

# The Media's Presence During the Execution of a Search Warrant: A Per Se Violation of the Fourth Amendment

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*This Note addresses the constitutionality of media presence during the execution of a search warrant at a private residence. After examining the Fourth Amendment's history and the development of standards for its application, the author highlights the recent conflict between the Second and Eighth Circuits. The author's Fourth Amendment analysis finds that media presence during the execution of search warrants implicates Fourth Amendment protection of individuals' privacy expectations, transforms media members from private actors into state actors, and offends the reasonableness threshold for constitutional invasions of individuals' homes. The author concludes his analysis by finding that, consistent with the Second Circuit's view, media presence during the execution of a search warrant is a per se violation of the Fourth Amendment.*

## I. INTRODUCTION

*"The privacy and sanctity of the home have been primary tenets of our moral, philosophical, and judicial beliefs."\*\**

Members of the media, in an effort to gain a larger portion of the market share, have become increasingly aggressive and intrusive in their newsgathering techniques.<sup>1</sup> The hallmark of these aggressive and intrusive newsgathering

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\*\* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285–86 (1990) (Brennan, J., dissenting).

<sup>1</sup> See John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996). "Driven by competition, the need for profits, and demands for higher ratings or circulations, and provided with technological marvels such as ever-smaller video cameras and tape machines, the media have shown an increasing willingness to engage in unlawful methods of newsgathering." *Id.* at 1144. In fact, it was ABC's use of hidden cameras and faux workers in its coverage of Food Lion's supermarket operations—not the accuracy or inaccuracy of its reporting—that caused a jury to award Food Lion compensatory and punitive damages. See Ginia Bellafante, *Hide and Go Sue*, TIME, Jan. 13, 1997, at 81. "[U]ndercover reporting tactics . . . have become commonplace in an era

techniques are seen on real-life television programs<sup>2</sup> and during news segments<sup>3</sup> where camera crews accompany civil servants, especially police officers, while they perform their official duties.<sup>4</sup> Scenes of law enforcement officers entering suspects' homes have become fixtures in American television.<sup>5</sup> In fact, such scenes have become more revealing as the media crew and camera now follow the police into the home in order to provide coverage of the search and arrest.<sup>6</sup> The media's entrance into private homes with the police raises a serious Fourth Amendment issue: Does an unreasonable search occur, under the Fourth Amendment, when members of the media accompany the police into the home of a private individual during the execution of a search warrant?<sup>7</sup>

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when there is a different TV newsmagazine show on almost every night of the week." *Id.* In addition, local news shows are cashing in on undercover exposes "during ratings sweeps." *Id.*

<sup>2</sup> The real-life television shows are epitomized by the show *COPS*. See *COPS* (FOX television broadcast, Barbour/Langley Productions, Inc.). During the show *COPS*, camera crews accompany the police while they are on patrol. See *id.* The show has become so popular that uncensored versions of the show are now available on home video. See *COPS TOO HOT FOR TV!* (Barbour/Langley Productions, Inc. 1996).

<sup>3</sup> Local news broadcasters have also begun to accompany the police during their patrols. See Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals"—The Outlawing of Police/Media Home Invasion in Ayeni v. Mottola*, 16 LOY. L.A. ENT. L.J. 325 (1995); see also *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996) (local television station in St. Louis accompanied police during the execution of a search warrant), *cert. denied*, 117 S. Ct. 1081 (1997).

<sup>4</sup> See Ransom, *supra* note 3.

At the 1995 meeting of the National Association of Television Program Executives, fifteen new reality-based entertainment programs were unveiled, including at least three that were exclusively devoted to fighting crime. All indications are that the public has a voracious appetite for such programming—an appetite producers are eager to satisfy.

*Id.* at 325.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* A familiar television scenario depicts people being caught off-guard in their homes. See *id.* at 355. The people who are present while the home is being searched by the police and videotaped by the media "are often in various stages of undress, sometimes cowering in corners or closets, and invariably shielding their faces from the glare of camera lights as they are handcuffed and led away by [the] police." *Id.*

<sup>7</sup> See *id.* at 334.

The central Fourth Amendment issue arising out of the joint incursions of police and reporters inside private homes during searches and seizures, is whether the presence of the media at the scene, invited by law enforcement officers, renders the search or seizure unreasonable. The more fundamental question involved is whether the presence of any

The United States Court of Appeals for the Second Circuit addressed the constitutionality of the media's presence during the execution of a search warrant in *Ayeni v. Mottola*.<sup>8</sup> The Second Circuit held that the Fourth Amendment's prohibition of unreasonable searches forbade police officers from bringing a media camera crew into an individual's home during the execution of a search warrant.<sup>9</sup> The Eighth Circuit, however, reached the opposite conclusion when it addressed the same issue two years later in *Parker v. Boyer*.<sup>10</sup> The Eighth Circuit concluded that the Fourth Amendment's prohibition of unreasonable searches and seizures is not violated when the police allow a media camera crew to enter an individual's home during the execution of a search warrant.<sup>11</sup>

Given the split among the circuits over the issue of the media's presence in the home of a suspect during the execution of a search warrant,<sup>12</sup> it should be considered by everyone who values civil liberties whether the Fourth Amendment prohibits law enforcement officials from allowing media members to enter a private home during the execution of a search warrant.<sup>13</sup> This Note

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non-government third party, invited by officers, renders the search unreasonable.

*Id.*

The same Fourth Amendment issue can arise in the absence of a search warrant, but this Note will specifically focus on the issue of the media's presence for news or entertainment purposes during the execution of a search warrant. The methodology used and the conclusion reached in this Note should be applicable to any situation where the police grant media members access to an individual's home. Furthermore, this issue can arise when any third party any private individual not authorized by the search warrant accompanies the police into an individual's home. This Note, while focusing on the media's presence, will refer to and address general third party presence during the execution of a search warrant. The reader should recognize that the methodology and analysis is the same whether or not the third party present during the execution of a search warrant is a part of the media.

<sup>8</sup> 35 F.3d 680 (2d Cir. 1994).

<sup>9</sup> *See id.* at 686.

<sup>10</sup> 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).

<sup>11</sup> *See id.* at 447.

<sup>12</sup> The split between the Second and Eighth Circuits is legal and not factual. The facts in the *Ayeni* and *Parker* cases are essentially the same. The circuits disagreed on whether Fourth Amendment principles prohibited the media's presence. *See Parker v. Boyer*, 93 F.3d at 447 (not self-evident that the Fourth Amendment prohibits media presence); *Ayeni v. Mottola*, 35 F.3d at 686 (clearly established Fourth Amendment principles prohibit media presence).

<sup>13</sup> Commentators have discussed the *Ayeni v. Mottola* decision and have concluded that the decision was correct, but they have failed to provide the Fourth Amendment analysis, in light of the Eighth Circuit's opinion, that is necessary to reach the conclusion that the media's presence at the execution of a search warrant is per se unreasonable under Fourth Amendment jurisprudence. *See, e.g., Ransom, supra* note 3, at 355.

will show, consistent with the Second Circuit's opinion in *Ayeni*,<sup>14</sup> that the media's presence during the execution of a search warrant is a per se violation of the Fourth Amendment. In Part II, this Note will provide the relevant Fourth Amendment background, including the Fourth Amendment's threshold requirements, and discuss the cases that have addressed the issue of media presence during the execution of a search warrant. In Part III, it will show that the Fourth Amendment is implicated when the media accompanies law enforcement officials during the execution of a search warrant because citizens have a reasonable expectation of privacy in their homes. In Part IV, this Note will show that members of the media become "state actors" when they accompany law enforcement officials during the execution of a search warrant implicating Fourth Amendment standards of reasonableness. In Part V, it will demonstrate that the media's presence during the execution of a search warrant is unreasonable under Fourth Amendment standards and is a per se violation of the Fourth Amendment. Finally, this Note will show that both media members and law enforcement officials who partake in such joint activities are liable for violating the constitutional right—to be free from unreasonable searches and seizures—of the individual whose home is searched.

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The property and privacy rights of such individuals do not vanish the moment they become subjects of a warrant. Indeed, the Fourth Amendment requires that such rights not be obliterated during searches and seizures, but preserved to the maximum extent consistent with the public's interest in community safety and crime control. What makes televised home searches unreasonable under the Fourth Amendment is not only that they fail to satisfy this requirement, but also that they involve police authorization of unlawful conduct by third parties.

*Id.* Ransom even viewed the *Ayeni* decision as a warning to media crews and law enforcement officials regarding concerted action between the police and the media. *See id.* at 357. With the recent Eighth Circuit opinion in *Parker v. Boyer*, however, one must question how serious Ransom's warning should be taken. This Note will, by providing methodical Fourth Amendment analysis, show that, despite the Eighth Circuit's opinion, law enforcement officials and media members should still heed Ransom's warning and discontinue joint enterprises that involve invasions of private homes. *See id.* In so doing, this Note aims to fill the void that has been left by the courts and commentators who have addressed the issue of media presence during the execution of a search warrant.

<sup>14</sup> 35 F.3d 680 (2d Cir. 1994).

## II. BACKGROUND

### A. *The Fourth Amendment's History and Purpose*

The Fourth Amendment<sup>15</sup> is one of the most litigated<sup>16</sup> yet least understood provisions in the Bill of Rights.<sup>17</sup> Although the Fourth Amendment contains confusing and ambiguous language, it has been settled that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,"<sup>18</sup> and that the clear purpose of the Fourth Amendment is to protect the home from unreasonable government intrusions.<sup>19</sup>

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<sup>15</sup> The Fourth Amendment to the Constitution of the United States provides:

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

U.S. CONST. amend. IV.

<sup>16</sup> See BRADFORD P. WILSON, *ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY* 1 (1986). Although the Fourth Amendment has the virtue of brevity, its language is often characterized as ambiguous and opaque. See *id.* at 2. Fourth Amendment scholars often blame the undisciplined and confusing development of Fourth Amendment jurisprudence on the Amendment's general terms; however, the same scholars believe that the Fourth Amendment is necessary to preserve and foster civil liberty. See *id.* at 3.

<sup>17</sup> "No area of constitutional decision making has generated more difficult decisions for the Court than the area of search and seizure." DARIEN A. MCWHIRTER, *SEARCH, SEIZURE, AND PRIVACY* ix (1994). In fact, the Fourth Amendment is often considered the most ambiguous, complex, and confusing amendment enumerated in the Bill of Rights. See *id.* at 1.

<sup>18</sup> *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972); see also *Payton v. New York*, 445 U.S. 573, 584-85 (1980) (Fourth Amendment was designed to prevent a broader evil than just the abuse of general warrants); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (very core of the Fourth Amendment is the right to retreat to home and be free from unreasonable government intrusion). The sanctity of the home is probably the most certain fact that underlies Fourth Amendment jurisprudence. See James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 674 n.120 (1985) ("The sanctity of the home remains today probably the most unassailable fact of Fourth Amendment jurisprudence.").

