Journal of Criminal Law and Criminology

Volume 72
Issue 1 *Spring*

Article 8

Spring 1981

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Linda Imes

0091-4169/81/7201-0293
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 72, No. 1
Printed in U.S.A.

ARRESTING A SUSPECT IN A THIRD PARTY'S HOME: WHAT IS REASONABLE?

Last term the Supreme Court in *Payton v. New York*[1] held that absent exigent circumstances, police officers may not make a nonconsensual entry into a suspect's home without an arrest warrant to make a routine felony arrest. The Court did not require officers in such circumstances also to obtain a search warrant.[2]

In deciding the home arrest issue, the Court left open[3] the question of whether the fourth amendment[4] protects a third person by requiring a search warrant for arrest of the suspect in the third person's home.[5] Of course, this issue was in dispute long before its mention in *Payton*,[6] and the courts have avoided the problem[7] as often as they have groped for a

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[1] 445 U.S. 573 (1980). For a discussion of the case, *see* Note, *Fourth Amendment—Nonexigent Home Arrest Entries*, 71 J. CRIM. L. & C. 518 (1980).

[2] 445 U.S. at 576.

[3] *Id.* at 583.

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

[5] For a pre-*Payton* discussion of arrests in the home, *see* Rotenberg & Ranzer, *Searching for the Person to be Seized*, 35 OHIO ST. L.J. 56, 65-71 (1974); Note, *Warrantless Arrests in Homes: Another Crisis for the Fourth Amendment*, 7 FORDHAM URB. L.J. 94 (1978); Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 STAN. L. REV. 995 (1971). *See also* Note, *The Constitutionality of Warrantless Home Arrests*, 78 COLUM. L. REV. 1558 (1978).

[6] *See* Commonwealth v. Reynolds, 120 Mass. 190 (1876); Olmstead v. Shed, 13 Mass. 520 (1816); Monette v. Toney, 119 Miss. 846, 81 So. 593 (1919); McCaslin v. McCord, 116 Tenn. 693 (1906). "What requirements must be satisfied before policemen without a search warrant may conduct a search of a third person's private home for a suspect for whom they have a valid arrest warrant are unsettled." United States v. Cravero, 545 F.2d 406, 415 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977). *Compare* United States v. Williams, 612 F.2d 735 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 1328 (1980), and Government of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S 909 (1975), *with* United States v. Phillips, 593 F.2d 553 (4th Cir. 1978), *cert. denied*, 441 U.S. 947 (1979). *See* Annot., 5 A.L.R. 263 (1920).

[7] *See, e.g.*, State v. Ragsdale, 381 So. 2d 492 (La. 1980); Commonwealth v. Wagner, 486 Pa. 548, 406 A.2d 1026 (1979). The Eighth Circuit avoided the question of whether the fourth amendment requires a search warrant to arrest in a third party's home by deciding that the *minimum* requirement is an arrest warrant and probable cause to believe that the suspect is within, and then failing to find the requisite probable cause. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), *aff'd sub nom.* Stone v. Powell, 428 U.S. 465 (1976). Federal law,

solution.[8] The dispute has centered on the conflict between the rights of the third party to privacy in the home and the governmental interests in conducting a search to arrest. Resolution of the issue[9] will define the parameters of an individual's right to privacy and freedom from intrusive home searches under the fourth amendment.

This comment argues that the fourth amendment commands that, absent exigent circumstances, government officers must obtain both search and arrest warrant determinations from a magistrate to make an unconsented entry into a third party's home to arrest a suspect.[10] The analysis will develop three major propositions. First, courts that require merely an arrest warrant and reasonable belief by the officer that the suspect is within the third party's home ignore the historic distinction between arrest and search warrants and the historic emphasis on impartial determinations of probable cause. Second, the fourth amendment requires that, unless the circumstances make it unreasonable to obtain a warrant, the magistrate must determine that there is probable cause to believe that the suspect has committed a crime and that the suspect is within the third party's home. Third, on balance, the search warrant requirement is reasonable because the factors militating in favor of requiring a search warrant outweigh the government's interests in conducting the search of a third party's home to arrest with only an arrest warrant.

I. PROBLEMS WITH EXCEPTIONS TO THE WARRANT REQUIREMENT

The Court has consistently followed the principle that "except in certain carefully defined classes of cases, a search of private property

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however, seems to have partially resolved the question in favor of requiring only an arrest warrant as sufficient to make an arrest in a private dwelling:

> Whoever, being an officer, agent or employee of the United States . . . engaged in the enforcement of any law of the United States, searches any private dwelling . . . without a warrant directing such search . . . shall be fined . . . or imprisoned . . . . This section shall not apply to any person —
>
> (a) serving a warrant of arrest. . . .

18 U.S.C. § 2236 (1948).

[8] *See, e.g.*, United States v. Adams, 621 F.2d 41 (1st Cir. 1980); United States v. Arboleda, No. 79-1278, slip op. at 3397 (2d Cir. June 9, 1980); Wallace v. King, 626 F.2d 1157 (4th Cir. 1980), *petition for cert. filed*, [1980] 28 CRIM. L. REP. (BNA) 4052.

[9] The Supreme Court will consider what authority is necessary to enter a third party's home to arrest a suspect in United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979), *cert. granted sub nom.* Steagald v. United States, 101 S. Ct. 71 (1980).

[10] This position is essentially that taken by the Fourth Circuit in Wallace v. King, 626 F.2d 1157. For discussion of the case, *see* notes 71-77 and accompanying text *infra*. The court held that in order to enter the home of a third person to arrest someone named in an arrest warrant, officers must have probable cause to believe the person named in the warrant is on the premises of the third party, and an appropriate exception to the warrant requirement must exist. 626 F.2d at 1161. The dissent reads this to require both an arrest and search warrant absent one of the exceptions. *Id.* at 1162 (Hall, J., dissenting).

without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[11] In spite of this long-standing presumption favoring a warrant,[12] some lower courts have permitted entry into a third party's home to arrest a suspect without a search warrant.[13] To allow this, these courts usually create one of two exceptions to the warrant requirement. One authorizes entry when the officer has an arrest warrant and reasonable belief that the suspect is within the third party's home.[14] The second permits the officer to enter a third party's home to arrest without a warrant when the officer has probable cause to believe that the suspect committed a felony and when the officer has a reasonable belief that the suspect is within the home.[15] Neither of these exceptions adequately considers the differences between arrest and search warrants or the historical societal value placed on an independent judicial determination as to the officer's belief.

The most frequently accepted theory in the lower courts as to what authority is necessary to enter a third party's home to arrest a suspect has been that the fourth amendment requires only an arrest warrant and reasonable belief by the officer that the suspect is within the third person's home.[16] The common formulation of this theory adds no further requirment of an appropriate exception to the warrant requirement such as consent or exigent circumstances.[17]

The Supreme Court in *Payton* gave some support to the arrest warrant/reasonable belief exception as applied to the suspect's home. While the issue of whether a search warrant is required was not squarely presented in *Payton*,[18] the Court concluded in dictum that a search warrant was not essential to assuring the suspect's fourth amendment

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[11] Camara v. Municipal Court of San Francisco, 387 U.S 523, 529 (1967). *See also* Wyman v. James, 400 U.S. 309, 317 (1971).

[12] *See* United States v. Watson, 423 U.S. 411, 445 (1976) (Marshall, J., dissenting).

[13] *See* notes 14-15 *infra*.

[14] *See* United States v. Gaultney, 606 F.2d at 544; United States v. Phillips, 593 F.2d at 557; United States v. Hammond, 585 F.2d 26, 28 (2d Cir. 1978); United States v. Harper, 550 F.2d 610, 613 (10th Cir. 1977); United States v. Cravero, 545 F.2d at 421 ; United States v. James, 528 F.2d 999, 1017 (5th Cir. 1976); Rodriquez v. Jones, 473 F.2d 599 (5th Cir. 1973); United States v. Brown, 467 F.2d 419, 424 (D.C. Cir. 1972); Lankford v. Gelston, 364 F.2d 197, 206 (4th Cir. 1966); Commonwealth v. Reynolds, 120 Mass. 190.

