Saint Louis University Public Law Review

Volume 19
Number 1 *Congress: Does It Abdicate Its Power? (Vol. XIX, No. 1)*

Article 9

2000

Would You Like to be on Television? Despite Wilson v. Layne, if Law Enforcement Officials Want to Bring the Media into the Home They Should Just Ask

Justin S. Chapell
chapellj@slu.edu

NOTES AND COMMENT

WOULD YOU LIKE TO BE ON TELEVISION? DESPITE *WILSON V. LAYNE*, IF LAW ENFORCEMENT OFFICIALS WANT TO BRING THE MEDIA INTO THE HOME THEY SHOULD JUST ASK

I. INTRODUCTION

In the recent case of *Wilson v. Layne*, the Supreme Court decided whether the Fourth Amendment is violated when law enforcement officials allow the media to accompany them into a home and document the execution of a warrant.[1] The Court spoke plainly and unanimously by holding that the Fourth Amendment is violated when law enforcement officials bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.[2] Amidst this seemingly straightforward rule, however, is a gray area with several important, yet unanswered, questions. The first and primary question is whether the Fourth Amendment is violated when the police attempt to obtain the consent of the homeowner for the media to enter the home.[3] If obtaining consent in this situation is not a *per se* Fourth Amendment violation, the next question that must be answered is what

1. *See* Wilson v. Layne, 119 S. Ct. 1692 (1999). It is important to point out that the latter half of the Wilson opinion discusses a separate issue. Since the Court had determined the police had violated a Fourth Amendment right, they subsequently had to analyze whether this was clearly established at the time of the incident since the Wilsons had sued the officers. *Id*. at 1696, 1699. Federal officials are entitled to qualified immunity when they are sued by homeowners alleging Fourth Amendment violations if their actions had not been clearly established as violative of the Amendment. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). The same standard also applies to state standards. 42 U.S.C. § 1983 (1998). The Court held the officers were protected by qualified immunity since "it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant (even in a home) was lawful." *Id*. at 1700. Because the issue is secondary to the determination that the Fourth Amendment was violated, and is not at all related to consent, it will not be focused upon in this note.

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

3. *See id*.

standard should be used to determine if the consent is valid. Finally, given the oppressive nature of nearly all executions of search and arrest warrants, it must be addressed whether a valid consent can exist under any standard.

This Note reviews the Fourth Amendment issues in *Wilson* and attempts to provide answers to these questions. Part II of this Note describes *Wilson* and identifies other recent appellate decisions addressing similar situations involving the media accompanying police during warrant executions. Part III gives an historical background of the Fourth Amendment in general, and as it has been applied to consent. Part IV of this Note argues that there is no per se violation of the Fourth Amendment under *Wilson* when the police obtain a valid consent for the media to enter the home. Part V argues the standard measuring the validity of a consent obtained by police for the media to enter the home must be that standard used to measure the validity of a consent to a warrantless search by the police. Finally, Part VI argues that though law enforcement may attempt to obtain consent for the media to enter, given the oppressive nature of searches and arrests pursuant to a warrant, the consent will rarely be valid.

II. HISTORY

The Supreme Court recently held the Fourth Amendment is violated when the police bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.[4] This opinion was the Court's response to a factual scenario that seemed blatantly repulsive to the Fourth Amendment's embodiment of principles respecting the privacy of the home.[5]

Wilson involved federal and local law enforcement officials inviting a reporter and photographer to accompany them to observe the officials execute an arrest warrant.[6] The warrant did not mention the media's presence, and the media was not there to assist the officials in executing the warrant.[7] The officials were attempting to arrest Dominic Wilson who was thought to reside at the dwelling where the warrant was to be executed.[8] It was unknown to the police, however, that this residence was actually the home of Charles and Geraldine Wilson, Dominic's parents.[9]

At approximately 6:45 a.m., the officers and the media forcefully entered the home of Charles and Geraldine and proceeded to look for Dominic.[10]

4. *See supra* text accompanying note 1.
5. *See generally Wilson*, 119 S. Ct. at 1692.
6. *See id.* at 1695.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Wilson*, 119 S. Ct. at 1696.

Charles, who was still in his bed, ran downstairs to investigate what was happening and was confronted in his living room by five men in street clothes with guns.[11] The officers believed him to be Dominic Wilson and quickly restrained him.[12] Once the officers learned that Dominic Wilson was not actually in the house, they released Charles and departed from the scene.[13] This, however, was only after the photographer had taken numerous pictures of the incident and the reporter had observed the confrontation between Charles and the officials.[14]

Wilson arose from the Fourth Circuit; however, it was not the first circuit to address such law enforcement practices.[15] The Second Circuit was the first to hear a media participation case involving the Fourth Amendment.[16] In *Ayeni v. Mottola*, secret service agents brought a Columbia Broadcast Service ("CBS") crew with them to film while the agents executed a search warrant.[17] The police were planning to search Babatunde Ayeni's apartment for evidence of credit card fraud.[18] When the police and camera crew arrived, Babatunde was not present; however, his wife and young son were.[19] The CBS crew accompanied the agents into the home and subsequently filmed the search of the home and Mrs. Ayeni and her son.[20]

The court held that the agents did violate the Fourth Amendment by bringing the film crew into the home.[21] Judge Newman stated his now oft-

11. *Id*.

12. *Id*.

13. *Id*.

14. *Id*.

15. *See* Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998). The Supreme Court granted certiorari after a split between the circuit courts on the issue of Fourth Amendment violations and whether the police could receive qualified immunity for any actions the courts deemed violative of the Fourth Amendment. *Id*. at 118-9; 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 (2nd Cir. 1994); *see also Bivens*, 403 U.S. at 388.

16. *See Ayeni*, 35 F.3d 680. It is important to note that the courts, prior to *Ayeni*, had addressed the media entering the home when accompanied with the police or otherwise. Challenges to such intrusions, however, were made under tort theories, primarily trespass and invasion of privacy, and not under the Fourth Amendment. The only Constitutional Amendment implicated by these cases was the First Amendment. The media typically used this to assert their justification for entering the home. This subject, and the case law associated with it, will be discussed more fully later in this note. *See infra* Part V.

17. *Ayeni*, 35 F.3d at 683.

18. *Id*.

19. *Id*.

20. *Id*.

21. *Id*. at 686. Contrary to the Supreme Court's decision in *Wilson*, the Fourth Circuit also held that Ayeni's protection under the Fourth Amendment from an agent bringing persons into their home not expressly nor impliedly authorized by the warrant was clearly established. *Id*. In making this determination, the court relied upon "well-established Fourth Amendment standards" and 18 U.S.C. § 3105 (1988). *Id.* at 686-7.

cited phrase "[a] private home is not a soundstage for law enforcement theatricals."[22] The court also noted the warrant did not authorize the media to accompany the agents, and the media did not aid the agents in the execution of the warrant.[23] Additionally, the court stated that Mrs. Ayeni had objected to the film crew's presence in her home.[24] Like *Wilson*, however, there was no further discussion on whether the agents could or should have attempted to obtain valid consent from Mrs. Ayeni in order to side-step any potential Fourth Amendment violations.

Nearly two years later, the Eighth Circuit addressed this issue in *Parker v. Boyer*, and reached quite a different conclusion.[25] In *Parker*, local law enforcement officers invited a local news station to accompany them to a home.[26] The news crew was there for no other purpose than to observe and film the officers execute a search warrant for evidence of illegal weapons.[27] Once again, the media accompanied the police into a private residence and filmed the search being conducted.[28]

Here, the court noted that the homeowner's permission to videotape the search was not obtained.[29] Furthermore, the court mentioned that the police department even had a policy requiring the media to obtain permission to videotape private citizens whose houses were being searched.[30] Though the court focused primarily on immunity, they did state that, with the exception of *Ayeni*, most courts have rejected the argument that the United States Constitution forbids the media to accompany the police to a person's property while it is searched.[31] Accordingly, the court felt no Fourth Amendment violations occurred, and therefore, the lack of consent of the homeowner, for Fourth Amendment purposes, was no longer an issue.