<sup>19</sup> See 2 JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE*, § 19:3, at 4 (2d ed. 1993). A major cause of the American Revolution was the English Government's use of general warrants. See MCWHIRTER, *supra* note 17, at 2-3. Since general warrants granted government officials the ability to go anywhere with complete immunity, any piece of private property could be entered and searched with a general warrant. See *id.* at 2. In response to the

In order to protect the home, Fourth Amendment jurisprudence prescribes that a warrantless physical entry into a home by a government actor is presumptively unreasonable,<sup>20</sup> and that a physical entry into a home by a government actor pursuant to a valid search warrant must be executed within reasonable bounds of intensity and duration.<sup>21</sup> Therefore, law enforcement officers executing a search warrant must enter the home,<sup>22</sup> execute the

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general warrants, the First Congress of the United States, after the ratification of the United States Constitution, adopted the Fourth Amendment with little debate and after only minor changes to James Madison's proposed original. *See id.* at 2-3. "[T]he decision to include the Fourth Amendment in the Bill of Rights appears to have been inevitable in light of the historical context." Ransom, *supra* note 3, at 332 (footnote omitted).

<sup>20</sup> *See* 2 HALL, *supra* note 19, § 19:2, at 4. Police have a heavy burden when trying to justify a warrantless entry into a home. *See id.* "For example, true hot pursuit of an accused robber justifies a warrantless entry, but hot pursuit of a DUI suspect does not." *Id.* (footnote omitted). "[T]he Supreme Court has consistently ruled that a home, whatever shape it takes, is protected from unreasonable invasion by the government. That means in most cases the government must have a warrant before invading the sanctity of the home." MCWHIRTER, *supra* note 17, at 34. "[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965) (citing *Jones v. United States*, 362 U.S. 257, 270 (1960), *overruled on other grounds* by *United States v. Salvucci*, 448 U.S. 83 (1980)).

<sup>21</sup> *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 4.10(d), at 670-81 (3d ed. 1996). The police are not completely free to execute a search warrant in any manner they choose. *See id.* at 674. The intensity of the search is determined by the items that are to be seized, *see id.* at 670, and the duration of the search is determined by when the purposes of the warrant have been carried out, *see id.* at 678. The model rules for search warrant execution also demonstrate that police should and must act reasonably when they enter a home pursuant to a search warrant. *See* MODEL RULES FOR LAW ENFORCEMENT: SEARCH WARRANT EXECUTION commentary at 14 (Project on Law Enforcement Policy and Rulemaking, Approved Draft 1974) [hereinafter, MODEL RULES] ("In warrant execution it is necessary to strike a balance between the need for official intrusion for the valid public purpose of criminal law enforcement, and the personal interest of those who have been intruded upon in the security and privacy of their premises.").

For discussion on the history and law of search warrant execution, see generally G. Robert Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499 (1964) (analyzing the legal history of government entrance into private dwellings from common law to 18 U.S.C. § 3109 to Supreme Court and state court decisions); Michael R. Sonnenreich & Stanley Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626 (1970) (tracing legal history of knock and announce laws including state and federal legislation).

<sup>22</sup> *See* MODEL RULES, *supra* note 21, Rule 206. Rule 206 provides, in part: "Entering the premises in order to conduct a search shall be done in as courteous and non-destructive a manner as is practicable." *Id.*, Rule 206, at 8. This rule is proposed because every effort should be made to minimize or avoid hostility when executing a search warrant since it is a

search,<sup>23</sup> and conduct themselves in a reasonable and professional manner.<sup>24</sup> In light of the fact that the Fourth Amendment was adopted primarily to protect the sanctity of the home<sup>25</sup> and in light of the fact that police officers must minimize the intrusion suffered by individuals when executing a search warrant,<sup>26</sup> the question rapidly arises: Under the Fourth Amendment, is it unreasonable for the media to accompany the police, into an individual's private home, during the execution of a valid search warrant?

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government agency that intrudes upon an individual's privacy when it executes a search warrant. *See id.*, Rule 206 commentary at 31; *see also* 18 U.S.C. § 3109 (1994) (knock and announce rule for search warrant execution).

<sup>23</sup> *See* MODEL RULES, *supra* note 21, Rules 301 and 302, at 8–9, commentary at 33–34. Rule 301, Search Progression, provides that once the site of a search is secured, the search should be conducted in an orderly progression. *See id.*, Rule 301, at 8–9. The reason for requiring an orderly progression is that the physical intrusion is minimized and the time expended during the search is kept to a minimum. *See id.*, Rule 301 commentary at 33. Rule 302, Scope of the Search, provides: "The area of the search is limited by the description of the premises in the warrant. The scope of the search within that area is limited by the type of item(s) listed in the warrant." *Id.*, Rule 302, at 9. This rule reveals the premise that police are not given carte blanche permission to conduct general exploratory searches of homes. *See id.*, Rule 302 commentary at 34 (citing *United States v. Pardo-Bolland*, 229 F. Supp. 473 (S.D.N.Y. 1964)).

<sup>24</sup> *See id.*, Rule 304, at 9–10, commentary at 35–36. Rule 304, Proper Conduct During the Search, provides:

Searching shall be conducted in as courteous and non-destructive a manner as possible, and any disarray caused by the search shall be minimized before the search team leaves.

[If the time and the place of the search are such as to arouse public curiosity, a uniformed officer should be assigned to answer bystanders' inquiries and to *control access to the search site.*]

*Id.*, Rule 304, at 9–10 (brackets in original) (emphasis added). The purpose of this rule is to insure that the police make every effort to minimize the impact of the intrusion. *See id.*, Rule 304 commentary at 36.

<sup>25</sup> *See, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting) (Fourth Amendment "embraces the concept of the privacy of the home"); *Frank v. Maryland*, 359 U.S. 360, 363 (1959) (history of Fourth Amendment specifically demonstrates it was designed to protect the home), *overruled in part by* *Camara v. Municipal Ct.*, 387 U.S. 523 (1967); *Boyd v. United States*, 116 U.S. 616, 626–27 (1886) (purpose of the Fourth Amendment is to prevent arbitrary government intrusion of the home).

<sup>26</sup> *See, e.g.*, *Dalia v. United States*, 441 U.S. 238, 257–58 (1979) (police may justify damage to property when damage was necessary to perform duty; the standard is reasonableness).

## B. *The Fourth Amendment's Two Threshold Requirements*

Two threshold requirements must be satisfied before the Fourth Amendment's standards of reasonableness are applicable to a particular situation.<sup>27</sup> First, the conduct must intrude into an area where the citizen holds a reasonable expectation of privacy.<sup>28</sup> Second, as with all the provisions of the Bill of Rights, the conduct must be governmental.<sup>29</sup> Therefore, the Fourth Amendment's standards of reasonableness only apply to situations where the government invades an area where the citizen may and does reasonably expect privacy.<sup>30</sup>

### 1. *The Reasonable Expectation of Privacy Threshold*

"The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected expectation of privacy.'"<sup>31</sup> A reasonable expectation

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<sup>27</sup> See ROBERT M. BLOOM & MARK S. BRODIN, *CRIMINAL PROCEDURE EXAMPLES AND EXPLANATIONS* 19 (2d ed. 1996). The issue of whether these threshold requirements are actually satisfied when the media accompanies the police during the execution of a search warrant at an individual's home will be discussed *infra* Parts III.-IV.

<sup>28</sup> See BLOOM & BRODIN, *supra* note 27, at 19. A Fourth Amendment search does not occur unless the person subjected to the search has a reasonable expectation of privacy in the place searched. See 1 JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE*, § 2:1, at 40 (2d ed. 1991).

<sup>29</sup> See 1 HALL, *supra* note 28, § 2:1, at 40. Private searches, unlike government searches, do not implicate the Fourth Amendment. See *id.* § 12:1, at 549.

<sup>30</sup> See *id.*

<sup>31</sup> *Id.* § 2:1, at 39 (citing *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) ("[T]he Fourth Amendment protects legitimate expectations of privacy rather than simply places. If the inspection by police does not intrude upon a legitimate expectation of privacy there is no 'search' subject to the Warrant Clause.")).

The Court's early cases on the scope of the interests protected by the Fourth Amendment followed a meandering course from a liberal application of the doctrine of trespass which protected the rights of privacy, personal security, and private property to a flirtation with the underpinnings of the concept of reasonable expectation of privacy to rigid unrealistic adherence to the concept of physical trespass.

*Id.* § 2:2, at 40-41 (footnotes omitted). The Supreme Court recognized the "first seeds of the expectation of privacy" in *Ex parte Jackson*, 96 U.S. 727 (1878), when it determined that sealed letters could not be opened and inspected without a warrant because sealed letters are "intended to be kept free from inspection." 1 HALL, *supra* note 28, § 2:2, at 42 (quoting *Ex parte Jackson*, 96 U.S. at 733). Finally, Justice Harlan, in his concurring opinion in *Katz v. United States*, 389 U.S. 347, 360 (1967), "captured what became the essence of the



of privacy exists when a person demonstrates a subjective expectation of privacy<sup>32</sup> that society is willing to recognize as reasonable.<sup>33</sup>

Therefore, the first requirement for Fourth Amendment protection is that the individual seeking Fourth Amendment protection have a subjective expectation of privacy.<sup>34</sup> The subjective expectation of privacy requirement is met when "the individual has shown that 'he seeks to preserve [something] as private.'"<sup>35</sup> This subjective expectation of privacy requirement can be easily

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'reasonable expectation of privacy' standard as he perceived it and as it should be." 1 HALL, *supra* note 28, § 2:4, at 51. Since Harlan's concurring opinion in *Katz*, a majority of the Court has adopted Harlan's reasonable expectation of privacy analysis which requires an expectation of privacy to be both subjectively and objectively reasonable to receive Fourth Amendment protection. *See, e.g., Smith v. Maryland*, 442 U.S. 735, 740 (1979).

For discussion on the reasonable expectation of privacy requirement, see generally Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1128 (1987) (stating that in determining whether a reasonable expectation of privacy exists "the Court looks to (1) the place or location where official surveillance occurs, (2) the nature and degree of intrusiveness of the surveillance itself, and (3) the object or goal of the surveillance."); Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy"*, 34 VAND. L. REV. 1289 (1981) (stating that the Court uses a privacy hierarchy to examine Fourth Amendment issues, according full Fourth Amendment protection when recognizing reasonable expectation of privacy, to no Fourth Amendment protection when failing to recognize reasonable expectation of privacy).

<sup>32</sup> *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). In determining whether a subjective expectation of privacy exists, the inquiry is "whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

<sup>33</sup> *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). In determining whether society is willing to recognize a subjective expectation of privacy as objectively reasonable, the question is whether "the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 353).

<sup>34</sup> *See Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>35</sup> *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 351) (alteration in original). The Supreme Court has only addressed the subjective expectation of privacy in a few cases. *See* 1 HALL, *supra* note 28, § 2:6, at 56. The Supreme Court, acknowledging shortcomings and complications within the subjective expectation of privacy requirement, "ultimately adopted the rationale that the Fourth Amendment is to be construed in 'light of contemporary norms and conditions.'" *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980)). Furthermore, "[i]n seeking to resolve whether an individual manifested a reasonable expectation of privacy, it must be determined whether he 'took normal precautions to maintain his privacy.'" *Id.* (quoting *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980)). Therefore, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of the Fourth Amendment." *Katz*, 389 U.S. at 351.

