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I. INTRODUCTION

Since the original Bill of Rights was drafted, the diverse warrant requirements necessary for reasonable searches and seizures under the fourth amendment\(^1\) have led to chaos and confusion. A dichotomy has existed between the requirements necessary for the search and seizure of property and those necessary for the search and seizure of persons.\(^2\) Generally, a warrant has been required when the object of the search and seizure was property\(^3\) while no warrant has been necessary for the seizure of an individual.\(^4\) The Supreme Court decision in Payton v. New York\(^5\) has erased much of this distinction, holding that the fourth amendment prohibits a warrantless entry into a suspect's home for a routine felony arrest. However, the decision left unanswered the question of whether the police have the authority, without obtaining either an arrest or a search warrant, to enter the home of a third party in order to arrest a suspect.\(^6\)

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1. U.S. Const. amend. IV:
   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.

2. See, e.g., Trupiano v. United States, 334 U.S. 699 (1948). This case involved an entry onto property for the dual purpose of searching and seizing both a person and property. Although there was ample time to obtain warrants, the entry and subsequent searches and seizures were performed without benefit of either a search or arrest warrant. The court denied the legality of the seizure of property while upholding the arrest, even though the reasons for denial were equally applicable to the arrest.


4. See Rotenburg and Tzanz, Searching for the Person to be Seized, 35 Ohio St. L.J. 56 (1974); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541 (1924). This "anomaly," as it is called in United States v. Watson, 423 U.S. 411, 427 (1976) (Powell, J., concurring), is an understandable by-product of a time when property rights were valued more highly than personal rights. See Nass, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-50 (1935).


6. Id. at 583.
The Fourth Circuit Court of Appeals has answered that question in *Wallace v. King,* 7 holding that the police may not search a third party dwelling to effectuate an arrest without a search warrant, even though they have a valid arrest warrant. This comment will trace briefly the history of entries for searches and arrests and then analyze the *Payton* decision and the Fourth Circuit’s extension of that decision in *Wallace.*

II. DISCUSSION

A. The History of Search and Seizure

While English common law often proves helpful in understanding current legal problems, such is not the case with the issue of warrantless arrests in a home. Disagreement among common-law commentators is based on two divergent maxims concerning the sanctity of the home: "a man's home is his castle" and "the king's keys unlock all doors." Because of this difference of opinion, nothing of real substance emerges from the common law to aid in the discovery of what was in the framers’ minds when they drafted the fourth amendment.

It is recognized, however, that "for four hundred years Crown and Parliament assumed and abused the power to authorize broad ranging searches and . . . [that] opposition to such practices culminated in the judicial decisions that inspired libertarian thought on this side of the Atlantic." It was the general writ, giving broad search powers, that the fourth amendment was designed to prohibit. These writs were mainly used by customs officers to enforce trade laws. It remains a subject of great controversy, however, as to whether our founding fathers intended

7. 626 F.2d 1157 (4th Cir. 1980).
9. CoKE, THIRD INSTITUTE 162 (1644), cited in *United States v. Reed,* 572 F.2d 412, 422 (2d Cir. 1978). While this maxim was primarily applicable to civil actions, its impact has also been felt in the area of criminal law.
10. Wilgus, *supra* note 4, at 800.
12. The Supreme Court, in *Stanford v. Texas,* 379 U.S. 476 (1965), recognized that [v]ivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws.

*Id.* at 481.
to extend the scope of the fourth amendment beyond the realm of the general writ.

The very language of the fourth amendment has contributed significantly to the controversy. As originally proposed, the amendment contained a single clause which imposed limitations on the issuance of warrants but not on warrantless searches and seizures.¹³ The language of our present amendment was rejected on the floor of the first Congress. However, the final draft, from the committee whose purported task it was to make grammatical but not substantive changes, contained the rejected language. It was in this form that the amendment completed the ratification process.¹⁴ In the present form there are two separate clauses, a warrant clause and a reasonableness clause. The relative importance of each is disputed. Some have inferred that the additional prohibition against unreasonable searches was intended to be more than a mere description of the form of the warrant.¹⁵

Despite these ambiguities, the language of our present fourth amendment applies equally to seizures of property and seizures of persons.¹⁶ Throughout its history, though, an ever-widening gap has developed between what is required in order to search and seize property and the requirements for a search for and arrest of an individual.¹⁷ By the time

¹³. The original language read:
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.

