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Constitutional Law--Payton v. New York: Home Arrest in the Shelter of Search and Seizure Law

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NOTES

Constitutional Law—*Payton v. New York*: Home Arrest in the Shelter of Search and Seizure Law

For decades judicial responses to the propriety of routine, warrantless home arrests have been conflicting,[1] purposefully restrained,[2] or relegated to dictum.[3] In *Payton v. New York*[4] the Supreme Court at last has determined the constitutional status of such arrests, holding that, absent exigent circumstances, warrantless and nonconsensual home entry and arrest, albeit effected with statutory authority and probable cause, is per se unreasonable under the fourth amendment.[5]

Payton v. New York combines two appeals from the New York Court of Appeals[6] in which police officers made warrantless entries to arrest as authorized by the New York Code of Criminal Procedure.[7] In the first case[8] officers pursuing Theodore Payton, an armed robbery and murder suspect, went to his apartment without a warrant. They observed light and heard the sounds of a radio emanating from within and knocked.[9] When no one responded, the officers summoned emergency help and eventually forced open the door. The officers entered, found the premises vacant, and seized a shell casing that was in plain view.[10] Because state law sanctioned such warrantless entries[11] and

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1. Federal and state courts have reached diverse holdings on the constitutionality of warrantless home arrests. *Compare, e.g.*, United States v. Reed, 572 F.2d 412 (2d Cir. 1978); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc); *and* People v. Ramey, 16 Cal.3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976) *with* State v. Perez, 277 So. 2d 778 (Fla.), *cert. denied*, 414 U.S. 1064 (1973) *and* People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978). *See* text accompanying notes 50-59, 72-90 *infra*.

2. "[W]e do not today consider or decide whether or under what circumstances an officer lawfully may make a warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy." United States v. Watson, 423 U.S. 411, 432-33 (1976) (Powell, J., concurring). Also *see id.* at 433 (Stewart, J., concurring) and note 72 *infra*.

"But we find it unnecessary to decide the question [of the constitutionality of forceful, nighttime, warrantless entry into a dwelling to arrest] in this case." Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971). "[W]e do not consider this issue [of forceful nighttime entry into a dwelling to arrest a person reasonably believed to be within upon probable cause that he had committed a felony under circumstances where no reason appears why an arrest warrant could not have been sought] fairly presented by this case." Jones v. United States, 357 U.S. 493, 499-500 (1958).

3. *See* Coolidge v. New Hampshire, 403 U.S. 443, 480-81 (1971); note 74 *infra*.

4. 445 U.S. 573 (1980).

5. 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.

6. People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978).

7. *See* note 11 *infra*.

8. People v. Payton, 84 Misc. 2d 973, 376 N.Y.S.2d 779 (Sup. Ct. 1974).

9. *Id.* at 974, 376 N.Y.S.2d at 780. Probable cause was provided by eyewitnesses who identified defendant and gave the police his home address two days after the crime. *Id.*

10. *Id.* The police also conducted a full search of the apartment, seizing other evidence that

exigent circumstances excused the officers from their statutory duty to announce authority and purpose,[12] the trial judge declared the entry valid and the shell casing admissible.[13]

In the second case[14] police investigating a robbery made a noontime warrantless home arrest[15] of Obie Riddick as authorized by New York statute.[16] The defendant's three-year-old son[17] answered the officers' knock on the door, and they entered, announced their authority[18] and placed Riddick under arrest. Riddick was in bed at the time of his arrest and was not allowed to dress until the officers searched the bed, closet, and bureau. Looking for weapons, the officers found drugs and a syringe instead. When Riddick was indicted later on narcotics charges, the trial court ruled the narcotics admissible as having been obtained incident to a lawful arrest.[19]

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was later suppressed by concession of the district attorney. 45 N.Y.2d 300, 305-06, 380 N.E.2d 224, 226, 408 N.Y.S.2d 395, 397.

11. Sections of the New York Code of Criminal Procedure in effect at the time authorized an officer to arrest without warrant "[w]hen a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it," and to break a door or window "if, after notice of his office and purpose, he be refused admittance." 45 N.Y.2d at 306 n.1, 380 N.E.2d at 226 n.1, 408 N.Y.S.2d at 397 n.1.

12. The trial judge held that the gravity of the offense plus the probability that the suspect was armed, dangerous and likely to escape combined to create exigent circumstances. 84 Misc.2d at 975, 376 N.Y.S.2d at 781. Thus the New York statute was complied with. *See* note 11 *supra*. Justice Stevens noted, however, that the trial judge had no reason to determine whether those circumstances were so exigent as to justify the failure to obtain a warrant. 445 U.S. at 577-78. Nor did the *Payton* Court decide this question; it was remanded to the New York Court of Appeals. *Id.* at 583, 603.

13. 84 Misc. 2d at 975-76, 376 N.Y.S.2d at 781.

14. Riddick v. New York, 56 A.D.2d 937, 392 N.Y.S.2d 848 (1977).

15. 45 N.Y.2d at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 398. Probable cause was provided by the victim's identification of defendant two years after the crime and acquisition of defendant's address six months thereafter. *Id.* Although the arrest was delayed an additional two months, neither the New York Court of Appeals nor the United States Supreme Court questioned the officers' failure to seek an arrest warrant in the interim. Yet so long as warrantless home arrests are viewed in the context of search and seizure law (see text accompanying notes 50-71 *infra*), the question whether ample time and the absence of exigent circumstances might have made procurement of a warrant reasonable in this case is relevant. *See* United States v. United States Dist. Court, 407 U.S. 297, 315-16 (1972); Chimel v. California, 395 U.S. 752, 762-63 (1969). The *Payton* Court did not speak to this point, proabably because the entries to arrest were invalid on other grounds. *Cf., e.g.*, Godfrey v. United States, 358 F.2d 850 (D.C. Cir. 1966) and United States v. Wilson, 342 F.2d 782 (2d Cir. 1965) (delay in obtaining a warrant invalidated the arrests only when delay was unjustified and defendant actually was prejudiced).

16. N.Y. CRIM. PROC. LAW § 140.15 (McKinney 1971) permitted an officer to make a warrantless entry and arrest on premises where he reasonably believed a suspect to be present, provided that he gave or made a reasonable attempt to give notice of his authority and purpose, as required by N.Y. CRIM. PROC. LAW § 120.80(4), (5) (1971). 45 N.Y.2d at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 398. Notice was not required if the officer had reasonable cause to believe it would (1) prompt the defendant's attempted escape, (2) endanger another's life or person, or (3) prompt the destruction or secretion of evidence. *Id.* Section 120.80 further authorized the officer's peaceful or forcible entry if he was not admitted after giving such notice.

17. Because of the son's age, the officers' entry was nonconsensual under the voluntariness test of Schneckloth v. Bustamonte, 412 U.S. 218 (1973). *See* notes 113-119 *infra* and accompanying text.

18. Defendant objected that the arrest was vitiated by the delayed announcement of purpose, but his motion to suppress was denied and the arrest declared generally valid. 45 N.Y.2d at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 398.