22. *Ayeni*, 35 F.3d at 686.
23. *Id*.
24. *Id*. at 683.
25. 93 F.3d 445 (8th Cir. 1996).
26. *Id*. at 446.
27. *Id*.
28. *Id*. at 447.
29. *Id*.
30. *Parker*, 93 F.3d at 447.
31. *Id*. (citing Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984); Moncrief v. Hanton, 10 MED. L. RPTR. 1620 (N.D. Ohio 1984); Higbee v. Times-Advocate, 5 MED. L. REPTR. 2372 (S.D. Cal. 1980); Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980)). The *Wilson* Court specifically distinguished these cases stating the cases were decided on "unorthodox non-Fourth Amendment right to privacy theories." *Wilson*, 119 S. Ct. at 1700. For an interesting discussion on how the court in *Berger* distinguished these cases from the factual circumstances in both *Parker* and *Berger*, see *infra* text accompanying note 39. The court did, however, acknowledge the decision in *Ayeni*. *Parker*, 93 F.3d at 447. The court went on to hold that the law did not clearly establish Fourth Amendment violations under these circumstances, and therefore, the officers enjoyed qualified immunity. *Id*.

The Ninth Circuit took its turn a year later in *Berger v. Hanlon*.[32] *Berger* involved a slightly different factual scenario than the other circuits had confronted.[33] Here, a search warrant was issued authorizing the search of a ranch for evidence indicating the taking of wildlife.[34] Prior to this search, the government agents had entered into an agreement with Cable News Network ("CNN") that allowed CNN to ride along with the police and observe and record the search.[35] The government agent conducting the search was wired with a hidden microphone, which was transmitting live audio to a CNN technical crew that was filming the search.[36] The agent obtained Mr. Berger's consent to enter the house since the warrant only authorized a search of the outdoor premises.[37] Unbeknownst to Mr. Berger, however, was the fact that the wired agent was recording the entire conversation both inside and outside the home.[38]

The court in *Berger* sided with the Second Circuit by holding that the Fourth Amendment was violated due to the media's recordings of the conversations inside Berger's home.[39] More importantly, for purposes of this argument, consent was finally recognized as an issue in situations where the media enter the home with the police.[40] Because Mr. Berger's home was outside the scope of the search warrant, the court pointed out that although he consented to the agent entering his home, he did not consent to the microphone's entry into his home.[41] The media appellees relied on the "invited informer" theory to support their claim that Berger's Fourth Amendment rights were not violated since he consented to the agents entry

32. 129 F.3d 505 (9th Cir. 1997).

33. *See id*.

34. *Id*. at 508. The officers did not have a search warrant to enter the house. The search warrant only allowed entry onto the outdoor premises of the ranch. As will later be mentioned, the officer obtained the consent of the homeowner for the officer's entry into the home.

35. *Berger*, 129 F.3d at 509.

36. *Id*.

37. *Id*.

38. *Id*. The recording of the conversation by CNN revealed to the court that the officer did obtain consent to enter the home. However, the recording also revealed that no mentioning was made of the media's wired entrance into the home. *Id*.

39. *Berger*, 129 F.3d at 510-11. The *Berger* court specifically distinguished the cases relied upon by the Eighth Circuit in *Parker*. The court stated that these cases involved media representatives who were playing a "passive role." *Id.* at 512. By "passive role" the court explained that in those cases the media passively observed for law enforcement purposes. *Id*. This, the court stated, was entirely different than taking an active role for strictly entertainment purposes. *Id*.

40. *Id*. at 513.

41. *Id*.

into the home.[42] The court rejected this theory since the recording was not done for any law enforcement purpose, but strictly for media entertainment purposes.[43] By holding that Berger had an expectation of privacy in his conversations with the agent that was infringed by the surreptitious recordings, the court also implies that had he consented to the recordings there would have been no expectation of privacy and no Fourth Amendment violation.[44]

A decision was finally rendered by the Fourth Circuit in *Wilson v. Layne* in April of 1998.[45] The Fourth Circuit did not address whether the Wilsons' Fourth Amendment rights were violated due to the media's presence in their home.[46] For immunity purposes, the court only decided that in April of 1992, when the incident occurred, there was no clearly established law that the law enforcement officials violated the Fourth Amendment by allowing the media to observe the execution of an arrest warrant inside a private home.[47] The court did, however, note the district court's holding which stated that by allowing the reporters to enter the Wilsons' home *without their consent*, the officers had violated their constitutional rights.[48] Since the Fourth Circuit did not address the constitutionality of the media's presence, they also did not analyze the issue of consent as it pertains to this matter.

III. THE FOURTH AMENDMENT

A. The General Application of the Fourth Amendment

The Fourth Amendment of the United States Constitution states:

> [t]he right of the people to be secure in their persons, houses, papers, and effects shall not be violated, and no warrants shall issue, but upon probable

42. *Berger*, 129 F.3d at 513. The court noted that the invited informer doctrine was developed in cases where the government used informants with recording devices to obtain information for legitimate law enforcement purposes. *Id.*

43. *Id*.

44. *Id*. at 514. The officer's warrantless entry into the home is initially what brought the issue of consent to the court's attention. The officer's entry alone was seen as non-violative of the Fourth Amendment since he asked and obtained permission from the homeowner. It was the "entry" of the media, via the hidden microphone, which was seen as a violation of the homeowner's Fourth Amendment rights since no such permission was granted. Therefore, though the initial issue of consent before the court dealt with a warrantless entry, the implication remains: this being that regardless of the existence of a warrant authorizing entry, there is no Fourth Amendment violation if the homeowner consents to the media's entry.

45. 141 F.3d 111.

46. *Id*. at 118.

47. *Id*.

48. *Id*. at 113-14.

> cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[49]

To understand how the Court interpreted these words to protect the Wilsons from media intrusion during the execution of an arrest warrant, it is necessary to view the historical notions of the sanctity of the home that pre-date our own Constitution.

As the Court in *Wilson* was apt to point out, "the Fourth Amendment embodies the centuries old principle of respect for the privacy of the home."[50] The roots of this principle can be found deeply embedded in English Common Law.[51] Lord Chatham in a 1763 address to the House of Commons succinctly declared these ideals in what remains to be a common reference for Fourth Amendment history:

> [t]he poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.[52]

The Framers obviously took such sentiments to heart when creating the Fourth Amendment.

Though the judiciary has adopted these widely agreed-upon principles, it has taken a couple hundred years of development for the home to receive the protection it is given today. The Fourth Amendment does not state, nor has it been interpreted, that a complete bar exists against government intrusion into the home. Rather, the Fourth Amendment protects against "unreasonable" searches and seizures and requires "probable cause" for the issuance of any warrants.[53] As the Court recently pointed out in *California v. Acevedo*, this does not by its terms require a prior warrant for a search.[54] Instead, the Fourth Amendment simply prohibits searches and seizures that are unreasonable.[55] The question then is whether a search or seizure without a warrant is

49. U.S. CONST. amend. IV.

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

51. *See* Entick v. Carrington & Three Other King's Messengers, 19 State Tr. 1029 (1765). This decision is often cited as formulating the underlying principle that their needs to be restraints on the government's ability to enter a private home. *Entick* involved a trespass action where authorities had entered his home to seize items that could potentially be used to convict the plaintiff of seditious libel. *Id*.

