations and asserting a claim for money damages.<sup>71</sup> The district court granted Anderson's motion for summary judgment because the undisputed facts indicated that probable cause existed to search the Creightons' home and exigent circumstances justified the warrantless search.<sup>72</sup> Nevertheless, the Eighth Circuit reversed because unresolved factual disputes rendered the matter inappropriate for summary judgment.<sup>73</sup> Moreover, the Eighth Circuit asserted that Anderson's qualified immunity claim could not be decided on summary judgment because the right protecting persons against warrantless searches of the home was clearly established.<sup>74</sup>

In determining whether a right is clearly established, the Supreme Court indicated that the test turns on the level of generality defining the right.<sup>75</sup> If the right is drawn too broadly, qualified immunity is transformed into a rule of pleading.<sup>76</sup> For this reason, the Court asserted:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an

---

67. Although some circuits have addressed the general issue regarding law enforcement officials and the media, no court has gone so far as to recognize a specific right against this particular kind of intrusion. Instead, these cases tend to focus on whether a reasonable official would have known that the conduct in question offended the traditional notions of the Fourth Amendment. *See, e.g.,* *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996); *Buonocore v. Harris*, 65 F.3d 347, 353-57 (4th Cir. 1995); *Ayeni v. Mottola*, 35 F.3d 680, 684-87 (2d Cir. 1994).

68. 483 U.S. 635, 640 (1987).

69. *Id.* at 637.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 637-38.

74. *Id.* at 638.

75. *Id.* at 639.

76. *Id.*

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.<sup>77</sup>

The Supreme Court determined that the Eighth Circuit misapplied these principles when it relied on the general right asserted by the Creightons in order to reverse Anderson's summary judgment.<sup>78</sup> Instead, the Eighth Circuit should have considered "the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."<sup>79</sup> The Supreme Court vacated the Eighth Circuit's judgment and remanded the case.<sup>80</sup>

Therefore, in order to reach a determination as to whether the officials violated a clearly established constitutional right in *Wilson* and *Berger*, the preexisting law on the matter is decisive. In both cases, the preexisting law in question revolves around the Fourth Amendment's core values and protections. As previously discussed, the Fourth Amendment serves to protect the privacy of individuals—particularly the right to privacy in the home. Although the exact right presented in *Wilson* and *Berger* differs from those rights considered in previous cases concerning unreasonable searches and seizures, the application and importance of the Fourth Amendment remains unchanged.

Prior to the decisions in *Wilson* and *Berger*, three circuits confronted the issue of whether law enforcement officials are entitled to qualified immunity when third parties participate in an execution of a warrant.<sup>81</sup> Although none of the circuits found that any officials violated a clearly established constitutional right, the Second and Fourth Circuits relied on the Fourth Amendment's general principles to reject a defense of qualified

---

77. *Id.* at 640 (citation omitted); *see also* Pritchett v. Alford, 973 F.2d 307, 314 (4th Cir. 1992).

The fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless "clearly established" for qualified immunity purposes. "Clearly established" in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked.

*Id.* (citation omitted).

78. *Creighton*, 483 U.S. at 640.

79. *Id.* at 641.

80. *Id.* at 646.

81. *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996); *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994).

immunity. The Eighth Circuit granted a defense of qualified immunity because a clearly established constitutional right was not violated.

In *Ayeni v. Mottola*<sup>82</sup> Special Agent Mottola received a warrant on March 5, 1992, to search the Ayenis' apartment for evidence of credit card fraud after a confidential informant notified officials about Mr. Ayeni's activities.<sup>83</sup> Six agents went to the Ayenis' apartment without a warrant and proceeded to knock on the door and announce "they were police conducting an investigation."<sup>84</sup> When Mrs. Ayeni answered the door, dressed only in a gown, one agent pushed her away, and two agents pushed the door, so they could enter.<sup>85</sup>

The agents immediately began searching the apartment.<sup>86</sup> When Mrs. Ayeni requested to see the warrant, an agent said they were waiting for "other people" to bring it.<sup>87</sup> About twenty-five minutes later, Agent Mottola arrived with the warrant and a CBS television crew.<sup>88</sup> Despite Mrs. Ayeni's objections, the CBS crew taped and recorded images of Mrs. Ayeni and her son.<sup>89</sup> The CBS crew also obtained footage of the agents searching the Ayenis' apartment and personal effects.<sup>90</sup> The Ayenis later brought suit against CBS, Mottola, and other agents.<sup>91</sup> The district court denied Mottola's "motion to dismiss on grounds of qualified immunity." An interlocutory appeal followed.<sup>92</sup>

The Second Circuit held that "an objectively reasonable officer [in March 1992] could not have concluded that inviting a television crew—or any third party not providing assistance to law enforcement—to participate in a search was in accordance with Fourth Amendment requirements."<sup>93</sup> Despite the absence of a clearly established rule forbidding the act, the Second Circuit rejected a defense of qualified immunity.