For discussion on the subjective expectation of privacy, see Anthony G. Amsterdam,

satisfied because, in most instances, it is not difficult to prove that a person has taken the normal precautions to maintain her privacy.<sup>36</sup>

Once a subjective expectation of privacy is established, a second requirement must be met for a reasonable expectation of privacy to exist.<sup>37</sup> The subjective expectation of privacy must be an expectation of privacy that "society is prepared to recognize as reasonable."<sup>38</sup> To examine whether the subjective expectation of privacy is one society recognizes as reasonable, the Court examines the beliefs and norms of contemporary society.<sup>39</sup>

The first threshold for Fourth Amendment analysis—a reasonable expectation of privacy—really involves two separate determinations. First, there must be a subjective expectation of privacy. Second, the subjective expectation of privacy must be objectively reasonable. Only when both of these requirements are satisfied is the first threshold to Fourth Amendment analysis and protection fulfilled.<sup>40</sup>

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*Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) (arguing the subjective expectation of privacy has no place in Fourth Amendment analysis because the government can easily destroy a subjective expectation of privacy prior to a search by simply announcing its intentions to conduct a search).

<sup>36</sup> See 1 HALL, *supra* note 28, § 2:6, at 56. The hope that something will not be found or discovered, however, is not a reasonable expectation of privacy. See *id.* at 56 n.16 (citing *United States v. Sarda-Villa*, 760 F.2d 1232, 1236-37 (11th Cir. 1985); *United States v. Oliver*, 657 F.2d 85, 87 (6th Cir. 1981), *cert. granted*, 459 U.S. 1168 (1983), *aff'd*, 466 U.S. 170 (1984); *State v. Drumhiller*, 675 P.2d 631, 632-33 (Wash. Ct. App. 1984)). "A legitimate expectation of privacy means more than the subjective expectation of not being discovered." *Drumhiller*, 675 P.2d at 632-33.

<sup>37</sup> See BLOOM & BRODIN, *supra* note 27, at 26. "It is not enough, in other words, for the target of the intrusion to *believe* that he is acting in private; that belief must be deemed *reasonable*." *Id.*

<sup>38</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Therefore, the second requirement for Fourth Amendment protection is met when "the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 353).

<sup>39</sup> See 1 HALL, *supra* note 28, § 2:7, at 60-61. The Supreme Court has held that society recognizes a reasonable expectation of privacy in a desk, filing cabinet, or the home of a host. See *id.* at 60-62. Society, however, does not recognize a reasonable expectation of privacy, according to the Supreme Court, in moving vehicles, open fields, or public areas. See *id.*

<sup>40</sup> "In analyzing the issue of whether a 'search' implicating the Fourth Amendment has occurred . . . attention must be paid to both the setting observed and the vantage point from which the observation is made. Those factors weigh heavily in the determination of which privacy expectations are 'reasonable.'" BLOOM & BRODIN, *supra* note 27, at 33.

## 2. *The Government Action Threshold*

“The Fourth Amendment applies only to action by the government, not to private conduct.”<sup>41</sup> Therefore, the government action threshold is easily fulfilled when the actor is a federal, state, or local government official.<sup>42</sup> The requirement is easily unfulfilled when the actor is a private party acting independent of government policy, authority, direction, or acquiescence.<sup>43</sup> A search by a private actor is not necessarily, however, a private search.<sup>44</sup> A search by a private actor is within the coverage of the Fourth Amendment, if the search is conducted pursuant to official government policy or at the direction of a government agent.<sup>45</sup> Furthermore, a private search is also

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<sup>41</sup> *Id.* at 19. “One of the oldest principles in the law of search and seizure holds that searches by private or non-law enforcement personnel are not limited by the Fourth Amendment regardless of the unlawful manner in which the search may have been conducted.” 1 HALL, *supra* note 28, § 12:1, at 549 (citing *Burdeau v. McDowell*, 256 U.S. 465 (1921)).

In *Burdeau v. McDowell*, private individuals illegally entered McDowell’s office, searched McDowell’s office, and seized some of McDowell’s papers. *See Burdeau v. McDowell*, 256 U.S. 465, 470–71, 472–74 (1921). The papers were given to a government prosecutor who intended to use the papers in a criminal trial against McDowell. *See id.* at 470. The Court held that the papers could be used as evidence by the government because the government did not play a role in the search of McDowell’s office. *See id.* at 476. The Fourth Amendment’s “origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies.” *Id.*

For discussion on private searches and the *Burdeau v. McDowell* decision, see Forrester R. Black, *Burdeau v. McDowell* [sic]—*A Judicial Milepost on the Road to Absolutism*, 12 B. U. L. REV. 32, 39 (1931) (stating that the *Burdeau* opinion, by technically examining the Fourth Amendment, has allowed for the creation of civilian law enforcement organizations immune from constitutional standards).

<sup>42</sup> *See BLOOM & BRODIN, supra* note 27, at 19–20. The Fourth Amendment covers not only conduct by law enforcement officials, but also conduct by civil authorities. *See id.* at 20 n.2 (citing *O’Connor v. Ortega*, 480 U.S. 709 (1987) (state hospital supervisor limited by Fourth Amendment); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (principal at a public school limited by Fourth Amendment)).

<sup>43</sup> *See id.* at 20.

<sup>44</sup> The terms “public search” and “private search” are used to distinguish between those searches that are covered by the Fourth Amendment—public searches—and those searches that are not covered by the Fourth Amendment—private searches. *See* 1 HALL, *supra* note 28, § 12:1, at 549–50.

<sup>45</sup> *See BLOOM & BRODIN, supra* note 27, at 20. “When a private individual acts at the direction of a government agent or pursuant to an official policy, the search will be deemed public and consequently within the coverage of the [Fourth] Amendment.” *Id.*

considered public and under the rubric of the Fourth Amendment when there is governmental acquiescence in the private party's conduct.<sup>46</sup> Therefore, the government action threshold can be fulfilled by government actors conducting the search,<sup>47</sup> by government actors directing or facilitating private actors in a search,<sup>48</sup> or by government actors acquiescing in a search conducted by private actors.<sup>49</sup>

### C. Case History of Media Presence During the Execution of a Search Warrant

#### 1. The Second Circuit's Approach in *Ayeni v. Mottola*<sup>50</sup>

On March 5, 1992, Special Agent Mottola, a United States Secret Service agent, obtained a search warrant that authorized Mottola and any authorized officer of the United States to enter and search the Ayenis' apartment for evidence of credit card fraud.<sup>51</sup> When Mottola arrived at the Ayenis' apartment, he was accompanied by three other Secret Service agents and by a

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<sup>46</sup> *See id.* In determining whether a private individual's conduct, in the absence of direct governmental command or policy, is subject to Fourth Amendment standards, courts examine: (1) the amount of government encouragement, knowledge, or acquiescence in regard to the private actor's conduct; and (2) the purpose of the private party's conduct (was the private party pursuing a government interest or a private interest). *See id.* at 20–21. A purely private search can be transformed into a public search and can subsequently become subject to Fourth Amendment standards and limitations when a government actor, upon receiving information from the private actor, exceeds the private actor's prior search. *See id.*

<sup>47</sup> *See, e.g.,* *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment applicable to both federal government and state and local government actors).

<sup>48</sup> *See, e.g.,* *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966) (evidence suppressed because government officers either participated in private search or private actor conducted search at government officer's request); *United States v. Stein*, 322 F. Supp. 346 (N.D. Ill. 1971) (evidence obtained by informant suppressed because police encouraged informant to gather evidence); *State v. Riser*, 294 S.E.2d 461 (W. Va. 1982) (police may not direct a private search and escape Fourth Amendment).

<sup>49</sup> *See, e.g.,* *United States v. Mekjian*, 505 F.2d 1320, 1327–28 (5th Cir. 1975) (government knowledge and tacit approval of private search invokes Fourth Amendment protection); *M.J. v. State*, 399 So.2d 996, 998 (Fla. Dist. Ct. App. 1981) (“When a law enforcement officer . . . acquiesces in a search conducted by private parties, that search must comport with usual constitutional standards.”).

<sup>50</sup> 35 F.3d 680 (2d Cir. 1994).

<sup>51</sup> *See id.* at 683. The search warrant was obtained on the basis of information given by an informant that suggested Babatunde Ayeni was engaging in credit card fraud. *See id.* Plaintiffs in the case were Ayeni's wife and son. *See id.*

three-member CBS television crew.<sup>52</sup> The CBS television crew followed Mottola and the other agents into the apartment and recorded the search with video and audio equipment.<sup>53</sup> Mrs. Ayeni protested the videotaping, but the CBS television crew, with the permission and support of the Secret Service, continued to videotape the search.<sup>54</sup> The television crew videotaped Mrs. Ayeni's face, the agents' questioning of Mrs. Ayeni, and the Ayenis' personal effects located throughout the apartment.<sup>55</sup> In all, the television crew videotaped the search for approximately twenty minutes before leaving the apartment with some of the Secret Service agents.<sup>56</sup>

Mrs. Ayeni and her son sued CBS and Mottola for violating their constitutional right—to be free from unreasonable searches and seizures—during the execution of the search warrant.<sup>57</sup> CBS and Mottola moved to dismiss the suit on the theory of qualified immunity.<sup>58</sup> The district court denied both CBS's and Mottola's motions to dismiss.<sup>59</sup>

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<sup>52</sup> See *id.* Mottola arrived at the Ayeni apartment after other Secret Service agents had entered and begun to search the apartment. See *id.* In fact, the agents that arrived before Mottola searched the apartment without the warrant Mottola had obtained. See *id.* Apparently, Agent Mottola allowed the CBS television crew to enter the Ayeni home simply for the purpose of producing a story about credit card fraud for the CBS news show *Street Stories*. See *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 365 (E.D.N.Y. 1994), *order aff'd sub nom.* *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994). In fact, one of the Secret Service agents, during the search of the apartment, gave CBS an interview, while he was in the Ayenis' foyer, regarding the motives and methods of people who commit credit card fraud. See *id.*

<sup>53</sup> See *Ayeni v. Mottola*, 35 F.3d at 683.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* During the search, Kayode Ayeni, Mrs. Ayeni's son, cried and told his mother he was frightened. See *id.* When Mrs. Ayeni tried to cover her face with a magazine, a Secret Service agent grabbed the magazine from Mrs. Ayeni and instructed the television crew to videotape her face. See *id.*

<sup>56</sup> See *id.* at 684.

<sup>57</sup> See *id.*; see also *Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994). The Ayenis also named the producer for the CBS show in their complaint, see *Ayeni v. CBS, Inc.*, 848 F. Supp. at 364, but for simplicity the parties will just be referred to as CBS and Mottola.

<sup>58</sup> See *Ayeni v. CBS, Inc.*, 848 F. Supp. at 364. Under qualified immunity, government officials, performing their discretionary duties, are immune from civil liability unless: (1) their conduct violates "clearly established statutory or constitutional rights of which a reasonable person should have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); or (2) it was unreasonable for the government officials to believe their conduct did not violate clearly established statutory or constitutional rights, see *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990).

<sup>59</sup> See *Ayeni v. CBS, Inc.*, 848 F. Supp. at 368. The trial court noted that even if CBS was entitled to the qualified immunity defense, the complaint filed by the Ayenis alleged a

Mottola challenged the trial court's decision by filing an interlocutory appeal to the United States Court of Appeals for the Second Circuit.<sup>60</sup> The Second Circuit affirmed the district court's decision concluding that the Ayenis' complaint sufficiently alleged Fourth Amendment violations that were capable of withstanding a motion to dismiss based on qualified immunity.<sup>61</sup> The Second Circuit, in addressing Mottola's qualified immunity defense, advanced a two-part analysis.<sup>62</sup> First, the court determined that clearly established Fourth Amendment principles prohibited Mottola from bringing the CBS television crew into the Ayenis' apartment.<sup>63</sup> Second, the court determined that "an

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violation of a then clearly established constitutional right precluding the grant of qualified immunity. *See id.* The district court stated:

As a Secret Service Agent, Agent Mottola was authorized by law to execute search warrants. 18 U.S.C. sec. 3056(c)(1)(A). His power was limited by restrictions established by Congress and by the Constitution. The action of Agent Mottola—arguably at this stage in the proceeding—was so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution.