Lasson, supra note 4, at 100 (quoting Annals of Cong. 452 (1st Cong., 1st Sess.)).

¹⁴. Yackle, supra note 11, at 344.

¹⁵. Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 366 (1921).

¹⁶. See note 1 supra.

¹⁷. There was not a great deal of fourth amendment case law decided by the early Supreme Court. Ex parte Buford, 7 U.S. (3 Cranch) 447 (1806) held that arrest warrants were similar to search warrants in that they had to be supported by probable cause. Subsequently, cases interpreted requirements for search warrants, but the court was curiously silent on arrest warrants. In Ex parte Jackson, 96 U.S. 727 (1877) the Court said, in dicta, that sealed letters and packages in the mail were personal papers and were to be given the same protection as if they were in the home, i.e. they could only be opened with a warrant. Boyd v. United States, 116 U.S. 616 (1886) extended fourth amendment protection to a subpoena duces tecum.

With the inception of the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914) and the ratification of the eighteenth amendment (prohibition), the Court was flooded with fourth amendment cases. Olmsted v. United States, 277 U.S. 438 (1928) (conviction of conspiracy to import liquor upheld) provided a good definition of search and seizure applicable at that time. The Court held that since wiretaps involved no physical trespass and no
Payton reached the Supreme Court, the two sets of requirements bore no resemblance to each other, as if emanating from separate sources. Concerning the search for property, Katz v. United States held that warrantless searches were per se unreasonable. Concerning arrests, however, United States v. Watson held that most warrantless arrests in public

seizure of tangible items, the protection of the fourth amendment was therefore not triggered.

Even when the activity was classified as search and seizure under the fourth amendment, the Court began carving out exceptions to the warrant requirement. In the early automobile cases, Hurst v. United States, 282 U.S. 694 (1931) and Carroll v. United States, 267 U.S. 132 (1925), the Court established the rule that exigency might excuse the lack of a warrant. In the alcoholic beverage cases, the Court began to expand the permissibly-searched area beyond the suspect's immediate person and into the surrounding area. See United States v. LeFkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Marron v. United States, 275 U.S. 192 (1927); Agnello v. United States, 269 U.S. 20 (1925).

While Weeks established the exclusionary rule for federal prosecutions, the fourth amendment itself did not become applicable to the states until Wolf v. Colorado, 338 U.S. 25 (1949). However, right and remedy were split as the Court refused to hold Colorado to the exclusionary rule, saying that other methods were available. 338 U.S. at 30. For a comprehensive study on the difficulties arising from this decision, see Kamisar, Wolf and Lustig Ten Years Later, 43 Minn. L. Rev. 1083 (1959). The Court in Mapp v. Ohio, 367 U.S. 643 (1961) recognized the exclusionary rule as the only effective means available to enforce the fourth amendment and, therefore, approved its applicability to state prosecutions.

As the foregoing synopsis shows, extensive delineation occurred with respect to searches for property. On the other hand, almost no guidance was forthcoming concerning arrests. Since the language of the fourth amendment applies equally to searches and seizures of individuals, it is reasonable to expect that the property cases would apply by analogy to arrests. Such has not been the case. The Supreme Court noted, in Gerstein v. Pugh, 420 U.S. 103, 113 (1975) that it had “never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant,” even though the use of a warrant was preferable. That statement held true until Payton.

18. 389 U.S. 347 (1967). The Katz Court overruled Olmstead v. United States, 277 U.S. 438 (1928) and rejected the notion that physical trespass was a prerequisite to a search. Also cast away was the notion that only tangible items were subject to seizure. The Court held that a defendant's justifiable expectation of privacy was violated so that a search and seizure covered by the fourth amendment occurred when his conversation from a tapped phone booth was intercepted and recorded by government officials.

