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Warrantless Home Arrests and Police Liability Under Utah Law

I. INTRODUCTION

Well-intentioned law enforcement officers in Utah beware. The forced entry statute found in section 77-7-8 of the Utah Code violates the Fourth Amendment of the United States Constitution. The plain language of this statute misleads peace officers as to the scope of their authority to make warrantless home arrests. Since 1980, three decisions by the United States Supreme Court have established constitutional protections against warrantless home arrests,¹ yet section 77-7-8 continues to authorize peace officers to force entry into a building to make a warrantless arrest, even if the building in question is a dwelling and even if there are no exigent circumstances² present. Consequently, police officers in the field, relying on section 77-7-8, might misunderstand the scope of their authority and commit unnecessary, unknowing violations of the Fourth Amendment by making unjustified warrantless home arrests. A decision by the United States Court of Appeals for the Tenth Circuit suggests that officers who act in good faith and precisely according to the rules articulated by the Utah Legislature might find themselves subject to civil liability without the protections of qualified immunity, making them personally liable for any damages.³

To explore this potential police liability trap, Part II reviews three modern United States Supreme Court cases that govern warrantless arrests within the home. Part III identifies the conflict between Utah law and current Fourth Amendment case law and analyzes the possible outcomes of a constitutional challenge to

1. See *Payton v. New York*, 445 U.S. 573 (1980); *Steagald v. United States*, 451 U.S. 204 (1981); *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

2. Courts define exigent circumstances as “those ‘that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.’” *State v. Beavers*, 859 P.2d 9, 18 (Utah Ct. App. 1993) (quoting *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984)).

3. See *Howard v. Dickerson*, 34 F.3d 978 (10th Cir. 1994); *see also infra* Part III.B.

section 77-7-8. Part III also examines the practical problems that may result from officers exercising authority under the current version of section 77-7-8. In Part IV, this Note proposes a revision of Utah's forced entry statute and provides a model that incorporates modern search and seizure jurisprudence. Part V gives a brief conclusion.

II. CONSTITUTIONALITY OF WARRANTLESS HOME ARRESTS

The Fourth Amendment provides protection from unreasonable governmental intrusion:

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.⁴

Since 1980, three United States Supreme Court decisions have shaped constitutional law regarding warrantless home arrests and have defined the level of protection that the Fourth Amendment provides a residence. Collectively, the cases impose significant limitations upon law enforcement officers seeking to make arrests within dwellings. *Payton v. New York*⁵ was the first of these cases to be decided.

A. *Payton v. New York*

In *Payton v. New York*, the United States Supreme Court held that, absent exigent circumstances, the protections of the Fourth Amendment prohibit police from entering a suspect's dwelling to make a warrantless arrest.⁶ In making its ruling, the Court examined two cases in which police officers had probable cause to make felony arrests but entered the suspects' homes without first obtaining arrest warrants.

In the first case, officers forced entry into the apartment of suspected murderer Theodore Payton. Having developed probable cause, officers arrived at the residence with the intent to arrest Payton without a warrant for the killing of a gas station manager,

4. U.S. CONST. amend. IV.

5. *Payton*, 445 U.S. 573.

6. *Id.*

which took place two days earlier.⁷ Upon arrival, the officers discovered lights on and music playing, but no one would answer the door.⁸ The officers forced entry, and they discovered that the apartment was unoccupied. Although unable to arrest Payton, officers seized as evidence an ammunition casing observed in plain view.⁹

The trial judge denied Payton's motion to suppress the evidence and ruled that exigent circumstances justified officers entering the apartment without announcing their presence.¹⁰ Finding statutory authorization for the entry, the judge did not determine whether the officers were justified in failing to obtain an arrest warrant prior to entry.¹¹ The appellate division affirmed.¹²

The second case concerned a warrantless entry of Obie Riddick's home.¹³ Officers had probable cause to believe that Riddick committed two armed robberies. When officers knocked on the door, Riddick's son opened it. Upon seeing Riddick sitting on a bed, officers entered and arrested him. Officers discovered drugs and paraphernalia in the nearby dresser.¹⁴

Riddick's arrest occurred more than four years after the arrest of Theodore Payton, and the New York statute had since been revised.¹⁵ The trial court refused to suppress the evidence, finding

7. *Id.* at 576.

8. *Id.*

9. *Id.* at 576-77.

10. *Id.* at 577 n.6. Officers were authorized to force entry to make a felony arrest if they announced their presence and purpose. The trial court dispensed with this requirement based on its finding of exigency. *See id.* n.7.

11. *Id.* at 578.

12. *Id.*

13. *Id.*

14. Incident to arrest, police officers are permitted to search the arrestee's person, as well as the area within his immediate control, without a warrant. *Chimel v. California*, 395 U.S. 752, 763 (1969).

15. *Payton*, 445 U.S. at 578-79. Payton was arrested in 1970, and the applicable New York statute was revised in 1971, three years prior to Riddick's arrest in 1974:

New York Crim. Proc. Law § 140.15(4) (McKinney 1971) provides, with respect to arrest without a warrant:

In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.

that the new version of the statute authorized the entry, and the Appellate Division affirmed.¹⁶ New York's highest court simultaneously addressed the appeals of both Payton and Riddick.

I. New York Court of Appeals review of Payton cases

In a 4–3 decision, the New York Court of Appeals affirmed both convictions and determined that entry of a suspect's home to effect a warrantless arrest is constitutional.¹⁷ Drawing a distinction between entering a dwelling to search and entering a dwelling to arrest an occupant, the majority found that there is less intrusion of privacy when entry is made for purposes of arrest.¹⁸ The majority found support for this distinction in both historic and modern contexts.¹⁹

Section 120.80, governing execution of arrest warrants, provides in relevant part:

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:

- (a) Result in the defendant escaping or attempting to escape; or
- (b) Endanger the life or safety of the officer or another person; or
- (c) Result in the destruction, damaging or secretion of material evidence.