*Id.* at 368. The trial court, in finding a clearly established Fourth Amendment prohibition against granting the media access to an individual's home, referred to and cited to numerous cases that demonstrate: (1) interruption of privacy is to be minimized under the Fourth Amendment, *see, e.g.,* *Marron v. United States*, 275 U.S. 192 (1927); (2) searches must be closely tailored to the purpose of the warrant and not overly destructive, *see, e.g.,* *United States v. Becker*, 929 F.2d 442 (9th Cir. 1991); and (3) the government shall not invade the privacy of the home without good cause, *see, e.g.,* *Steagald v. United States*, 451 U.S. 204 (1981). *See Ayeni v. CBS, Inc.*, 848 F. Supp. at 366.

<sup>60</sup> *See Ayeni v. Mottola*, 35 F.3d at 684. CBS did not appeal the trial court's decision because CBS entered into a confidential settlement with the Ayenis. *See id.* at 684 n.2.

<sup>61</sup> *See id.* at 691.

<sup>62</sup> *See id.* at 684–88. The court stated that Mottola, to be successful in his claim of qualified immunity, would have to demonstrate that either the rights claimed by the Ayenis were not clearly established at the time the search warrant was executed or that it was objectively reasonable for him to believe that his conduct did not violate the clearly established rights asserted by the Ayenis. *See id.* at 684 (citing *Soares v. Connecticut*, 8 F.3d 917, 920 (2d Cir. 1993) (to establish qualified immunity, one must show either conduct did not violate clearly established rights which a reasonable person would have known or it was objectively reasonable to believe conduct did not violate clearly established rights); *Finnegan v. Fountain*, 915 F.2d 817, 823 (2d Cir. 1990) (same)).

<sup>63</sup> *See Ayeni v. Mottola*, 35 F.3d at 684–86.

[C]ourt decisions have repeatedly made clear that law enforcement officers conducting searches under a warrant are limited in their conduct to either (a) actions expressly authorized by the warrant, or (b) such further actions as are impliedly authorized because

objectively reasonable officer could not have concluded that inviting a television crew . . . to participate in a search was in accordance with Fourth Amendment requirements.”<sup>64</sup> The court noted that allowing the media to enter a private citizen's home, during the execution of a search warrant, needlessly magnifies the impairment of the citizen's right to privacy without any justification based on the legitimate needs of law enforcement.<sup>65</sup> The court went on to state that the media's presence, during the execution of a search warrant, is “calculated to inflict injury on the very value that the Fourth Amendment seeks to protect—

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they are reasonably related to accomplishing the search authorized by the warrant or accomplishing additional legitimate law enforcement objectives, such as insuring the safety of the searching officers and effectively responding as law enforcement officers to circumstances that might arise during the course of the search.

*Id.* at 685 (footnotes omitted).

The court acknowledged that there was no reported case on point that prohibited law enforcement officials from bringing members of the media into a home during the execution of a search warrant, but the court still concluded that clearly established Fourth Amendment principles prohibited Mottola from allowing the CBS television crew to enter the Ayenis' home. *See id.* at 686. “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.*” *Id.* at 686 (emphasis added) (footnote omitted).

<sup>64</sup> *Id.* at 686. The court stated: “The contours of the Ayenis' rights were ‘sufficiently clear that a reasonable official [in Mottola's position] would understand that what he [was] doing violate[d] th[ose] right[s].’” *Id.* (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

<sup>65</sup> *See id.* at 686. “The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right to privacy.” *Id.* The court also reinforced its decision by discussing 18 U.S.C. § 3105:

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

*Id.* at 687 (quoting 18 U.S.C. § 3105 (1988)) (emphasis added). The court, however, noted that its rejection of Mottola's qualified immunity defense rested on Fourth Amendment principles and that 18 U.S.C. § 3105 was just a reinforcement of their rejection. *See id.* This Note will not focus on 18 U.S.C. § 3105 because the aim of this Note is to demonstrate that the Second Circuit was correct when it concluded the Fourth Amendment itself prohibits the media from accompanying the police into an individual's home during the execution of a search warrant.

the right of privacy.”<sup>66</sup>

## 2. *The Eighth Circuit's Approach in Parker v. Boyer*<sup>67</sup>

On February 9, 1994, Boyer, a police officer with the St. Louis Police Department, executed a search warrant at the Parkers' residence.<sup>68</sup> Boyer, accompanied by a KSDK television crew,<sup>69</sup> executed the search warrant at the Parker residence with other members of the St. Louis Police Department.<sup>70</sup> The KSDK television crew followed the police into the Parkers' home, filmed the search of the home, and subsequently televised the video of the search of the Parkers' home during local newscasts.<sup>71</sup>

The Parkers sued KSDK<sup>72</sup> and Boyer<sup>73</sup> asserting, among other things, that KSDK and Boyer violated their Fourth Amendment rights when KSDK entered

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<sup>66</sup> *Ayeni v. Mottola*, 35 F.3d at 686. Other courts have since followed the Second Circuit's decision in *Ayeni v. Mottola*. See, e.g., *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (“[W]e have no doubt that the Fourth Amendment prohibits agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant.”); *Hagler v. Philadelphia Newspapers, Inc.*, No. CIV.A.96-2154, 1996 WL 408605, at \*2 (E.D. Pa. July 12, 1996) (“A reasonable person would know that the purpose of a warrant is to facilitate proper law-enforcement, not to provide a ‘photo opportunity.’ A search warrant is simply not a press pass.”).

<sup>67</sup> 93 F.3d 445, 446 (8th Cir. 1996), cert. denied, 117 S. Ct. 1081 (1997).

<sup>68</sup> See *Parker v. Clarke*, 905 F. Supp. 638, 640 (E.D. Mo. 1995), rev'd in part sub nom. *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), cert. denied, 117 S. Ct. 1081 (1997). The target of the search warrant was Travis Martin, a relative of the Parkers, who was living in the Parkers' home. See *id.* at 641. Martin was detained outside the Parkers' home before the police entered the house and executed the search warrant. See *id.*

<sup>69</sup> See *id.* at 641. KSDK was a local television station that contacted the St. Louis Police Department in an effort to produce a news segment about police efforts to combat illegal weapons. See *id.* KSDK was assigned to ride on patrol with Officer Boyer on the day Boyer decided to execute the warrant at the Parkers' home. See *id.* When the KSDK film crew was assigned to ride with Officer Boyer, St. Louis Police officials did not know Officer Boyer was going to serve the search warrant at the Parker residence that night. See *id.*

<sup>70</sup> See *id.* at 640.

<sup>71</sup> See *id.* at 641. In fact, the KSDK television crew accompanied some of the same police officers during the execution of another search warrant after they left the Parkers' home. See *id.* KSDK broadcasted the video of both searches on local newscasts. See *id.* The video of the search of the Parkers' home was broadcasted on three occasions. See *id.*

<sup>72</sup> The actual name of the defendant was Multi-Media KSDK, Inc. See *id.* at 640.

<sup>73</sup> Other police officers and police officials were named as defendants in the Parkers' lawsuit, see *id.*, but for simplicity this Note will refer to Boyer as the representative defendant of all the police.



their home during the execution of the search warrant.<sup>74</sup> The Parkers, KSDK, and Boyer made cross motions for summary judgment.<sup>75</sup> The district court granted the Parkers' motion for summary judgment on their Fourth Amendment claim against Boyer,<sup>76</sup> but granted KSDK's motion for summary judgment on all counts against the Parkers.<sup>77</sup>

On review, the Eighth Circuit affirmed the district court's granting of summary judgment in favor of KSDK.<sup>78</sup> The court, however, reversed the district court's granting of summary judgment in favor of the Parkers against Officer Boyer and held that Boyer was entitled to qualified immunity.<sup>79</sup>

In affirming the district court's conclusion that KSDK was not a state actor, the Eighth Circuit concluded: "It is undisputed that KSDK acted independently

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<sup>74</sup> See *id.*

<sup>75</sup> See *id.* at 640.

<sup>76</sup> See *id.* at 646. In granting the Parkers' motion for summary judgment against Boyer, the district court relied heavily on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), concluding that:

the rationale and conclusions of *Ayeni* yield not only a determination that the officers responsible for the KSDK personnel's presence in the plaintiff's home are not entitled to qualified immunity, but yield further the determination as a matter of law that plaintiffs are entitled to summary judgment as to liability on their Fourth Amendment claim.

*Parker v. Clarke*, 905 F. Supp. at 643-44.

<sup>77</sup> See *Parker v. Clarke*, 905 F. Supp. at 643-44. In granting KSDK's motion for summary judgment, the district court concluded that KSDK was not a state actor and, therefore, could not be liable, as a matter of law, for an alleged violation of the Parkers' Fourth Amendment rights. See *id.* at 641-43. The court reasoned that there was no "mutual understanding or purpose on the part of the KSDK personnel and the police officers who conducted the search." *Id.* at 642. The KSDK television crew was simply riding along with Officer Boyer. See *id.* "The passivity of this circumstance demonstrates the absence of any affirmative agreement between KSDK and the police concerning particular conduct of KSDK which plaintiffs now challenge." *Id.* Furthermore, the two distinct purposes of KSDK and the police, according to the court, support the conclusion that KSDK was not a state actor. See *id.*

The KSDK personnel were present for the purpose of gathering news and preparing a report for broadcast. The police were engaged in the conduct of law enforcement activity. The police did not participate in the filming of the objects and events in the house, and the KSDK personnel did not participate in the execution of the search.

*Id.* (footnote omitted).

<sup>78</sup> See *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).

<sup>79</sup> See *id.* at 446.

of the police in deciding to enter the house and videotape the event(s) there and that neither KSDK nor the police assisted the other in the performance of their separate and respective tasks.”<sup>80</sup> The Eighth Circuit noted that KSDK’s decision to trespass during the execution of the search warrant did not transform KSDK into a state actor.<sup>81</sup>

In reversing the district court’s granting of summary judgment in favor of the Parkers against Boyer,<sup>82</sup> the Eighth Circuit held that Boyer was entitled to qualified immunity because he did not violate a clearly established constitutional right.<sup>83</sup> The Eighth Circuit stated that most courts, contrary to the Second Circuit, “have rejected the argument that the United States Constitution forbids the media to encroach on a person’s property while the police search it.”<sup>84</sup>

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<sup>80</sup> *Id.* at 448.

<sup>81</sup> *See id.* Chief Judge Richard S. Arnold concurred in the court’s decision, but dissented on the issue of whether KSDK was a state actor. *See id.* at 448–49 (Arnold, C.J., concurring in part and dissenting in part). Chief Judge Arnold concluded that KSDK acted in concert with the St. Louis Police Department and that KSDK was, in fact, a state actor when it entered the Parkers’ home. *See id.* at 449 (Arnold, C.J., concurring in part and dissenting in part). KSDK “came to the location with the police and could not have entered if the police had not done so first. They [KSDK] did not simply happen along the street at the time that a search was being conducted.” *Id.* (Arnold, C.J., concurring in part and dissenting in part). KSDK “were ‘willful participant[s] in joint activity with the State or its agents.’” *Id.* (Arnold, C.J., concurring in part and dissenting in part) (alteration in original) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)).