52. *See* Payton v. New York, 445 U.S. 573, 601 n. 54 (1980) (Powell, J., dissenting); United States v. Sansuni, 813 F. Supp. 149, 158 (E.D.N.Y. 1992).

53. U.S. CONST. amend. IV.

54. 500 U.S. 565, 569 (1991). Though *Acevedo* did not involve the search of a home, the Court spoke very generally of the Fourth Amendment regarding its requirements and protections. *Id*. *Acevedo* involved the warrantless search of a bag within the trunk of an automobile. *Id*. at 569-70. The Court held that as long as police had probable cause, a warrant is not necessary to search closed containers in automobiles. *Id*.

55. *Id*.

unreasonable. Regarding entry into the home, our jurisprudence generally indicates that implicit within the reasonableness requirement is the requirement that a warrant be issued.[56] However, a textual encounter with the Fourth Amendment reveals that the lack of a warrant does not, by itself, always make a search or seizure unreasonable.[57]

There are generally two recognized types of warrants, search warrants and arrest warrants. As mentioned, a warrant can only be issued upon a showing of probable cause. For a search warrant, the probable cause must be based on a reasonable belief that the legitimate object of a search is located in a particular place.[58] For an arrest warrant, the probable cause must be based upon a reasonable belief that the subject of a warrant has committed the offense.[59] The search warrant then protects the individual's interest in the privacy of the home, while the arrest warrant protects an individual from an unreasonable seizure.[60] To further this intended protection, there is an additional requirement of the detached and neutral magistrate.[61] Neither a search warrant nor an arrest warrant is valid unless issued by such an impartial judicial member.[62]

It has only been since 1948 that the Supreme Court has recognized the reasonableness requirement of the Fourth Amendment implicitly requires the government to obtain a search warrant to enter one's home.[63] In *Johnson*, the Court expressed the Fourth Amendment required more than the reasonable probable cause inferences made by law enforcement officers.[64] Here, the Court stated that Fourth Amendment protection "consists in requiring that

56. *See* Johnson v. United States, 333 U.S. 10 (1948); Katz v. United States, 389 U.S. 347 (1967); *Payton*, 445 U.S. at 573. *See also Wilson*, 119 S. Ct. 1692, (1999); Buonocore v. Harris, 134 F.3d 245 (4th Cir. 1998); *Berger*, 129 F.3d at 505; *Ayeni*, 35 F.3d at 680.

57. U.S. CONST. amend IV. As will be explained later, the Court has made this same textual interpretation by carving out several exceptions to the warrant requirement, including consent. *See infra* Part IV.

58. Steagald v. United States, 451 U.S. 204, 212-13 (1981); *Katz*, 389 U.S. at 357.

59. *Steagald*, 451 U.S. at 212.

60. *Id*.

61. *See Johnson*, 333 U.S. at 10, *infra* notes 63-65; Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). *Lo-Ji* involved the search of an adult bookstore where the magistrate issuing the warrant also participated in the search. The Court stated "[t]he Town Justice did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure." *Lo-Ji*, 442 U.S. at 326. *See also* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

62. *See* cases cited *supra* note 61.

63. *Johnson*, 333 U.S. at 10. Here, the police smelled burning opium in the hallway of a hotel after receiving information from an informant that opium was, in fact, being smoked in the room. *Id*. The officer knocked on the door and stated, "I want to talk to you a little bit." *Id*. at 12. Once the resident opened the door, the officer, without a warrant or obtaining consent, entered the room. *Id*.

64. *Id*. at 14.

those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[65] This reasoning was later expressed in *Katz v. United States*, where the Court held that searches conducted outside the judicial process without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment.[66] The Court did explain, however, that this *per se* rule was subject to a few "specifically established and well-delineated" exceptions.[67]

The Supreme Court has equally recognized the importance of the home when arrests are being made.[68] In 1980, in *Payton v. New York*, the Court held that absent a warrant or exigent circumstances, the police cannot enter a private residence to make an arrest.[69] This has particular importance in *Wilson* since the police were entering a house with an arrest warrant and not a search warrant. Citing to *Payton*, the Court in *Wilson* noted that they were convinced of "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."[70] Such statements indicate that the Court continues to provide the home with an added level of protection from intrusion by law enforcement.

B. Application of the Fourth Amendment in Wilson

Using this Fourth Amendment history and jurisprudence, the *Wilson* Court formulated a holding precluding the police from bringing members of the media or other third parties along when the presence of those third parties in

65. *Johnson*, 333 U.S. at 14. As *supra* note 63 mentions, the officer entered the room without consent. Here the Court stated that entry into the defendant's living quarters "was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Id.* at 13. Though not setting out the specific exception of consent, this is the closest the Supreme Court came to reaching such a decision prior to *Schneckloth v. Bustamonte*. 412 U.S. 218 (1973). *Johnson* also alludes to the coercive atmosphere that can be created by an officer's actions and the potential invalidity of an alleged consent. *Johnson*¸ 333 U.S. at 515-16. This will be discussed further under the analysis section of this note. *See infra* Part IV.

66. *Katz*, 389 U.S. at 357. The police wire-tapped a public phone booth in an attempt to listen to a man make illegal phone calls. *Id*. at 348-49. *Katz* set out a two-pronged test to determine when a "search" has occurred. *Id*. at 350-52. The Court determined that when the police violate 1) a reasonable expectation of privacy, that 2) society is willing to accept, then a Fourth Amendment search has occurred. *Id*.

67. *Katz*, 389 U.S. at 357. As will be discussed later, consent has evolved into one of these specific and well-delineated exceptions. *See infra* Part IV.

68. *See Payton*, 445 U.S. at 573.

69. *Id* at 583. After establishing probable cause that Payton had committed murder, police officers showed up at his home intending to make an arrest. *Id.* The officers knocked on the door, and after no one answered they entered the home and conducted a search. *Id*.

70. *Wilson*, 119 S. Ct. at 1697 (quoting *Payton*, 445 U.S. at 603-04).

the home was not in aid of the execution of the warrant.[71] In making this determination, the Court relied heavily on their earlier decision in *Horton v. California*.[72] There, the Court held that if the scope of a 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.[73] The Court further reasoned that "the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusions."[74]

At this point the *Wilson* Court simply applied this reasoning to the facts surrounding the case. The arrest warrant the police were executing did not contain any information regarding the media accompanying the police.[75] Furthermore, the media representatives who entered the Wilson home did not assist the police in any form to execute the warrant.[76] The media's purpose for being in the home was, therefore, not related to the justification the police had to enter the home.[77] The arrest warrant authorized the apprehension of Dominic Wilson.[78] It did not authorize the observation and recording of the incident.[79] Therefore, "the presence of the reporters inside the home was not related to the objectives of the authorized intrusion."[80]

The respondents took the position that it should be in the police's discretion to determine if the presence of the media serves a legitimate law enforcement purpose.[81] They further argued that a legitimate law enforcement purpose was served since the media's observation allows the public to view the law enforcement's efforts in fighting crime and in protecting against police abuses.[82] The Court, however, soundly rejected these arguments stating that the legitimate law enforcement purposes of which the respondents spoke were

71. *Id*. at 1699. Without engaging in an argument that is outside the scope of this note, it is assumed the Court's holding refers to both search and arrest warrants. Though the facts of this case are primarily concerned with the entry into a house based on an arrest warrant, the holding speaks of warrants in general terms. There is no indication in the holding or the Court's analysis that their decision only applies to situations involving arrest warrants.

72. 496 U.S. 128 (1990); *see also Wilson*¸ 119 S. Ct. at 1697.