19. 423 U.S. 411 (1976). Upon probable cause to believe Watson was in possession of stolen credit cards, a postal inspector arrested him in a restaurant. Watson was then removed to the street and given Miranda warnings. Even though Watson had no cards on his person, the Inspector asked if he could search Watson’s car, reminding him that anything found there could be used against him. Watson replied, “Go ahead!” and gave the inspector the keys. In the subsequent search two cards were found and later determined to be stolen. The Court held Watson’s arrest was not invalid because it was warrantless and justified its decision on three grounds: 1) common law authority allowed arrests in public without a warrant; 2) the consensus of the states clearly allowed warrantless arrests; 3) there was a federal statute authorizing the postal inspector to make such arrests.
were reasonable.

Lower courts began to fill the void with decisions of their own. Some held that an arrest warrant was necessary for an arrest made in the home.20 Others found if there was probable cause to arrest the Constitution did not require a warrant.21 Still others merely assumed that a warrantless arrest in the home was unconstitutional.22 One case upheld such an arrest without discussing the constitutional issue.23 Since the Supreme Court denied certiorari in two of these cases,24 it is conceivable that the Justices were waiting for the right factual situation in order to decide the issue. The opportunity apparently presented itself when the New York Court of Appeals, in a single decision, affirmed the convictions of Theodore Payton and Obie Riddick.25

B. Payton v. New York

The facts of the Payton arrest are as follows: on January 15, 1970 at 7:30 a.m., six New York police officers went to Payton's apartment to arrest him. They had not obtained a warrant for his arrest but perceived, after an intensive investigation, that they had probable cause to believe Payton had murdered a gas station manager a few days earlier.26 The officers knocked on the door but drew no response even though there was light and music coming from the apartment. With the use of crowbars, the police entered the dwelling and found no one present. However, they did find, among other things,27 a 30-caliber shell casing in plain view.


23. Michael v. United States, 393 F.2d 22 (10th Cir. 1968).


27. A thorough search of the apartment divulged numerous objects which were seized as additional evidence of Payton's guilt. But the prosecutor stipulated that these were illegally seized since they were found outside the scope of the search for the defendant, i.e. bureau drawers were searched. Id. at 577 n.5.
This was seized and later admitted into evidence at Payton’s murder trial. A motion to suppress the evidence was denied. The trial judge held that the warrantless entry to arrest was authorized by statute and the plain view evidence was properly seized.

The situation surrounding the Riddick arrest is as follows: Riddick was suspected of having perpetrated two armed robberies in 1971. He was identified by the victims in June of 1973, but police did not learn of his address until January, 1974. No warrant for his arrest was obtained. On March 14, 1974, three police officers and a detective knocked on Riddick’s door. His three-year-old son opened the door and revealed Riddick in the house on a bed. The officers rushed in and placed him under arrest. Before allowing him to dress, the police searched a chest of drawers for weapons and found narcotics and related paraphernalia. On trial on the subsequent narcotics charges, Riddick moved to suppress the evidence. The trial judge held that the warrantless entry was authorized by the revised New York statute and that the search of the immediate area was

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28. At the time in question, January 15th, 1970, the law applicable to the police conduct related above was governed by the Code of Criminal Procedure. Section 177 of the Code... recited: "A peace officer may, without a warrant, arrest a person... 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." Section 178 of the Code... provided: "To make an arrest, as provided for in the last section (177), the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance."


29. The trial judge decided that the suspect was reasonably believed to be armed and dangerous to the community; there was a clear showing of probable cause that the suspect had committed the offense, that he was on the premises being entered, and that he would likely escape if not swiftly apprehended. For those reasons, the judge held that exigent circumstances excused the lack of compliance with the notice provision of the New York Code. 84 Misc. 2d at 975, 376 N.Y.S.2d at 780. See note 34 infra. Arguably, this same set of facts could justify a warrantless intrusion. But the New York court did not rely on any such justification. The court of appeals majority treated both arrests as routine arrests where there was ample time to obtain a warrant. 45 N.Y.2d 300, 308, 380 N.E.2d 224, 228, 408 N.Y.S.2d 395, 398 (1978).