[15] Latimer v. United States, 415 F.2d 1288, 1289-90 (6th Cir. 1969); McCaslin v. McCord, 116 Tenn. at 707-08. *But see* United States v. Prescott, 581 F.2d 1343, 1350 (9th Cir. 1978).

[16] *See* note 14 *supra*.

[17] Wallace v. King, 626 F.2d at 1161. Note that the Third Circuit varied the exception by holding that the requirement of an arrest warrant and probable cause that the suspect is within applies even in cases of exigent circumstances. Fisher v. Volz, 496 F.2d 333, 341 (3d Cir. 1974). *Cf.* United States v. McKinney, 379 F.2d 259, 263 (6th Cir. 1967) (arguing that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant).

[18] The issue in *Payton* was only whether an arrest warrant was necessary to enter a suspect's home to arrest, not whether a search warrant was also required. 445 U.S. at 575.

rights.[19] Despite its recognition that a search took place to make an arrest,[20] the Court argued that the search to arrest with an arrest warrant and reasonable belief that the suspect is in his home would be "reasonable" under the fourth amendment:

> 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 dwelling in which the suspect lives when there is reason to believe the suspect is within.[21]

Thus, the Court in dictum apparently laid the groundwork for an exception to the warrant clause requirement that no warrant issue without "particularly describing the place to be searched."[22] The basis for this exception is the existence of an arrest warrant. The notion implicit in this *Payton* dictum was explicitly stated by the Fifth Circuit in *United States v. Woods*:[23] "[T]he law recognizes that an entry to execute an arrest warrant is an exception to the requirement of a search warrant to intrude into a home."[24]

After *Payton*'s holding that an arrest warrant and reasonable belief is sufficient to enter the suspect's home, the question is whether a similar construction of the warrant requirement can be applied to a third party's home.[25] As applied to the third party home entry situation, the

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19 Whether the Court reached its conclusion by finding that a search on arrest warrant authority was reasonable by balancing the interests at stake or by finding that the magistrate had essentially made the equivalent of a search warrant determination in issuing the arrest warrant is not clear. *See id.* at 602-03. The argument that a magistrate, in issuing an arrest warrant, implicitly authorizes the search of the home is discussed in note 38 and accompanying text *infra*.

20 445 U.S. at 588 ("It is inherent in such an entry that a search for the suspect may be required before he can be apprehended.").

21 *Id.* at 602-03.

22 *See* U.S. CONST. amend. IV.

23 560 F.2d 660 (5th Cir. 1977). Like *Payton*, this case involved an entry to execute an arrest warrant in the arrestee's home.

24 *Id.* at 665.

25 *Payton* is not dispositive of the question as the Court itself recognizes that the holding is limited to entries into the suspect's home. 445 U.S. at 583. This is apparent in the lower courts' subsequent confusion as to what is required under the fourth amendment when officers enter a third party's home to arrest. After *Payton*, three circuit courts split on the requirements in a third party entry situation. In United States v. Adams, 621 F.2d 41, F.B.I. agents entered the defendant's home without an arrest or search warrant in search of an escaped convict, who was found hiding in a closet. Indicted for harboring a fugitive, Adams moved to suppress the evidence of the seizure of the escaped felon. Adams' housekeeper supplied police with the tip that the escaped felon would be at her apartment. At the suppres-

arrest warrant/reasonable belief requirement is unacceptable.

The theory that an arrest warrant and reasonable belief justify the search[26] of a third party's home for a suspect is problematic because it ignores the distinction between arrest and search warrants.[27] An arrest

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sion hearing a magistrate found both probable cause and exigent circumstances. *Id.* at 43. The court found that the use of the seizure of the escaped convict as evidence against the defendant could only be upheld upon a finding of exigent circumstances. *Id.* at 42. Placing the burden to show exigency upon the government, the court refused to apply the Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970), factors (listed in text accompanying note 116 *infra*) to determine exigent circumstances as a strict checklist. "The ultimate test is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." 621 F.2d at 44.

Finding no such exigency, the court suppressed the evidence on that basis without reaching the question of whether a search or arrest warrant was required. *Id.* at 44 n.7. The court criticized the agents for not seeking an arrest warrant when they had known of the escape and probable whereabouts for two weeks. The court in dicta implied that a search warrant was surely in order:

> There was no reason why either an arrest or search warrant could not have been obtained during the afternoon or evening of [the day before arrest] . . . . We are incredulous at the magistrate's finding that the agents might reasonably have assumed that a magistrate or judge would not be available at 8:30 a.m. . . . There was no reason why the apartment could not have been staked out . . . while the warrant was obtained.

Id. at 44-45 (footnotes omitted).

Of course the *Adams* court could have found that the *Payton* requirement of an arrest warrant would suffice, but instead said that the earlier ruling was not dispositive in the third party situation. *Id.* at 44 n.7. While refusing to hold that either kind of warrant is required, the *Adams* court at least implied that a search warrant is preferred.

Compare the holdings in United States v. Arboleda, No. 79-1278, slip op., and Wallace v. King, 626 F.2d 1157. *See* notes 27, 71-77 & accompanying text *infra*.

[26] An entry to arrest in a third party's home, like the entry to arrest in the suspect's home, constitutes fourth amendment activity. The test to determine what areas the fourth amendment protects is that announced in Katz v. United States, 389 U.S. 347 (1967): "[T]here is a twofold requirement, first that a person have an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Id.* at 361 (Harlan, J., concurring). Despite its admonition that "the fourth amendment protects people, not places," *id.* at 351, the Court in *Katz* used the home as an example of an area where a person has a constitutionally protected reasonable expectation of privacy. *Id.* at 361 (Harlan, J., concurring). *See also* United States v. Reed, 572 F.2d 412, 422 (2d Cir. 1978), *cert. denied*, 439 U.S. 913 (1978).

In addition to recognizing that people have a legitimate expectation of privacy in their homes, the courts have stated that a home entry is a search. In United States v. Woods, 560 F.2d 660, the court noted that " 'the arrest can only be effected if the subject is first found and thus a search is a necessary factual pre-requisite to the possible arrest.' " *Id.* at 666 (quoting United States v. Cravero, 545 F.2d at 416). *See also* Rotenberg & Tanzer, *supra* note 5.

In *Payton*, the Court lent support to the theory that an entry to arrest entails a search when it rejected the New York Court of Appeals' conclusion that there was a "substantial difference" between police intrusion to search a home and police intrusion to arrest a resident: "an entry to arrest and an entry to search for and seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection." 445 U.S. at 588. The Court further noted that "the two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home." *Id.* at 589.

[27] A recent Second Circuit opinion provides the best example of minimization of the difference between the two warrants. In United States v. Arboleda, No. 79-1278, slip op., police

warrant does not satisfy the fourth amendment's requirement that a warrant "particularly describing the place to be searched" issue upon probable cause supported by oath or affirmation.[28] Despite the fourth amendment's general reference to "warrants," an arrest warrant cannot be substituted for a search warrant because there is a difference between the two types of warrants[29] and the particular interests each protects.

According to caselaw, arrest warrants and search warrants require a different determination by the magistrate. A search warrant reflects a magistrate's determination that there is probable cause to believe that the evidence sought will aid in apprehension or conviction, and it names the particular place to be searched and things to be seized.[30] A search warrant issues only upon a showing that there is probable cause to believe that the item sought is located on the premises for which the search

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officers went to the defendant's apartment to apprehend his brother, Gilberto Arboleda, on a homicide charge. An officer poised outside the apartment window on a ledge observed the defendant throw a foil packet of cocaine out of the window. The officer then knocked on the window, entered, and arrested the defendant as he dropped narcotics to the floor. After the arrest, officers searched the apartment for the defendant's brother, whom they originally came to arrest, and found other evidence of narcotics activity.