5. If the officer is authorized to enter premises without giving notice of his authority and purpose, or if after giving such notice he is not admitted, he may enter such premises, and by a breaking if necessary.

Id. at 578 n.9.

16. *Id.* at 578–79.

17. *Id.* at 579.

18. *Id.* at 579–80. The majority opinion explained that a distinction must be drawn between entering a residence to conduct a search and entering to apprehend a criminal:

At least as important, and perhaps even more so, in concluding that entries to make arrests are not “unreasonable”—the substantive test under the constitutional proscriptions—is the objective for which they are made, viz., the arrest of one reasonably believed to have committed a felony, with resultant protection to the community. The “reasonableness” of any governmental intrusion is to be judged from two perspectives—that of the defendant, considering the degree and scope of the invasion of his person or property; that of the People, weighing the objective and imperative of governmental action. The community's interest in the apprehension of criminal suspects is of a higher order than is its concern for the recovery of contraband or evidence; normally the hazards created by the failure to apprehend far exceed the risks which may follow nonrecovery.

Id. at 580–81 n.13 (quoting *People v. Payton*, 380 N.E.2d 224, 228–29 (N.Y. 1978)).

19. *Id.* at 581 n.14 (referring to “apparent historical acceptance in the English common law” and statutory authorization by several states to make such arrests).

The dissenting trio argued that absent exigent circumstances,²⁰ warrantless entry of a suspect's home to make an arrest violated the Fourth Amendment.²¹ Viewing entry to seize a person as a greater invasion of privacy than entry to search, the dissenters argued for heightened constitutional protection from warrantless home arrests.²²

2. *United States Supreme Court review of Payton cases*

The United States Supreme Court granted certiorari to resolve the question of whether the Fourth Amendment prohibits police from entering a suspect's home without consent to make a warrantless felony arrest.²³ After noting that “[u]nreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the [Fourth] Amendment,”²⁴ the Court looked to the purpose of the Fourth Amendment and called physical invasion of the home “the chief evil against which the wording of the Fourth Amendment is directed.”²⁵ The Court answered the question regarding warrantless home arrests in unequivocal terms:

[T]he critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: “The right of the people to

20. *See supra* note 2.

21. *Payton*, 445 U.S. at 581.

22. *Id.* at 581–82. The New York Court of Appeals dissenters acknowledged the historical and modern support for the majority position but argued that “neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented” and cannot replace proper judicial analysis. *People v. Payton*, 380 N.E.2d at 238 (Cooke, J., dissenting).

23. *Payton*, 445 U.S. at 582–83. The Court did not examine whether the entries were justified by exigent circumstances and explicitly reserved the question of whether police could enter a third party's home without an arrest or search warrant in order to arrest a person.

24. *Id.* at 585.

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

be secure in their . . . houses . . . shall not be violated.” That language unequivocally establishes the proposition that “[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.” *In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.*²⁶

The Court then conducted its own analysis of common law support for warrantless home entries and concluded that “the absence of any 17th- or 18th-century English cases directly in point, together with the unequivocal endorsement of the tenet that ‘a man’s house is his castle,’ strongly suggests that the prevailing practice was not to make such arrests except in hot pursuit or when authorized by a warrant.”²⁷ A review of recent state high court decisions revealed that, of twelve states to address the issue, only New York and Florida upheld warrantless entries for purposes of arrest in the face of direct constitutional challenges, weakening reliance upon widespread statutory authorization of the practice.²⁸

Finally, the Supreme Court dispensed with policy arguments against requiring a warrant to enter a home and explained that “an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe that the suspect is within.”²⁹ The

26. *Id.* at 589–90 (emphasis added) (citation omitted).

27. *Id.* at 598.

28. *Id.* at 599–600; *see also id.* at 575 n.4. The Court also noted that the declining trend by states to support such warrantless entries was more than a mere ten-to-two vote:

Seven state courts have recently held that warrantless home arrests violate their respective *State* Constitutions. That is significant because by invoking a state constitutional provision, a state court immunizes its decision from review by this Court. This heightened degree of immutability underscores the depth of the principle underlying the result.

Id. at 600 (citation and footnote omitted).

29. *Id.* at 603. How far this implicit authority extends is unclear. The *Payton* court gave the following explanation:

It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate’s determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen’s participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a

Court did not determine whether the arrest warrant also carried with it the authority to enter homes of third parties.

B. Steagald v. United States

Just one year later, in *Steagald v. United States*,³⁰ the Supreme Court answered the question that *Payton* did not: in order to arrest a suspect in the home of a third-party, officers must possess a search warrant, not just an arrest warrant, before entering the third-party residence absent consent or exigent circumstances.

In *Steagald*, officers were aware of an outstanding arrest warrant for fugitive Ricky Lyons. When the Drug Enforcement Administration received a tip from an informant as to the whereabouts of Lyons, it assembled an arrest team and went to the address corresponding to Lyons's supposedly temporary telephone number.³¹ Gary Steagald and another man stood outside of the home when officers arrived. When officers determined that neither of the two men were Lyons, they forced their way inside and searched the residence.³² Although the officers did not locate Lyons, they did observe what they suspected to be cocaine.³³ After obtaining a search warrant, officers discovered an additional forty-three pounds of cocaine.³⁴

Holding that the officers could rely on the Lyons arrest warrant to make entry into Steagald's home, the United States District Court

dwelling in which the suspect lives when there is reason to believe the suspect is within.

Id. at 602–03.