19. *Id.*

The New York Court of Appeals affirmed both Payton's and Riddick's convictions and implicitly found the authorizing statutes constitutional.[20] Rejecting the appellants' contention that "any proper sense of constitutional symmetry" mandated the same warrant or exigent-circumstances requirement for home arrest as for search and seizure,[21] the court of appeals accepted the validity of a more stringent standard for search and seizure. This acceptance was premised on a view of the warrantless search as potentially more intrusive in its breadth and intensity than the warrantless home arrest,[22] on a refusal to differentiate between the intrusiveness of a permissible warrantless *public* arrest[23] and that of a warrantless *home* arrest,[24] and on the notion that the public's interest in apprehending a suspect exceeds its interest in obtaining evidence.[25]

In *Payton v. New York* the Supreme Court reversed the New York Court of Appeals and held that nonconsensual home entries made to effect a routine arrest are unconstitutional under the fourth amendment. The Court scrutinized the issue of warrantless home arrests from historical and contemporary vantage points. Looking to common law and colonial history, it sought the Framers' intent in drafting the fourth amendment and determined that the amendment's specific language protected people as well as objects from warrantless seizures. After considering recent judicial treatment of warrantless public arrests and of searches and seizures, the Court classified warrantless home arrests with the latter.

The question of the propriety of warrantless home arrests has a long and confusing history, extending from early common law commentators, through colonial Americans' hatred of writs of assistance, to more recent case law concerning warrantless search and seizure and arrest. But an historical understanding of the common law illuminates that question only insofar as the authors of the fourth amendment subscribed to the dictates of common law, and only if their intent is accepted as binding on a present reading of the amendment. To some extent, these two considerations are intertwined. When history indicates a consistent attitude towards a challenged practice, that practice is less likely to bow to the winds of judicial change, particularly if the practice accords with current policy.[26] But when the common law is ambiguous, as in the case of warrantless home arrest, history neither delineates the Framers' intent nor impresses us with the weight of its independent authority.

The historical confusion regarding the acceptability of warrantless home arrests was evident even in two of the earliest English cases that touched the

20. *Id.* at 315, 380 N.E.2d at 232, 408 N.Y.S.2d at 401.

21. *Id.* at 309, 380 N.E.2d at 228, 408 N.Y.S.2d at 399.

22. *Id.* at 310, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

23. The Supreme Court validated warrantless public arrests in United States v. Watson, 423 U.S. 411 (1976).

24. 45 N.Y.2d at 310, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.

25. *Id.*

26. *See, e.g.*, Watson v. United States, 423 U.S. 411 (1976) and text accompanying notes 124-30 *infra*. *But see* 423 U.S. at 438-43 (Marshall, J., dissenting) (the common law history of warrantless public arrests is misread and misapplied by the Court's "unblinking literalism").

issue.[27] These cases were concerned primarily with the imperatives of notice and demand for entry, and neither made clear whether an arrest warrant or exigent circumstances were present.[28] Common law commentators addressed the issue of warrantless home arrest more directly but with no less ambiguity. Although neither Coke nor Hawkins approved of entry to arrest on mere suspicion,[29] Blackstone clearly permitted it.[30] And while Hale's remarks appear to accord with those of Blackstone, they arise in a context analogous to hot pursuit,[31] a circumstance under which even Coke and Hawkins sanctioned the breaking of doors to arrest.[32]

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27. Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603) and Burdett v. Abbot, 104 Eng. Rep. 501 (K.B. 1811) (an officer of the Crown may "break open the house" in order to arrest).

28. In Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603), it was unclear whether entry was pursuant to a warrant, from the mention of both a "writ" and "process" in the context of the court's discussion:

> [T]he *K*'s officer may break the house to apprehend the felon, and that for two reasons: 1. For the commonwealth, for it is for the commonwealth to apprehend felons. 2. In every felony the King has an interest, and where the King has an interest the writ is *non omittas propter aliquam libertatem*; and so the liberty or privilege of a house doth not hold against the King.

77 Eng. Rep. at 196-97.

> In all cases where the King is a party, the sheriff may (if the doors be not open) break the party's house, either to arrest him or to do other execution of the K's *process*, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming and to make request to open doors; . . . for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the *process*, of which, if he had *notice*, is to be presumed that he would obey it . . . .

77 Eng. Rep. at 195-96 (emphasis added).

In Burdett v. Abbot, it was clear that a warrant had been issued for the arrest of plaintiff: "[The House of Commons ordered that] plaintiff should be committed to the Tower for his said offense, and that the Speaker should issue his warrant accordingly. . . ." 104 Eng. Rep. at 560. *See generally* Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Kerr v. California, 112 U. PA. L. REV. 499 (1964).

29. [A] justice of the peace may make his warrant for the salvation of the peace, meaning to assist the party that knoweth or hath suspicion of the felony. But in this case neither the constable, nor any other can break open any house for the apprehension of the party suspected or charged with the felony, for it is in law the arrest of the party that hath the knowledge of suspicion, who cannot break open any house.

3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 177 (1817).

"But where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day, that no one can justify the breaking open doors in order to apprehend him." 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 139 (1788).

30. "[I]n case of felony actually committed, or a dangerous wounding whereby felony is likely to ensue, he [the constable] may upon probable suspicion arrest the felon; and for that purpose is authorized . . . to break open doors . . . ." 4 W. BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 292 (1818).

31. A passage permitting the constable to break doors to arrest, after notice and demand for entry, if he suspected the accused felon "on probable grounds," proceeded to describe the suspect who "flees and takes house." 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 92 (1778).

32. And yet it is to be understood, that if one be indicted of felony, the sherif may by process thereupon after denyall made, . . . break the house for his apprehension, or upon hue and cry of one that is slain or wounded, so as he is in danger of death, or robbed, the king's officer that pursueth may (if denyall be made) break a house to apprehend the delinquent.

COKE, *supra* note 29 at 176.

> [W]here a person authorized to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him; it seems generally to be agreed, that he may

Nor does history indicate clearly whether the Framers intended the fourth amendment to forbid all unreasonable seizures, implicitly including unreasonable seizures without a warrant with the more explicit restrictions on those with a warrant; or whether they intended to curtail only the abusive general warrant,[33] accepting the persistence of such warrantless seizures as arguably were permitted at common law.[34] In the latter case, knock and notice and the officer's suspicions presumably would suffice as "reasonable" for the purpose of the fourth amendment. History also leaves unclear whether the amendment's restrictions of searches and seizures protect all objects seized, whether they are persons or things.

The Court concluded in *Payton* that the first clause of the fourth amendment speaks plainly to *any* unreasonable warrantless search and seizure, including that of persons.[35] This holding rests on an expansive perception of the fourth amendment as protecting the sanctity of the home and justifying an expectation of privacy in the home, a perception for which the intrusiveness of arrest and that of a search for objects is fundamentally the same.[36]

Clearly the Court lacked sound historical evidence that this interpretation of the amendment was in accord with original intent. Thus, the Court's concern with the Framers' intent revealed not so much an affinity for historical roots as a desire to find support for its holding in the amendment's language. Indeed, the Court's admitted bias favors a dynamic Constitution, not one shackled to the attitudes and experiences of the founding fathers.[37] In divin-

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justify breaking open the doors in the following instances: . . . Fifthly . . . [w]here one known to have committed a treason or felony or to . . . have given another a dangerous wound, is pursued either with or without a warrant, by a constable or private person.

HAWKINS, *supra* note 29 at 138-39.

33. There is no question that the colonists hated writs of assistance (general warrants to search aimed at apprehending smugglers) as much for their permanence (they remained in effect for the life of the monarch) as for their frequent use. The writ was not itself a search warrant but a summons to the constable to keep the peace while customs officers searched pursuant to their established authority. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 41 (1966). There is some authority, however, that the writs of assistance were used both to search and to arrest. *See* 14 AM. CRIM. L. REV. 193, 212 n.129 (1976) (citing E. FISHER, SEARCH AND SEIZURE 3-5 (1970)).