Noting that the record did not show whether an arrest warrant was obtained, the court denied the defendant's motion to suppress saying: "Although there was no search warrant for Arboleda's apartment the police officers were going to the apartment to arrest Gilberto, and if they had an arrest warrant for Gilberto this would have *the same legal effect as a search warrant* in justifying entry into Arboleda's home to effect the arrest." *Id.* at 3403-04 (emphasis added). The *Arboleda* court declined to rule on the arrest warrant question because the defendant did not meet its burden to produce evidence that he was arrested or searched without a warrant, and therefore, the government was under no obligation to adduce evidence of a warrant for the brother's arrest. The result of the decision is to require only an arrest warrant to enter a third party's home.

28 *See* U.S. CONST. amend. IV.

29 The Ninth Circuit has argued that the fourth amendment makes no distinction between an arrest and search warrant. However, the court also said: "The warrant, whatever it be called, must describe 'the place to be searched,' here apartment 544, and 'the persons or things to be seized,' here Duvernay [the suspect] and the parcels." United States v. Prescott, 581 F.2d at 1350. However, the court's description is not of an arrest warrant but of a search warrant. Because the officer may not know that the suspect will be seized in a place, an arrest warrant rarely names a place to be searched.

Support for the notion that an arrest warrant might serve the purposes of a search warrant in the third party entry situation can also be found in Dalia v. United States, 441 U.S. 238 (1979). In rejecting a claim that the Court should set forth procedures for electronic surveillance, the Court said:

> This view of the warrant clause parses too finely the interests protected by the fourth amendment. Often in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant. For example, police executing an arrest warrant commonly find it necessary to enter the suspect's home in order to take him into custody, and they thereby impinge on both privacy and freedom of movement.

Id. at 257-58. This statement is distinguishable from the third party situation in that it involves a suspect's home.

30 *Id.* at 255.

warrant is requested.[31] In contrast, as the court in *Fisher v. Volz*[32] noted, an arrest warrant indicates merely that an "officer has probable cause to believe the suspect committed a crime; it affords no basis to believe that the suspect is in some stranger's home."[33] The differences in the warrants are designed to maximize protection against the type of intrusion the government is about to make: the search warrant protects against unreasonable search of the home or seizure of property while the arrest warrant protects against unreasonable seizures of the person.

Search and arrest warrants differ not only because different judicial determinations are involved, but also because the use of an arrest warrant to justify a search would violate the fourth amendment's command for particularity. The Fifth Circuit drew the opposite conclusion in *Cravero v. United States*,[34] arguing that a search warrant is not required to execute an arrest warrant in a third person's home because the arrest warrant already particularizes the search.[35]

The *Cravero* analysis fails to consider two problems. First, the particularity clause in the fourth amendment applies not only to "the person or thing to be seized" (which an arrest warrant describes), but also to the "place to be searched" (which arrest warrants traditionally do not describe). To the extent that the arrest warrant does not name the place to be searched for the suspect, it is general rather than particular. Second, a routine search for a suspect can take on the characteristics of a search under a general warrant because the plain view and search incident to arrest doctrines expand the scope of the search.[36] This expansion should be avoided by the adoption of a rule like that suggested in the *United States v. Boyer* concurrence whereby a search uncovering items

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31 Rice v. Wolff, 513 F.2d at 1285.

32 496 F.2d at 333.

33 *Id.* at 341.

34 545 F.2d at 421 n.1.

35 *But see* the assertion by the *Harper* court that arrest warrants put few or no limitations on the power of police to enter a private home. United States v. Harper, 550 F.2d at 613. The same cannot be said of search warrants.

36 The importance of a magistrate's delineation of the *scope* of the search was emphasized by the Court in *Katz*: "[B]ypassing a neutral predetermination of the scope of a search leaves individuals secure from fourth amendment violations 'only in the discretion of the police.' " 389 U.S. at 358-59.

The *Fisher v. Volz* discussion of the claim that the lack of a search warrant will transform the arrest warrant into a "general warrant" is not necessarily inconsistent with this line of argument. *See* 496 F.2d at 343. In *Fisher*, the police had an arrest warrant, probable cause, *and* exigent circumstances. A rule that in exigent circumstances a search warrant is not necessary does not preclude an argument that in nonexigent circumstances a search warrant is required because an arrest warrant alone would operate as a general warrant. The *Fisher* discussion of the general warrant claim should be read to apply only when exigent circumstances are present. With that reading, its rule would be consistent with that in Wallace v. King, 626 F.2d at 1157.

resulting in the arrest of the third party rather than the suspect would be unreasonable and the evidence suppressed.[37]

In addition to these differences in judicial determination, the two warrants cannot be treated as interchangeable as search warrant determinations are not made when an arrest warrant issues. In the context of any entry into the suspect's home, the *Payton* Court argued that the magistrate implicitly considers the privacy rights of the suspect when issuing an arrest warrant by logically assuming that the officers will go to the arrestee's home first to make the arrest.[38] Regardless of whether this principle could withstand scrutiny in the suspect home entry situation, it certainly would not apply to the third party home entry. Under current warrant practices, the magistrate makes no determination that the suspect might be at a friend's or relative's home. Even if the magistrate implicitly considers that an arrest warrant could be executed in *any* home, that consideration does not have the same kind of particularity as an implicit determination that a suspect will be arrested in his own home. The latter determination is limited to the residence of a named person, while the former is a limitless inclusion of every residence without any determination as to a particular person's residence. Therefore, in contrast to the arrestee home entry situation, the third party's right to be free from unreasonable searches is not considered implicitly or otherwise when the magistrate issues the arrest warrant for the suspect.

Arrest and search warrants are also not interchangeable because different authorities may actually issue the warrants. While in theory one would expect a neutral magistrate to issue both kinds of warrants, in practice the arrest warrant may not be issued by a magistrate. Professor LaFave has observed that "in practice it is the prosecutor or his assistant who is actually consulted by the police officer." In some cases "a judicial officer does not enter the picture at any point."[39] LaFave's research on the warrant systems in three states indicates that, at least for some states, in everyday police practice the prosecutor makes the decision to arrest and the warrant is signed as a mere formality.[40] LaFave explains

37 United States v. Boyer, 574 F.2d 950, 955 (8th Cir. 1978) (Ross, J., concurring). Apart from this discussion, Judge Ross' solution to the problem is inadequate because the homeowner's expectation of privacy is still violated when the search is made pursuant to an arrest warrant, even though the evidence against him is suppressed. That is, a determination by a magistrate as to the belief that the suspect is in his home has still not been made. Furthermore, such a rule would create evidentiary and enforcement problems for police due to the suppression of evidence which could easily be solved by obtaining a search warrant.

38 *See* 445 U.S. at 603.

39 W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 31 (1965).

40 *Id.* at 33. "Often the warrant is signed without any examination of its contents. The reason for complete abdication of control was explained simply by one judge: 'I have complete confidence in the police and prosecutor's office.' " *Id.* at 34 (footnote omitted).

The Supreme Court tacitly accepted this practice in Ocampo v. United States, 234 U.S.

that the reason for this procedure is that arrest warrants are infrequently issued, and a separate process similar to the charging function has not developed. LaFave's findings probably may be projected to other states because prior to *Payton* under caselaw an officer rarely had to obtain an arrest warrant.[41] This practice may change as officers seek more arrest warrants to make arrests in the suspect's home in compliance with *Payton*. However, a change in the dominant role prosecutors play in the issuance of arrest warrants is not assured.

Though such a procedure is objectionable in any case because it circumvents the historic emphasis on impartiality,[42] it is particularly so when the arrest warrant will be the basis for a search of someone's home. A prosecutor is not a "disinterested observer," and his decision to issue an arrest warrant is based more on the likelihood of prosecution than it is on "a meticulous testing of the evidence against the probable cause norm"[43] envisioned by the framers. While the prosecutor will usually issue warrants only for those suspects who can be successfully prosecuted, the potential for prosecution and the existence of probable cause will not always be equivalent at the time the prosecutor decides to seek a warrant. Furthermore, the probability of successful prosecution is not the standard for seizure set forth in the amendment.