31. N.Y. Crim. Proc. Law § 140.15(4) (McKinney 1971) provides:

In order to effect... an arrest [without a warrant], 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... if he were attempting to make such arrest pursuant to a warrant of arrest.

Section 120.80 of the code, covering execution of arrest warrants, provides in 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,
reasonable.\textsuperscript{32}

The New York Court of Appeals affirmed both Payton's and Riddick's convictions, relying for the most part on the substantial difference between the intrusion which attends an entry for the purpose of searching the premises and that which results from an entry for the purpose of making an arrest, and on the significant difference in the governmental interest in achieving the objective of the intrusion in the two instances.\textsuperscript{33}

While the court recognized that the particular question presented in the instant case was not addressed by the Supreme Court in \textit{United States v. Watson},\textsuperscript{34} the majority nevertheless felt that the decision by the Supreme Court in \textit{Watson} necessitated the finding that a warrant was not a prerequisite for an in-home arrest.\textsuperscript{35} In support of this, the court of appeals noted the "apparent historical acceptance" of warrantless intrusions to effect felony arrests at English common law\textsuperscript{36} and the use of the practice in many of the states to this day.\textsuperscript{37} Three members of the court dissented.\textsuperscript{38}

unless there is reasonable cause to believe that 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.

32. 445 U.S. at 679 (citing Brief for Appellee at 63-66).
33. People v. Payton, 45 N.Y.2d at 310, 380 N.E.2d at 228-29, 408 N.Y.S.2d at 399. The majority felt that a search, unless limited by a warrant, was more intrusive on the privacy of the householder than that involved with an entry to arrest: a search includes rummaging through personal belongings; an entry to arrest is not accompanied by this "prying into the area of expected privacy attending his possessions and affairs." \textit{Id.} at 310, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.
34. 423 U.S. 411 (1976).
35. The court of appeals explained:
That personal seizure alone does not require a warrant was established by \textit{United States v. Watson} . . . which upheld a warrantless arrest made in a public place. In view of the minimal intrusion on the elements of privacy of the hope [sic] which results from entry on the premises for making an arrest (as compared with the gross intrusion which attends the arrest itself), we perceive no sufficient reason for distinguishing between an arrest in a public place and an arrest in a residence.

45 N.Y.2d at 310, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.
36. \textit{Id.}
37. \textit{Id.} at 311-12, 380 N.E.2d at 229-30, 408 N.Y.S.2d at 400-01.
38. The dissenting justices expressed the view that the Constitution required a warrant unless there were exigent circumstances. They also disagreed with the majority, believing that an entry for arrest presented an even greater intrusion and should be afforded at least
The United States Supreme Court reversed the decision and held that a warrantless arrest in a suspect's home, like a warrantless search, is unconstitutional. This closed the gap that had existed for so long between the fourth amendment protection afforded to people and that afforded to property. Mr. Justice Stevens, writing for the majority, stated: "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." The key to the resolution of this issue is an understanding that any difference in intrusiveness between an arrest and a search is not one of kind but one of degree. In both instances there has been a breach of privacy, namely the entrance into an individual's home. Many aspects of individual privacy are protected by the fourth amendment but "[i]n 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 be secure in their . . . houses . . . shall not be violated.'"

The New York Court of Appeals, in affirming Payton's and Riddick's convictions, had based its decision on the Supreme Court's opinion in Watson. That case held that the arrest of the defendant, in public and without a warrant, did not violate the Constitution. However, not only are the grounds for the Watson decision inapplicable to Payton, but the grounds themselves are questionable.