Thus, the blanket statement that an arrest warrant has implicit authority to enter the suspect's home is immediately preceded by reference to commission of a felony offense. It remains unclear whether the implicit authority to enter only applies to arrest warrants for felony offenses or whether it applies to all arrest warrants. Moreover, the Court states that the authority is "to enter," yet it makes no reference to forcible entry. Of course, the officers in *Payton* used crowbars to make forced entry, so it seems that the authority "to enter" includes forcible entry. Given these ambiguities, however, it is preferable for the time being to have subsection (2) of the proposal recognize the authorization of a warrant, whether explicit or implicit. *See infra* Part IV.

30. 451 U.S. 204 (1981).

31. *Id.* at 206. The informant indicated that Lyons would be available at a supplied telephone number for the next twenty-four hours. Agents received the corresponding address from the telephone company and responded to the address with an arrest team two days later.

32. *Id.*

33. *Id.*

34. *Id.* at 207.

denied Steagald's motion to suppress the evidence, and Steagald was convicted of federal drug charges.³⁵ The Fifth Circuit affirmed on appeal.³⁶

The United States Supreme Court granted certiorari to resolve the conflict among the circuits as to whether an arrest warrant permitted law enforcement to enter the homes of persons not named in the warrant in order to apprehend the named suspect.³⁷ As in *Payton*, the Court rejected arguments that common law and policy reasons mandate authority to make such warrantless entries.³⁸ The Court reasoned that an arrest warrant, while protecting the right of the named suspect from an unreasonable seizure, did nothing to shield third-party residences from unreasonable searches.³⁹ To rule otherwise could create significant potential for abuse by police and could allow arrest warrants to "serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place."⁴⁰

In sum, *Payton* and *Steagald* combine to demonstrate the force of the presumption that a warrantless home entry is unreasonable. Absent consent or exigent circumstances, police officers must obtain an arrest warrant in order to enter a suspect's home to make an arrest. When the named suspect of an arrest warrant is within a third-party's home, officers must obtain a search warrant to justify entry. The Court soon made it clear, however, that probable cause, when coupled with exigent circumstances, does not automatically justify warrantless home arrests in all situations.

C. *Welsh v. Wisconsin*

In *Welsh v. Wisconsin*,⁴¹ the United States Supreme Court further limited police authority to make in-home warrantless arrests. In *Welsh*, a witness observed a car swerving along the road before it came to a stop in an open field.⁴² No personal injury or property

35. *Id.*

36. *Id.*

37. *Id.*; see also *id.* n.3.

38. *Id.* at 217-22.

39. *Id.* at 213.

40. *Id.* at 215. "Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances." *Id.*

41. 466 U.S. 740 (1984).

42. *Id.* at 742.

damage occurred. The driver exited the car and walked home.⁴³ When officers responded, they discovered that the abandoned car was registered to the defendant, Edward G. Welsh, who lived within walking distance of the scene.⁴⁴ Officers went to the residence, gained entry, and went into the bedroom where they found Welsh lying in bed.⁴⁵ The officers arrested the defendant without a warrant for driving while intoxicated.⁴⁶ At the time, the offense of driving while intoxicated was classified as a non-jailable traffic offense, punishable by fine only.⁴⁷ The Court found Welsh's warrantless arrest in the home to be unlawful:

[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, *application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.*⁴⁸

Thus, a warrantless arrest in the home is less likely to be justified by exigent circumstances if the underlying offense is minor.

This limitation is not clearly defined, and officers should be aware that even when probable cause to arrest is coupled with apparently exigent circumstances, a warrantless home arrest for a minor offense might be viewed as a violation of the Fourth Amendment under the reasoning in *Welsh*.⁴⁹

43. *Id.*

44. *Id.*

45. *Id.* at 743.

46. *Id.*

47. *Id.* at 746.

48. *Id.* at 753 (emphasis added) (citation omitted).

49. Because the holding in *Welsh* has yet to be clearly defined, it would be far more difficult to incorporate it into a revision of section 77-7-8. This Note focuses primarily on the need to revise the statute to incorporate the more clearly established holdings in *Payton* and *Steagald*, but *Welsh* is discussed because it represents a constitutional limitation on the exigent circumstances exception to the warrant requirement. Should the scope of *Welsh* be clarified in the future, it may be necessary to incorporate it into the forced entry statute as well because qualified immunity will be denied if *Welsh* is viewed as a clearly established right. *See infra* notes 79, 81, 91.

III. UTAH'S STATUTORY CONFLICT WITH MODERN CASE LAW

Twenty years have passed since the United States Supreme Court promulgated the rules in *Payton*, *Steagald*, and *Welsh*. Utah's forced entry arrest statute plainly conflicts with these points of well-settled constitutional law and survives only because it has yet to be challenged directly.⁵⁰ Section 77-7-8 of the Utah Code reads:

To make an arrest, a private person, if the offense is a felony, and *in all cases*, a peace officer, may break the door or window of the *building* in which the person to be arrested is, or in which there are reasonable grounds for believing him to be. Before making the break, the person shall demand admission and explain the purpose for which admission is desired. Demand and explanation need not be given before breaking under the exceptions in Section 77-7-6⁵¹ or where there is reason to believe evidence will be secreted or destroyed.⁵²

The plain language of this statute allows police officers to make forced entry into a home to make an arrest.⁵³

Utah law grants officers the authority to arrest in three situations: (1) when an offense is committed in the officer's presence; (2) when the officer has reasonable cause to believe the suspect committed a felony or class A misdemeanor; and (3) when the officer has reasonable cause to believe that the suspect committed an offense and is likely to flee, to harm property or another person, or to destroy evidence.⁵⁴ Thus, an officer with probable cause to believe

50. The only citation of section 77-7-8 in Utah case law since *Payton* is *State v. Webb*, 790 P.2d 65 (Utah Ct. App. 1990). In *Webb*, the defendant challenged statutory compliance rather than constitutionality, and the court refused to entertain the argument based on the defendant's failure to properly raise the issue below. *Id.* at 77-78.