Because the decision to issue an arrest warrant comes from those charged with enforcement of laws, issuance of an arrest warrant does not represent the same degree of objective, impartial decisionmaking as does issuance of a search warrant. The search warrant is supported by an affidavit stating the officer's reason to believe that the suspect is in the third person's home. In practice, entry upon an arrest warrant and a police officer's reasonable belief that the suspect is within leaves citizens with scant protection of their fourth amendment rights.[44]

In addition to this failure to distinguish appropriately between arrest and search warrants, a second problem with the arrest warrant/reasonable belief approach is that it ignores the rationale behind the distinction between probable cause and reasonable belief. The lit-

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91 (1914), when the Court refused to invalidate a statute allowing the prosecuting attorney to make the probable cause determination. "[T]he function of determining that probable cause exists for the arrest of a person accused is only *quasi*-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal." *Id.* at 100.

41 The practice, which was affirmed by the Court in United States v. Watson, was for officers to arrest in a public place without an arrest warrant. 423 U.S. 411. Before *Payton* officers usually arrested in the home without an arrest warrant on their own determination of probable cause. Payton v. New York, 445 U.S. at 607-09 (White, J., dissenting).

42 *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948).

43 W. LAFAVE, *supra* note 39, at 36.

44 One could argue that requiring a search warrant to arrest in the home might result in a similar practice as to issuance of search warrants. This is unlikely as the procedure for issuing search warrants is already intact.

eral language of the fourth amendment requires that an officer have probable cause, not a reasonable belief, to conduct a search or seizure. While probable cause is defined in terms of reasonableness,[45] the different terminology is usually associated with *who* makes the determination. In *United States v. Cravero*, the court said:

> Probable cause is essentially a concept of reasonableness, but it has become a term of art in that it must always be determined by a magistrate unless exigent circumstances excuse a search warrant. When one says "probable cause," therefore, one also says either "magistrate" or "exigent circumstances." Reasonable belief embodies the same standard of reasonableness but allows the officer. . . to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.[46]

Furthermore, in *Dunaway v. New York*,[47] the Court recognized that probable cause is a higher standard than the reasonable suspicion standard. Refusing to allow officers to take someone into custody on the basis of reasonable suspicion, the Court noted that: "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even strong reason to suspect was not adequate to support a warrant for arrest.' "[48] In allowing an entry on reasonable belief instead of the constitutionally mandated probable cause, the courts essentially require a lower standard of proof.

Later judicial review of the sufficiency of the officer's reasonable belief does not adequately protect individual rights. As the Court noted in *Beck v. Ohio*,[49] "the after-the-event justification for the arrest or search is a far less reliable procedure than an objective predetermination of probable cause because it is influenced by the shortcomings of hindsight judgment." The fact that injustice might be discovered after the damage is done does not make it any less desirable to prevent it when possible through prior judicial review.

Reliance upon an arrest warrant and the officer's reasonable belief that the person is on the premises also contravenes the fourth amendment's historical preference for determination of probable cause by a magistrate. The most notable statement of the need for such a determi-

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[45] *See, e.g.*, Green v. United States, 289 F. 236, 238 (8th Cir. 1923): "Probable cause which will justify an arrest is reasonable belief or suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense of which he is suspected."

[46] 545 F.2d at 421.

[47] 442 U.S. 200 (1979).

[48] *Id.* at 213.

[49] 379 U.S. 89, 96 (1964).

nation was by Justice Jackson in *Johnson v. United States*:[50]

> 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. . . . When the right of privacy must reasonably yield to the right to search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[51]

The requirement developed to protect citizens, not to punish law officers. The need to protect basic fourth amendment rights is so great that the judgment of police as to probable cause is sufficient authorization for a search only in exigent circumstances.[52]

A magistrate's review of a police officer's belief as to whether the suspect is in the home is no less essential in a search of a third party home to arrest a suspect than in other search situations.[53] As contrasted with an entry into a suspect's home,[54] an entry into a third party's home involves the interests of a person not suspected of a crime. Because the police do not have reason to believe that the third party is guilty of wrongdoing, the third party whose home is subjected to a search for a suspect is similar to a homeowner whose house is subjected to a search for evidence. Like the homeowner in an evidence search, the third party in a suspect search has a right to a determination by someone not charged with ferreting out crime that an invasion of the third party's right to enjoy the privacy of the home is necessary.

When compared to an entry to arrest in a suspect's home, "the intrusion onto a third party's property would seem to be a more possible fourth amendment infringement."[55] When the fourth amendment

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[50] 333 U.S. 10.

[51] *Id.* at 13-14 (footnotes omitted). *See also* Katz v. United States, 389 U.S. at 357; McDonald v. United States, 335 U.S. 451, 455-56 (1948); Rice v. Wolff, 513 F.2d at 1286; Dorman v. United States, 435 F.2d at 389.

[52] Rice v. Wolff, 513 F.2d at 1287. *See also* Paper v. United States, 53 F.2d 184, 185 (4th Cir. 1931).

[53] "The sanctity of the home is no less threatened when the object of police entry is the seizure of a person, rather than a thing. A magistrate's disinterested determination that governmental intrusion is warranted is no less desirable when the policeman's quarry is a suspect, rather than a piece of evidence." United States v. Prescott, 581 F.2d at 1349.

[54] The *Payton* Court is errant at least to the extent that its decision rests on the assumption that only the suspect's fourth amendment rights are at stake when officers enter the suspect's home to make an arrest. Even in the entry of a suspect's home there are potentially third party privacy interests at stake. That is, a suspect may live with a family or spouse whose privacy interests must be considered separately via a search warrant inquiry. To base their fourth amendment right to privacy on the notion that they are "one" with the suspect contravenes the Constitution's guarantee of individual liberty.

[55] United States v. Woods, 560 F.2d at 666.

stakes are high,[56] as here, the detached judgment of a magistrate is essential.[57] There is nothing unique about a search to arrest a person in a third party's home which makes judicial determination of probable cause unnecessary.

Allowing officers to make probable cause determinations on their own to enter a home might seem reasonable if society was assured that police officers somehow exercise better and more honest judgment in entries to arrest in a third party's home than in entries to seize evidence. However, cases such as *Lankford v. Gelston*,[58] in which over three hundred homes were searched by police officers, indicate that a mistake of judgment could just as easily be made in this kind of entry as in any other where a magistrate's prior approval is required. Furthermore, some police officers apparently have failed to adopt the judiciary's reverence for the right to privacy in the home. In one case an officer testified that in twenty-six years on the police force he had never secured a search warrant.[59] Since "history shows that police acting on their own cannot be trusted,"[60] a magistrate's prior approval of a home search must be required to enforce the policy of the fourth amendment.[61]

A second exception to the general search warrant requirement suggested by the courts allows an officer to enter a third party's home to conduct a warrantless arrest upon the officer's reasonable belief that the suspect, whom the officer has probable cause to believe committed a felony, is within the home.[62] The theory was more prevalent prior to the *Payton* decision, and seems to have little constitutional support after *Payton*. The position would, however, not necessarily be logically untenable in light of *Payton* if the Court believed that a third party had less fourth amendment protection in his home than a suspect did in his own home,

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56 *But see* statements to the effect that an arrest is usually considered more burdensome than the "annoyance and temporary inconvenience" attendant to a search. United States v. Watson, 423 U.S. at 428; Chimel v. California, 395 U.S. 752, 776 (1969) (White, J., dissenting).

57 Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

58 364 F.2d 197. The search was conducted over 19 days to find two black men who shot and killed a police officer.