It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers'

---

82. 35 F.3d 680 (2d Cir. 1994).

83. *Id.* at 683.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 684.

92. *Id.*

93. *Id.* at 686.

invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals.<sup>94</sup>

The Second Circuit added that the unreasonableness of the conduct in question was made even more unsavory under Fourth Amendment standards because it failed not only to serve the legitimate needs of law enforcement, but the conduct specifically sought to offend the Amendment's primary value of protecting the right to privacy.<sup>95</sup>

In *Buonocore v. Harris*<sup>96</sup> the Bureau of Alcohol, Tobacco, and Firearms (ATF) received information that Buonocore possessed illegal and unregistered firearms as well as property belonging to his employer.<sup>97</sup> On November 24, 1992, Special Agent Harris of the ATF received a search warrant for Buonocore's home.<sup>98</sup> Harris, accompanied by other law enforcement officers and a corporate security officer of Buonocore's employer, executed the warrant that evening.<sup>99</sup> Buonocore brought suit alleging various

94. *Id.*

95. *Id.*; see also *Hagler v. Philadelphia Newspapers, Inc.*, 24 Media L. Rep. (BNA) 2332, 2334 (E.D. Pa. 1996) (adopting and quoting the reasoning of *Ayeni*). But see *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) (rejecting *Ayeni* for failing "to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms"). Following the *Ayeni* decision, commentators recognized the consequences and need for a uniform analysis—consistent with that advocated by the Second Circuit—governing the presence of the media during the execution of warrants. See Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals"*—*The Outlawing of Police/Media Home Invasions in Ayeni v. Mottola*, 16 LOY. L.A. ENT. L.J. 325 (1995) (analyzing *Ayeni* and its effect on the media); Brad M. Johnston, Note, *The Media's Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment*, 58 OHIO ST. L.J. 1499 (1997) (indicating why the Second Circuit reached the correct decision in *Ayeni*); Kevin E. Lunday, Note, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis*, 65 GEO. WASH. L. REV. 278 (1997) (discussing the balance of interests presented in *Ayeni* and its consequences for federal officials).

96. 65 F.3d 347 (4th Cir. 1995).

97. *Id.* at 350.

98. *Id.* The warrant denoted that only Harris or another "authorized officer" could perform the search. *Id.*

99. *Id.*

causes of action.<sup>100</sup> The district court refused to grant Harris and a local deputy summary judgment based on qualified immunity.<sup>101</sup>

On appeal the Fourth Circuit held that a federal officer violated the Fourth Amendment and was not entitled to qualified immunity after allowing an employee of a private corporation to attend an execution of warrant when the employee acted exclusively for the corporation's benefit and did not aid the officer.<sup>102</sup> In its opinion, the Fourth Circuit cited *Ayeni* with approval.<sup>103</sup> Furthermore, the court recognized that the Fourth Amendment guarantees "[t]he right to be free from government officials facilitating a private person's general search."<sup>104</sup> Nevertheless, in deciding *Wilson*, the Fourth Circuit rejected *Buonocore* on the ground that the same issue and right were not involved in the two cases.<sup>105</sup> Specifically, the majority opinion reasoned that the officers in *Wilson* did not allow the reporters to conduct their own independent search, whereas the police in *Buonocore* permitted the employee to conduct an independent search.<sup>106</sup>

In *Parker v. Boyer*<sup>107</sup> a reporter contacted the St. Louis police because a St. Louis television station wanted to chronicle the department's fight against illegal weapons.<sup>108</sup> At the time, the police were concentrating their efforts on Travis Martin, a man who lived with Sandra and Dana Parker.<sup>109</sup> The department invited the television station to ride along with Officer Boyer.<sup>110</sup> After detaining Martin outside the Parkers' house, officers executed the search warrant and allowed the television crew to document the event.<sup>111</sup> The Parkers brought sundry claims, and the district court granted summary judgment for the Parkers on their Fourth Amendment claims.<sup>112</sup>

On appeal the Eighth Circuit concluded that it was not "self-evident that the police offend general [F]ourth-[A]mendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant."<sup>113</sup> As a result, the court granted the officers a defense of qualified immunity because they did not violate a clearly established right.<sup>114</sup> Moreover, the Eighth Circuit dismissed the rationales of *Ayeni* and

100. *Id.* at 351.

101. *Id.* at 352.

102. *Id.* at 356.

103. *Id.* at 356 n.7.

104. *Id.* at 357.