34. Warrantless public arrests, for example, were permitted at common law. *See* United States v. Watson, 423 U.S. 411, 418-22 (1976).

35. 445 U.S. at 585.

36. *Id.* at 588-89. To this end, the Court cited G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977); United States v. United States Dist. Court, 407 U.S. 297 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969); and Johnson v. United States, 333 U.S. 10 (1948), as cases that establish rules protecting search and seizure of objects on private premises. *Id.* at 585-89. Referring extensively to two lower court decisions that apply these rules to warrantless home arrest, United States v. Reed, 572 F.2d 412 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978) and Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc), the Court approved a view of the fourth amendment that shields persons and objects equally from unreasonable government intrusion. *Id.* at 587-89.

37. *See, e.g.*, 445 U.S. at 591 n.33 (calling attention to the difference between rules for search and seizure at common law and what has *evolved* in the modern American legal context, emphasizing that the Constitution has not been and should not be frozen by practices existing at its inception); People v. Payton, 45 N.Y.2d 300, 324, 380 N.E.2d 224, 238, 408 N.Y.S.2d 395, 409 (1978) (dissenting opinion) (rejecting antiquity and legislative unanimity as determinative where a "grave constitutional question" is at issue); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (referring to "a constitution intended to endure for ages to come, and, consequently, to be

ing the Framers' intent, the *Payton* Court thus sought to indicate the breadth of the amendment's language—that it restricts not only abuses created by general warrants but also unreasonable searches and seizures not under general warrants.[38]

In addition to an historical analysis of warrantless home arrests, a central concern of the *Payton* Court was to reconcile its holding with the constitutionality of warrantless public arrests. Spurred by the New York Court of Appeals' reliance on *United States v. Watson* as a basis for its decision in *People v. Payton*, the *Payton* Court proceeded to distinguish *Watson* and show why it was not determinative of the issue in *Payton*.[39] *United States v. Watson* was the first Supreme Court case unequivocally declaring warrantless public arrests to be permissible under the fourth amendment. A postal inspector, who was authorized by federal statute[40] to make warrantless arrests when he had reasonable grounds to believe a person had committed a felony, arrested Watson in a restaurant for possession of stolen credit cards. A personal search proved fruitless, but Watson consented to a search of his car,[41] where officers found the stolen cards.[42] The *Watson* majority pointed to the validity of warrantless public arrests not only under the Postal Service statute but also under other federal statutes and under similar statutes in most states.[43] This statu-

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adapted to the various *crises* of human affairs" and not one intended to have "the properties of a legal code") (emphasis supplied). *See also* Missouri v. Holland, 252 U.S. 416, 433 (1920) ("It was enough for [the Framers of the Constitution] to realize or to hope that they had created an organism . . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."). *See generally* Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. ILL. L. F. 655, 661 on the evolutionary nature of Supreme Court-created law.

38. To this end, the Court noted the rejection of James Madison's one-clause draft, which was more pointedly aimed only at restricting the issuance of warrants:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

445 U.S. at 584 n.22. That rejection, the Court indicated, was evidence of the purposeful adoption of the present two-clause amendment. *Id.* at 584-85. Actually, the two-clause version survived by historical fluke. Its promulgator ignored the vote of the House majority not to change the phrase "by warrants issuing" to the phrase "and no warrants shall issue," and reported his amendment as the final version. J. LANDYNSKI, *supra* note 33, at 42. Nevertheless, this version was passed by the House and Senate and ratified in its present form by the states. Thus, rather than remaining restricted to the response to general warrants that begot it, the fourth amendment is open to the *Payton* Court's broader interpretation. The first clause, said the Court, protects a basic right to be free from unreasonable searches and seizures; the second clause, meant to curb the sweeping power of general warrants, requires warrants to be particular and supported by probable cause. 445 U.S. at 584.

39. This task was particularly important, given the impact on fourth amendment law many expected from *Watson*. When *Watson* was first reported, some feared that it would draw warrantless home arrests into its vortex. For example, Justice Marshall, dissenting, argued for arrest as a form of seizure which should merit identical fourth amendment protections, and for the Court's historic preference for a warrant, which preference was rendered toothless by the majority decision.

40. 18 U.S.C. § 3061(a)(3) (1969).

41. The request to search Watson's car was preceded by *Miranda* warnings and followed by an admonition that anything found would be used against him. 423 U.S. at 413.

42. *Id.*

43. *Id.* at 421-22.

tory validity was itself substantiated by both recent judicial precedent[44] and early common law.[45]

A concurring opinion in *Watson* stressed that differing historical backgrounds underlay routine warrantless arrests in public and warrantless searches and seizures, therefore justifying the anomalous treatment of each under the fourth amendment.[46] Indeed, an analysis of all factors supporting the *Watson* Court's approval of warrantless public arrest does not carry over to warrantless home arrests. Regarding warrantless home arrests, the authority of common law commentators is ambiguous and contradictory;[47] state authority for warrantless entries, while still representing the majority position, is being eroded through state court decisions;[48] and congressional approval is virtually nonexistent.[49] Thus the *Payton* majority adequately justified its refusal to apply the logic of *Watson* to warrantless home arrests.

Because *Payton* put home entry to arrest in a class with entry to search, those cases developing fourth amendment protections for search and seizure are vital to an understanding of how home arrest will now be treated. The license for law officers to enter a dwelling either to arrest or to search without a warrant has undergone progressive limitation by Supreme Court decisions. Two early cases concerned with searches incident to warrantless home arrests focused on the validity of the search rather than on the arrest. *Johnson v. United States*[50] held that an entry to arrest with neither warrant nor reason-

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44. Justice Powell commented in his concurring opinion that the cases cited by Justice White did not squarely face the issue of warrantless arrest but were concerned only with the limited issue of probable cause. *Id.* at 426-27 n.1. (Powell, J., concurring). *See also id.* at 437 (Marshall, J., dissenting).

45. *Id.* at 418-19.

46. *Id.* at 429-30 (Powell, J., concurring).

47. The Court indicated that, while Coke and Hawkins plainly declared warrantless home arrests to be illegal, Blackstone clearly said the opposite. Yet Blackstone's authority rested on the study of Hale, whose own remarks on the subject were ambiguous and could be read as being restricted to instances of hot pursuit. *See* 445 U.S. at 595-96 n.41. The Court noted that other common law authority is similarly unclear or unauthoritative. Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603), was "equivocal dictum" and perhaps referred to entry pursuant to a writ (445 U.S. at 592); and a Year Book statement that, for bare suspicion of felony, a man may break house, was "extrajudicial opinion" (445 U.S. at 596). *See generally* notes 27-32 *supra*.

Justice White, dissenting in *Payton*, insisted that the majority's treatment of common law was cursory and distorted. He saw commentators having a more consistent attitude towards warrantless home arrests on mere suspicion. Yet he stressed that the propriety of warrantless arrests on mere suspicion, even in public, was not definitively established until 1790, implying that less weight should be put on common law than on the Framers' intent that the fourth amendment protect chiefly against abuses of the warrant power. 445 U.S. at 607-08 (dissenting opinion).

48. *Id.* at 598-99.