59 Fisher v. Volz, 496 F.2d at 337, 344.

60 McDonald v. United States, 335 U.S. at 456.

61 This type of reasoning has been applied to other fourth amendment questions. Rice v. Wolff, 513 F.2d at 1286, in rejecting the claim that an inadequate affidavit can be rehabilitated in a suppression hearing following the search, held the suggestion that in the absence of exigent circumstances the police should be permitted to conduct searches on their own assessment of probable cause to be contrary to the policies to be furthered by the warrant requirement. This approach "in no way would protect innocent citizens from unreasonable searches by police officers who had erred in assessing the existence of probable cause to search the particular premises." *Id.* That a third party home search is for purposes of arrest should not affect the societal refusal to rely upon an officer's assessment of probable cause.

62 *See* Latimer v. United States, 415 F.2d at 1290.

and that the suspect had less fourth amendment protection in the third party's home than in his own.[63]

The probable cause/reasonable belief exception suffers the same infirmities as the arrest warrant/reasonable belief exception, but to a greater degree. The theory provides less protection for the third party's rights via a prior judicial ruling on the officer's suspicion than its stricter counterpart discussed above. The theory is mentioned here only for completeness, as it has little if any merit in light of the *Payton* ruling that at least an arrest warrant is required.

II. THE COMMAND OF THE FOURTH AMENDMENT

Having addressed the historic importance of independent judicial review of police decisions and the importance of what determinations lie behind the issuance of a particular kind of warrant, the next question for consideration is what the fourth amendment requires for an entry to arrest in the third person's home. The answer is best found by looking to the literal language of the amendment.

What the language of the fourth amendment requires may be clouded more than it is clarified by the use of labels to describe what must be decided in advance by a judicial officer. Although the terms "arrest warrant" and "search warrant" provide easy labels for purposes of understanding and discussing the rule, much of the semantic debate over arrest and search warrants could be resolved by simply setting forth, without labels, what judicial determinations need to be made in order to enter a third party's home to arrest a suspect. Because the basis for the entry is the arrest, the magistrate should determine whether the police have probable cause to believe that the suspect committed a crime, much as the magistrate determines in issuing a warrant for a thing whether the thing sought is evidence of the crime. This requirement fulfills the amendment's command that "no warrants . . . issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons . . . to be seized."[64] The magistrate should also decide whether there is probable cause to believe that the suspect is on the premises of the third party. This requirement fulfills the fourth amendment provision that the warrant, issued on probable cause "particularly describ[e] the place to be searched."[65] The officer's

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63 *See* Olmstead v. Shed, 13 Mass. at 522 (suggesting that visitors in a home would have less protection against arrest than family members and servants). *Cf.* People v. Tillery, 99 Cal. App. 3d 975, 978, 160 Cal. Rptr. 650, 652 (1980): "The expectation of privacy, against police intrusions, of an invited guest in a home should be as great as that of the resident himself." *See also* United States v. Williams, 612 F.2d at 738.

64 *See* U.S. CONST. amend. IV.

65 *Id.* The Court has recognized that "the language of the Fourth Amendment, that '. . .

reasonable belief combined with an arrest warrant should only be sufficient authority for entry into a third party's home when one of the exceptions[66] to the search warrant requirement, such as exigent circumstances or consent to enter, is present.[67] It is evident from the framers' use of "and" rather than "or" as a connector that both the person to be seized and place to be searched must be named in the warrant.

Issuance of a search warrant alone could, in some circumstances, be sufficient authority for a third party home entry under this rule. The issue of whether the equivalent of a search warrant supports an entry to arrest in the suspect's home arose in a recent case interpreting *Payton*. The court suggested that a search warrant could replace an arrest warrant to arrest a suspect in his own home. In *State v. Ruth*,[68] police who had probable cause to believe that the defendant had committed felony murder obtained a search warrant. In the process of executing the search, police discovered the defendant in the apartment and arrested him. The defendant claimed that the absence of an arrest warrant made the arrest illegal. Deciding that the arrest was valid, the court held that where the police enter a home for the purpose of conducting a search under a valid search warrant, they may arrest a resident within if they have probable cause to believe he committed a felony.[69] Citing *Payton*, the Connecticut Supreme Court reasoned that the search warrant met *Payton*'s requirement for a judicial determination of probable cause, and once legally on the premises, the police had a right to arrest based on the plain view doctrine. The court argued that it would be a "fruitless exercise" for police to obtain another warrant authorizing arrest.

Although it is unclear from the *Ruth* reasoning exactly what determination the magistrate made in issuing that search warrant, presumably the issuance of a search warrant to enter a third party's home to arrest necessitates a determination by the magistrate that there is probable cause to believe the suspect committed a crime and that the suspect is within the home. Otherwise, there would be no basis for the search. This is analogous to the determination before a search for evidence that

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no warrant shall issue, but upon probable cause . . .' of course applies to arrest as well as search warrants." Giordenello v. United States, 357 U.S. 480, 485-86 (1958).

66 One court has suggested that the issuance of an arrest warrant might itself be an exception to the search warrant requirement: "[T]he law recognizes that an entry to execute an arrest warrant is an exception to the requirement of a search warrant to intrude into a home." United States v. Woods, 560 F.2d at 665. *See also* Wallace v. King, 626 F.2d at 1162 (Hall, J., dissenting).

67 *See* Wallace v. King, 626 F.2d at 1161.

68 41 CONN. L.J., June 10, 1980, at 14 (Conn. 1980).

69 *Id.* at 16.

the thing sought is evidence of a crime and that the thing is on the premises.[70] Thus, a search warrant would, if both determinations were made, support an entry into a third party's home to arrest a suspect since both essential determinations were made by the magistrate.

Even though a search warrant may suffice, the necessity for an arrest warrant remains. In reality, officers probably will first develop a belief that the suspect committed a crime, and sometime later, develop a belief as to the suspect's whereabouts. Since the arrest warrant seems to be sufficient to arrest on the suspect's premises under *Payton*, the officer would naturally want to get the arrest warrant as soon as the belief that the suspect committed a crime develops. To enter a third party's home, however, the officer would have to obtain a search warrant naming the place to be searched and person to be seized. The only time the search warrant alone would suffice is when the two beliefs as to the commission of the offense and the suspect's location develop simultaneously.

Thus, under the literal language of the fourth amendment, no matter what the warrant is called, a magistrate must make the equivalent of both arrest and search warrant determinations before officers may enter a third party's home in nonexigent circumstances to arrest a suspect. This rule is preferable not only because it avoids the problems inherent in the two theories rejected above, but also because it best comports with the letter and spirit of the fourth amendment.

Some lower courts have advocated this formulation of the warrant requirement. In *Wallace v. King*,[71] the court supported a rule requiring both arrest and search warrant determinations. This case was brought under 42 U.S.C. § 1983[72] to question an unwritten police policy authorizing officers to search any place without a search warrant when they had a reasonable belief that the person named in the arrest warrant would be there. The police had an arrest warrant for Susan Swain in a child custody matter. Proceeding on the estranged husband's suggestion that Swain was at her parents' home, police searched it without a search warrant or circumstances requiring immediate arrest. One month later Swain's estranged husband again contacted police, saying that she was on the premises of a friend. When police searched the home for Swain, their reply to the owner's objection to the warrantless search was that the arrest warrant sufficed.

Although the court refused to hold the officers liable for damages

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70 *See* Warden v. Hayden, 387 U.S. 294, 307 (1967).

71 626 F.2d 1157.