105. *Wilson v. Layne*, 141 F.3d 111, 116 n.6 (4th Cir.) (en banc), cert. granted, 119

S. Ct. 443 (1998).

106. *Id.*

107. 93 F.3d 445 (8th Cir. 1996).

108. *Id.* at 446.

109. *Id.*

110. *Id.*

111. *Id.* at 446-47.

112. *Id.* at 446.

113. *Id.* at 447.

114. *Id.*

*Buonocore* as “only the beginnings of a trend in the law.”<sup>115</sup>

In light of the scarce case law, the Fourth Amendment analysis presented in *Ayeni* and *Buonocore* appears to be the most persuasive and instructive. The officials in both the *Wilson* and *Berger* cases completely disregarded the long-standing requirements of the Fourth Amendment because the reporters’ presence was not authorized by a warrant, nor was their presence reasonably necessary for the execution of warrant. By merely examining the history and the Supreme Court’s Fourth Amendment jurisprudence, any reasonable officer would know that failure to meet either of these two requirements renders a search per se unreasonable and unconstitutional.

More importantly, law enforcement officials should not be entitled to qualified immunity simply because the facts of these two cases involved the media—an area in which a case directly on point did not exist. By arguing that the preexisting law concerning Fourth Amendment principles alone is not sufficient, officials seek to disregard constitutional guarantees altogether, thereby converting qualified immunity into absolute immunity. As a result, a decision immunizing officials from liability could have far-reaching ramifications in destroying the sanctity of the home and the right to privacy.<sup>116</sup> “[I]f ever the government need enter a private home, the home—and its

115. *Id.* *Parker* has been criticized because it is void of any discussion regarding the constitutional principles controlling the execution of warrants.

[The Eight Circuit] improperly ended its inquiry after ascertaining that no case had explicitly identified such a right at the time the officers conducted their search. Instead, the court should have considered whether an existing precedent falling along the spectrum between the general Fourth Amendment principles and a previous case on point clearly established a constitutional right to be free from media intrusion at the execution of a search.

Recent Case, 110 HARV. L. REV. 1340, 1342 (1997). Other commentators have criticized *Parker* because of the opinion’s blatant disregard of the home and the right of privacy. “The Eighth Circuit, on the issue of the sanctity of the home and the right of privacy, missed the mark. The Eighth Circuit failed to address how the media’s presence did not violate the right of privacy or the sanctity of the home when granting Boyer qualified immunity.” Johnston, *supra* note 95, at 1529-30.

116. Judge Murnaghan recognized this concern in his criticism of the majority opinion in *Wilson*:

The majority goes much too far when it sanctions unconsented-to public tours of private homes, with photography allowed, under the guise of an arrest warrant. After today, any police officer entering a private home under a search or an arrest warrant may bring along any observer as a bystander, even an observer there only to serve his own commercial purposes or to satisfy mere curiosity.

*Wilson v. Layne*, 141 F.3d 111, 132 (4th Cir.) (en banc) (Murnaghan, J., dissenting), cert. granted, 119 S. Ct. 443 (1998).

occupants—can be laid bare for all the world to see.”<sup>117</sup>

#### IV. CONCLUSION

Because of the current disarray in the case law and the growing popularity of real-life police dramas, a resolution to the conflict presented by *Wilson* and *Berger* is imperative. The United States Supreme Court has the opportunity to issue that decision. First, the Supreme Court must decide whether or not the actions involved in *Wilson* and *Berger* violate the Fourth Amendment. Given the Fourth Amendment’s cardinal principles, this issue should be answered in the affirmative. Not only did the actions of law enforcement officials in those cases exceed the bounds of the warrants, but the execution of both warrants was unreasonable and failed to minimize the intrusion upon the right of privacy in the home.

More importantly, by issuing an express decision on this issue, the Court will prevent cases like *Wilson* and *Berger* from hinging on whether officials should have known their conduct violated preexisting principles.<sup>118</sup> Instead, a bright line test can be utilized because an authoritative decision by the Supreme Court renders the right “clearly established” for qualified immunity purposes.<sup>119</sup> As a result, the lower courts will no longer have to treat the issue of media presence during the execution of warrants as a gray area. The actions of law enforcement officials will be adjudged uniformly and fairly.

Second, in finding a Fourth Amendment violation, the Supreme Court must decide whether the officials are entitled to qualified immunity. Because the conduct in *Wilson* and *Berger* was so repugnant to the clearly established rights and ideals set forth in the Fourth Amendment, the officials should have known that their actions violated the right to privacy in the home. In denying a defense of qualified immunity, the Supreme Court can reaffirm the validity of the warrant process and urge law enforcement officials to err on the side of the Fourth Amendment.

*Tracey L. Mitchell*

---

117. *Id.*

118. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

119. *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980).