<sup>82</sup> *See Parker v. Boyer*, 93 F.3d at 446.

<sup>83</sup> *See id.*

<sup>84</sup> *Id.* The cases cited by the Eighth Circuit do not provide strong support for the contention that most courts have held the Constitution does not forbid the media from accompanying the police during the execution of a search warrant at an individual’s home. The Eighth Circuit cited the following cases: *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984); *Moncrief v. Hanton*, 10 Med. L. Rep. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rep. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). *See Parker v. Boyer*, 93 F.3d at 447.

In *Avenson v. Zegart*, the operator of a puppy mill sued various public officials for violating the Equal Protection Clause of the Fourteenth Amendment. *See Avenson*, 577 F. Supp. at 962. The public officials told the media that they would be executing a search warrant at the Avenson residence. *See id.* at 960. When the warrant was executed, members of the media were present at the Avenson residence. *See id.* The public officials refused to remove the media members upon Avenson’s request to do so. *See id.* The media members never entered the Avenson home, as they covered the search for animal cruelty from outside. *See id.* In addressing Avenson’s *Fourteenth Amendment* claim, the district court, in granting summary judgment for the public officials, stated: “Plaintiffs have failed to establish a valid equal protection claim pursuant to the fourteenth amendment since they do not allege that they are members of a discrete and insular minority or that they were treated differently from similarly situated individuals.” *Id.* at 962. In fact, the court in *Avenson* never addressed the

Therefore, according to the Eighth Circuit, Boyer did not violate a clearly established constitutional right when he allowed KSDK crew members to accompany him during the execution of the search warrant at the Parkers' home.<sup>85</sup>

The Eighth Circuit concluded that the *Ayeni*<sup>86</sup> and *Buonocore*<sup>87</sup> decisions were irrelevant to the determination of the qualified immunity issue because the cases were decided after Boyer executed the search at the Parker residence.<sup>88</sup> The court stated that even if the two cases were entitled to consideration, "they

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issue of whether or not the media's presence was reasonable under the Fourth Amendment. *See id.* The only Fourth Amendment claim present in *Avenson* was whether the Fourth Amendment was violated when public officials went to the Avenson residence to discuss allegations with Avenson and discovered the puppy mill. *See id.* at 961-62. This initial visit to the Avenson residence is what subsequently produced the search warrant. *See id.*

In *Moncrief v. Hanton* and *Higbee v. Times-Advocate*, United States District Court judges agreed that the media's presence during the execution of a search warrant at an individual's home does not violate the narrow constitutional right to privacy. *See Moncrief*, 10 Med. L. Rep. at 1622; *Higbee*, 5 Med. L. Rep. at 2372. Neither judge, however, examined whether the media's presence violated the residents' Fourth Amendment rights to be free from unreasonable searches because neither plaintiff alleged this specific Fourth Amendment violation. *See Moncrief*, 10 Med. L. Rep. at 1621-22; *Higbee*, 5 Med. L. Rep. at 2372. The plaintiffs in both cases simply alleged a general violation of a constitutional right to privacy. *See Moncrief*, 10 Med. L. Rep. at 1621-22; *Higbee*, 5 Med. L. Rep. at 2372-73.

In *Prahl v. Brosamle*, the Wisconsin Court of Appeals stated: "We are unwilling to accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness." *Prahl v. Brosamle*, 278 N.W.2d at 774. It is unclear whether the media actually entered the home in the *Prahl* case. *See id.* at 773. It is clear, however, that the media in *Prahl* did not enter the residence behind the police or cover the entire search of the Prahl residence. *See id.*

From this brief discussion of the cases cited by the Eighth Circuit, it can be seen that the cases do not strongly support the Eighth Circuit's position, especially since the Eighth Circuit was facing circumstances where the plaintiff was asserting a specific Fourth Amendment claim and where the media accompanied the police into the Parkers' home and filmed the entire search. Furthermore, the Second Circuit had already decided *Ayeni* and the Fourth Circuit, in *Buonocore*, had already followed the principles outlined in *Ayeni*. *See supra* note 66 and accompanying text.

<sup>85</sup> *See Parker v. Boyer*, 93 F.3d at 447. "[W]e cannot say that the kind of conduct in which the police engaged in this case was a violation of a clearly established constitutional principle of which the police, at the time they executed their search warrant, should have been aware." *Id.*

<sup>86</sup> *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994).

<sup>87</sup> *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995); *see supra* note 66 and accompanying text (discussing how the Fourth Circuit followed the principles of the Second Circuit's *Ayeni* opinion).

<sup>88</sup> *See Parker v. Boyer*, 93 F.3d at 447.

would appear . . . to indicate at most only the beginnings of a trend in the law” and not a clearly established constitutional principle.<sup>89</sup> The court went on to state that it did not “think it self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone’s house during the execution of a search warrant.”<sup>90</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* The Eighth Circuit’s decision to grant Boyer qualified immunity is, at least, understandable because no court had specifically held that the media’s entrance into a private citizen’s home, during the execution of a search warrant, violated the Fourth Amendment before Boyer allowed the KSDK television crew to enter the Parkers’ home. Therefore, one can understand the argument that Boyer did not violate a *clearly established* constitutional right when he allowed the KSDK television crew to enter the Parkers’ home. The Eighth Circuit’s position that the Fourth Amendment is not violated by media presence, however, is incomprehensible. Judge Rosenbaum, a district court judge sitting by designation, agreed. *See id.* at 445, 448 (Rosenbaum, J., concurring specially). Judge Rosenbaum concurred that Boyer was entitled to qualified immunity, but stated that the court should clearly establish, consistent with the *Ayeni* decision, “that police officials executing a search warrant violate a resident’s Fourth Amendment rights, when they admit representatives of the public media into a private citizen’s home, without first securing the resident’s express consent.” *Id.* at 448 (Rosenbaum, J., concurring specially). Judge Rosenbaum’s concurring opinion demonstrates that the majority in *Parker v. Boyer* rejected the Second Circuit’s holding that the Fourth Amendment is violated when the media accompany the police during the execution of a search warrant at a private citizen’s home. The disagreement between the Second and Eighth Circuits is, therefore, not really on the issue of qualified immunity, but on whether the Fourth Amendment is violated by the media’s presence.

The Sixth Circuit has addressed the issue of the presence of a third party during the execution of a search warrant. *See Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995); *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992). The Sixth Circuit’s position does not provide an adequate resolution to the issue presented in this Note, but the Sixth Circuit’s position is worthy of discussion because the Sixth Circuit has failed to adopt a *per se* rule, like the Second and Fourth Circuits, *see Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), holding that search warrants cannot be used to facilitate private individual searches. “The Sixth Circuit has determined that the presence of a private citizen at the execution of a search warrant is not a *per se* constitutional violation.” *Bills v. Aseltine*, 52 F.3d at 602 (private security guard conducted private independent search while police executed a search warrant). In the Sixth Circuit, it is for the jury to decide whether the police act unreasonably when they allow a third person to be present during the execution of a search warrant. *See Bills v. Aseltine*, 52 F.3d at 603; *Bills v. Aseltine*, 958 F.2d at 705.

To be sure, independent third parties can assist the police in the execution of a search warrant without the Fourth Amendment being violated, *see, e.g., United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980) (*per curiam*) (telephone workers present at search to identify stolen telephone equipment); *see also* 18 U.S.C. § 3105 (1994) (third parties can assist police when assistance is needed), but the presence of the media, during the execution of a search warrant for news or entertainment purposes, does not provide assistance. Therefore, upon a

### III. REASONABLE EXPECTATION OF PRIVACY

To conclude that the Fourth Amendment is violated when members of the media accompany the police into a citizen's home during the execution of a search warrant, one must first show that citizens have a reasonable expectation of privacy in their homes.<sup>91</sup> A reasonable expectation of privacy exists when a person demonstrates a subjective expectation of privacy<sup>92</sup> that society is willing to recognize as reasonable.<sup>93</sup>

#### A. *Subjective Expectation of Privacy*

The first requirement for Fourth Amendment protection is that a subjective expectation of privacy be exhibited by the individual seeking Fourth Amendment protection.<sup>94</sup> The home<sup>95</sup> is obviously a place where one

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proper showing, the presence of the media can be viewed as a per se violation of the Fourth Amendment and not as a question for the jury. In some rare situations the media may assist the police during the execution of a search warrant, but in the normal case where the media is simply covering the execution of a search warrant at an individual's home for news purposes, no assistance is being offered. The Sixth Circuit's decision to place the issue of the reasonableness of a third party's presence, during the execution of a search warrant, into the hands of juries is erroneous because the presence of any third party who is not assisting the police is unreasonable as a matter of law. The detached magistrate, upon issuing the warrant, should determine whether or not the presence of the third party is necessary for the search to be effective and reasonable under the Fourth Amendment. A determination of reasonableness by a jury is not needed. That issue, however, is for another Note. This Note will focus on the issue of whether or not the media's presence, for news or entertainment purposes, at the execution of a search warrant is a per se violation of the Fourth Amendment.

<sup>91</sup> See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see also *supra* Part II.B.1.

<sup>92</sup> See *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring). In determining whether a subjective expectation of privacy exists, the inquiry is "whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). See also *supra* notes 34-36 and accompanying text.

<sup>93</sup> See *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In determining whether society is willing to recognize a subjective expectation of privacy as objectively reasonable, the question is whether "the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 353). See also *supra* notes 37-39 and accompanying text.

<sup>94</sup> See *Katz*, 389 U.S. at 361 (Harlan, J., concurring); see also *supra* Part II.B.1.

<sup>95</sup> "It is also clear that one's reasonable expectation of privacy in the home is entitled to a unique sensitivity from federal courts." *United States v. Reed*, 572 F.2d 412, 422 (2d Cir. 1978).

subjectively expects privacy.<sup>96</sup> The home is where people eat, sleep, keep personal belongings, and live their lives with their families.<sup>97</sup> A person subjectively expects privacy in the home because the home encompasses an element of sanctity that is jealously guarded by the courts and the law.<sup>98</sup> “The home not only provides a domain in which to enjoy solitude and secrecy, it also furnishes a readily identifiable space within which people can fearlessly enjoy other entitlements of our free society.”<sup>99</sup>

Therefore, the first requirement of the Fourth Amendment—a subjective expectation of privacy—is fulfilled. Individuals hold and demonstrate a subjective expectation of privacy in their homes.<sup>100</sup>

### B. Objectively Reasonable Expectation of Privacy

Once a subjective expectation of privacy is established, that subjective expectation of privacy must be an expectation of privacy that “society is prepared to recognize as ‘reasonable.’”<sup>101</sup> The home,<sup>102</sup> by definition, is a place where society is prepared to recognize subjective expectations of privacy

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<sup>96</sup> See *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (“[A] man’s home is, for most purposes, a place where he expects privacy.”). “[T]he sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

<sup>97</sup> Cf. *Payton v. New York*, 445 U.S. 573, 601 n.54 (1980) (stating that the home is where citizens can bid defiance).

<sup>98</sup> The purpose of the Fourth Amendment is to protect the home. See *supra* notes 18–19 and accompanying text. Reverence for the sacredness of the home has clearly been recognized by the courts and commentators alike. See *Ransom*, *supra* note 3, at 333.