72 "Every person who, under color of any statute . . . subjects . . . any citizen of the United States or other person . . . 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 by law. . . ." 42 U.S.C. § 1983 (1976).

because they acted in good faith on the basis of instructions from superiors, the court set forth a stricter standard for third party home entries than that set forth for entry of a suspect's home in *Payton*. Essentially adopting the plaintiffs' claim that searches based on a reasonable belief that a person named in an arrest warrant might be found in the third party's home contravene the particularity requirement of the fourth amendment, the court said:

> Reasonable or probable cause to believe that a person for whom an arrest warrant has been issued is on the premises, standing alone, is not sufficient. 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.' . . . An arrest warrant indicates only that there is probable cause to believe that the suspect committed a crime; it affords no basis to believe that the suspect is in a stranger's home.[73]

While the *Wallace* court does not explicitly call for a search warrant,[74] its test requires more than did its predecessors: "[N]ot only must the officers have probable cause to believe that the person named in the arrest warrant is on the premises of the third person, but there must also exist an appropriate exception to the warrant requirement" such as consent or exigent circumstances.[75] The court went even further and required an analysis of several factors, some of which include: whether a magistrate is available, whether an officer can stake out the premises while another gets a search warrant, the nature of the premises to be entered, and the reasonableness of the belief.[76] Thus, *Wallace* vitiates the previous talismanic quality of the entry standard premised upon the "reasonable belief that the suspect is within" by making that standard merely one of several factors to determine what authority is necessary to validate a search to arrest in a third person's home.[77]

With the exception of the recent *Wallace v. King* opinion, the caselaw provides only scattered support for a search and arrest warrant requirement. The reluctance of the courts to establish a search warrant requirement in the absence of specific Supreme Court guidance is indi-

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[73] 626 F.2d at 1161.

[74] Judge Hall writing in dissent interprets the majority as requiring a search warrant. *Id.* at 1162.

[75] *Id.* at 1161.

[76] *Id.*

[77] The *Wallace* standard can be criticized because it does not provide a "bright line" for guidance to police officers, who must juggle these factors in their heads as they decide whether to enter and arrest. The criticism loses its salience, however, to the extent that the exigent circumstances exception would save an officer from going through mental fourth amendment gymnastics in a true emergency. Otherwise, the officer should be forced to carefully consider the reasons for the substantial invasion of privacy involved in an entry of a third person's home.

cated by their willingness to support the theory in dicta but not in a holding, as well as their adroitness in evading the question.

In *McDonald v. United States*,[78] for example, a case involving the entry of a rooming house without arrest or search warrant to arrest a suspect after officers saw evidence of a numbers operation from outside the house, the Court refused to "assume that where a defendant has been under surveillance for months, no search warrant could have been obtained."[79] Resting upon the need to protect the individual's privacy, the Court said: "When we move to the scene of the crime, the reason for the absence of a search warrant is even less obvious. When the officers . . . saw what was transpiring in the room, they certainly had adequate grounds for seeking a search warrant."[80]

In *Government of Virgin Islands v. Gereau*,[81] the court discussed the search warrant requirement. Pursuant to arrest warrants issued for three suspects in an armed robbery, the police searched buildings clustered together and arrested the suspects. While implicitly supporting a search warrant requirement in dicta,[82] the court essentially adopted the *Fisher v. Volz* rule by holding that exigent circumstances validated the warrantless unconsented search: "Although police have warrants for the arrest of suspects, they may enter premises, at least of third persons, to search for these suspects only in exigent circumstances where the police officers also have probable cause to believe that the suspects may be within."[83] In spite of the holding of *Gereau*, the Ninth Circuit has cited the case for the proposition that a search warrant, not just an arrest warrant, is required when officers seek a suspect in a third party's home.[84]

The Eighth Circuit artfully avoided making a decision on the question in *Rice v. Wolff*.[85] After an arrest warrant issued for a bombing suspect, police entered the home of the suspect's friend (Rice) upon a search warrant and found dynamite in plain view. Once the court found that the search warrant was invalid because the affidavit was insufficient to establish probable cause, the question of whether the arrest warrant was sufficient to validate the entry was squarely before the court. Instead of reaching the question, the court said that "the fourth

78 335 U.S. 457.

79 *Id.* at 454-55.

80 *Id.* at 455. Note, however, that Jackson's concurrence implies that an arrest warrant may have justified the entry. *Id.* at 459.

81 502 F.2d 914.

82 "Arrest warrants are not substitutes for search warrants." *Id.* at 928.

83 *Id.*

84 United States v. Prescott, 581 F.2d at 1349-50. *See also* United States v. Adams, 621 F.2d at 44 n.7 (citing *Gereau* for that proposition).

85 513 F.2d 1280.

amendment mandates, as a *minimum*, that police officers may not enter the dwelling or premises of a third person in search of a suspect for whom they have a valid arrest warrant unless they have reasonable or probable cause to believe that the suspect is within."[86] Because the police acted only upon a hunch or guess, they failed to show a "firm, concrete, and otherwise reasonable belief" constituting probable cause.[87] The case supports search warrant protections to the extent that the court refused to validate the entry on the grounds of exigency and to the extent that it left open the question of whether the police or a magistrate shall determine whether the officers have a reasonable belief that the suspect is within.[88]

Finally, in *United States v. Williams*,[89] police entered a third party's home with neither an arrest nor a search warrant upon an informer's tip to arrest Williams, a shooting suspect. Finding that the protection against warrantless arrests in private dwellings extends to one who is in the dwelling of a third party,[90] the Third Circuit nevertheless held that exigent circumstances justified the entry to arrest.[91] The court's discussion of whether the police had sufficient time to obtain a warrant lends support to a search warrant requirement in nonexigent circumstances.[92]

The halting steps of these courts toward requiring both arrest and search warrant determinations in third party home entry situations support the idea that more is at stake in the third party entry situation than in the entry into the suspect's home. In *Wallace v. King* the court accepted the proposition alluded to in *Gereau, Wolff*, and *Williams*, holding that in the absence of a search warrant, officers must have both probable cause to believe the person named in the arrest warrant is on the premises of the third person and an appropriate exception to the warrant requirement.[93]

This rule appropriately allocates the determinations as to arrest and search to the judiciary. By allowing the judicial officer to determine whether the suspect has committed a crime, the rule protects the third

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86 *Id.* at 1292 (emphasis added). *See also* Lankford v. Gelston, 364 F.2d at 203.

87 513 F.2d at 1292.

88 The "firm, concrete" language could also be read to establish an intermediate standard requiring more than the usual "reasonable belief" but less than a determination of probable cause by a magistrate.

89 612 F.2d 735.

90 *Id.* at 738.

91 *Id.* at 739.

92 *Id.* Another case often cited as supporting a search warrant requirement is United States v. Reed, 572 F.2d 412, 424 (2d Cir. 1978), *cert. denied*, 439 U.S. 913 (1978). *Reed* requires that for an arrest in a suspect's home absent exigent circumstances officers must have "a warrant to arrest a suspect at home," *i.e.*, a search warrant. *See* United States v. Arboleda, No. 79-1278, slip op.

93 626 F.2d at 1161.

party from intrusions into privacy based on less than probable cause for arrest. Likewise, the search warrant requirement protects the third party from an arbitrary entry based on the officer's suspicion that the suspect might be inside. A rule not assuring judicial determination on both questions would leave a huge loophole, allowing officers to use their decisions on whichever question has been left to their judgment as a basis for the entry. Such a rule provides feeble protection for third persons in their homes. In contrast, the rule in *Wallace* recognizes the special protection afforded the home under the fourth amendment and essentially adopts the literal language of the fourth amendment.

III. BALANCING THE INTERESTS

As the presumption under the fourth amendment is that warrantless searches of private property are generally unreasonable,[94] the burden must be on the one desiring to create a general exception to show that requiring a warrant is unreasonable or that creating an exception is reasonable.[95] The analysis behind creating an exception or upholding the requirement is essentially the same.[96] As established in *Camara v. Municipal Court of San Francisco*,[97] the Court balances "the need to search against the invasion which the search entails."[98] Using the balancing approach, the Court has carved out a few narrow exceptions to the warrant requirement by finding a particular type of fourth amendment activity to be reasonable.[99] The practical impact of these exceptions is either that officers may search[100] or seize[101] without a warrant, or that they may do so with less than probable cause.[102] Likewise, the Court has upheld the requirement for a warrant by showing that it is not un-

94 *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); See v. City of Seattle, 387 U.S. 541, 543 (1967).