49. *Id.* at 601. Justice White disagreed, pointing to the general authority granted federal agents by 18 U.S.C. § 3052 (1969) to make warrantless arrests on probable cause alone, which he presumed to include warrantless arrests in the home. He further referred to the explicit provisions in 18 U.S.C. § 3109 (1970) for entry pursuant to a search warrant. That statute has been interpreted also to authorize entry to arrest on probable cause in lieu of a warrant. *See* Miller v. United States, 357 U.S. 301, 306 (1958). Justice White concluded that statutes of this type are not meant to derogate from what he saw as the historically broader authority of officers to arrest without a warrant—an authority he presumed Congress recognized. 445 U.S. at 614-15 (dissenting opinion).

50. 333 U.S. 10 (1948).

able cause to believe the suspect guilty, as required by state statute,[51] cannot be justified by subsequent discovery of evidence in a search incident to that arrest.[52] *Ker v. California*[53] similarly noted that for a warrantless entry and search incident to arrest to be valid, officers must be armed with probable cause[54] and their mode of entry authorized by statute.[55] But the *Ker* Court held that when the facts fit a statutory or judicial exception for exigent circumstances, an otherwise illegal entry and subsequent search is reasonable under the fourth amendment.[56] *Chimel v. California*,[57] also involving a search incident to an arrest, held that such a search must not extend beyond "the arrestee's person and the area 'within his immediate control' "—namely, the area into which he might reach.[58] Presumably this injunction bears on any entry to arrest, even one prompted by exigent circumstances, so long as the suspect is in view and the area within his control is thereby defined.[59]

Several fourth amendment principles have emerged from a line of cases following *Johnson* and *Ker* that develop further the constitutional parameters of warrantless entry for search and seizure.[60] First is the notion of the home as a "constitutionally protected area,"[61] a concept expanded in *Katz v. United States*[62] to include any area where a person has an "actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.' "[63]

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51. *Id.* at 15 n.5.

52. In language directed at warrantless searches, the Court said that if the existence of evidence sufficient to support a magistrate's warrant could authorize officers to make a warrantless search in the absence of "exceptional circumstances," the amendment would be reduced to a "nullity." *Id.* at 14.

53. 374 U.S. 23 (1963).

54. *Id.* at 34-35. Probable cause, the standard of reasonableness for both arrests and search and seizure, has been defined only vaguely by the Court. Probable cause for arrests must be based on information "sufficient to warrant a prudent man in believing that the [suspect] has committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964).

55. 374 U.S. at 37. In *Ker* the officers' unannounced entry violated the applicable statute. *Id.*

56. *Id.* at 41-42. The vital role of the authorizing statute was stressed by the Court in distinguishing Miller v. United States, 357 U.S. 301 (1958), where a warrantless entry preceded by the officers' inaudible announcement was declared illegal for not meeting District of Columbia statutory knock-and-notice requirements. *Id.* at 305-06. Because exceptions for exigent circumstances neither existed in District of Columbia law nor were argued before the Court, however, the arrest and search were not legally justified. 374 U.S. at 40.

57. 395 U.S. 752 (1968). In *Chimel* the arrest was valid.

58. *Id.* at 763.

59. Where the suspect is absent, however, *Chimel* would not control. *See* Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc) and text accompanying notes 79-93 *infra*.

60. *See generally* Rotenberg and Tanzer, *Searching for the Person to be Seized*, 35 OHIO ST. L.J. 56, 70 & nn.63-65 (1974); 14 AM. CRIM. L. REV. 193 (1976); Note, *supra* note 37.

61. "At the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961).

62. 389 U.S. 347 (1967).

63. *Id.* at 361 (Harlan, J., concurring). Even the earliest judicial interpretations of the fourteenth amendment similarly expressed its protection of a right to privacy as its keystone: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes . . . the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . . ." Boyd v. United States, 116 U.S. 616, 630 (1886).

Second is the requirement of a warrant. That a search of premises without a warrant is per se unreasonable, absent exigent circumstances, was a rule announced in *Katz* and reiterated in *Coolidge v. New Hampshire*.[64] Related to the warrant requirement is a third principle, namely that a search generally is not consensual when conducted under a warrant.[65] Fourth is the idea that exigent circumstances generally should be limited to those instances when quick police action is necessary to prevent dangers inherent in a suspect's attempted resistance or escape (including "hot pursuit"),[66] to otherwise protect the officer,[67] or to preserve evidence from destruction.[68] While these principles logically could have been applied as easily to warrantless home arrests as to search and seizure, the Court prior to *Payton* persistently had kept the issues separate by either avoiding such application,[69] pointing out significant distinctions,[70] or restricting such application to dicta.[71]

Three lower court cases,[72] however, declared warrantless entries absent

64. 403 U.S. 443, 478, 481 (1971). The warrant requirement has also been derived from a balancing of the public's interest in intruding against the right to privacy promised by the fourth amendment. *See generally* United States v. United States Dist. Court, 407 U.S. 297, 314-21 (1972); Comment, *The Constitutionality of Warrantless Home Arrests*, 78 COLUM. L. REV. 1550 (1978); Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 DICK. L. REV. 167 (1977); Note, *supra* note 37.

Camara v. Municipal Court, 387 U.S. 523 (1967), which held that a warrantless administrative search in nonemergency situations violated the fourth amendment, threw more weight to the constitutional right, stating that one must ask "not whether the public interest justifies the . . . search in question, but whether . . . the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Id.* at 533. Even more extreme in favoring the constitutional right over the public's interest is the following:

> The warrant requirement . . . is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly over-zealous executive officers" who are a part of any system of law enforcement.

403 U.S. at 481 (quoting Gouled v. United States, 255 U.S. 298, 304 (1921)).

65. Whether there is consent to a search is determined by judicial tests. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (the "totality of all the circumstances" test); text accompanying notes 117-20 *infra*.

66. Warden v. Hayden, 387 U.S. 294, 299 (1967); Johnson v. United States, 333 U.S. 10, 16 n.7 (1948).

67. United States v. United States Dist. Court, 407 U.S. 297, 318 (1972). *See also* Katz v. United States, 389 U.S. 347, 357 n.19 (1967).

68. 407 U.S. at 318.

69. *See, e.g.*, United States v. Watson, 423 U.S. 411, 418 n.6 (1976): "[T]he still unsettled question posed in that part of the *Coolidge* opinion was 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.' *Watson*'s midday public arrest does not present that question." *See also* note 2 *supra*.

70. For example, Justice Powell's concurring opinion in *Watson* indicated that, while an arrest is "quintessentially a seizure [and] it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches . . . , history and experience" for warrantless public arrests compel a different conclusion. 423 U.S. at 428-29.

71. *See, e.g.*, 403 U.S. at 477-78:

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without a warrant are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

72. United States v. Reed, 572 F.2d 412 (2d Cir. 1978); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970); People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976).

exigent circumstances unconstitutional and refused to accept disparate fourth amendment analyses for arrest and for search and seizure. Seeing separate rules for each kind of intrusion as "incongruous"[73] and anomalous,[74] these cases relied substantially on those principles developed for warrantless searches and seizures in analyzing situations of warrantless entries and arrests.[75]

In *Dorman v. United States*,[76] a case highlighted by the *Payton* Court,[77] police were investigating a robbery committed the same day. Armed with probable cause but no warrant, they knocked and announced their identity at the home of the suspect. The suspect's mother admitted them so that they could verify her averment of his absence, and, while searching the apartment for him, the officers discovered evidence incriminating him in the robbery.[78] Excusing the entry and search due to "urgent need," Judge Leventhal analyzed the entry in search and seizure terms—protection of privacy and the general requirement of a warrant.[79] Apart from those cases where speed is essential, "the constitutional safeguard that . . . assures citizens the privacy and security of their homes unless a judicial officer determines that it must be overridden, is applicable not only in case of entry to search for property, but also in case of entry to arrest a suspect."[80] From this premise Judge Leventhal concluded: "Subject to exceptions for circumstances, that constitutional principle prohibits invasion of the privacy of the home by unconsented entry unless need therefor has been determined by a warrant."[81] The *Dorman* court catalogued a list of factors pertinent to establishing when urgency reasonably

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73. Moreover, it is incongruous to pay homage to the considerable body of law that has developed to protect an individual's belongings from unreasonable search and seizure in his home, and at the same time assert that identical considerations do not operate to safeguard the individual himself in the same setting.