<sup>99</sup> *Tomkovicz*, *supra* note 18, at 674. Furthermore, the home provides the arena for free expression, religious practice, and personal autonomy. See *id.*

<sup>100</sup> Some may question whether this reasonable expectation of privacy is forfeited or destroyed when a search warrant is being executed. People who ask this question do not truly understand what the reasonable expectation of privacy really is. This reasonable expectation is only one of two thresholds that determine whether the Fourth Amendment is applicable to a government act. See *supra* Part II.B.1. If there is this reasonable expectation in the home (which there is), the Fourth Amendment allows for reasonable intrusions into the home. Therefore, once this reasonable expectation is established and the government conducts a search in the area where this reasonable expectation exists, the question is not whether the reasonable expectation still exists, but whether the government’s intrusion was reasonable under the Fourth Amendment. This reasonable expectation simply renders the Fourth Amendment applicable.

<sup>101</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring); see also *supra* Part II.B.1.

<sup>102</sup> “It is certainly true that a homeowner has a *reasonable* expectation of privacy in the contents of his home.” *United States v. Karo*, 468 U.S. 705, 732 (1984) (Stevens, J., dissenting) (emphasis added).

as objectively reasonable.<sup>103</sup> To conclude that society does not view subjective expectations of privacy in the home as reasonable, one would have to make the absurd conclusion that society is unwilling to accept a place mentioned in the Constitution—the home—as a place where an individual can reasonably expect privacy.<sup>104</sup> Therefore, because individuals have subjective expectations of privacy in their own homes and because society views these privacy expectations as reasonable, the first Fourth Amendment threshold is fulfilled when members of the media accompany the police into an individual's home during the execution of a search warrant.

#### IV. STATE ACTION AND THE DISTINCTION BETWEEN PRIVATE AND GOVERNMENT SEARCHES

Even after a reasonable expectation of privacy is established, to conclude that the Fourth Amendment's standards of reasonableness are applicable to media activity, one must demonstrate that the media's presence was governmental.<sup>105</sup> Therefore, a critical issue surrounding the Fourth

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<sup>103</sup> See 1 HALL, *supra* note 28, § 2:7, at 62.

<sup>104</sup> When the cases that discuss the purpose of the Fourth Amendment and the sanctity of the home are examined, it is easy to see that the Court has, in effect, recognized that subjective expectations in the home are, as a matter of law, objectively reasonable. See, e.g., *Payton v. New York*, 445 U.S. 573, 584–85 (1980) (recognizing that the Fourth Amendment applies to all government intrusions into the home). Cases that directly address reasonable expectations of privacy in the home are difficult to uncover because of the fact that it is assumed that because the Fourth Amendment was enacted, in part, to protect the home, it is reasonable to expect privacy in the home. See Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 958 (1997). “In the context of houses, whether a person who lives in the house has a reasonable expectation of privacy is rarely at issue. [Thus, a] homeowner has virtually unlimited expectations of privacy from intrusions into his home.” *Id.*

Some may question whether society will accept, as reasonable, an expectation of privacy subjectively held during the execution of a search warrant by an individual. This question can easily be answered in the affirmative. The courts have repeatedly shown that warrants must be executed reasonably in scope and manner. See *supra* notes 22–24 and accompanying text. This is de facto recognition that when a warrant is being executed there is still an expectation of privacy present that society will view as reasonable. Again, cases that discuss expectations of privacy when the home is involved are difficult to locate because it is assumed a reasonable expectation of privacy exists in the home.

<sup>105</sup> See *supra* Part II.B.2. The Fourth Amendment will always apply to the police when they are executing a search warrant, but the media will only be liable if they are state actors. Therefore, the issue of whether the media members are state actors is crucial to determining Fourth Amendment liability. Moreover, if the media's presence is wholly independent of the police's execution of the search warrant, then the media's presence would not affect the police

Amendment's applicability to the media's presence during the execution of a search warrant at an individual's home is the distinction between searches conducted by private actors and searches conducted by government actors.<sup>106</sup> That is, when members of the media accompany the police into an individual's home during the execution of a search warrant, are the media members government actors participating in the execution of the search warrant or are they private actors conducting an independent private search of the individual's home?<sup>107</sup>

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officer's reasonableness under the Fourth Amendment. *See supra* notes 43-49 and accompanying text. For further discussion and analysis of the distinction between private and government searches, see generally Emily M. Stout, Comment, *Bounty Hunters as Evidence Gatherers: Should They Be Considered State Actors Under the Fourth Amendment when Working with Police?*, 65 U. CIN. L. REV. 665, 670-73 (1997); Timothy B. Lennon, Comment, *The Fourth Amendment's Prohibitions on Encryption Limitation: Will 1995 Be Like 1984?*, 58 ALB. L. REV. 467, 479-80 (1994).

<sup>106</sup> Private searches, unlike government searches, do not implicate the Fourth Amendment. *See Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *see also* 1 HALL, *supra* note 28, § 12:1, at 549; Black, *supra* note 41, at 33.

<sup>107</sup> Analysis and resolution of this issue is determinative of whether the media can be held liable for possible violations of the Fourth Amendment. Furthermore, this issue also affects the analysis of police conduct and liability. For now, it is sufficient to provide how the Second and Eighth Circuits addressed this issue, since the issue will be fully addressed *infra*.

The Second Circuit did not address the issue of whether the CBS television crew was a state actor when it accompanied the police into the Ayeni's home. *See Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994). The reason the court did not address the issue is most likely because CBS settled the case before the case was heard on appeal. *See id.* at 684 n.2. However, the Second Circuit concluded that the police violated the Fourth Amendment without discussing the distinction between private and public searches. *See id.* at 686. That is, was the Fourth Amendment violated in *Ayeni* because the police facilitated and participated in an unreasonable private search or because the CBS television crew was an unauthorized state actor? The Fourth Amendment can be implicated on either theory. However, the proper theory on which to base a Fourth Amendment violation in these cases is the media members are unauthorized state actors (unless a detached magistrate authorizes their presence when issuing the warrant) who participate in the execution of the search warrant. Declaring the media members *unauthorized* state actors does not mean their action is private. It simply means that their joint activity with the police is not permitted (authorized) by the warrant and, therefore, is unreasonable under the Fourth Amendment. By declaring the media unauthorized state actors, it is possible to clearly establish the media's liability for damages for violating the Fourth Amendment.

The Eighth Circuit addressed the issue of state action in the *Parker* case. *See Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997). The Eighth Circuit, in holding that KSDK did not act under color of state law, concluded that KSDK acted independently of the police when it entered the home and videotaped the search. *See id.* at 448. KSDK, according to the court, did not exercise a right or privilege created by the state



### A. *The Media as State Actors Jointly Participating in the Execution of a Search Warrant*

The Supreme Court has clearly established that private persons act under color of law when they are willful participants in joint activity with the State or its agents.<sup>108</sup> Media members, who cover the execution of a search warrant by entering an individual's home with the police, are private persons acting under color of state law because they are willful and joint participants in government action—the execution of a search warrant.<sup>109</sup>

The media willfully participate in the execution of search warrants in an effort to obtain video footage that will capture more viewers and bolster ratings.<sup>110</sup> The media members often ride with the police to the home that is going to be searched and gain access to the home only after the police enter the citizen's home.<sup>111</sup> If the police were not executing the search warrant, the media would only be able to gain access to the interior of the home through the owner's consent.<sup>112</sup> The show of authority by the police under color of law is what allows the media to enter the private home. It is only through this willful and voluntary joint activity that the media know where the warrant is going to be executed, cover the execution of the search warrant, enter the private home

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when it entered the home to videotape the search. *See id.* Chief Judge Richard S. Arnold concurred with the Eighth Circuit's holding that the Fourth Amendment had not been violated at the Parkers' home, but the Chief Judge did dissent on the issue of state action. *See id.* at 448–49 (Arnold, C.J., concurring in part and dissenting in part); *see also supra* note 81 and accompanying text (discussing Chief Judge Arnold's opinion).

<sup>108</sup> *See* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (explaining that a private party involved in a conspiracy with a state actor can be liable under § 1983 for a civil rights violation); *see also* *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941 (1982) (stating that joint action between private and state actors can place private actors' conduct under color of law); *United States v. Price*, 383 U.S. 787, 794 (1966) (noting that private persons jointly engaged with state officials are acting under color of law).

<sup>109</sup> *See* *Parker v. Boyer*, 93 F.3d at 449 (Arnold, C.J., concurring in part and dissenting in part).

<sup>110</sup> *See* *Walsh*, *supra* note 1, at 1144.

<sup>111</sup> *See id.* at 1127–28; *see also* *Parker v. Boyer*, 93 F.3d at 446–47; *Ayeni v. Mottola*, 35 F.3d at 683.

<sup>112</sup> It seems clear that if the media simply went to a home and entered the home without the permission of the individuals present, the media would be liable for an action in trespass. If the media's presence without the resident's consent violates tort law, then it follows that the media's presence without the owner's consent cannot be rendered lawful simply because the police are executing a search warrant. If the Court still utilized trespass theory to examine Fourth Amendment issues, it might easily be concluded that the media's presence violates the Fourth Amendment, but the Court has moved away from trespass theory to the reasonable expectation of privacy standard. *See supra* note 31 and accompanying text.

of the private citizen whose home is being searched, and videotape the execution of the subsequent search. It is the government's execution of a search warrant that serves as the necessary prerequisite to the media's coverage. Without the government action, the media coverage would simply not occur.

Therefore, media members do act under color of law when they accompany the police into a private individual's home during the execution of a search warrant. The media and the police are liable then if the media's presence during the search is unreasonable under the Fourth Amendment.<sup>113</sup>

### B. *The Media as Private Actors Conducting a Private Independent Search*

Even if media members are considered independent actors conducting an independent private search and not considered state actors willfully participating in the execution of a search warrant when they enter an individual's home with police during the execution of a search warrant, the Fourth Amendment can still be violated.<sup>114</sup> Police involvement in private searches, under certain circumstances, can transform a private search into a public search that is subject to Fourth Amendment limitations.<sup>115</sup> Under this theory, however, only the police, and not the members of the media, would be liable for the constitutional violation.<sup>116</sup>

When police participate in a private search, ask a private person to conduct a search, or observe the private party's execution of a search, the search is no longer private and the Fourth Amendment is implicated.<sup>117</sup> The issue of

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<sup>113</sup> See *Adickes*, 398 U.S. at 144. The issue of whether the media's presence is unreasonable will be discussed *infra* Part V.

<sup>114</sup> Private searches cannot by themselves implicate the Fourth Amendment. See *supra* note 41 and accompanying text. However, police involvement in a private search can implicate the Fourth Amendment. See 1 HALL, *supra* note 28, § 12:4, at 557. Furthermore, the Fourth Amendment can be violated by the presence of a third party during the execution of a search warrant. See, e.g., *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995); *Ayeni v. Mottola*, 35 F.3d at 686; *Hagler v. Philadelphia Newspapers, Inc.*, No. CIV.A.96-2154, 1996 WL 408605, at \*3 (E.D. Pa. July 12, 1996). The Fourth Amendment is also obviously implicated in these cases because search warrants must be executed in a reasonable manner. Fourth Amendment analysis and standards cannot be escaped by simply concluding that the media's presence was not under the color of state law.