95 United States v. Watson, 423 U.S. at 445; Camara v. Municipal Court, 387 U.S. at 528.

96 *See, e.g.*, the Court's analysis in Wyman v. James, 400 U.S. 309, a welfare home visit case, where the factors were balanced to show an exception would not be unreasonable. One of the arguments was that a search warrant requirement would be unreasonable because it would frustrate the purpose of the AFDC program.

97 387 U.S. 523.

98 *Id.* at 537. For another application of the balancing approach, *see* Terry v. Ohio, 392 U.S. 1.

99 Some of the traditionally recognized exceptions to the warrant requirement include search incident to arrest, United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969); consent, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); plain view, Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971); and stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968).

100 United States v. Robinson, 414 U.S. at 235.

101 United States v. Watson, 423 U.S. at 414.

102 Marshall v. Barlow's, Inc., 436 U.S. at 320.

reasonable.[103] Reasonableness is the ultimate standard.[104]

Some of the factors the Court has considered in applying the balancing test are: the protection of police officers and citizens,[105] the intrusiveness of the search,[106] the occupation of the person conducting the search,[107] the individual's right to privacy,[108] the successful prosecution of a crime,[109] and the purpose of the search.[110] Usually no one factor is determinative of the reasonableness issue. The Court balances many of these interests, attempting to maximize both individual rights and the government's concern for successful law enforcement.

To determine whether the proposed requirement of both arrest and search warrant determinations by a magistrate is "unreasonable," the need for the intrusion into the third party's home to arrest a suspect must be balanced against the invasion which such a search entails for the third party. Of course, general societal interests exist on both sides of the balance between governmental concerns and the individual's interests.

It is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interest of the private citizen."[111] The most compelling government interest is the apprehension of criminals as safely and efficiently as possible.[112] The fact that one must engage in balancing indicates that the challenged fourth amendment requirement somewhat burdens the enforcement interest.[113] The question is not whether the requirement is burdensome at all, but whether it is *unduly* burdensome.[114]

The government's goal of criminal apprehension is more likely to

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103 *See, e.g., id.* at 311-15, where the Court upholds the search warrant requirement for an OSHA inspection.

104 Camara v. Municipal Court of San Francisco, 387 U.S. at 539.

105 Terry v. Ohio, 392 U.S. at 27.

106 Wyman v. James, 400 U.S. at 321; Terry v. Ohio, 392 U.S. at 24-25.

107 Wyman v. James, 400 U.S. at 322-23.

108 Marshall v. Barlow's, Inc., 436 U.S. at 311-12; Camara v. Municipal Court of San Francisco, 387 U.S. at 528.

109 Terry v. Ohio, 392 U.S. at 22.

110 Wyman v. James, 400 U.S. at 323.

111 Camara v. Municipal Court of San Francisco, 387 U.S. at 534-35.

112 Terry v. Ohio recognized this interest as "effective crime prevention and detection." 392 U.S. at 22.

113 Fourth amendment requirements do not inherently frustrate law enforcement. While there is conflicting evidence as to their practical impact, these restrictions may well enhance society's law enforcement goal by forcing police officers to do more thorough investigative work and not waste limited resources pursuing persons on whom there is insufficient evidence. An important indirect benefit, moreover, is to instill greater faith and cooperation in citizens who realize that the officers are carrying forth their duties in a responsible and restrained manner.

114 *See* United States v. Watson, 423 U.S. at 445 (Marshall, J., dissenting).

be delayed than frustrated[115] by a search and arrest warrant requirement. The exigent circumstances exception to the warrant requirement, which would allow the officer to enter the third party's home to arrest upon a reasonable belief that the suspect is within, provides officers with a range of activity that need not be approved by a magistrate in emergency situations. In deciding whether the situation is an exigent one, the officer would consider the factors suggested in *Dorman v. United States*[116]: seriousness of the offense, reasonable belief that the suspect is armed, probable cause and reasonably trustworthy information that the suspect committed a crime, likelihood of escape, and peaceable nature of the entry. Additional considerations for the officer would be those enumerated in *Wallace v. King*: hot pursuit,[117] fear of injury to others if the arrest is delayed, availability of a magistrate, and ability of police to keep watch while a search warrant is obtained.[118] Conversely, a passage of time between the officer's belief that the suspect is within and the actual entry would militate against a finding of exigent circumstances.[119] Similarly, a prior formalized strategy to execute entry by police would be a factor indicating that a search warrant should have been sought.[120]

In situations where a suspect flees into a private home, as contrasted with a flight in a public area, a finding of exigent circumstances would generally be less likely since the suspect is confined to one place. The suspect's potential mobility is much more restricted, particularly if officers have staked out the residence.[121] A situation which might qualify as exigency and thereby not require a search warrant would be where a violent crime is committed late at night, one or two officers respond, and the suspect is seen fleeing into a nearby building armed.

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115 *Camara* suggests that "[i]n assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." Camara v. Municipal Court of San Francisco, 365 U.S. at 533.

116 435 F.2d at 392-93.

117 This factor has been recognized by the Supreme Court. United States v. Santana, 427 U.S. 38, 42-43 (1976). *See, e.g.*, People v. Bradford, 28 Cal. App. 3d 695, 104 Cal. Rptr. 852 (1972).

118 626 F.2d at 1161. *Government of Virgin Islands v. Gereau* suggests that the factors should be reasonable grounds to believe the suspect will not tarry long, commission of a grave offense, and a heavily armed suspect. 502 F.2d at 928.

119 An example of what should not be exigent circumstances under this rule is found in the facts of United States v. Boyer, where surveillance went on for two hours before the entry. 574 F.2d at 952. *See also* United States v. Robertson, 606 F.2d 853, 856 (9th Cir. 1979) (two-hour delay).

120 *See, e.g.*, the facts of Smith v. United States, 254 F.2d 751 (D.C. Cir. 1958).

121 United States v. Adams, 621 F.2d at 44-45.

This is typically described as "hot pursuit."[122] Grave endangerment of the officers' lives or the lives of others would be a factor to consider in such situations.[123]

The exigent circumstances exception thus provides flexibility, within the fourth amendment's prohibition against unreasonable searches, and assures that the government's purpose of criminal apprehension is not frustrated. The exception would provide officers with the tools necessary to capture armed and dangerous criminals in someone's home without a search warrant when the emergency demands instant action.

In applying the exigency exception, however, officers must remember that it is not the general rule. Officers must still adhere to the rule that "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."[124] The presumption should always be in favor of seeking the warrant, with the burden on the state[125] to show that, on balance, circumstances were exigent and that police did everything in their power to make the entry upon authority of a valid search warrant. Formulating a strict standard as to what comprises an exigent circumstance is necessary, because anything but a narrow definition would make the search warrant requirement an empty promise.[126]

Putting aside the concern about apprehension of criminals , the remaining burden on the state of the search warrant requirement is the delay in obtaining a warrant. In nonexigent circumstances the significance of the delay diminishes, as immediate apprehension is not imperative. In most cases the officer would already have obtained an arrest

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122 "[R]easonableness without a warrant is adjudged solely by the extremity of the circumstances of the moment and not by the general characteristics of the officer or his mission. If an officer is pursuing a felon who runs into a house and hides, the officer may follow and arrest him. But this is because under the exigencies of the circumstance the law of pursuit supersedes the rule as to search. . . . [E]xcept for the most urgent of necessities, the question of reasonableness is for a magistrate and not for the enforcement officer." District of Columbia v. Little, 178 F.2d at 16 (D.C. Cir. 1949), *aff'd*, 339 U.S. 1 (1950).

123 *See, e.g.*, Warden v. Hayden, 387 U.S. at 298-99.

124 Terry v. Ohio, 392 U.S. at 20.

125 "Terms like 'exigent circumstances' . . . are useful in underscoring the heavy burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant . . . ." Dorman v. United States, 435 F.2d at 392. *See also* United States v. Williams, 612 F.2d at 739.