16 Cal. 3d at 275, 545 P.2d at 1340, 127 Cal. Rptr. at 636.

74. United States v. Reed, 572 F.2d 412, 419 (2d Cir. 1978) (quoting Justice Powell's concurring opinion in *Watson*). *See* text accompanying note 46 *supra*.

75. The analogy of search and seizure and home arrests for fourth amendment purposes appeared early, in *Coolidge* (*see* note 71 *supra*) and in *Watson* (*see* note 70 *supra*). Often called the symmetry argument, this analogy is not merely an aesthetic argument nor a simple derivation from the plain language of the amendment. Rather, it recognizes that both intrusions share essentially the same character—they threaten to violate an expectation of privacy deserving of protection. The argument further recognizes that the desire expressed in search and seizure rules for a balance of privacy interests and public policy, stemming as much from a distrust of police practices as from a concern for the protection of society, implicitly applies to arrests. Nevertheless, the symmetry argument has been rejected on the ground that one intrusion is "more extensive and more intensive" than the other and therefore not deserving of the same constitutional protection. People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 244, 408 N.Y.S.2d 395. For the formal rather than substantive nature of its rationale, *see* Note, *supra* note 37 at 673 and n.101. *But see* note 115 and text accompanying notes 111-15 *infra*.

76. 435 F.2d 385 (D.C. Cir. 1970).

77. 445 U.S. at 575 n.4, 587-88.

78. 435 F.2d at 387-88.

79. *Id.* at 389-90. Judge Leventhal quoted Johnson v. United States, 333 U.S. 10, 14 (1948), on the fourth amendment protection of the right to privacy in the home, a right which should yield to government intrusion only at the decision of a judicial officer; and he cited Camara v. Municipal Court, 387 U.S. 523 (1967), on the vitality of the warrant requirement, and Chimel v. California, 395 U.S. 752 (1969), on the restricted scope of a search incident to arrest. 435 F.2d at 390.

80. *Id.*

81. *Id.* at 391.

demands foregoing a warrant: (1) the gravity of the offense, including whether violence is involved; (2) a reasonable suspicion that the suspect is armed; (3) a "clear showing of probable cause" that the suspect committed the offense; (4) "a strong reason to believe the suspect is in the premises"; (5) the likelihood of the suspect's imminent escape; (6) the reasonableness of entry, including whether force is necessary; and (7) whether the entry is made during daylight hours.[82] Although the *Payton* Court did not mention this list, it has impressed other courts[83] as a reasonable effort to clarify the parameters of exigent circumstances.

The impact of *Dorman* was apparent in two other lower court decisions based on the same symmetrical view of fourth amendment protections for search and seizure and for arrest. *People v. Ramey*[84] held that a warrantless home arrest absent an emergency or consent to enter violated the California constitution's analogue to the fourth amendment. The *Ramey* court anticipated *Payton* by noting that Supreme Court dicta leaned towards the conclusion that the fourth amendment's foci are the protection of privacy and the importance of obtaining a warrant. In *United States v. Reed*,[85] involving a delayed narcotics arrest in the suspect's home,[86] the United States Court of Appeals for the Second Circuit held that absent a warrant or exigent circumstances, the fourth amendment prohibits federal law officers from entering the home of a suspect to effect a felony arrest, statutory authority[87] notwithstanding. The *Reed* opinion referred extensively to *Dorman* and *Ramey* and to search and seizure cases relying on (1) expectations of privacy, especially in the home,[88] (2) restrictions on the scope of permissible warrantless government invasions,[89] and (3) such factors creating exigent circumstances as those delineated in *Dorman*.[90]

The treatment of *Payton* issues by the lower courts provides background not only for understanding *Payton* itself, but also for evaluating the problems left unresolved by the Court. The Court's new perception of home entry to arrest as logically related to fourth amendment search and seizure law will

82. *Id.* at 392-93.

83. *See, e.g.*, United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978).

84. 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976). In *Ramey* a burglary victim's own investigation convinced police officers that defendant was guilty, if not of possessing stolen goods, then of having at one time received them. The officers made a warrantless entry in accordance with standard police practice and arrested defendant, seizing a weapon within his reach and drugs in plain view. The court held that the evidence should have been suppressed, as exigent circumstances did not excuse the intrusion. *Id.* at 275-76, 545 P.2d at 1340-41, 127 Cal. Rptr. at 636-37.

85. 572 F.2d 412 (2d Cir. 1978).

86. The arrest occurred more than two months after probable cause had been established through arranged purchases by undercover agents. *Id.* at 415.

87. The arrest in *Reed* was within the scope of the Comprehensive Drug Abuse Prevention and Control Act of 1970, *as amended*, 21 U.S.C. § 801 (1977). 572 F.2d at 417 n.3.

88. *Id.* at 422 (citing United States v. United States Dist. Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967); Warden v. Hayden, 387 U.S. 294 (1966); and Miller v. United States, 357 U.S. 301 (1957)).

89. *Id.* at 423 (citing Chimel v. California, 395 U.S. 752 (1969)).

90. *Id.* at 424.

have consequences for legislatures, for police practices, and for citizens generally. One consequence of *Payton* is immediately apparent: all state and federal statutes authorizing routine, warrantless, nonconsensual home entry and arrest are now to that extent unconstitutional.[91] State court decisions sanctioning such statutes are overruled implicitly.[92]

Several more troublesome consequences follow from requiring a warrant for nonexigent home arrests. While inanimate objects of a search cannot escape while officers seek a warrant,[93] people are more mobile and their locations are consequently less predictable. This creates a potential problem involving police practices. The State of New York argued in *Payton v. New York* that a warrant requirement would frustrate police work by (1) pressuring police to make warrant requests and arrests too hurriedly, resulting in rubber-stamped warrants and careless arrests;[94] (2) wasting police resources by, for example, necessitating stakeouts of the suspect's dwelling while a warrant is being obtained;[95] (3) penalizing officers who plan deliberately;[96] and (4) causing more injuries.[97] But the *Payton* majority said there is no evidence in those states where warrantless home arrests have been declared unconstitutional[98] that a warrant requirement would be debilitating.[99] If the reasonable-

91. Included are statutes in 25 states permitting forcible entries to make any lawful arrest, those in six states permitting forcible entries with a warrant or for a felony arrest, and those of two states authorizing entry to arrest for felonies. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, app. XI, 696-97 (1975). North Carolina is in the last category: N.C. GEN. STAT. § 15A-401 (1978 & Supp. 1979) permits warrantless entry to arrest if the officer has probable cause to believe the suspect committed a felony, *id.* at § 15A-401(b); reasonable grounds to believe he will evade arrest if not apprehended immediately, *id.* at § 15A-401, Official Commentary (b); reasonable grounds to believe that the suspect is present, *id.* at § 15A-401(e)(1)(b); or when the officer has given or has made a reasonable attempt to give notice of his authority and purpose, unless there is reasonable cause to believe such notice could endager human life, *id.* at § 15A-401(e)(1)(c).