<sup>115</sup> See *supra* notes 45-49 and accompanying text; see also 1 HALL, *supra* note 28, § 12:1, at 550. Private searches are considered public searches, under certain circumstances, to prevent government actors from evading Fourth Amendment standards by simply employing private citizens to conduct searches. See *id.* at §§ 12:1-12:4.

<sup>116</sup> See, e.g., *Adickes*, 398 U.S. at 144.

<sup>117</sup> See 1 HALL, *supra* note 28, § 12:4, at 557. Note, however, if "the police do not

whether a private search implicates the Fourth Amendment because of a police presence hinges on the "consideration of the actual participation by the government agent in the total enterprise of securing evidence by other than appropriate means."<sup>118</sup>

Even if the media is not present under color of law, the media's presence during the execution of a search warrant cannot be considered a private search that is exempt from Fourth Amendment limitations and standards.<sup>119</sup> First, the police are present during the media's search of the home.<sup>120</sup> Second, the police actively participate in the media's search in the sense that the police grant the media access to the citizen's home. Finally, the police provide protection to the media as a videotape of the inside of the home is made. This police involvement is sufficient enough to subject the media's actions—even if considered a private search—to Fourth Amendment standards and limitations.<sup>121</sup> Therefore, it does

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tacitly encourage the search, they take a tip derived from a private search to conduct an otherwise valid search, or they do not get involved until after the search occurs, it is a private search." *Id.* (footnotes omitted). The Fourth Amendment has also been implicated when the police make a private person their agent for the purpose of a criminal investigation. *See id.* at 556.

<sup>118</sup> *Id.* "[A] search is a search by a federal official if he had a hand in it." *Lustig v. United States*, 338 U.S. 74, 78 (1949) (noting that a federal officer must be deemed to have participated in a search so long as he was involved before the object of the search was completely accomplished).

<sup>119</sup> Compare *United States v. Newton*, 510 F.2d 1149, 1153 (7th Cir. 1975) (holding that federal agent's presence while airline employee searched luggage rendered search public and Fourth Amendment applicable), and *Stapleton v. Superior Ct.*, 447 P.2d 967, 970 (Cal. 1968) (concluding that police officers' presence and failure to protect citizen from illegal private search rendered private search public); with *Pleasant v. Lovell*, 654 F. Supp. 1082, 1089 (D. Colo. 1987) (concluding that a federal agent's acceptance of information from a private informant did not render the private informant's search public), *rev'd in part*, 876 F.2d 787 (10th Cir. 1989), and *Gundlach v. Janing*, 401 F. Supp. 1089, 1093 (D. Neb. 1975) (holding that police's knowledge that a private person might conduct an illegal search did not transform the private search into a public search), *aff'd*, 536 F.2d 754 (8th Cir. 1976). *See BLOOM & BRODIN*, *supra* note 27, at 20 & n.3 (citing these cases to show support for applying the Fourth Amendment to illegal searches by private citizens who previously summoned police to the scene).

<sup>120</sup> For a discussion on whether the media's presence is a search or a seizure under the Fourth Amendment, see Antonio Yanez, Jr., Note, *Ayeni v. Mottola and the Implications of Characterizing Videotaping as a Fourth Amendment Seizure*, 61 BROOK. L. REV. 507, 530-31 (1995) (arguing that videotaping should be properly characterized as a search and not a seizure).

<sup>121</sup> The Eighth Circuit stated that KSDK's actions were at most parallel to and contemporaneous with the police officers' execution of a search warrant. *See Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997). This

not matter (in terms of whether or not the Fourth Amendment is implicated and violated) whether the police jointly execute the search with members of the media at the individual's home or whether the police simply allow the media to enter the individual's home and conduct a private search during the execution of a search warrant. The Fourth Amendment applies and its standards and limitations will be used to determine the reasonableness of the media's presence.

#### V. THE MEDIA'S PRESENCE DURING THE EXECUTION OF A SEARCH WARRANT IS UNREASONABLE UNDER THE FOURTH AMENDMENT

This Note has clearly established that the threshold requirements of the Fourth Amendment are fulfilled and that the Fourth Amendment is applicable when the media is present during the execution of a search warrant.<sup>122</sup> Therefore, the final step in Fourth Amendment analysis must take place: Does a search transcend the bounds of reasonableness when the media accompany the police into a private individual's home during the execution of a search warrant? The media's entrance into a private individual's home during the execution of a search warrant is unreasonable because: (1) the media's presence exceeds the actions authorized by the warrant; (2) the media's presence creates an additional invasion of the home that is unnecessary; and (3) the media's presence causes an additional harm.<sup>123</sup>

##### A. *The Media's Presence Exceeds the Actions Authorized by a Search Warrant*

Police officers who execute a search warrant are limited in their conduct to actions expressly authorized by the search warrant<sup>124</sup> or to actions that are

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statement was made in analyzing whether or not KSDK was a state actor in the execution of the search warrant. *See id.* Because the Eighth Circuit went on to examine whether the police violated the Fourth Amendment by allowing the media crew to enter the Parkers' home, the Eighth Circuit demonstrated that you cannot evade Fourth Amendment analysis simply by concluding that the media did not act under color of law. *See id.* The Fourth Amendment is implicated because a search warrant is being executed and because the media's presence is not an independent private search immune from the Fourth Amendment's standards. *See Newton*, 510 F.2d at 1153; *Stapleton*, 447 P.2d at 970.

<sup>122</sup> *See supra* Parts III.-IV.

<sup>123</sup> This is not an exhaustive list of reasons why the media's presence is unreasonable, but these reasons demonstrate why a per se rule declaring media presence unreasonable is needed.

<sup>124</sup> *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971) (stating that bounds are set by the search warrant) (citing *Marron v.*

impliedly authorized by the search warrant because such actions are reasonably related to accomplishing the authorized search or accomplishing additional legitimate law enforcement objectives.<sup>125</sup>

The media's presence is outside of a warrant's scope.<sup>126</sup> The media is not expressly authorized by search warrants to participate in the searches of people's homes,<sup>127</sup> and the media's presence cannot be impliedly authorized by the warrant because the media's presence during the execution of a search

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United States, 275 U.S. 192, 196 (1927)); *Ayeni v. Mottola*, 35 F.3d 680, 685 (2d Cir. 1994). Furthermore, the authority to search is limited to the purpose of the warrant. *See* 2 LAFAYETTE, *supra* note 21, § 4.10(d), at 678 (noting that evidence found by actions exceeding the scope of the warrant must be suppressed). Actions conducted by the police that do not serve the purpose of the warrant are unreasonable under the Fourth Amendment because they exceed the scope of the warrant. *See id.*

<sup>125</sup> *See* *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (holding that a search warrant to search for contraband implicitly provides limited authority for detaining the occupants during the search); *Ayeni v. Mottola*, 35 F.3d at 685.

<sup>126</sup> In reality, the media's presence is nothing more than state-supported trespass. The media cannot enter an individual's home without consent. The media, however, does just that—enter a private home without consent—when it accompanies the police during the execution of a search warrant at a private residence. The question then arises: If the media are illegally trespassing on the resident's property or invading the resident's privacy, why are constitutional remedies necessary when general tort remedies are already available? First, "the tort of invasion of privacy may properly have little if any actual bite." C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 380 (1997); *see also* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983) (explaining that privacy torts have little power). Second, and more fundamentally, the remedy should be available for what actually occurs—a violation of the Fourth Amendment. When the media accompany the police during the execution of a search warrant, it is not a simple trespass or a simple invasion of privacy issue; rather, it is a state-supported trespass or invasion of privacy which is an abuse of government power. The Fourth Amendment was designed to prohibit abuse of government power, *see supra* notes 18–19 and accompanying text, so the remedy should lie within the Fourth Amendment itself. Furthermore, a remedy sought under 42 U.S.C. § 1983 (1994) for a violation of the Fourth Amendment will be more complete since a prevailing plaintiff in a § 1983 lawsuit can recover attorney's fees under 42 U.S.C. § 1988 (1994). *See* 42 U.S.C. § 1988 (1994).

<sup>127</sup> There is of course the possibility that the media could be named as an authorized actor in the warrant. For example, if a local television station was burglarized, officials from the station could accompany the police during the execution of the search warrant in order to identify the station's stolen property. *See* *United States v. Clouston*, 623 F.2d 485, 485 (6th Cir. 1980) (*per curiam*) (holding that telephone workers' presence during the search was reasonable because workers were present to identify stolen telephone equipment). This, however, would not authorize the television station to cover the execution of the search warrant in a media capacity.

warrant does not serve a legitimate law enforcement objective.<sup>128</sup>

Therefore, if media members are viewed as state actors when they accompany the police during the execution of a search warrant, then the media members are unauthorized state actors who violate the Fourth Amendment when they enter an individual's home. If media members are viewed as private actors when they accompany the police during the execution of a search warrant, then the media members do not themselves violate the Fourth Amendment. However, their presence violates the Fourth Amendment because it serves no legitimate government objective and is not authorized by the search warrant itself.<sup>129</sup>

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<sup>128</sup> The Second Circuit demonstrated that general Fourth Amendment principles establish the unreasonableness of the media's presence during the execution of a search warrant. *See Ayeni v. Mottola*, 35 F.3d at 686. However, the Second Circuit also noted that there is statutory reinforcement for the conclusion that the media's presence violates the Fourth Amendment. *See id.* at 687. Federal law provides:

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

18 U.S.C. § 3105 (1994). "This statute identifies those who may 'serve' a search warrant—only authorized officers and those legitimately assisting officers, but it has been construed to determine those who may 'execute' a warrant." *Ayeni v. Mottola*, 35 F.3d at 687. The statute does not determine the entire scope of the Fourth Amendment, but it does provide a background for the reasonableness standard. For cases demonstrating that the presence of a third party does not violate the Fourth Amendment or 18 U.S.C. § 3105, see *Clouston*, 623 F.2d at 486–87 (telephone company employee present to identify stolen telephone equipment); *United States v. Gambino*, 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990) (informant assisting in the installation of listening devices on the defendant's property).

<sup>129</sup> *See Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995).

[W]e have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant. Such a search is not "reasonable." It *obviously* exceeds the scope of the required specific warrant and furthermore violates the "sanctity of private dwellings."

*Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)) (emphasis added).

### B. *The Media's Presence Creates an Additional and Unnecessary Invasion of the Home*

When a search warrant is executed at the home of a private individual, the home of that private individual is invaded. The Fourth Amendment, however, tries to minimize the intrusion by requiring that the search be reasonably conducted in both intensity and duration.<sup>130</sup> The presence of the media during the execution of a search warrant in a private citizen's home unnecessarily causes a more intense invasion of the home, unreasonably violating the sanctity of that home.<sup>131</sup>

The Second Circuit, in discussing the media's presence at the Ayeni's home, stated:

The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect—the right of privacy. The purpose of bringing the CBS camera crew into the Ayeni's home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right of privacy.<sup>132</sup>

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

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<sup>130</sup> See 2 LAFAYE, *supra* note 21, § 4.10(d), at 670. "The permissible intensity of the search within the described premises is determined by the description of the things to be seized." *Id.* Therefore, when the warrant is issued to search for something small, the police can search more closely and thoroughly than when the warrant is issued to search for something large. For example, the police can search a desk when looking for stolen checks, but cannot search that same desk when looking for a stolen television set. See *id.* Therefore, "given the longstanding requirements that the officers remain on the premises only so long as is reasonably necessary to conduct the search and that they avoid unnecessary damage to the premises, it would appear that the police are not completely free to pursue the search in any manner they choose." *Id.* § 4.10(d), at 673–74 (footnotes omitted).