Watson was based on three premises. First, it was well-settled that

as great a protection. Id. at 324, 380 N.E.2d at 238, 408 N.Y.S.2d at 409. (Cooke, J., dissenting).
40. Id. at 590.
41. Id. at 589 (quoting the fourth amendment). Justice Stevens also noted several factors that were not considered by the court in deciding the case. First, exigent circumstances were arguably present in at least one of the arrests considered. See note 29 supra. Since the lower courts considered these arrests routine, the Supreme Court treated them likewise. Second, lack of consent was not an issue. Crowbars were used to break open Payton's door, see note 26 supra and accompanying text, and Riddick was seized before he could either object or consent. See note 30 supra. The fact that this three-year-old son opened the door for the police was held to be of no consequence. For a discussion of searches consented to by the minor child of an adult defendant, see Annot., 99 A.L.R.3d 598 (1980). Lastly, in neither arrest was it argued that police lacked probable cause to believe that the suspect was at home when they entered. 445 U.S. at 583.
42. See note 35 supra.
43. 423 U.S. at 414-24.
common law authorized the practice of warrantless arrests in public.44 Second, the clear consensus of the states was to approve warrantless arrests.45 Third, there were congressional statutes authorizing the practice and indicating that Congress believed the practice to be constitutional.46

However, where the warrantless arrest is made in the home, as it was in both arrests considered in Payton, these grounds simply do not apply. First, the issue of warrantless in-home arrests was not well settled at common law. It remains debatable whether or not such arrests were authorized.47 The common law, therefore, should not be as persuasive in Payton as it was in Watson.48 Secondly, there is no clear consensus of the states on the issue of such arrests. Although a majority of states considering the issue allowed warrantless in-home arrests when Payton was decided, there has been a marked decline over the past decade in states so holding.49 Virtually all state courts recently deciding the issue have held that, absent exigency, a warrantless in-home arrest is unconstitutional.50 Other than New York's decision in Payton, only Florida has recently upheld such an arrest in spite of constitutional attack.51 Thirdly, there is no corresponding statute authorizing warrantless arrests made in the home.52

Even if these grounds were applicable to the Payton case, there could not be a well-founded holding to the contrary of that reached by the court in Payton. Congressional statutes, like state statutes, are open to constitutional attack. Case precedent and common law have merely assumed that a warrantless in-home arrest is reasonable and therefore do not present a strong precedent. Moreover, state consensus does not, or should not, create binding precedent for the constitutional interpretation. The mere fact that "everybody is doing it" simply does not make the practice ipso facto constitutional. Felonies at common law were much more serious than today when, for instance, many white collar and victimless crimes are considered felonies. The point is that there is not the urgency of the magnitude of an exigent circumstance, just because the individual is a suspected felon. Of course, where there are true exigent

44. Id. at 421-23.
45. Id. at 419-21.
46. Id. at 415-16.
47. See note 8 supra and accompanying text.
48. This reasoning is also applicable in countering Justice White's dissent in Payton, 445 U.S. at 603-20.
49. 445 U.S. at 598-99.
50. Id.
52. 445 U.S. at 601 n.53.
circumstances, these can excuse the need for a warrant.

The Court's decision in *Payton* is firmly entrenched in and fortified by the fourth amendment. Although the Court has stated that "logic sometimes must defer to history and experience," *Payton* does not subscribe to the notion that logic must defer at all. After two hundred years, searches and seizures of property and searches and seizures of persons are brought together on more equal ground. There is no logical reason why fewer safeguards should attach to a search and seizure of persons. "[N]either antiquity nor legislative unanimity can be determinative of the grave constitutional question presented [and] can never be a substitute for reasoned analysis."

In *Coolidge v. New Hampshire* the Supreme Court recognized 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 warrant are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

Now, with *Payton*, this conflict is settled. *Payton*, however, left unresolved the question of whether police have authority to enter the premises of a third party in order to execute a valid arrest warrant. This issue was precisely the one facing the United States Court of Appeals for the Fourth Circuit in *Wallace v. King*.