The ALI MODEL CODE, *supra*, will be affected as well. Rules for nighttime entries accord with *Payton* (permissible with warrant or necessitous circumstances only), but rules for warrantless daytime entries, requiring a felony suspect or necessity plus prior notice and demand for entry unless escape or destruction of evidence might result, will have to reflect the stricter guidelines now required only for nighttime entries. *Id.* at § 120.6.

92. This would seem to apply to cases such as State v. Perez, 277 So. 2d 778 (Fla.), *cert. denied*, 414 U.S. 1064 (1973), which held that a home arrest made on probable cause in accord with statutory criteria was valid even though there was ample time to obtain a warrant. Because the statute did not require exigent circumstances to justify this mode of arrest, the entry and seizure of evidence in plain view was held valid.

93. This is obviously not the case where a possessor's suspicions are alerted or the evidence is likely to deteriorate with delay.

94. *See* Note, *supra* note 37, at 667 n.74 (noting that arrest warrants commonly have been issued routinely without adequate review of the complaint).

95. 445 U.S. 573, 619 (1980) (White, J., dissenting).

96. *Id.* at 602 n.55. It is unclear what the state had in mind here; it would seem that deliberate planning should include obtaining a warrant.

97. *Id.* The state's fear that more injuries would result from a delay should be allayed by the license inherent in the exigent circumstances exception, which includes dangerous situations. *See also* Comment, *The Constitutionality of Warrantless Home Arrests*, *supra* note 64, at 1559-62 (dismissing arguments against requiring a warrant for nonexigent home arrests based on "inherent danger" and "risk of flight"); Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, *supra* note 64, at 182-83 (potential burden on law enforcement and possibility of probable cause becoming "stale" unlikely to outweigh privacy interests); and Note, *supra* note 37, at 666-68 (rejects similar arguments based on anticipated constraints on police and court routines).

98. 445 U.S. at 599-602. *See also* United States v. Watson, 423 U.S. 411, 448-49 (1976) (Mar-

ness test is to be a balance between public interest and a right to privacy,[100] a more substantial case for the obstruction of law enforcement methods must be made.

A second problem is apparent in what the *Payton* Court called the implicit authority conveyed by an arrest warrant to enter a home "when there is reason to believe the suspect is within."[101] This problem is of course not new to cases of entry under a valid arrest warrant. However, since the *Payton* Court, in accord with long-existing practice,[102] required no demonstration before a magistrate that the suspect is probably on the premises,[103] it is unclear whether "reason to believe the suspect is within" imposes any meaningful standard. A zealous officer with only an arrest warrant might conclude from an unanswered knock and a car in the driveway or from a light left on that the suspect is hiding at home. A court might hold that the officer had "reason to believe" the suspect was within and therefore that the officer was free to enter and search anywhere a person might hide, seizing whatever evidence he found in plain view.[104] Thus, the potential exists for a general war-

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shall, J., dissenting) (noting that the Federal Bureau of Investigation, which requires prior demonstration of evidence for arrest warrants to issue, nevertheless has remained efficient).

99. Nor will the decision necessarily force a change in police practices. In North Carolina, Burley B. Mitchell, State Crime Control Secretary, has said that he sees nothing alarming in *Payton*, since police in North Carolina generally obtain arrest warrants anyway. Raleigh News and Observer, April 16, 1980, at 1, col. 1.

100. *See* note 64 *supra*.

101. 445 U.S. at 603.

102. *See, e.g.*, Hawkins v. Commonwealth, 53 Ky. 395, 396 (1 B. Mon. 1854):

> The right to break open the outer door to make the entrance of course includes the right to break open the doors of the different rooms and chambers in the house to make a thorough search throughout the premises; and though the defendant in the process be not found, or shown to be in the place of his dwelling at the time, yet such entrance and search of the officer, having valid criminal process in his hands, would not therefore be unlawful, or make him a trespasser . . . ;

State v. Shook, 224 N.C. 728, 733, 32 S.E.2d 329, 332 (1944) (quoting State v. Mooring, 115 N.C. 709, 711, 20 S.E. 182, 182-83 (1894)); "If the officer have valid process in his hands, he does not become a trespasser *ab initio* if he fail to find the accused in the house after breaking the door."

103. Indeed, as the Court noted, this would be virtually impossible, the sworn facts being too ephemeral to keep the warrant from going stale. 445 U.S. at 602. A warrant goes stale when the original facts supporting probable cause have been discredited by new information or altered circumstances. United States v. Watson, 423 U.S. 411, 432 n.5 (1976) (Powell, J., concurring). Those who discuss the unlikelihood of an arrest warrant going stale are speaking of probable cause that the suspect committed the crime, not probable cause as to his whereabouts. *See, e.g.*, Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, *supra* note 64, at 183 (because "probable cause [for an arrest warrant] is predicated on the immediate suspicion of an ineradicable crime, it necessarily continues indefinitely, so long as no exculpatory facts are discovered in the interim"). *See generally* 14 AM. CRIM. L. REV. 193, 203 n.71 (1976).

104. The facts of Theodore Payton's case illustrate this scenario. *See* text accompanying notes 8-13 *supra*. The New York Court of Appeals recognized that whether the police overstepped the bounds of entry to arrest was a legitimate question, but held that it was an issue of fact decided by the suppression court and appellate division and was beyond review by the Court of Appeals. 45 N.Y.2d 300, 301, 380 N.E.2d 224, 230, 408 N.Y.S.2d 395, 401 (1978). *See also* Rotenburg and Tanzer, *supra* note 60, at 66-67 (discussing United States v. Retolaza, 398 F.2d 235 (4th Cir. 1968), where entry without a search warrant to verify that the suspect was *not* present was upheld). The danger of overstepping is of course restricted by *Chimel* when the suspect is present. *See* text accompanying notes 57-59 *supra*.

rantless search under the authority of a less exacting arrest warrant.[105] However, two checks exist that may prevent such excesses. One is the ubiquitous requirement that any nonexigent forcible entry be preceded by knock and notice. An unanswered knock with no certain sign that anyone is present should leave no "reason to believe the suspect is within," and the officer, *ideally*, would not enter. The second, possibly more effective, check is common sense. An officer whose genuine aim is arrest will want to be certain of the suspect's presence before exercising his warrant, for an ineffectual entry may alert the suspect and lead to his escape or the destruction of evidence. Despite these potential checks, the Court left a loophole to fourth amendment abuse that could have been closed by requiring *demonstrable*[106] reason to believe that the suspect is at home.