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

74. *Id*. at 1698 (citing Arizona v. Hicks, 480 U.S. 321, 325 (1987); Maryland v. Garrison, 480 U.S. 79, 87 (1987)).

75. *Wilson*¸ 119 S. Ct. at 1695.

76. *Id*. at 1698.

77. *Id*.

78. *Id*. at 1695.

79. *Id*.

80. *Id*. at 1698.

81. *Wilson*, 119 S. Ct. at 1698. Interestingly, the Court did not reference their own prior decision of *Andresen v. Maryland*, 427 U.S. 463 (1976), when responding to this contention. *Andresen* specifically states that "nothing [should be] left to the discretion of the officer executing the warrant." *Andresen*, 427 U.S. at 480.

82. *Wilson*, 119 S. Ct. at 1698-99.

too general to trump the Fourth Amendment.[83] In other words, the general purpose of publicizing law enforcement activities is not sufficiently related to the specific purpose in the warrant, that of apprehending Dominic Wilson. The Court stated, "the possibility of good public relations for the police is simply not enough, standing alone, to justify the ride-along intrusion into a private home."[84] This dicta seems not only controlling for law enforcement but for judges and magistrates issuing warrants as well. Though the Court specifically points out that Dominic's warrant did not authorize the media's presence, the Court seems to indicate that even if a warrant permitted the media to accompany the police for "ride-along" purposes, such a warrant would be invalid.[85]

C. The Fourth Amendment As Applied to Consent

As previously mentioned, the Fourth Amendment does not say that a search or seizure is unreasonable absent a warrant.[86] Rather the demand of the Fourth Amendment is that any search conducted must be reasonable.[87] Though this has been interpreted to mean that a search of or entry into a home can only be reasonable if conducted pursuant to a warrant, the Court has set forth several exceptions.[88] One of the most widely used and recognized exceptions to this rule is the valid consent of a person for the police to enter and search their home.[89]

The issue of consent was addressed by the Supreme Court in 1972 in *Schneckloth v. Bustamonte*.[90] Though that case deals with the search of an

83. *Id*. at 1699.

84. *Id*. at 1698.

85. *Id*. at 1698-99. It is not the intention of this analysis to further explore the issue of whether the Court is indicating that warrants should not be issued that allow media intrusion into the home for non-policing objectives.

86. U.S. CONST. amend. IV.

87. *Id*.

88. *See Katz*, 389 U.S. at 35. *See also Payton*, 445 U.S. at 603 (suggesting that the amount of time that has elapsed bears on whether exigent circumstances exist to justify a warrantless search); Minnesota v. Olson, 495 U.S. 91, 100-01 (1990) (holding that the gravity of the crime and the risk of danger to establish probable cause must be assessed to determine if exigent circumstances exist to justify a warrantless search); Chimel v. California, 395 U.S. 752, 767-68 (1969) (holding that a warrantless search of a home incident to a lawful arrest is constitutionally justified).

89. 26 AM. JUR. 2D *POF* §465 (1981).

90. 412 U.S. 218 (1973). In *Schneckloth*, officers on routine patrol stopped a vehicle after observing a headlight and license plate light were not functioning. *Id*. at 220. The officer asked the passenger if he could search the car and the passenger replied that he could. *Id*. The officers then asked "Does the trunk open?" *Id*. The driver responded that it did and went and obtained the keys and opened the trunk. *Id*. In the trunk, the police discovered three stolen checks. *Id*. The Court held that the consent to search the truck was not valid because it was not voluntarily given. *Id*. at 249.

automobile, *Schneckloth* sets forth the basic rules of when a warrantless search conducted pursuant to a consent is permissible.[91] The Court essentially stated that unless consent was freely and voluntarily given, it would be considered invalid.[92] A search or entry into a home pursuant to an invalid consent would, therefore, be deemed as violative of the would-be consenter's Fourth Amendment rights.

Though the Court sets forth some definitive guidelines in measuring the validity of consent, issues of consent have been dealt with by the Court long before *Schneckloth*. For example, in 1948 in the already mentioned case of *Johnson v. United States*, officers entered the private residence of a woman without a warrant of any kind.[93] The officers gained entrance by knocking on the door and telling the lady they wished to speak with her.[94] The officers claimed the woman then let them enter the room.[95] The Court noted, however, that the officers' entrance was "granted in submission to authority rather than an understanding and waiver of a constitutional right."[96]

In 1967 in *Katz v. United States*, the Court again addressed consent and recognized that a search authorized by consent is wholly valid.[97] It was not until the next year, however, in *Bumper v. State of North Carolina*, that the Court spoke more fully on consent and its requirement that it be freely and voluntarily given: "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."[98]

This decision is more relevant to *Wilson* and this note since it involves the warrantless search of a home and the potentially coercive atmosphere law enforcement officers can create.[99] *Bumper* involved a 66 year-old black woman being confronted by four white law enforcement officers at her front door stating that they had a search warrant.[100] Without questioning the officers, the woman let them in to search the house.[101] The Court held that her

91. *Id*.

92. *Id*. at 249.

93. *See supra* notes 63, 65.

94. *Johnson*, 333 U.S. at 12.

95. *Id*.

96. *Id.* at 13. It is indicated in *Schneckloth*, however, that there need not be an understanding by the consenter that he or she is waiving a constitutional right. *Schneckloth*, 412 U.S. at 234.

97. *Katz*, 389 U.S. at 357-58 (citing Zap v. United States, 328 U.S. 624 (1946)). For a description of the facts surrounding *Katz*, see *supra* note 66.

98. 391 U.S. 543, 548-49 (1968).

99. *See id*.

100. *Id*. at 546.

101. *Id*.

Fourth Amendment rights were violated since her consent was not freely and voluntarily given.[102]

As the Court also sets out in *Schneckloth*, the exception of consent to the warrant and probable cause requirements had also been established in *Davis v. United States* and *Zap v. United States*.[103] The Court in *Schneckloth*, therefore, accepted that a voluntary consent is constitutionally valid.[104] The Court then had the arduous task of defining and articulating a definition of "voluntary," and setting forth guidelines that help determine whether this definition has been satisfied.

The test the Court espoused to make this determination was to examine whether the consent was "the product of an essentially free and unconstrained choice by its maker."[105] Having no prior decisions addressing this test in Fourth Amendment contexts, the Court adopted their "traditional definition of voluntariness."[106] This definitional approach relied on the Court's decisions determining the voluntariness of defendants' confessions for purposes of the Fourteenth Amendment.[107] This subject had been addressed by the Court nearly 40 years earlier in *Brown v. Mississippi*, where it was held that criminal convictions based upon confessions obtained by brutality and violence are constitutionally invalid under the Due Process Clause of the Fourteenth Amendment.[108] In other words, the Court was going to examine whether or not the consent was coerced.[109]

To determine if a confession had been coerced, the Court adopted a totality of the circumstances approach.[110] Characteristics of the accused, such as age and intelligence, and details of the interrogation have all been taken into account.[111] The Court in *Schneckloth* then decided that all the surrounding circumstances should be taken into account to determine if a consent has been coerced.[112] The Court specifically stated it would examine subtly coercive consent questions and the vulnerable subjective state of the person who consents.[113] *Schneckloth* does not contend, however, that the person must be

102. *Id*. at 550.

103. *Schneckloth*, 412 U.S. at 233; *see also* authority cited *supra* note 97.

104. *Id*. at 227-30.

105. *Id*. at 225.

106. *Id*. at 223

107. *Id*.

108. 297 U.S. 278 (1936).

109. *Schneckloth*, 412 U.S. at 229.

110. *Id*. at 226, 229-30.