C. *Wallace v. King*

The *Wallace* case involved the search of two Fairfax residences for a Mrs. Swain, who was named in a valid arrest warrant. The residences

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54. As Justice Mosk of the California Supreme Court noted in a similar case, it would be "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." People v. Ramey, 16 Cal. 3d 263, 275, 545 P.2d 1333, 1340, 127 Cal. Rptr. 629, 636 (1976).
55. People v. Payton, 45 N.Y.2d at 324, 380 N.E.2d at 238, 408 N.Y.S.2d at 409 (Cooke, J., dissenting).
57. Id. at 477-78.
58. "Nor do these cases raise any question concerning the authority of the police, without either a search or arrest warrant, to enter a third party's home to arrest a suspect." 445 U.S. at 583.
59. 626 F.2d 1157 (4th Cir. 1980).
60. Id. at 1159. Mrs. Swain was being sought for refusing to obey a court order in a
searched were not Mrs. Swain's but those of her parents, the Wallaces, and her parents' friends, the Debiases. The suit was filed under 42 U.S.C. § 1983 by the Wallaces and the Debiases.

The search of the Wallace home took place on October 6, 1976. Fairfax police had received a phone call from Mrs. Swain's estranged husband. He informed them that Mrs. Swain was at her parents' home. Upon their arrival at the Wallace home, Mr. Swain identified a car in the driveway as belonging to his wife. At 8:30 p.m. two officers were admitted into the Wallace home without incident. They announced that their purpose was to arrest Mrs. Swain, pursuant to a warrant for her arrest, and that they had received information indicating she was on the premises. When the police were asked if they had a search warrant, they replied that the arrest warrant gave them the authority to perform the search. The search which ensued was brief and fruitless. Both officers conceded that there was ample time to obtain a search warrant and that there were no exigent circumstances necessitating Mrs. Swain's immediate arrest.

The Debiase search occurred about a month later. Again Mr. Swain notified the Fairfax police that his wife was present at the Debiase home. At 6:00 p.m. two officers arrived and were met at the door by Mrs. Debiase whom they proceeded to question. Once inside, they requested permission to search the house for Mrs. Swain. Mrs. Debiase objected and asked to see a search warrant but was told such a warrant was not needed since there was a valid warrant issued for Mrs. Swain's arrest. This search also failed to reveal Mrs. Swain's whereabouts.

The suit for money damages and declaratory and injunctive relief was filed by the owners of the two houses searched. Argument was heard in

domestic relations matter concerning the custody of her infant child.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

62. 626 F.2d at 1159. Although Mrs. Swain had occasionally stayed at the Wallaces' home during periods of marital discord, she had not lived with them for a number of years.

63. The parties dispute whether there was hostility displayed by the officers. Id. at 1160.

64. Id. The police made inquiries at the Debiase residence three days after the Wallace search but made no search at that time. They also received information that Mr. Swain might be using the police for purposes of harassment. Mr. Swain was warned that he would be prosecuted if such a motive developed. Swain denied the allegation. Without further inquiry, the search of the Debiase home was ordered. Id.
February of 1979 and re-argued in October, 1979. However, the actual
decision was withheld pending the decision in Payton, which was handed
down April 15, 1980.\textsuperscript{65} The Wallace decision followed on July 1, 1980,
holding for the plaintiffs as follows:

Although Payton held that an arrest warrant requires that a suspect "open
his doors to the officers of the law," that holding was specifically limited to
the "dwelling in which the suspect lives." \textsuperscript{445 U.S. at 603. An arrest warrant
indicates only that there is probable cause to believe the suspect committed
a crime; \textit{it affords no basis to believe that the suspect is in a stranger's house}.\textsuperscript{66}

The Fourth Circuit goes beyond Payton's requirement of an arrest war-
rant for the seizure of an individual in his own home by finding that a
search warrant, as well as an arrest warrant, is required in order to at-
ttempt to arrest a suspect on the premises of a third party. This decision,
although novel, is also well supported by both logic and the Constitution.
Other circuit courts have passed on this same issue, but none have found
as much protection existent in the fourth amendment.