51. Section 77-7-6 makes the statute's demand and explanation, or "knock and announce" provision, inapplicable where exigent circumstances are present.

52. UTAH CODE ANN. § 77-7-8 (1980) (emphasis added). This current version was enacted in 1980.

53. See *infra* note 56 and accompanying text.

54. UTAH CODE ANN. § 77-7-2 (1999) reads:

A peace officer may make an arrest under authority of a warrant or may, without warrant, arrest a person:

- (1) for any public offense committed or attempted in the presence of any peace officer; "presence" includes all of the physical senses or any device that enhances the acuity, sensitivity, or range of any physical sense, or records the observations of any of the physical senses;

that the suspect has committed a felony or class A misdemeanor “may break the door or window of the building in which the person to be arrested is, or in which there are reasonable grounds for believing him to be.”⁵⁵ Additionally, even minor offenses, when committed in the officer’s presence, would justify a forcible entry and a warrantless arrest, and the statute makes no distinction between a dwelling and any other type of building.

As written, section 77-7-8 is facially unconstitutional, and even the nation’s highest court has viewed it as such. The United States Supreme Court in *Payton* included Utah’s forced entry statute as among the “majority of the States that . . . permit warrantless entry into the home to arrest even in the absence of exigent circumstances.”⁵⁶ As presently worded, the Utah forced entry statute suffers from the same fatal flaw as the New York statute struck down in *Payton*: it grants statutory authority to effect a warrantless arrest in the home absent consent or exigent circumstances.

Examining the history of the forced entry statute provides some clues as to why it conflicts with modern case law. The Utah Legislature enacted the current version of the statute in 1980. The statutory language, however, predates Utah’s statehood.⁵⁷ Enacted by the Governor and Legislative Assembly of the Territory of Utah on February 22, 1878, the first version of Utah’s forced entry statute looked remarkably similar to the current one:

(2) when he has reasonable cause to believe a felony or a class A misdemeanor has been committed and has reasonable cause to believe that the person arrested has committed it;

(3) when he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:

(a) flee or conceal himself to avoid arrest;

(b) destroy or conceal evidence of the commission of the offense; or

(c) injure another person or damage property belonging to another person.

55. UTAH CODE ANN. § 77-7-8 (1980).

56. *Payton v. New York*, 445 U.S. 573, 598 (1980); *see id.* at 598–99 n.46. Utah was one of twenty-three additional states that permitted by statute the type of warrantless arrest struck down in *Payton*. Other courts have agreed with the *Payton* Court’s survey. *See Patzner v. Burkett*, 779 F.2d 1363, 1370 (8th Cir. 1985) (“[I]n 1980, 24 states . . . permitted warrantless arrests even absent exigent circumstances . . .”).

57. Utah became a state in 1896. 1 WAYNE STOUT, HISTORY OF UTAH 520–21 (1967) (quoting *Birth of a New State*, DESERET NEWS, Jan. 5, 1896, at 1).

To make an arrest, if the offense is a felony, a private person, if any public offense, a peace officer, may break open the door or window in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.⁵⁸

Essentially, the current unconstitutional version has not been revised in any substantial way since being crafted more than 120 years ago. While it is arguable that the statute has been in conflict with constitutional principles since its inception, the holdings in *Payton* and *Steagald* make clear that, as presently worded, section 77-7-8 cannot sustain a direct constitutional challenge today.

A. Possible Outcomes of a Constitutional Challenge

A constitutional challenge to Utah's forced entry statute can have only one of two outcomes: either the Utah Supreme Court will strike the statute down as unconstitutional *per se*, or the court will read in an implied requirement of exigent circumstances with respect to warrantless home arrests.

1. Unconstitutional per se

Because the language of section 77-7-8 clearly conflicts with the holdings of *Payton* and *Steagald*, the Utah Supreme Court should strike it down as unconstitutional on its face.

The Utah Supreme Court has explained its duty when examining a statute that conflicts with established constitutional protections: "The statute should not be stricken down nor applied other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason, or inoperable, *or it contravenes some basic constitutional right.*"⁵⁹ Thus, the statute in question, although presumed valid,⁶⁰ can be declared unconstitutional when it directly conflicts with constitutional liberties.

Moreover, "[w]hen state action impinges on fundamental rights, due process requires standards which clearly define the scope of permissible conduct so as to avoid unwarranted intrusion on those

58. 1878 Utah Laws 23d Session, Criminal Procedure Title II, Ch. V, § 82.

59. *Gord v. Salt Lake City*, 434 P.2d 449, 451 (Utah 1967) (emphasis added).

60. *Id.*

rights.”⁶¹ Thus, “[a] statute which affects fundamental liberties is unconstitutional if it is so vague that ‘men of common intelligence must necessarily guess at its meaning’”⁶² The court has noted that “[v]agueness is particularly repugnant if the statute could be construed to permit illegal interference with individual liberties.”⁶³

Section 77-7-8 is unconstitutional on its face. By using broad language, the statute conveys power to peace officers to force entry into any building, including a home, when there is intent to make an arrest. Working in conjunction with section 77-7-2, the forced entry statute mirrors the New York statute relied upon by the officers in *Payton*.⁶⁴ As it currently reads, section 77-7-8 can easily “be construed to permit illegal interference with [the] individual liberties” established in *Payton* and *Steagald*.⁶⁵

The statute is vague, sweeps too broadly, and authorizes warrantless entries that violate the Fourth Amendment. A plain reading of the statute lends itself to erroneous interpretation by officers, who could reasonably assume that their arrest powers extend further than *Payton*, *Steagald*, and *Welsh* permit. Moreover, the United States Supreme Court itself apparently viewed the Utah statute as authorizing unconstitutional arrests.⁶⁶

If a direct constitutional challenge is made to section 77-7-8, the Utah Supreme Court should therefore declare it unconstitutional on its face.⁶⁷ Nevertheless, the court could elect to uphold the statute by looking beyond its text.