The *Payton* Court expressly chose not to consider a third problem, namely, exactly what circumstances qualify as exigent other than an "emergency or dangerous situation."[107] The Court's reluctance to be more precise perhaps resulted as much from widespread acceptance of a loose definition[108] as from the difficulty of formulating a more exact test.[109] Yet for the phrase "exigent circumstances" to be meaningful, it is necessary to test the circum-

105. The possibility of a general warrantless search might have an especially insidious effect on third persons. While *Payton* left unsettled an officer's authority to enter the home of a third person in pursuit of a suspect, 445 U.S. at 583, the question should be affected by the Court's renewed emphasis on the sanctity of private premises. Rotenburg and Tanzer discuss intrusions into homes of third parties under the authority of an arrest warrant and note the half-hearted attempt of the American Law Institute to provide a voluntary alternative to this practice (the ALI provides for a search-for-person warrant requiring a prior showing of probable cause to believe the suspect is in a particular location). Rotenburg and Tanzer, *supra* note 60, at 67-68 and 58 n.10. A similar procedure to search for a person to be arrested is described in FED. R. CRIM. PROC. 41 (a)-(c) (Supp. 1980), but no restraints on the breadth of a search pursuant to an arrest warrant alone are proposed. Some lower court decisions provide a judicial check on intrusions into the privacy of third persons. *E.g.* Fisher v. Volz, 496 F.2d 333, 333 (3d Cir. 1974) (law enforcement officers "may not constitutionally enter the home of a private individual to search for another person, though he be named in a valid arrest warrant in their possession, absent probable cause to believe the suspect is presently within at the time"). *See* Wallace v. King, 626 F.2d 1157 (4th Cir. 1980). *See also* the recent Supreme Court decision in Steagald v. United States, 49 U.S.L.W. 4418 (1981). Nevertheless, the possibility for excessive intrusion under an arrest warrant persists—not only are *Fisher v. Volz* and *Wallace v. King* not binding beyond their jurisdictions, but they also allow the officer to determine for himself probable cause to believe the suspect present. The protection of third persons, including members of the suspect's family, deserves a magistrate's judgment that a suspect is likely to be found on the third person's premises. *See* Note, *supra* note 37, at 675 n.113.

106. Thus an officer could be challenged at a hearing to show what led him to believe the suspect was at home. If the officer seized evidence in plain view after an unreasonable entry to arrest, that evidence could be suppressed under the exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961). While it would be patently absurd to apply the exclusionary rule to exclude the arrestee himself when entry occurred without reason to believe him at home, the rule would nevertheless be an effective deterrent against entries to search that are thinly disguised as entries to arrest.

107. 445 U.S. at 583.

108. The United States Circuit Courts' tests have ranged from a totality of the circumstances test in United States v. Flickinger, 573 F.2d 1349, 1354-56 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978), to less stringent tests, as in United States v. Rumpf, 576 F.2d 818 (10th Cir.), *cert. denied*, 439 U.S. 893 (1978); United States v. Williams, 573 F.2d 348 (5th Cir. 1978); United States v. Easter, 552 F.2d 230 (8th Cir.), *cert. denied*, 434 U.S. 844 (1977). *See generally* Note, *supra* note 37, at 676-85.

109. *See* text accompanying notes 110-11 *infra*.

stances against several factors such as those catalogued in *Dorman*.[110] Nevertheless, while the *Dorman* list is comprehensive, it posits no test. No minimum number of factors qualify a situation as exigent; no standard for balancing is suggested. Further, it is unrealistic to expect an officer faced with an apparent emergency to take pause and ponder how the situation measures up against *Dorman*'s list.[111] If the uniform protection of persons against unreasonable searches and seizures as promised by the fourth amendment is the Court's intention, then it would have been better to define more exactly the limits to "exigent circumstances." Until the Court more adequately defines that phrase, it will be subject to abuse as a general license to enter and arrest with neither warrant nor consent; and, from another point of view, it will be a thorn in the side of police, who seek to produce admissible evidence.[112]

A fourth problem for the Court's new stand on home arrests is determining when consent will validate a warrantless home arrest. Consent under search and seizure doctrine is based on voluntariness as determined from the totality of the circumstances.[113] This test is complicated by such nebulous factors as the nature of the officer's questions and the state of mind of the suspect or third person assenting to entry.[114] The suspect who is located within the sanctity of his dwelling and is faced with the knock and announcement of police at his door must either surrender at the threshold "voluntarily" or risk a forcible entry on the officer's presumption that the suspect is home and hiding, which will lead to the inevitable search incident to arrest. That such a surrender is consensual only in terms of a critically impaired capacity for self-determination cannot be doubted.[115] The Supreme Court has added to the

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110. *See* text accompanying note 82 *supra*.

111. Justice White asserted that the failure to define exigent circumstances will force police officers to make subtle distinctions on their beats that elude even judges in their chambers, sometimes resulting in delayed arrests and other times jeopardizing the admissibility of evidence. 445 U.S. at 619 (White, J., dissenting). One reasonable suggestion for a more workable definition of exigent circumstances proposes entry in three situations: where the suspect might escape, where he poses an immediate danger to others, or where he will destroy evidence. Further, a time limit of eight hours should define any need for "immediate" police action. Note, *supra* note 37, at 681.

112. *See also* Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, *supra* note 64, at 180-81, 181 n.117.

113. *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973):

> [W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it [the State] demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances . . . .

The *Schneckloth* criterion for consent to search itself was based on a voluntariness test for confessions. *See* Culombe v. Connecticut, 367 U.S. 568, 603 (1961).

114. "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." 412 U.S. at 229.

115. *See, e.g.*, Johnson v. United States, 333 U.S. 10 (1948), in which knock and notice were deemed sufficiently coercive to vitiate the subsequent consent to enter: "[E]ntry . . . was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Id.* at 13.

Equally problematic is the situation illustrated by *Riddick*, where a third person has consented to entry. *See* text accompanying notes 14-19 *supra*. The consent rule in search and seizure cases is based upon the relationship between the third person and the place being searched.

infirmities of the consent exception by repeatedly holding that, because of the practical value of consensual searches[116] and the duty of each citizen to aid however he can in law enforcement,[117] the suspect need not be advised of his right to refuse consent.[118] Accordingly, when consent substitutes for an arrest warrant to permit entry in home arrests and such advice is absent, it is particularly important to scrutinize the facts for signs of coercion or duress, however subtle, so that due process will not be denied through an unintentional exposure of self-incriminating evidence.[119]

A fifth problem is created by having different rules for each side of the fine line between public and private premises. This issue was addressed in *United States v. Santana*,[120] where a warrantless arrest on probable cause was effected in the suspect's home after a chase from the front porch into the foyer.[121] The Supreme Court held that, had the suspect been apprehended on her doorstep, the arrest would have been public: there can be no reasonable expectations of privacy once one crosses the threshold into public view.[122] Though it did not mention *Santana*, the *Payton* Court agreed with the *Santana* distinction between public and private that accords with search and seizure precedent, where that line has been drawn between objects in plain

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"[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." United States v. Matlock, 415 U.S. 164, 170 (1974). *Matlock* defined common authority as resting not on

> the mere property interest the third party has in the property, . . . [but on] mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id. at 171 n.7. Thus, when the person consenting co-owns or co-inhabits the premises with the suspect, consent to search is virtually unimpeachable. But when a small child permits entry, as in *Riddick*, consent is clearly absent and the entry must be supported by either a warrant or exigent circumstances. Neither was present in *Riddick*.

Consent may be difficult to establish when police gain permission to conduct a search by virtue of their official status. *E.g.*, Bumper v. North Carolina, 391 U.S. 543, 548-50 (1968) (no consent when third person allowed search after officers announced they had search warrant); *see* United States v. Page, 302 F.2d 81, 83-84 (9th Cir. 1962) ("The consent must be 'unequivocal and specific' and 'freely and intelligently given'. . . . Coercion is implicit in situations where consent is obtained under color of the badge . . . . The government's burden is greater where consent is claimed to have been given while the defendant is under arrest."). The *Watson* Court qualified this approach when it viewed the totality of circumstances and found that the arrestee, who was experienced with police procedure, of normal intelligence, and able to exercise free choice while under arrest in a public place, freely consented to a search. "[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search." 423 U.S. at 424-25.