<sup>131</sup> "[T]he sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). "No study of the scope of fourth amendment coverage would be complete without acknowledging that the principle of home sanctity resides securely at the core of the guarantee and motivates its restraints upon official search and seizure power." Tomkovicz, *supra* note 18, at 674 n.120. The sanctity of the home has been well recognized by the judiciary. See *Ransom*, *supra* note 3, at 333.

<sup>132</sup> *Ayeni v. Mottola*, 35 F.3d at 686.

granting Boyer qualified immunity.<sup>133</sup> The Eighth Circuit simply, in an inexcusable fashion, stated: “Nor do we think it self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone’s house during the execution of a search warrant.”<sup>134</sup> If the sanctity of the home truly exists (which it does),<sup>135</sup> then, contrary to the Eighth Circuit’s opinion, the home cannot become “a soundstage for law enforcement theatricals”<sup>136</sup> simply because a search warrant has been issued.<sup>137</sup> “A search warrant is simply not a press pass.”<sup>138</sup>

Therefore, in light of the reverence that is afforded to the home under the Fourth Amendment, the media’s presence during the execution of a search warrant is unreasonable.

### C. *The Media’s Presence Causes an Additional Harm*

The greatest reason for concluding that the media’s presence during the execution of a search warrant violates the Fourth Amendment is that the media’s presence creates an additional harm.<sup>139</sup> The additional harm is not the additional invasion of the physical privacy of the home suffered by the individual, but is the actual invasion of personal privacy suffered by the individual residents because of the media’s coverage and broadcast of the

<sup>133</sup> See *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).

<sup>134</sup> *Id.* at 446. This statement forced Judge Rosenbaum to concur specially, as he “would find, consistent with *Ayeni v. Mottola*, that police officials executing a search warrant violate a resident’s Fourth Amendment rights, when they admit representatives of the public media into a private citizen’s home without first securing the resident’s express consent.” *Id.* at 448 (Rosenbaum, J., concurring specially) (citation omitted).

<sup>135</sup> “The sanctity of the home is not to be disputed.” *Segura v. United States*, 468 U.S. 796, 810 (1984).

<sup>136</sup> *Ayeni v. Mottola*, 35 F.3d at 686.

<sup>137</sup> “The confidentiality assured by our homes is valuable not just because it closes actual doors to the government, but because it opens figurative doors for those who dwell within.” Tomkovicz, *supra* note 18, at 675. These “figurative doors” will no longer remain open if search warrants grant the media access to private dwellings.

<sup>138</sup> *Hagler v. Philadelphia Newspapers, Inc.*, No. CIV.A.96-2154, 1996 WL 408605, at \*2 (E.D. Pa. July 12, 1996).

<sup>139</sup> This argument may at first glance seem to be the same as a further invasion of privacy, discussed *supra* Part V.B., but this point is totally independent from the invasion of the physical privacy of the home. Invasion of privacy involves the destruction of a private area where privacy is expected. The additional harm is the consequence that results from media coverage. The invasion of the expected personal privacy area is separate and apart from the sanctity of the home where physical privacy is reasonably expected.



search.<sup>140</sup> There is nothing equivalent to the exclusionary rule for private actors like the media.<sup>141</sup> A hypothetical will best illustrate this additional harm.<sup>142</sup>

Take the typical facts of the *Ayeni* or *Parker* cases.<sup>143</sup> The police arrive at an individual's home to execute a search warrant. The television camera crew from a local station is accompanying the police. The television camera crew enters the home behind the police, as the police properly enter the home pursuant to the warrant. The resident objects to the media's presence, but the police allow the media to remain in the home. The camera crew videotapes the search, the inside of the home, and the residents. The police find some contraband, arrest one of the residents, and leave the home, taking the

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<sup>140</sup> Actual broadcast of the search is not a necessary component of this additional harm. To be sure, broadcast of the video obtained during the search magnifies the additional harm, but additional harm also occurs simply from the anxiety of possible media broadcast. Moreover, the Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and is '*fully accomplished*' at the time of an unreasonable governmental intrusion." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (emphasis added) (quoting in part *United States v. Leon*, 468 U.S. 897, 906 (1984); *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

<sup>141</sup> See 1 HALL, *supra* note 28, § 12:1, at 550. One reason why the Fourth Amendment is inapplicable to private actors is because the judicially created exclusionary rule is designed to deter improper police conduct and is not designed for, nor applicable against, private action. See *id.* The Fourth Amendment protects against government intrusion, not private intrusion. See *supra* note 41 and accompanying text.

<sup>142</sup> The media's coverage of the Olympic Park bombing in Atlanta and Richard Jewell is illustrative of the additional harm being argued here. Richard Jewell was, at first, the hero of the Olympic Park bombing. See Richard Corliss, *From Fame to Infamy*, TIME, Aug. 12, 1996, at 24. Jewell was interviewed on network television as the security guard who saved lives. See *id.* Jewell, however, after being considered a hero, was named as a suspect. See *id.* The media hounded Jewell, replayed earlier interviews of Jewell, the hero, and questioned why he was ever hired as a security guard. See *id.* Jewell proclaimed his innocence throughout the ordeal until he was finally removed from the list of suspects. See *id.*; see also David Van Biema, *Atlanta's Fed-Up Suspect*, TIME, Sept. 2, 1996, at 44. Jewell, according to one of his attorneys, now has no "semblance of normal life" despite the fact that he was cleared as a suspect. Van Biema, *supra* (quoting G. Watson Bryant, Jr., Jewell's attorney). Furthermore, Jewell's family has been left distraught over the entire ordeal. See *id.* The legality, morality, or professionalism of the media's conduct concerning Jewell and the bombing are not at issue here. Jewell simply demonstrates that media coverage can be exceptionally harmful to a person's expected personal privacy even if a person is cleared of all criminal charges or is never even formally charged with a crime. Therefore, when the execution of a search warrant is broadcast, an additional harm (invasion of personal privacy) occurs that is not remedied by the dismissal of criminal charges, suppression of evidence, or acquittal at trial. The invasion of personal privacy lingers because of the publicity the search captured.

<sup>143</sup> See *supra* notes 51-56 and accompanying text; notes 68-71 and accompanying text.

television camera crew with them. The additional harm comes next.

The media members who accompanied the police now have video footage of the execution of the search warrant. The video will be broadcasted numerous times. In fact, the media will probably headline the coverage in its news promotions. The residents of the home are offended, embarrassed, and labeled by the community. This is all in addition to the increased invasion of physical privacy the residents incurred when the media entered their home. The residents suffer from the invasion of their expected personal privacy because their personal lives are made public by the media's entrance into their home pursuant to a valid search warrant.<sup>144</sup>

Furthermore, the residents will have no immediate recourse to prevent the media from broadcasting the videotape.<sup>145</sup> The residents will be able to challenge what the police obtained during the search by filing a motion to suppress, but there is no such equivalent to prevent the media's use of the video for the media's benefit. This demonstrates the additional harm residents experience when the media enters their home during the execution of a search warrant. The additional harm to expected personal privacy will exist even if criminal charges are never filed or are subsequently dismissed, or the residents are eventually acquitted or convicted at trial.

The residents may subsequently file a lawsuit against the media and the police to recover damages, but some courts, based on the Eighth Circuit's reading of the Fourth Amendment, will reject the residents' complaint that the media violated the Fourth Amendment and will grant the police officers qualified immunity.<sup>146</sup> If a per se rule similar to that of the Second Circuit is adopted, this additional harm will not occur because the media will not accompany the police during the execution of search warrants at private homes.<sup>147</sup>

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<sup>144</sup> Cf. *Oziel v. Superior Ct.*, 273 Cal. Rptr. 196, 206 (Ct. App. 1990) (refusing to release police-made videotapes of a search because, among other things, residents had a constitutionally protected right to privacy).

<sup>145</sup> An injunction might be possible, but if the court finds that no rights have been violated by the media's coverage of the search, what legal theory would support the injunction? Furthermore, in reality it is likely that there would not be enough time to get an injunction even if one was available on some legal theory. For example, if a search warrant is executed at 10:30 p.m. and the news broadcast is at 11:00 p.m., when would the injunction be obtained? The video of the search would be broadcasted before the residents recovered from the initial shock of the intrusive search. In addition, the residents may, in fact, be in jail during the time between the search and broadcast, leaving them with no opportunity to take the necessary steps to challenge the broadcast of the search.

<sup>146</sup> See, e.g., *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997).

<sup>147</sup> If the media accompanies the police during the execution of a search warrant

Therefore, because the additional harm that occurs when the media accompany the police during the execution of a search warrant is severe, unavoidable by the residents, and preventable by the police, the media's presence during the execution of a search warrant violates the Fourth Amendment's reasonableness standard.

## VI. CONCLUSION

Invasions of private homes by the media during the execution of search warrants cannot be taken lightly nor summarily analyzed through the use of conclusory language.<sup>148</sup> Methodical Fourth Amendment analysis must be applied to successfully address and resolve the issue. Such analysis demonstrates that the media's presence during the execution of a search warrant at an individual's home is a per se violation of the Fourth Amendment. The Fourth Amendment is applicable to the issue because individuals hold a reasonable expectation of privacy in their homes and because the media's presence during the execution of a search warrant cannot be considered an independent private search immune from the standards and limitations of the Fourth Amendment. Finally, the media's presence during the execution of a search warrant is unreasonable because the presence exceeds the conduct permitted by the search warrant, unnecessarily and unreasonably causes an additional invasion of privacy, and creates an additional harm that cannot be immediately remedied, if at all, by those who are subjected to the media's presence. The sanctity of the home will no longer exist if, as the Eighth Circuit has held, the media can accompany the police into a private citizen's home during the routine execution of search warrants.<sup>149</sup> Courts should follow the lead of the Second Circuit and refuse to let search warrants be used by the

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subsequent to the adoption of a per se rule against such accompaniment, damages will be used to compensate the victim for the additional harm suffered. Damages, however, are second best to prevention. Since a per se rule would prevent the additional harm, a per se rule should be used to deter media presence, rather than possible jury determinations of damages on a case-by-case basis.

<sup>148</sup> Supreme Court decisions "reflect no lack of solicitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel of the tired, the weary, and the sick.'" *Carey v. Brown*, 447 U.S. 455, 471 (1980) (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring in part and dissenting in part)).

<sup>149</sup> *See Parker v. Boyer*, 93 F.3d at 447 (concluding that the Fourth Amendment's prohibition of unreasonable searches and seizures is not violated when police allow the media to be present during the execution of a search warrant).

media as general admission tickets to the homes and lives of private citizens.<sup>150</sup>

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<sup>150</sup> See *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (Fourth Amendment prohibits the police from allowing media presence during the execution of a search warrant). As this Note was on its way to print, the United States Court of Appeals for the Ninth Circuit indeed followed the Second Circuit's lead and held that the media's presence during the execution of a valid search warrant violates the Fourth Amendment. See James Sterngold, *Court Rules Against CNN in Search Case*, N.Y. TIMES, Nov. 14, 1997, at C5. The Ninth Circuit concluded that the agreement between the United States Attorney's office and CNN to allow CNN to film the search "transformed the execution of a search warrant into television entertainment." *Id.* (quoting the yet published Ninth Circuit decision in *Berger v. Hanann*, No. 96-35266 (9th Cir. Nov. 13, 1997)).