111. *Id*. at 226 (citing Haley v. Ohio 332 U.S. 596 (1948) (regarding age); Payne v. Arkansas, 356 U.S. 560 (1958) (regarding lack of education); Fikes v. Alabama, 352 U.S. 191 (1957) (regarding low intelligence)).

112. *Schneckloth*, 412 U.S. at 229.

113. *Id*.

aware of their right not to consent, but did acknowledge that this would be a factor considered in the examination of all the surrounding circumstances.[114]

Both before and after *Schneckloth*, the Court, in a variety of decisions in varying circumstances, has refined and expanded the factors considered in determining whether a consent has been voluntarily given. For instance, the Court has looked at whether the police made any claim of authority prior to obtaining consent.[115] When consent is given to enter the home only after the officers have asserted they have a warrant, the consent is typically considered invalid.[116] Likewise, if the police threaten to obtain a warrant if the suspect does not acquiesce to the police's request to enter or search a home, the threat has been viewed as coercive unless the police have valid grounds to obtain a warrant.[117] Similarly, a show of force or other inherently coercive circumstances can make a consent invalid.[118] As indicated in *Bumper*, a large number of officers waiting on one's doorstep can potentially create this coercive atmosphere.[119] These factors not only consider the actions of the police, but also the situation and actions of the person consenting. For example, the age, intelligence, and mental state of the person consenting has been considered extremely relevant in testing the validity of a "voluntary" consent.[120] The Court has reasoned that immaturity and minimal education carries with it a higher degree of impressionability.[121] Therefore, a more impressionable person will be more likely to submit to an officer's request to

114. *Id*. at 249.

115. *See Bumper*, 391 U.S. at 543. As mentioned earlier, the Court felt that the presence of four white officers and their assertion that they were going to search the house constituted a claim of authority that contributed to a coercive atmosphere. This factor will become of particular importance when examining whether the police, when executing a search or arrest warrant, can obtain consent for media to enter the home. Though *Bumper* involves the police claiming they had a warrant that did not exist, the Court heavily scrutinized the inherently coercive atmosphere created by four uniformed white police officers at the door step of an elderly black woman's home. *Id*. As will later be discussed, this type of coercive atmosphere seems to also be created in situations such as *Wilson*, where a homeowner encounters several agents in his home late at night. Even if the media had remained outside the home, until given permission to enter, the question remains as to whether it would have been possible for the police to obtain a valid consent in this context.

116. *Id*.

117. United States v. Evans, 27 F.3d 1219, 1231 (7th Cir. 1994) (citing United States v. White, 979 F.2d 539, 542 (7th Cir. 1992)). In *White*, the court stated "[w]hen the expressed intention to obtain a warrant is genuine. . . and not merely a pretext to induce submission, it does not vitiate consent." *White*, 979 F.2d at 542.

118. *Bumper*, 391 U.S. at 546, 555.

119. *Id*. The converse result using this reasoning, however, seems to imply that a person being confronted by law enforcement at his or her home, as opposed to a dark, rural road, can be considered as diluting, to some degree, the coercive atmosphere that has been created.

120. *See supra* note 111.

121. *Id*.

enter the home or conduct a search. To the contrary, a criminal defense attorney is more likely to resist police requests to search when a warrant does not exist. This rationale can also potentially apply to intoxicated persons.[122] Regardless of the person's intellect, age, etc., the fact the person is not aware he or she is waiving a constitutional right by consenting is only one factor to be considered and is not determinative on whether a consent was voluntary.[123]

The Court has also held that when a person expresses a denial of guilt to the police, even if consent is obtained, the consent may not be valid.[124] On the other hand, a lower court noted that a valid confession of guilt prior to the search would tend to weigh in favor of a valid consent.[125] Once again, the existence of any single factor does not necessarily make a consent *per se* invalid. Instead, consent is examined in light of all the surrounding circumstances.

Consent, as it pertains to warrantless entries into a home, has received very little judicial attention. Unfortunately, the judiciary has focused even less on consent as it pertains to the media accompanying the police inside a home, where the police's entry is justified by a warrant. The law on this issue is virtually undeveloped. The Supreme Court's first decision focusing on the media entering with the police into a private residence did not at all address the issue of consent.[126] Even the circuit courts have remained relatively silent on this subject.[127] The subject still seems to be undergoing development in the state and federal district courts. Reliance on these lower court interpretations is, therefore, necessary.

Traditionally courts did not analyze the media's entrance into a home, with or without the police, in the context of the Fourth Amendment.[128] Rather, the First Amendment was often cited and examined since media representatives would typically argue that they had a First Amendment right to enter the home

122. United States v. Leland, 376 F. Supp. 1193 (D. Del. 1974). Here the Court considered whether the defendant was so intoxicated that his consent to a search of his automobile was not the result of a rational intellect. Though it was determined that he was able to make a valid, uncoerced consent, the court demonstrated their willingness to take this factor into consideration when determining whether a consent has been freely and voluntarily given.

123. *Schneckloth*, 412 U.S. at 226-27.

124. Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954).

125. *See* United States v. Mitchell, 322 U.S. 65 (1944).

126. *See generally Wilson*, 119 S. Ct. at 1692.

127. *See* cases cited *supra* notes 25, 30 - 32. *See also supra* text accompanying notes 39, 42, 44. It seems the Fourth Circuit decision in *Berger* (addressing that there was no consent to bring in the microphone) and Eighth Circuit decision in *Parker* (discussing the department's policy to obtain consent of the homeowner before allowing the media into the home) are the only circuit court opinions addressing the issue of consent in this context. *Id.*

128. *See* A.A. Dietmann v. Time, Inc. 449 F.2d 245 (9th Cir. 1971); *Sanusi*, 813 F. Supp. 149; Florida Publ'g Co. v. Fletcher, 340 So.2d 914 (Fla. 1976); Anderson v. WROC-TV, 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981).

and observe and report on the police activities.[129] Those challenging media intrusion would usually do so under tort theories, specifically trespass and invasion of privacy.[130] Therefore, when consent became an issue, it was not analyzed in accordance with *Schneckloth* and other decisions that used the Fourth Amendment.[131] Instead it was analyzed in the context of being an affirmative defense against actions of trespass.[132] Where an individual consented to the media's presence it was typically viewed as a complete bar to any subsequent actions of trespass.[133]

Determining whether consent had been obtained in trespass actions also involved a much lesser degree of scrutiny by the courts.[134] The potential coercive atmosphere created by police presence and other factors considered under the Fourth Amendment were not contemplated when dealing with trespass actions.[135] Additionally, the courts sought to determine whether the media obtained consent to be present.[136] This differs from Fourth Amendment analysis since, in the latter, the court determines whether the police obtained consent for the media to be present.[137] This distinction is important since in these prior decisions it was the media's actions in obtaining consent that were scrutinized rather than the actions of the police.