61. *In re Boyer*, 636 P.2d 1085, 1087–88 (Utah 1981).

62. *Id.* at 1088 (quoting *State v. Packard*, 250 P.2d 561, 563 (Utah 1952)).

63. *Id.* The court distinguished, however, between vagueness and “facial imprecision in statutory terms,” finding the former sufficient cause to declare a statute unconstitutional but not necessarily the latter. *See id.* (citing *Roth v. United States*, 354 U.S. 476 (1957)).

64. *See supra* notes 10, 15. The NEW YORK CODE OF CRIMINAL PROCEDURE authorized warrantless arrests for felony offenses when officers have probable cause to believe the suspect committed the offense. *See Payton*, 445 U.S. at 577 n.6. Combined with authority to “break open an outer or inner door or window of a building,” this section granted statutory authority for the warrantless entry to arrest Theodore Payton in his home for murder. *Compare id.*, with *supra* notes 54, 55 and accompanying text.

65. *See In re Boyer*, 636 P.2d at 1088.

66. *See supra* note 56 and accompanying text.

67. *See Nowers v. Oakden*, 169 P.2d 108, 112 (Utah 1946) (“It is not the province of courts to substitute what they think ought to be the law for the ambiguous or indefinite terms of the legislature. Rather the court should declare such an uncertain act invalid and leave to the legislature the task of clarifying the enactment.”).

2. Upheld through a reading that implies mandatory compliance with modern case law

The Utah Supreme Court could uphold section 77-7-8 if it read into the statute an implied mandatory compliance with *Payton*, *Steagald*, and *Welsh*.

When a statute is being examined for constitutionality, the court prefers to apply an alternative interpretation of the statute and to uphold the statute's constitutionality where possible.⁶⁸ Conceivably, the court could construe section 77-7-8 as permitting forced entry only when such entry is made to conduct a lawful arrest. The court could then note that absent consent or exigent circumstances, forced entry of a dwelling to make a warrantless arrest is not authorized under the statute because such an arrest has been declared unlawful in *Payton*.

The Court of Appeals of Ohio used this alternative interpretation to uphold a similar forced entry statute.⁶⁹ The Ohio statute in question authorized law enforcement officers to forcibly enter a dwelling or building “[w]hen making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant.”⁷⁰ The court upheld the statute:

The statute does not provide, as the appellants state, that an officer may forcibly enter a house to make a warrantless arrest absent exigent circumstances. The statute simply provides when an officer may use force to enter a home to make an arrest, execute a warrant for the arrest of a person, or execute a search warrant. The statute does not negate the requirement that the arrest or execution of a warrant be lawful, *i.e.*, not in violation of the Fourth Amendment. Therefore, [the statute] permits an officer to use force to enter a home where first, the officer has a right to enter the home to make an arrest or conduct a search, either by way of a warrant, or by way of one of the exceptions to the prohibition of warrantless entries as delineated by the courts; and second, the officer has given notice of his intention to make such arrest or search, and he is refused

68. See *Wagner v. Salt Lake City*, 504 P.2d 1007, 1012 (Utah 1972) (“It is a well-established rule of constitutional law that where there are two alternatives as to the interpretation of a statute, one of which would make its constitutionality doubtful and the other would render it constitutional, the latter will prevail.”).

69. *City of Middleburg Heights v. Theiss*, 501 N.E.2d 1226 (Ohio Ct. App. 1985).

70. *Id.* at 1230 (quoting OHIO REV. CODE ANN. § 2935.12 (West 1960)).

admittance. In light of this rational interpretation, we conclude that [the statute] is not unconstitutional.⁷¹

By implying that the officer may only enter with a warrant or under an exception to the warrant requirement, the Court of Appeals of Ohio salvaged the constitutionality of the statute.

The Utah Supreme Court could adopt a similar interpretation of section 77-7-8 by viewing the statute as only allowing forced entry “in all cases” where the arrest being made is lawful. Further, the court could conclude that, because absent consent or exigent circumstances a warrantless home arrest is unlawful under *Payton*, such action by police would not be authorized under the statute. Such an interpretation relies on circular reasoning,⁷² and this does little to assist officers in understanding the constitutional limits of arrest powers because officers must comply with rules and limitations that are not expressed in the statute’s text. Thus, while this type of interpretation could be applied to section 77-7-8, the better reasoned approach would be to simply declare the statute unconstitutional.⁷³

B. Implications of the Conflict

Regardless of the court’s decision in a direct constitutional challenge, the problematic implications of section 77-7-8 will persist unless and until the Utah Legislature revises the statute. Police officers might easily misunderstand the current statute and the limitations on their authority. In addition to leading to potentially enormous evidentiary errors,⁷⁴ the misleading statute creates two

71. *Id.* at 1231.

72. This type of interpretation declares that such a statute authorizes forcible entry only where the arrest is lawful and that lawful arrests do not occur when forced entry is not authorized.

73. *See supra* Part III.A.1.

74. As *Payton* demonstrates, evidence seized upon unlawful forced entry into a residence is inadmissible at trial. *Payton v. New York*, 445 U.S. 573 (1980). Because the officers in *Payton* entered unlawfully, the plain view evidence was fruit of the poisonous tree and therefore inadmissible. *See* Matthew F. Bogdanos, *Search and Seizure: A Reasoned Approach*, 6 PACE L. REV. 543, 564 (1986).