116. Schneckloth v. Bustamonte, 412 U.S. 218, 232 (1973).

117. Miranda v. Arizona, 384 U.S. 436, 477-78 (1966).

118. 412 U.S. at 232. *See also* United States v. Legato, 480 F.2d 408 (5th Cir.), *cert. denied*, 414 U.S. 979 (1973) and United States v. Hall, 565 F.2d 917 (5th Cir. 1978).

119. *See* Escobedo v. Illinois, 378 U.S. 478 (1964); Brown v. Mississippi, 297 U.S. 278 (1936).

120. 427 U.S. 38 (1976).

121. *Id.* at 40.

122. *Id.* at 43. When, as in *Santana*, escape across the doorstep is "solely a product of police conduct," Justice Marshall would hold that circumstances thus made exigent cannot validate warrantless arrest. *Id.* at 48 (Marshall, J., dissenting). Justice Stevens, however, found the possibility of the destruction of evidence by itself sufficiently exigent to justify the arrest. *Id.* at 44 (Stevens, J., concurring.).

view or in a public place and those on private premises.[123] A significant task for the Court in the future will be to define more precisely how the line between public and private is to be drawn.

In sum, the Court's decision in *Payton v. New York* puts twentieth century judicial precedent before the precepts of history and concludes that fourth amendment protections should be identical for warrantless home arrests and for the search and seizure of property. The reasons for this viewpoint are twofold: first is the obscurity surrounding attitudes toward warrantless home arrests at common law[124] and at the time the fourth amendment was drafted.[125] While the Court generally has indicated that logic "must defer to history and experience,"[126] the hegemony dissolves when, as with warrantless home arrests, history and experience give mixed signals rather than a steady beam of a consistently accepted practice.[127] Because of the current Court's reluctance to legislate,[128] the Framers' intent is normally considered vital in construing the Constitution; but in this instance we are left with logic alone to plumb that intent—to determine whether the fourth amendment was meant simply as a restriction on warrants or as a broader assertion of the right to privacy.[129] Logic leads us to presume the latter interpretation. For if the Framers meant to assure security against arbitrary warrants, they could not simultaneously have meant to preserve the constable's authority arbitrarily to find probable cause to support a home arrest. Such a paradoxical interpretation would make the amendment's guarantee of the right to be secure in one's *person* ring hollow. If *Watson* was correct in stating that warrantless public arrests were meant to endure under the fourth amendment, then the most reasonable interpretation of the amendment's reference to security from *personal* seizure is that it offers protection within one's dwelling, a protection *Payton v. New York* revitalizes.

The *Payton* Court's analysis of warrantless home arrests in terms of search and seizure precedent also is logical, particularly since there is no clear historical support such as exists for warrantless public arrests. Search and

123. *Id.* at 43. The Court described this public/private distinction in G. M. Leasing Corp. v. United States, 429 U.S. 338, 354 (1976) (quoted at 445 U.S. at 587):

> It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.

124. *See* notes 27-32 *supra*.

125. *See* text accompanying notes 33-34 and note 33 *supra*.

126. United States v. Watson, 423 U.S. 411, 429 (1976) (Powell, J., concurring).

127. The *Payton* Court indicated agreement with this view by quoting Justice Powell's concurring opinion in *Watson*. 445 U.S. at 601.

128. This reluctance obviously stems from the separation of powers doctrine and is exemplified by decisions wherein the Court seeks to construe federal statutes by scrutinizing legislative history. *See, e.g.*, Cort v. Ash, 422 U.S. 66 (1975); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979).

129. It is important to keep in mind the caveat in Katz v. United States that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,' " for it also offers protection from the mental harassment, including annoyance and humiliation, that is part of any government intrusion, whether public or private. 389 U.S. at 350.

seizure law has not merely defined procedural rules; it has developed fundamental principles under the fourth amendment. Therefore, if arrest is "quintessentially a seizure,"[130] then it follows "that the constitutional provision should impose the same limitations upon arrests that it does upon searches."[131]

The second reason for stressing contemporary judicial precedent over history in the case of warrantless home arrests is the Court's treatment of the Constitution as an unfinished document, one that reflects the attitudes of each generation applying it, not one fossilized in a colonial frame of reference.[132] While such a perspective appears to conflict with the more recent reluctance of the Court to legislate, in cases of warrantless home arrests it is appropriate. Unless history dictates otherwise,[133] the more consistent our reading of the fourth amendment for each issue it concerns, the more stable and strong our law becomes, and the more certain its protections.

Despite the appropriateness of stressing contemporary search and seizure precedent over history, the Court's perspective creates several areas of controversy. Some say the Court has gone too far: requiring a warrant for all routine home arrests may force police to difficult, precipitous decisions as to whether impending danger or emergency will vindicate a warrantless intrusion and involve them in lengthy litigation if they decide wrongly.[134] Conversely, the Court may not have gone far enough. In leaving undefined and unexamined such elements of entry and arrest as reasonable cause to believe the suspect at home, consent of the accused or a third person, and exigent circumstances, the Court arguably encourages impetuous home arrests by allowing easily manipulated legal excuses.

These problems will, of course, be addressed by lower courts and in federal and state statutes, which for the most part will have to be amended to accord with *Payton*. This was surely the Court's intention—to make the law, but not, in one fell swoop, all the rules. The decision is otherwise sound in concluding that the fourth amendment right to be secure in one's person, house, papers, and effects merits the same treatment for seizure of persons as for seizure of evidence.[135] Further, the decision makes more meaningful the

130. United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring).

131. *Id.* Justice Powell suggests that perhaps arrest standards should be more stringent than search standards, an arrest being not the mere inconvenience a search can be, but a "serious personal intrusion." *Id.* This tips the balance described in the "symmetry" argument to a position opposite to that of the New York Court of Appeals in *People v. Payton*. *See* text accompanying notes 21-22 and 75 *supra*.

132. *See* note 33 and accompanying text *supra*.

133. Even given a strong historical case, obeisance to eighteenth century ways does not necessarily follow. *See* Note, *supra* note 37, at 660-61.

134. *See* 445 U.S. at 619 (White, J., dissenting). *See also* note 111 *supra*.

135. It is a truism worth mentioning that the Framers did not intend the present body of search and seizure law any more than they intended its application to home arrests. It may be argued strongly, however, that they did intend the two kinds of intrusions to be treated alike. This intention is suggested not only by the single-phrase structure of the amendment, but also by the amendment's purpose to restrict writs of assistance, which allowed arrests as well as searches and seizures. *See* 14 AM. CRIM. L. REV., *supra* note 33, at 212 n.129; *see also* note 33 *supra*.

"reasonable expectation of privacy"[136] all citizens enjoy within their homes. *Payton* provides assurance that, when neither danger nor emergency motivates the officer, a warrant must be obtained for a home arrest, and that a warrant will be issued only after probable cause (as to who is suspected and why) is sworn to and determined sufficient by a disinterested magistrate. Police officers may on occasion exceed in practice the authority the Court here restricts; suspects may on occasion slip the dragnet or abscond with the evidence. But in general, the Court's requirement of a warrant for routine home arrests strikes an acceptable balance between a vital constitutional right and the public's interest in effective law enforcement.

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136. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).