More recently, however, the courts have begun to recognize that when the media did accompany the police into a home, they were doing so under a right the police possessed.[138] The police's right to enter the home was created by obtaining a warrant.[139] As discussed, obtaining a warrant was generally seen as necessary under the reasonableness requirement of the Fourth Amendment.[140] Therefore, the Fourth Amendment is implicated when the media accompany the police or other government officials into a private residence under the authority of a warrant.[141] *Wilson*, in fact, now indicates this is the supreme law of the land.[142] The courts only needed to take one more step to make the determination that the Fourth Amendment is also implicated when the media accompany the police into a home under the guise of consent. Recent lower

129. *See* cases cited *supra* note 128.
130. *Id.*
131. *Id*.
132. *Id*.
133. *See* cases cited *supra* note 128.
134. *Id.*
135. *Id*.
136. *Id*.
137. *Berger*, 129 F.3d at 513.
138. *Wilson*, 119 U.S. at 1697-98; *Berger*, 129 F.3d at 513; *Ayeni*, 35 F.3d at 685-86.
139. *See* cases cited *supra* note 138.
140. *Id*.
141. *Id*.
142. *Wilson*, 119 S. Ct. at 1699.

federal and state court decisions indicate that this final step of reasoning has been taken.[143]

IV. ANALYSIS

A. Wilson Does Not Act as a Complete Bar to the Media Accompanying the Police into the Home

It is conceded at the outset of this argument that *Wilson* is hardly the scenario where consent of the homeowners for the media to enter is a feasible option. *Wilson* involved the unannounced entry of the police into a home to execute an arrest warrant on a fugitive.[144] Before the homeowner had a chance to do anything other than inquire why the strangers were in his house, law enforcement officials were tackling him to the ground.[145]

Instead of discussing the fact that consent was obviously not obtained for the media to be in the house, the Court simply held that the Fourth Amendment is violated when the media accompany the police into a home for purposes not justified by the warranted intrusion of the police.[146] This holding, however, should not be interpreted as preventing the police from attempting to obtain the voluntary consent of the residents for the media to enter.

As discussed, many courts now implicate the Fourth Amendment when they are analyzing an individual's consent for the media to enter the home with the police.[147] This means that the factors set forth in *Schneckloth* and its progeny are considered. What this also means, however, is that when a consent is determined to be valid, the Fourth Amendment is viewed as being waived.[148] In other words, the Constitutional right that kept the media from entering the home is voluntarily waived by the resident. So long as the consent is freely and voluntarily given, the police cannot violate the Fourth Amendment by bringing media into a home with them since the protection of the Amendment has been waived.[149]

The Supreme Court has repeatedly stated that the Fourth Amendment is violated if the police enter a home absent probable cause and a warrant.[150] The

143. *See Berger* 129 F.3d at 513; Robinson v. City and Cty. of Denver, 39 F. Supp.2d 1257, 1262 (D. Col. 1999); Reeves v. Fox Television Network, 983 F. Supp 703, 713-14 (N.D. Ohio 1997); Barett v. Outlet Broadcasting, Inc., 22 F. Supp. 2d 726 (S.D. Ohio 1997).

144. *Wilson*, 119 S. Ct. at 1695.

145. *Id*.

146. *Id*. at 1698-99.

147. *See* cases cited *supra* note 143.

148. *Schneckloth*, 412 U.S. at 235-37.

149. *See id*. It is understood that *Schneckloth* involved the search of an automobile and not the media's accompanying the police into a home. *Schneckloth*, however, is relied upon to determine the validity of a consent in any situation where the Fourth Amendment is implicated.

150. *See Wilson*, 119 S. Ct. at 1692; *Katz*, 389 U.S. at 347; *Payton*, 445 U.S. at 573.

Court has carved out a few narrow and well-delineated exceptions to this general rule.[151] Though factually dealing with automobile searches, *Schneckloth* sets forth the basic principle that the valid consent of a resident for the police to enter waives their Fourth Amendment right to keep the police out of the home.[152] This rationale is what allows the police to enter a home without a warrant or even probable cause. As long as a valid consent is obtained, there is no violation of the Fourth Amendment by law enforcement's subsequent entry into a home.[153] The fact that *Wilson* holds the Fourth Amendment is violated by the media accompanying the police into a home while a warrant is executed is irrelevant when the police obtain a valid consent for the media's entry. The consenting individual has voluntarily waived the protection the Constitution affords him and has freely and voluntarily chosen to allow the media to accompany the police into his home.[154]

B. Measuring Consent In a Way to Assure the Validity of a Waiver of a Fourth Amendment Right

The validity of the consent obtained by police for the media to enter the home must be in accordance with that standard used to measure the validity of a consent to a warrantless search by the consenting individual. The plethora of case law already discussed reveals a Fourth Amendment right to keep law enforcement officials out of the home absent certain circumstances.[155] Because the police are entering the home pursuant to a warrant, *Wilson* indicates an

151. *See* cases cited *supra* note 143.

152. *Id*.

153. *Id*. This is not intended to suggest there is no Fourth Amendment violation if the officers exceed the scope of the consent that they have been granted. There is ample authority holding that when the police do exceed the consent they have obtained, the Fourth Amendment can still be violated. *See* United States v. Turner, 169 F.3d 84, 87 (1st Cir. 1999); United States v. Rudolph, 970 F.2d 467, 468 (8th Cir. 1992); United States v. Dichiarinte, 445 F.2d 126, 129 n.3 (7th Cir. 1971).

154. It is interesting to note the Court's discussion of the point of view that a valid consent can rarely be obtained, regardless of the circumstances. *Schneckloth*, 412 U.S. at 247 (citing Miranda v. Arizona, 384 U.S. 436, 458 (1966)). These sentiments seem to stem from the rationale that uniformed police officers, no matter how polite, create an automatic coercive atmosphere in the eyes of the potential consenter. Some scholars have even cited to psychologist Stanley Milgram and his obedience theories. Daniel L. Rotenberg, Symposium, *An Essay On Consent(less) Police Searches*, 69 WASH. U.L.Q. 175, 187-89 (Spr. 1991). These theories hypothesize that instead of exercising free will, individuals are much more likely to submit to the requests of a person in an authority position. *Id*. (citing S. MILGRAM, OBEDIENCE TO AUTHORITY (1974)). The submission, or consent, is not seen as an exercise of free will that is voluntarily given, but simply as obedience to authority. *Id*.

155. *See Berger*, 129 F.3d at 513. As discussed, any entrance into the home must meet the reasonableness requirement of the Fourth Amendment. Implicit within this requirement is that the police obtain a warrant based upon probable cause. This is essentially what justifies the police entry into the home.

invocation of the Fourth Amendment when the media enter the home under the shield of the warrant the police obtained.[156] Since the media's purpose of entering the home is in no way related to the justification the police have for entering, *Wilson* holds that the Fourth Amendment is violated.[157] In other words, a person has a Fourth Amendment right to keep the media, or anyone else the police bring along, out of the home when their presence is not specifically justified by a warrant. Due to this invocation of the Fourth Amendment by the media's presence, when the police obtain consent for the media to be present inside the home, the individual consenting is waiving this Fourth Amendment right.[158] Therefore, the court must conduct a Fourth Amendment analysis of the media intrusion.

The most notable decision making such an analysis occurred in the Fourth Circuit in *Berger v. Hanlon*.[159] As previously discussed, the court acknowledged that a law enforcement official obtained a valid consent to enter a home.[160] He did not obtain a valid consent, however, to permit the media to "enter" the home via a hidden microphone transmitting in real time to a CNN crew.[161] This situation differs slightly from *Wilson*, since the officer was entering the home without a warrant.[162] What is stressed, however, is that the court held the Fourth Amendment was violated since there was no valid consent for the media to enter the home.[163] The police, in a sense, exceeded the scope of the consent they had obtained. The court, therefore, determined that the homeowner had not waived his Fourth Amendment right to prohibit the police from allowing the media to enter the home.

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

157. *Id*.

158. *Id. See also* cases cited *supra* notes 128. As mentioned, the courts traditionally used a consent standard measured in the context of a trespass action when the media entered the home. This is primarily because, prior to this decade, there were very few homeowners alleging Fourth Amendment violations as a result of the media accompanying police into their home. *Id*. Instead, the typical form of redress was in tort law. Homeowners would usually bring actions of trespass or invasion of privacy when the media crossed the "threshold of the ruined tenement." In situations where the petitioners did claim Fourth Amendment violations it was often ignored or the theory was rejected. *Id*. If any constitutional amendment was implicated it was usually the First Amendment. *Id.* It was also usually used as a defense by the media, who claimed that they had a First Amendment right resulting from an implied invitation to enter the home. In the past decade, however, these theories have largely been abandoned. *Id*. This is primarily due to a host of lower court decisions addressing the media's entry into the home with the Fourth Amendment rather than tort law. *Id*. Accordingly, the courts also started ushering in analysis that considered whether this Fourth Amendment right had been waived with a valid consent. *Id*.