A hypothetical example demonstrates the potential magnitude of a *Payton* violation with respect to plain view evidence. Suppose that officers in Utah are investigating the murder of a motel clerk. The officers develop probable cause to believe that John Doe committed the murder, and when they arrive at Doe’s apartment, they see him seated at the kitchen table in a neighbor’s apartment. Doe and his neighbor, a convicted felon with whom the officers are

significant problems. First, police officers may be subjected to civil liability for mistakenly violating the constitutional rights of others. Second, by misleading those who operate under it, section 77-7-8 fails to clearly protect the well-settled Fourth Amendment guarantees of Utahns. In other words, the statutory language of section 77-7-8 creates a lose-lose situation for both officers and citizens by setting the stage for unnecessary and unknowing constitutional violations.

A Utah peace officer might easily misunderstand his arrest power under section 77-7-8 to be far broader than *Payton* and *Steagald* allow. Recognizing that he has probable cause to believe that a suspect has committed a felony, the officer can then assume that the statute allows him to force entry into any "building" in order to make the intended arrest. On its face, the statute sweeps too broadly and creates a trap for even well-intentioned officers who strive to operate within it.

The Utah Legislature must revise the section 77-7-8 to provide needed guidance and to prevent police officers from misunderstanding the limitations of their arrest powers. Police officers are expected to know and understand the law and the limitations on their authority. Statutory provisions establish guidelines that govern minimum age and training requirements before a person can be certified as a peace officer in the State of Utah.⁷⁵ There are statutes that define when the use of deadly force by an officer in the course of duty is justified and when an officer can

familiar, are playing cards. Unfortunately, the officers violate *Payton* and *Steagald* by making a warrantless arrest after forcing entry into the neighbor's apartment. As the officers enter, they conduct a routine protective sweep of the premises to ensure they have accounted for all occupants. One officer notices a hallway closet door is open. Inside the closet, in plain view, the officer sees the body of an eight-year-old girl who was reported missing from a neighboring town just four days earlier. The abduction investigation had been completely unfruitful, and officers had no previous information that might have implicated Doe or his neighbor in the kidnapping. In this situation, the only piece of evidence linking Doe's neighbor to the missing girl is the girl's body itself. If the body is suppressed because of the *Payton* violation, prosecutors may never be able to convict the neighbor of the abduction and murder. Although this hypothetical is admittedly extraordinary, it demonstrates that the evidentiary ramifications of unlawful home arrests could be enormous. A loss of valuable evidence in any case, if resulting from a good faith effort by an officer acting under a reasonable interpretation of section 77-7-8, would be even more tragic because it might have been avoided had the state legislature revised the statute.

75. See Chapters 6 and 13 of Title 53 in the Utah Code for a discussion of certification requirements.

make a warrantless arrest.⁷⁶ After several weeks of complex training at Utah's Peace Officer Standards and Training ("POST"), rookie officers can begin working on patrol.

Through application on the streets of principles learned at POST, officers develop a working knowledge of areas of law, including search and seizure under the Fourth Amendment.⁷⁷ During the first few years of experience, officers refer repeatedly to the Utah Traffic and Criminal Code in order to verify and clarify their understanding of statutory authorizations and limitations. Even though POST instructors strive to provide specific instruction on modern constitutional principles of warrantless home arrests, officers need an opportunity to develop a working knowledge before they can be expected to understand the precise limits of their arrest powers. This kind of understanding can only come by real-life application and continual reference to constantly evolving statutory guidelines.

The duty of revising this statute rests squarely on the collective shoulders of Utah legislators. When the Utah Supreme Court strikes down a statute as unconstitutional, it is the responsibility of the Utah Legislature to repeal the section. When the court upholds a statute because it meets constitutional minimums, the court "has a duty to let it operate as the legislature has provided."⁷⁸ Additionally, the legislature passes statutes to define police powers and to provide guidance to officers who derive their authority from the state. In order to meet this goal, the legislature should eliminate the broad and imprecise language of section 77-7-8 in favor of a version that properly limits forcible entries and that recognizes modern Fourth Amendment jurisprudence. Such action would constitute a win-win situation: in addition to protection from civil liability, officers acting under the statute would receive more precise and accurate guidance while Utahns would be protected from unnecessary violations of clearly established rights.

Under the doctrine of qualified immunity, a law enforcement officer is protected from liability for injuries to others unless the officer violates a clearly established right that the officer should have

76. See UTAH CODE ANN. § 76-2-404 (1987) (when deadly force is justified); UTAH CODE ANN. § 77-7-2 (1999) (when warrantless arrests are permitted).

77. See *infra* note 95.

78. *Gord v. Salt Lake City*, 434 P.2d 449, 451 (Utah 1967).

known to exist.⁷⁹ Officers and legislators alike may mistakenly assume that qualified immunity will protect officers who reasonably rely on section 77-7-8 when committing a *Payton* violation. However, the United States Court of Appeals for the Tenth Circuit has made it clear that illegal warrantless home arrests can give rise to civil liability.

In *Howard v. Dickerson*,⁸⁰ the court rejected an officer's request for qualified immunity from a *Payton* violation. During the course of an investigation, Officer Dickerson identified Howard as a suspect in a hit-and-run accident. Dickerson responded to Howard's home and arrested her. Howard filed suit under 42 U.S.C. § 1983⁸¹ and argued that her arrest violated the protections afforded by the Fourth Amendment. The court examined whether the warrantless home arrest violated clearly established law, calling *Payton* a "long-established constitutional principle[]."⁸²

On appeal, the Tenth Circuit upheld the trial judge's refusal to grant summary judgment for Dickerson. Dickerson argued that his warrantless home arrest of Howard was both authorized and required under New Mexico law and that if state law conflicted with the Fourth Amendment, such conflict was not clearly established at the time. The court found Dickerson's argument unpersuasive:

Though the New Mexico Motor Vehicle Code authorizes warrantless arrests in some instances, this license is circumscribed by the Fourth Amendment. The warrantless arrest at Ms. Howard's home violated the constitutional prohibition against unreasonable seizures. *Any New Mexico law which might have condoned Officer Dickerson's actions will not protect him from the consequences of his clearly illegal conduct.* The district court, therefore, properly denied Officer Dickerson's claim of qualified immunity and rejected his

79. Law enforcement officers "may not be held liable for [the plaintiff's] injury if their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Patzner v. Burkett*, 779 F.2d 1363, 1369 (8th Cir. 1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982)).