The weight of authority among the circuits seems to be that where
there is probable cause to believe that a suspect named in an arrest war-
rant is within a third party's dwelling, the police have authority to enter
and search for him.\textsuperscript{67} Those courts which have held the search for the
suspect invalid have usually done so because there was no reason to be-
lieve the suspect was within that dwelling.\textsuperscript{68} There is also authority which
seems to require exigent circumstances in addition to an arrest warrant
and probable cause to believe the suspect is within.\textsuperscript{69} However no other

\begin{footnotes}
\item[${\text{65.}}$] Id. at 1159.
\item[${\text{66.}}$] Id. at 1161 (emphasis added).
\item[${\text{67.}}$] United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979); United States v. Brown, 467
F.2d 419 (D.C. Cir. 1972); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967).
\item[${\text{68.}}$] See, e.g., Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) where the police searched a
home listed incorrectly on the arrest warrant. The court held that where twenty to twenty-
five percent of the warrants received had improper addresses, the address listed on the war-
rant gave no probable cause to search that address when the occupant established that he
was not the person named on the warrant. In Vasquez v. Snow, 616 F.2d 217 (5th Cir. 1980),
the police had followed the suspect for some time and knew that he did not spend more
than one or two nights at any one house. The court held that the search of four houses in a
neighborhood was invalid when the information that the suspect was staying at one of the
houses was received two or three days before the search. Fisher v. Volz, 496 F.2d 333 (3d
Cir. 1974) held that even with exigent circumstances, police can not enter the dwelling of a
third party to serve an arrest warrant without a search warrant if there is no probable cause
to believe that the suspect is there at the time. The police in Fisher admitted they had no
indication that the suspect was present in the apartment being searched.
\item[${\text{69.}}$] Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974). The court stated that arrest
\end{footnotes}
federal case has yet held that a search warrant is a constitutional prerequisite. It is this distinction that makes the Wallace decision unique.

The court in Wallace explains that the probable cause needed for an arrest warrant and that needed for a search warrant are not the same. The necessary ingredient missing from the arrest warrant is the probable cause to believe that the suspect is in the stranger's house. Not even a tortured reading of the fourth amendment could validate a search where there is no probable cause to believe the object of the search is contained in the area to be searched. It has long been recognized that the burden of determining probable cause cannot be borne by the police. The general rule that a warrant is needed to enter a house to search is well established.

The warrants are not to be used as search warrant substitutes. Even with a valid arrest warrant, the premises of a third party cannot be entered in search of a suspect except "in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within." Id. at 928.

70. 626 F.2d at 1161.
71. Fisher v. Volz, 496 F.2d at 341.
72. U.S. Const. amend. IV. "The right of the people to be secure in their . . . houses . . . against unreasonable searches . . . shall not be violated . . . ."
73. The Supreme Court in Johnson v. United States, 333 U.S. 10 (1948) explains:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Id. at 13-14 (footnotes omitted).

74. The following is an excerpt from the oral argument of Johnson v. Louisiana, 406 U.S. 356 (1972). The attorney for the state, after arguing that it was unreasonable to require the police to obtain a warrant, was asked:

Mr. Justice Stewart: "Are you familiar with this Court's case of Warden v. Hayden?"

Mrs. Korns: "Yes, your honor, I am."

Mr. Justice Stewart: "Well, why do you think this Court spent so long in carving out an exception if there was [sic] no general rule that you cannot enter a house without a warrant?"

Quoted in Y. KAMISAR, W. LAFAVE, AND J. ISRAEL, MODERN CRIMINAL PROCEDURE 311-12 n.1
fourth amendment. It assures an individual of a magistrate's consideration of the issue of probable cause before his home will be entered, regardless of the object of the search.\(^{75}\)

This even-handed protection of an individual's privacy rights in a private home is infinitely preferable to the practice of acknowledging those rights only when the objective is property. "[F]rom the standpoint of the victim of the search, the invasion of the privacy of his home is unaffected by the object of the policeman's search."\(^{76}\) Regardless of the uncertainty of the common law, it is the "physical entry of the home [that] is the chief evil against which the wording of the Fourth Amendment is directed . . . ."\(^{77}\) The Wallace rule, stated simply, requires that some showing of probable cause for believing the individual to be located within the third party dwelling be brought before a magistrate.\(^{78}\) If the police have no such evidence, they have no business disrupting the third party's privacy. If they do have such evidence and there is ample time, there is no reason not to get a warrant. The cry of police efficiency espoused by the dissent in Wallace should be given no weight. A practice should never be approved as constitutional merely because it makes law enforcement easier. Requiring a search warrant seems the least that could be done considering the privacy invasion and the relative innocence of the third party.\(^{79}\)