159. *See Berger*, 129 F.3d at 509-14.

160. *Id*. at 509.

161. *Id*. at 513.

162. *Id*. at 509.

163. *Id.* at 513-14

This decision seems to impact consent analysis concerning media intrusions in three distinct ways. First, this holding demonstrates the court's willingness and insistence that the issue of consent for the media's entrance implicates the Fourth Amendment.[164] Second, is that the court scrutinized the officer's actions, and not the media's, in obtaining consent to enter the home. Citing *Schneckloth*, the court determined that the officer did not obtain a consent that was freely and voluntarily given by the homeowner for the media to enter.[165] By deferring to *Schneckloth*, the court strongly implies it will examine consent in accordance with this case and its progeny. Third, the court also implies that if consent for the media to enter the home had been obtained, there would have been no Fourth Amendment violation.[166]

Numerous lower court decisions both before and after *Berger* reveal this same analysis being made. In *U.S. v. Sanusi*, a case factually similar to *Wilson*, the court recognized that a news crew had "entered defendant's home without the consent of defendant or his family." [167] By not obtaining consent, the court observed that the media's participation in the execution of a search warrant was under color of official right and was contrary to the Fourth Amendment.[168]

Though dealing with an action for trespass, in *Reeves v. Fox* the Federal Court for the Northern District of Ohio followed an analysis similar to that argued in this analysis.[169] In *Reeves*, the police arrived at the plaintiff's (Reeves) home after learning of a physical altercation between plaintiff and another man.[170] The police then obtained consent to enter the home.[171] A camera crew from the television show *COPS* followed the police into the home.[172] The crew then videotaped the police encounter and subsequent arrest of the plaintiff.[173] Plaintiff then sought to argue that even if he had consented

164. *Id*. at 510-14.

165. *Berger*, 129 F.3d at 510-14.

166. *Id*. The police's ability, despite *Wilson*, to continue bringing the media into the home as long as consent is obtained, will be discussed further in the next section of this note.

167. 813 F. Supp. at 160. *Sanusi* is the district court setting for what later arose to the Second Circuit as *Ayeni*. Babatunde Ayeni was one of the named defendants in the district court action. The factual setting the district court encountered, was therefore, similar to that examined by the Second Circuit.

168. *Id*. It is important to recognize that when the court spoke of consent, they spoke in terms of the media obtaining that consent and not the police. *Wilson*, however, loosely implies that it is the police who must obtain consent for the media to enter, since it is the police who are authorized to enter. Also, though *Sansuni* involves a trespass action, the court counters with a Fourth Amendment analysis. *See supra* notes 17-20.

169. 983 F. Supp. 703 (N.D. Ohio 1997).

170. *Id*. at 707.

171. *Id*.

172. *Id*.

173. *Id*.

to the media's entry, it was done so under duress.[174] Reeves stated that he was under duress to consent to the media's entry from the moment the police entered the house.[175]

In response to this argument, the court addressed this as a "criminal law enforcement context" stating "the court must review the 'totality of the circumstances' to determine whether the consenting party's consent was voluntary or was the product of duress."[176] The court then went on to consider a variety of factors considered by *Schneckloth* and its progeny.[177] The court noted there was no physical contact or verbal force and that plaintiff had had several previous encounters with the police that resulted in arrest.[178] The court also brought attention to the fact that the police did not threaten any consequences if Reeves did not consent, that Reeves was aware of his right to deny their entry, and that Reeves made no objections to either the police or media's entry.[179] The court, therefore, held that the consent was freely and voluntarily given.[180] Though the *Reeves* Court should be commended for their *Schneckloth* analysis, it will later be argued in this paper that their final decision of a valid consent was probably incorrect.

Later in the same year, the Federal Court for the Southern District of Ohio, in *Barrett v. Outlet Broadcasting, Inc.* followed the lead of its northern neighbor.[181] In *Barrett*, the police were responding to a 911 suicide call at a private residence.[182] When they arrived, they brought with them a news crew, which subsequently entered the home. The news crew eventually made its way upstairs to where the body was located and filmed the suicide victim.[183] Later, it was contended by the family of the decedent that her Fourth Amendment rights were violated since the media did not have consent to enter the home; and even if they did have consent to enter the home, the plaintiff argued they did not have consent to venture upstairs and film the body.[184]

In responding to this contention concerning the media's unconsented to entry, the court conducted a Fourth Amendment consent analysis.[185] Citing *Schneckloth*, the court stated, "[c]onsent is an exception to the warrant requirement of the Fourth Amendment."[186] The court went on to examine the

174. *Reeves*, 983 F. Supp. at 713.
175. *Id*. at 713-14.
176. *Id*. at 713.
177. *Id*. at 713-14.
178. *Id*. at 714.
179. *Id*.
180. *Reeves*, 983 F. Supp. at 714.
181. 22 F. Supp.2d. 726 (S.D. Ohio 1997).
182. *Id*. at 731.
183. *Id*.
184. *Id*. at 739.
185. *Id*.
186. *Id*.

scope of the consent the media may have been granted. Citing *Florida v. Jimeno* the court stated that the "scope of consent is that which a typical reasonable person would understand from the exchange between the government and the person who gave consent.[187] The court went on to hold that a reasonable jury could find that allowing a news crew to "come in" does not include permission to go upstairs and film a victim; and therefore a valid consent was not obtained.[188]

Like the decision in *Reeves*, the court analyzes consent in a criminal context, which implicates the Fourth Amendment rights of the homeowner. The court then relies on *Schneckloth* to determine if that Fourth Amendment right has been adequately waived by a valid consent.

An even more recent district court decision further demonstrates this mode of analysis. In *Robinson v. Denver* the police were entering a home pursuant to an arrest warrant.[189] Like *Reeves*, the media followed the police into the home and then filmed the arrest.[190] In *Robinson*, however, the plaintiff did not consent to the media's entry into the home and, in fact, specifically objected to their presence.[191] Similar to *Wilson*, the court held that the police had exceeded the scope of their arrest warrant by allowing the media into the home and, therefore, violated the Fourth Amendment.[192] Though the court did not give any analysis of *Schneckloth* or other consent factors, as it was obvious that no consent was given, this decision has much the same implications as *Berger*. Noting that no consent was given implies that when a valid consent is obtained for the media to enter the home, no violation of the Fourth Amendment occurs. The court goes on to state that "absent justification. . . for the intrusion consistent with the Fourth Amendment, such behavior clearly exceeds the scope of the arrest warrant."[193] A logical extrapolation of this statement, however, indicates any justification for intrusion must also be consistent with the Fourth Amendment. When consent is the justification, it must therefore be analyzed within the context of the Fourth Amendment. This requires making a *Schneckloth* analysis of the consent.

C. The Pervasiveness of Consent Searches

Consent searches are the most common form of searches conducted by the police. It is, in fact, estimated that ninety-eight percent of searches are conducted pursuant to a consent and not a warrant.[194] Although most consent

187. *Barrett*, 22 F. Supp.2d at 739 (citing 500 U.S. 248, 251 (1991)).
188. *Id*.
189. 39 F. Supp.2d 1257, 1262 (D.Colo. 1999).
190. *Id*.
191. *Id*.
192. *Id*. at 1265.
193. *Robinson*, 39 F. Supp.2d at 1265.
194. *See supra* note 89.

searches occur away from the home, in automobiles or on the person, it is still a popular method utilized by law enforcement to gain entrance into the home. Decisions such as *Schneckloth* have only affirmed this police practice by stating that as long as the consent is freely and voluntarily given, the police are not violating any Fourth Amendment right. Despite *Wilson*, it seems likely that this form of authorized intrusion will be extended by the police as a means to continue to permit the media to enter a home with them.