80. 34 F.3d 978 (10th Cir. 1994).

81. When a § 1983 claim is filed, a defendant can claim qualified immunity from potentially unconstitutional acts. "When a defendant raises the issue of qualified immunity on a summary judgment motion, the plaintiff must demonstrate the alleged conduct constituted a violation of law and the law was clearly established at the time of the violation." *Id.* at 981 (citation omitted); *see also supra* note 79.

82. *Howard*, 34 F.3d at 982. The court also noted that the offense for which Howard was arrested was extremely minor and "d[id] not merit the extraordinary recourse of warrantless home arrest." *Id.*

motions for summary judgment and dismissal on the Fourth Amendment claim.⁸³

Thus, although reasonably believing his actions to be permitted under state law, Officer Dickerson became subject to liability for violating clearly established rights.⁸⁴ It is unsettling to know that well-intentioned officers acting under a reasonable interpretation of state law might unknowingly violate a suspect's rights and then be denied immunity for their objectively reasonable, good faith reliance on a statute.

Even if the Utah Supreme Court holds that 77-7-8 is unconstitutional, the legislature needs to revise the section's language to provide needed guidance to officers. At least one state legislature failed to take action after a similar forced entry statute was ruled unconstitutional. In the wake of *Payton*, the Supreme Court of North Dakota struck down a state law that permitted warrantless home arrests.⁸⁵ Despite the clarity of the conflict between the statute and *Payton*, the North Dakota Legislature has yet to repeal or revise the section, leaving officers with little guidance.⁸⁶

Without adequate statutory guidance, some North Dakota officers have unfortunately found themselves operating outside the constitutional limits of their authority. The Eighth Circuit, in *Patzner v. Burkett*,⁸⁷ rejected North Dakota officers' claims of qualified immunity for making a warrantless arrest in the suspect's

83. *Id.* (emphasis added) (internal citation omitted).

84. Despite the alleged conflict between state law and *Payton*, the court found no objective reasonableness in the warrantless home arrest of Howard. The district court below "noted state law does not trump the Fourth Amendment." *Id.* at 980. The circuit court summarized, "[a]gainst the backdrop of these long-established constitutional principles, Officer Dickerson's claim for qualified immunity is patently disingenuous." *Id.* at 982.

85. *State v. Nagel*, 308 N.W.2d 539, 541 (N.D. 1981). The North Dakota statute provided that "[a]n officer may break open any door or window of a dwelling house to execute a warrant of arrest, or to make such arrest for a felony without a warrant . . . if, after notice of his authority and purpose, he is refused admittance." N.D. CENT. CODE § 29-06-14 (1943).

86. The unconstitutional statute remains in the code with the following note in the annotation: "The [S]upreme [C]ourt of North Dakota declared this section to be unconstitutional because it violated the [F]ourth [A]mendment of the United States Constitution by permitting the warrantless, nonconsensual entry into a suspect's home in the absence of exigent circumstances to make a routine felony arrest." N.D. CENT. CODE § 29-06-14 (1943 & Supp. 1991) (citing *State v. Nagel*, 308 N.W.2d 539 (N.D. 1981)). While this notation provides some instruction on the *Payton* rule, it gives no guidance on the principles set forth in *Steagald* or *Welsh*.

87. 779 F.2d 1363 (1985).

home absent exigent circumstances.⁸⁸ Instead, the court held that the officers were not immune from suit, finding the illegality of the arrest “not seriously open to question at the time it occurred.”⁸⁹ Had the officers received better guidance from their state legislature regarding the scope of their arrest powers, perhaps that violation—and the civil liability stemming from it—could have been avoided.

Like the officers in *Howard* and *Patzner*, Utah law enforcement officers could find themselves without qualified immunity for actions based on a reasonable interpretation of authority under section 77-7-8. By revising the statute, the legislature would assist Utah peace officers in better understanding the constitutional limits on their arrest powers. The benefits of a revision would necessarily extend to the citizens of Utah by explicitly recognizing established constitutional mandates and by significantly reducing the likelihood of good faith violations.

88. The court explained qualified immunity did not exist for a *Payton* violation:

When this arrest took place in April of 1983, . . . *Payton* w[as a] firmly entrenched legal guidepost[], and had removed any doubt that the privacy of the home is paramount in weighing [F]ourth [A]mendment concerns. It should have been obvious that if the home is to be protected against warrantless arrests for felonies, as *Payton* established, the home should be even more sacrosanct from invasion for warrantless arrests for minor crimes, requiring a far greater showing of exigency than that alleged here. The North Dakota legislature has apparently so concluded as well. The arrest in this case is no longer sanctioned by North Dakota law. The statute authorizing warrantless home arrests had been declared unconstitutional by the North Dakota Supreme Court in the wake of *Payton* two years earlier. . . . We conclude that the illegality of Patzner’s arrest was not seriously open to question at the time it occurred. We hold, therefore, that the deputies are not immune from suit with respect to Patzner’s claims of illegal arrest.

Id. at 1370–71 (citation omitted).

The court’s claim that “[t]he North Dakota legislature has apparently so concluded as well” is an oddity. The statute was indeed struck down by the North Dakota Supreme Court, and the state legislature has yet to repeal or revise the provision. The only reason that such arrests are “no longer sanctioned by North Dakota law” is the ruling in *Nagel*, 308 N.W.2d 539. How legislative inaction equates with a conclusion is unclear. It is worth noting that the Eighth Circuit called *Payton* a “firmly entrenched legal guidepost[]” as early as 1983. *Patzner*, 779 F.2d at 1370.