There is the argument, suggested by the dissent in Wallace, that having a magistrate determine probable cause does not protect the third party.\(^{80}\) This argument presupposes that magistrates do nothing but

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\(^{75}\) Of course, Payton did hold that only an arrest warrant was necessary for the search of the suspect's own home. 445 U.S. at 602. This allows for search without judicial determination of his presence. This holding is not wholly unsatisfactory because of the fact that it is the suspect's home, and perhaps it can then be said to be per se reasonable to infer his presence. However, problems are foreseeable in determining whether or not the dwelling is in fact the suspect's home. Naturally this is a factual determination which ultimately will be determined by the jury. However, as is the case with exigent circumstances, it will initially be the police who make this determination.

\(^{76}\) Lankford v. Gelston, 364 F.2d 197, 205 (4th Cir. 1966).


\(^{78}\) If exigent circumstances are present, a court reviewing the legitimacy of the entrance at a later time will be required to make this factual determination. Obviously the very nature of the exception prevents a preliminary determination of probable cause.

\(^{79}\) It may be, even if the suspect is, or has been, present, that the third party is unaware of the arrest warrant or that the suspect is "wanted."

\(^{80}\) 626 F.2d at 1162 (Hall, J., dissenting). A similar position was taken by Justice White's dissent in Payton. 445 U.S. 616-17. There it was argued that sufficient safeguards exist to
“rubberstamp” all applications for warrants. Even though no system is perfect and “rubberstamping” may occur in some instances, the suggestion that frivolous requests for warrants are not screened is improbable. Furthermore, even if the practice of “rubberstamping” were widespread, the remedy should not be the rejection of the necessity for a neutral determination. If magistrates are not performing their assigned functions, something should be done to insure that they do. The need for protection still exists, whether or not the present methods used for guaranteeing protection are effective. If the present methods are not effective, the logical remedy is to fashion some that are.

III. Conclusion

The search and seizure clause of the fourth amendment has been the source of much confusion. Although the language of the amendment concerning what is required in order to protect the individual is not clear, one thing stands out: There is no constitutional basis for any difference in the treatment of the searches and seizures of property and the searches and seizures of persons. Nevertheless, for two hundred years there have been separate requirements based on the classification of the police objective. The arguments in favor of this distinction run into an additional difficulty when the search and seizure is to take place in the home. The home is protected by the plain language of the fourth amendment.

The Supreme Court in Payton held that a warrant is required to arrest an individual in his home. The Court has finally recognized that privacy suffers an equally great intrusion when the police objective is the arrest of a person living therein as when a search is conducted for property. Thus, an equal amount of protection is owed. The standard measure of protection, also mentioned in the fourth amendment, is the warrant, the magistrate's neutral determination of the existence of probable cause. The purpose is to insure that the intrusion does not occur unless and until it is judicially determined to be reasonable.

The Fourth Circuit Court of Appeals took Payton one step further. Wallace held that a search warrant is also required before a search for a suspect may be conducted in a third party's home. An arrest warrant alone is simply not enough because there has been no determination by a magistrate that the suspect is present. If an arrest warrant were all that was required, every home owner would be at the mercy of the police and protect the individual's privacy interests without requiring a trip to the magistrate. This reasoning ignores the need for a warrant in any case. It is difficult to comprehend such a reading of the fourth amendment.
there would be no way to prevent abuse before it occurred. The remedy after-the-fact is less than satisfactory since tort actions against the police usually produce inadequate results.

The answers to Payton and Wallace are found in the fourth amendment itself. Common law, history and experience do little to serve justice when they are wrong. It is infinitely better to correct injustice rather than to continue a practice which is patently unreasonable, merely because it has been the accepted practice for many years.

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