Law enforcement has continually insisted that they have a strong interest in allowing the media to accompany them into a home during an arrest or search warrant.[195] Police claim that they have an interest in demonstrating to the public their combative efforts at fighting crime. The popularity of shows such as *COPS* makes this contention hard to rebut. This assertion was even used in *Wilson* as an attempt to justify the media's presence in the home.[196] Although the Court rejected the argument, it did acknowledge the importance of the public being informed about the administration of criminal justice.[197]

It has also been argued that the media's presence will result in more accurate reporting.[198] Along with this is a video documentation of the police's execution of the warrant. It could potentially benefit law enforcement officials to have such documentation available should there be subsequent claims that the warrant was executed improperly. These arguments were also posed and rejected in *Wilson* due to the Court's determination that police could provide their own "quality control" techniques without the media's presence.[199]

This note does not argue that the Court should have accepted such justifications to allow the media's presence in the home. Rather, these attempted justifications are mentioned to demonstrate law enforcement's strong desire to continue to publicize and popularize their work in the field. In the eyes of law enforcement, such publicizing of their work provides a more positive view of their efforts, while at the same time creating negative feelings towards the evils they are fighting against.[200]

If there is a way around *Wilson*, the police are obviously going to take advantage of it since they have expressed the strong desire to bring the media along with them. Fortunately for the police, *Wilson* uses the Fourth Amendment to protect the homeowner's right to keep the media out of the home.[201] As previously discussed, there has long existed a generally accepted

195. *See* defendant's arguments in *Wilson*, *supra* notes 81-82; *Ayeni*, 35 F.3d at 686*; Berger*, 129 F.3d at 513-14.

196. *Wilson*, 119 S. Ct. at 1697-98.

197. *Id*. at 1698.

198. *Id*.

199. *Id*. at 1699.

200. *Id*. at 1697-99.

201. *Id*. at 1699.

way around the Fourth Amendment.[202] It follows, therefore, that there is a way around *Wilson*. Just obtain the consent of the homeowner, and whether the consenting individual knows it or not, he could be waiving his Fourth Amendment protections. The police will certainly take advantage of this "loop-hole" to continue their efforts to publicize their efforts to fight crime.

D. The Invalidity of Most Consents For the Media to Enter

Before police officers start rehearsing their uncoercive requests to bring the media into the home, they should be aware that a valid consent will be virtually impossible to obtain in most situations involving the execution of a warrant. As discussed, a consent must be freely and voluntarily given, and must be free from police coercion.[203] A variety of other factors have also been recognized by the Court to determine if this consent was actually free from coercion.[204] When police arrive at the doorstep of the home, or force their way into the home, a coercive atmosphere is often automatically created.[205] This precludes the existence of any potentially valid consent that would otherwise allow the media to enter the home with the police.[206]

This can best be demonstrated during the execution of an arrest warrant. In *Wilson*, for instance, the police forcefully entered the home and immediately took the homeowner into custody.[207] Though the media had already entered, even if they had waited outside for the police to obtain consent, a valid consent could not have been obtained. It is important to remember that consent for the media's presence in the home is being analyzed in accordance with *Schneckloth* and subsequent Fourth Amendment cases.[208] As such, any consent to further requests made by a person who has been forcefully taken into custody will likely be viewed as invalid in light of all the circumstances.[209] The fact that many situations do not even require the police to knock before entering the home to execute an arrest warrant further supports this contention regarding the coercive nature of such circumstances.[210]

202. *See Schneckloth*, 412 U.S. at 218. This "way around the Fourth Amendment" is referencing the valid consent enunciated in *Schneckloth*.

203. *Id*.

204. *Id*.

205. *See Bumper*, 391 U.S. at 543.

206. *Id*.

207. *Wilson*, 119 S. Ct. at 1695.

208. *See id*. at 1699.

209. *Id*.

210. Richards v. Wisconsin, 520 U.S. 385, 386 (1997). The Court considers a no-knock entry as justified when the police have a reasonable suspicion that knocking and announcing their presence before entering would be dangerous or futile or doing the same would inhibit an effective investigation of the crime.

This rationale also applies when the police arrive to execute a search warrant. Although consents are routinely obtained to search a home when there is no probable cause or even a warrant, when the police arrive with a warrant a different scenario is created. In the former circumstance, the resident has a right to refuse the police's entry due to the lack of a warrant or even probable cause.[211] In the latter circumstance, when the police arrive with a search warrant, they are essentially saying they are going to enter your home and conduct a search. The owner has no right of refusal. The reasonableness requirement of the Fourth Amendment is assumed to be satisfied by the issuance of the warrant.

It is important to notice a difference in the intensity of the coercive atmosphere created in each situation. When the police arrive without a warrant or probable cause they must ask to enter the home.[212] This cannot be done by threats, intimidation, etc.[213] There is also the homeowner's right to reject their request. When the police arrive with a warrant, however, they assert that they are going to enter the home. The resident has no choice but to submit to the police requests.

When the police arrive with a search or arrest warrant, the coercive nature of their presence greatly increases. As the setting in *Wilson* demonstrates, it would be under this heightened degree of coerciveness that the police must obtain a valid consent for the media to enter the home. Though consent history indicates that the totality of the circumstances is considered, and this coercive atmosphere created by the warrant might only be one factor, this factor seems to carry enough coercive weight to make the consent invalid. Even in light of the Court's consideration of the resident's intelligence, age, awareness of his or her right to refuse the media's entrance, etc., the defectiveness of the consent seems to persist.[214] It seems, therefore, that if the Court adheres to its *Schneckloth* analysis, a valid consent for the media to accompany the police during the execution of search or arrest warrants will be extremely difficult to obtain.

V. CONCLUSION

The *Wilson* decision establishes that law enforcement officials violate the Fourth Amendment when they permit media to accompany them inside a home during the execution of a warrant for purposes not specifically related to the

211. *See supra* text accompanying note 153. Though residents may have the right to not consent, critics of the consent exception see it as useless due to most people's seemingly innate submissions to authority figures.

212. *See Payton*, 445 U.S. at 573.

213. *See supra* text accompanying note 117. Threatening to obtain a warrant will not vitiate the consent, however, if the police have genuine reasons to obtain a warrant. *Id.*

214. *See* cases cited *supra* note 111.

officials' justified intrusion. *Wilson* does not clearly establish, however, that a Fourth Amendment violation occurs when the media enter the home pursuant to a valid consent obtained by the officers. To measure the validity of this consent, the same standard used to measure the validity of a consent during a warrantless search, *Schneckloth's* totality of the circumstances, should be utilized.

Given the extensive use of consent searches by law enforcement, it is likely that police officials will attempt to extend this warrantless method of entering the home to situations where a warrant does exist to enter the home, but does not specifically allow the media to enter and observe the activities. The officers will simply attempt to obtain the consent of the homeowner for the media to enter. Such consents will rarely be valid, however, due to the increased coercive atmosphere that usually occurs when the police are executing a warrant. Until there is a Court decision speaking more clearly on the issue, however, *Wilson* is not likely going to keep the police from bringing the media into the home through this "consent" method.

JUSTIN S. CHAPELL*

* J.D. Candidate, Saint Louis University School of Law, 2001. The author would like to thank his wife, Angella, and his parents, Pennye and Gary, for their support before, during and after the writing of this article.