89. *Patzner*, 779 F.2d at 1371.

IV. PROPOSED REVISION OF SECTION 77-7-8⁹⁰

Because section 77-7-8 conflicts with current Fourth Amendment case law and because unknowing *Payton* violations can give rise to police liability, it is imperative that the Utah Legislature revise the statute. In order to comply with the rules promulgated in *Payton* and *Steagald*, the following revision of section 77-7-8 is recommended:

77-7-8. Forced entry to make an arrest permitted, when.

(1) Subject to subsection (2), when making an arrest, a peace officer may forcibly enter the building in which the person to be arrested is, or in which there are reasonable grounds for believing him to be. Before forcibly entering, the officer shall demand admission and explain the purpose for which admission is desired. Demand and explanation need not be given before forcibly entering under the exceptions in Section 77-7-6 or where there is reason to believe evidence will be secreted or destroyed.

(2) Absent consent to enter or the existence of exigent circumstances, if the building is known by the officer to be or reasonably appears to be a dwelling, the officer must:

(a) obtain an arrest or search warrant before entering the dwelling if it is the residence of the person to be arrested;
or

(b) obtain a search warrant before entering the dwelling if the person to be arrested does not reside therein.

This revision makes several significant improvements to the statute, including the codification of the holdings in *Payton* and *Steagald*.⁹¹ The proposal provides law enforcement officers⁹² with

90. In the spring 2002, the author presented a proposal to revise section 77-7-8 to the Legislative Advisory Committee of Utah's Statewide Association of Public Attorneys ("SWAP"). More recently, SWAP has agreed to support the proposed revision and to seek out a legislative sponsor to present the bill in the 2003 Utah Legislative Session.

91. Although the holding in *Welsh* serves as a limiting principle on the exigent circumstances exception to the warrant requirement, it need not be incorporated into the text of the statute until it is more clearly defined and is more threatening to an officer's claim of qualified immunity. See *supra* note 49 and accompanying text.

92. Another noticeable change is the proposal's elimination of any reference to private persons. This change recognizes that the Fourth Amendment does not apply to actions by private citizens. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("This Court has . . .

meaningful guidance as to the limitations of their authority to make warrantless home arrests. It replaces the phrase “break the door or window” of the building in question with the more precise description “forcibly enter.” While forcing entry may require the breaking of a door or window, the current wording “break the door or window” does not provide explicit authority for officers to enter the building after making the break. The current text also limits the use of force to breaking “the door or window” of the suspect’s hiding place. Changing the statute to permit officers to “forcibly enter” clarifies the text and provides officers with alternative points of entry should the need arise.⁹³ The proposal also makes a distinction between buildings generally and dwellings, providing specific additional requirements applicable to private homes in the absence of consent to enter or the existence of exigent circumstances. Subsection 2(a) represents the rule in *Payton* and informs officers of the need to obtain an arrest or search warrant prior to forcing entry into the suspect’s residence. Subsection 2(b) reflects the holding in *Steagald* by requiring a search warrant prior to forcibly entering a third-party’s residence.

By providing Utah law enforcement agents with meaningful guidance, this proposed revision would substantially reduce the likelihood of unknowing constitutional violations by officers. It would also expressly recognize the constitutionally mandated sanctity of the home as expressed in modern Fourth Amendment case law. In short, this proposal protects both officers and citizens alike from unnecessary intrusion of clearly established Fourth Amendment protections.

consistently construed this protection as proscribing only governmental action; it is wholly inapplicable ‘to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.’” (citation omitted)). If the Utah Legislature wishes to retain statutory authority for private persons to make forcible entry felony arrests, the issue can be addressed in state tort law.

93. The proposal would authorize an officer to enter a building through a non-traditional point of entry if, for example, reasons of officer safety made entry via a rooftop vent preferable to forcing open bar-covered windows or reinforced doors. Of course, this broader grant of authority would still be circumscribed by the Fourth Amendment’s reasonableness requirement. *See Illinois v. Rodriguez*, 497 U.S. 177, 183–84 (1990); *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979).

V. CONCLUSION

Utah's forced entry statute conflicts with well-established principles of Fourth Amendment jurisprudence. Although the statute has yet to be subjected to a direct constitutional challenge, such an attack will require the Utah Supreme Court to either strike the statute down as unconstitutional or to imply required compliance with modern case law that restricts police power more than the broad language of the statute suggests. The Utah Legislature needs to revise the statute to provide peace officers more accurate guidance with respect to arrest powers. Until the statute is revised, officers are likely to view their authority as broader than modern cases allow. This misunderstanding may subject officers to civil liability for violating clearly established rights. The outdated statute also fails to recognize the mandated sanctity of the home.⁹⁴ By revising the statute, Utah legislators can create a win-win situation by protecting peace officers and citizens alike from the undesirable consequences of unnecessary Fourth Amendment violations.

*Matthew Bell*⁹⁵

94. *See supra* note 25 and accompanying text.

95. Juris Doctor candidate, April 2003, J. Reuben Clark Law School; B.S., Brigham Young University, 1997; certified Category I Peace Officer and Advanced Officer, Utah POST; former police officer, St. George, Utah, assigned as patrolman, hostage negotiator, and field training officer. I first must thank my devoted wife, Emily, for her continuous support and confidence. I next thank my children, Naythan and Brooklyn, for their patience, unconditional love, and constant cheerfulness. My sincere appreciation goes to Professor Larry Echohawk for his insight, feedback, and encouragement. This Note is dedicated to all law enforcement officers who protect and serve with integrity and honor.