126 Some have suggested that the issuance of an arrest warrant constitutes exigent circumstances. United States v. McKinney, 379 F.2d at 263. Even if such a rule were applied only to arrest warrants issued for felonies, it would be too broad and would have no direct correlation with the violence of the crime or dangerousness of the criminal. Many crimes which were not classified as felonies at common law are assigned that label today, and the determination that a crime is a felony is related more to the punishment than to the nature of the offense. *See*, Note, *Justifiable Use of Deadly Force by the Police: A Statutory Survey*, 12 WM. & MARY L. REV. 67, 71 (1970).

warrant under *Payton* to search for the suspect in his own home and would have ample time to obtain a search warrant after his belief as to the suspect's presence in the third person's home developed. If the officer feared that the suspect might leave the home, a guard could be posted outside the home to arrest the suspect in public if he did flee the residence. Should the two suspicions as to commission of the crime and whereabouts of the suspect develop simultaneously, only one trip to the magistrate would be necessary because both determinations could be presented to the magistrate at the same time.[127] One trip to the magistrate is no more than the Court required in *Payton*.

Thus, in most cases the result will be a relatively minor delay in obtaining the proper entrance authorization, resulting in a correspondingly slight increase in police resources expended, not the escape of the criminal. This minimal delay and extra expenditure is the burden on the enforcement goal which must be balanced with the individual's interests.

Another significant factor on the governmental side of the balance is the interest in protecting citizens in their homes from dangerous suspects. Presumably if a third party feared the suspect, he would consent to a police entry for purposes of arresting the suspect. Voluntary consent is a well-established exception to the search warrant requirement.[128] When the suspect enters the home against the party's wishes, however, the peril is likely to be so immediate that police could not obtain consent. The most common example is of the armed and dangerous suspect fleeing into the third party's home after committing a crime. Just as the exigent circumstances exception helps the officer to prevent escape of the suspect, so does it help the officer to enter a residence quickly to protect the citizen.

Another consideration is whether the danger to police officers in carrying out their duty is increased by the warrant requirement in the third party home entry situation. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."[129] In theory, the officer would be endangered if obtaining a warrant gave the suspect extra time to arm himself in the home. The notion that the suspect would have more time is based on the assumption that the suspect knows the officer has gone to get a warrant. In most nonexigent circumstances cases, however, a period of time

127 *See* text accompanying notes 64-71 *supra* concerning when a search warrant is sufficient authority to enter a third person's home to arrest a suspect.

128 *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1972). Whether the suspect could complain of the entry when the third party consents poses a standing question beyond the scope of this comment.

129 Terry v. Ohio, 392 U.S. at 23.

passes after the arrest warrant issues, during which the officer develops probable cause as to whereabouts, gets a search warrant, and goes to the home. The suspect would not know the officer had gone to get a search warrant, and would likely be just as surprised when the officer knocked on the door with a search warrant as when he knocked on the door with only an arrest warrant. When the crime is a nonviolent one, such as a white collar crime, the danger of the suspect arming himself rarely exists. While the effect of a warrant requirement on police safety is difficult to predict, it is certainly not as substantial as the Court found it to be in the stop and frisk[130] or public arrest situations,[131] where the officer has not confined the suspect to the areas or may not know what crime, if any, has been committed.

Finally, the proposed warrant requirement could burden judicial calendars. Because the procedure of acquiring a search warrant is intact, the burden on judicial officers would be the consideration of more requests for warrants rather than the creation of a new procedure. Moreover, the Supreme Court has frequently warned that fourth amendment rights do not rise and fall in accordance with the enforcement problems their protection might pose.[132] In *Payton*, for example, the Court rejected claims that an arrest warrant requirement must fall in the face of practical considerations, saying that "such arguments of policy must give way to a constitutional command that we consider to be unequivocal."[133] If the Constitution requires a search warrant, the marginal increase in judicial resources to meet additional warrant requests cannot provide the basis for finding the warrant requirement unreasonable.

On the other side of the balance, the nature and quality of the intrusion on individual rights must be examined. The fourth amendment rights at issue are those of the third party.[134] The most compelling third party interest is the right to privacy in the home. This privacy is one of

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130 *Id.* at 24.

131 *See generally* United States v. Watson, 423 U.S. 411.

132 Johnson v. United States, 333 U.S. at 15. There the Court suggested that inconvenience for the police and slight delay are not good enough reasons to bypass constitutional requirements.

133 445 U.S. at 602.

134 For purposes of determining whose rights are at stake, a question which arises is whether the suspect is in his own or a third party's residence. The difficulties in applying a search warrant requirement for a third party home entry but not for a suspect home entry are illustrated by United States v. Arboleda, No. 79-1278, slip op. The case involved the arrest of the defendant at his brother's apartment. The Second Circuit did not discuss the question of whether this was a search of a third person's home, which could have been in doubt if the two brothers shared the same apartment. The court seemed to assume, however, that it was a third party home entry. *Id.* at 3404 n.5 (referring to decisions on entry into a third party's residence). The distinction between the third party's and suspect's home also might be un-

the primary rights protected by the fourth amendment.[135] "The basic premise of the prohibition against searches was . . . the common law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization . . . . [I]t belonged to all men, not merely criminals, real or suspected."[136] The Supreme Court has said that "the fourth amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[137] The phrase "every man's house is his castle," commonly used to support the proposition today, became doctrine in the famed *Semayne's Case*[138] nearly four hundred

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clear when the suspect is at his parent's home or when the suspect maintains several residences.

Of course, the rights of third persons present in the suspect's home (spouses, children) should not turn on the fact that they happen to live with someone for whom an arrest warrant has been issued. Although the best solution to these problems would be to require both types of warrants regardless of whose residence it is, the fact that *Payton* requires a different standard to enter the suspect's home than is advocated here to enter a third party's home necessitates setting forth a definition of the term. A third party's residence could be defined as one which the suspect does not own or live in a majority of the time.

The attempt to define the third party home illustrates why distinguishing between a suspect's home and a third party's home as a basis for a warrant requirement is a fruitless exercise. One reason is that the line may be difficult for police officers to draw when, for example, the suspect lives with a friend with or without maintaining a separate residence. Another is that it is tenuous to base the *suspect's* fourth amendment rights on what may be a distinction without a difference. If a suspect lives with her brother and her brother is considered a third party, both an arrest and search warrant would be required to arrest her in the residence. However, if the brother is not considered a third party because the suspect lives at the residence that they share, only an arrest warrant and reasonable belief would be required under *Payton*.

135 Many judicial statements emphasize that the home merits special protection under the fourth amendment. In United States v. Williams, 612 F.2d at 738, the court said: "In our constitutional jurisprudence no subject has been so jealously protected from intrusion or seizure as the private dwelling place." After Katz v. United States, 389 U.S. at 351, stated that the fourth amendment protects "people not places," the Ninth Circuit underscored the importance of the home in fourth amendment law:

> [T]he amendment itself gives special emphasis to the protection of people in their houses. The singling out of "houses" suggests that the draftsmen were especially anxious to safeguard "the sanctities of a man's home and the privacies of life." This is consistent with the emphasis placed upon the sanctity of the home in England immediately before the revolution . . . .

United States v. Prescott, 581 F.2d at 1348 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). In United States v. United States District Court, 407 U.S. 297, 313 (1972), the Court reiterated that "physical entry of the home is the chief evil against which the wording of the fourth amendment is directed."

For other statements of the principle, *see* Silverman v. United States, 365 U.S. 505, 511 (1961); United States v. Cravero, 545 F.2d at 415; Dorman v. United States, 435 F.2d at 389; District of Columbia v. Little, 178 F.2d at 16.

136 District of Columbia v. Little, 178 F.2d at 16-17.

137 Silverman v. United States, 365 U.S. at 511.

138 11 Eng. Rul. Cas. 628, 630 (1604). ("The house of everyone is to him as his castle and fortress, as well as for his defense against injury and violence, as for his repose . . . .") *See also*

years ago.

While the right to privacy in the home intuitively seems to belong to the people, articulation of exactly what that right means is elusive. Those attempting to elucidate the right to privacy have variously defined it as the right to satisfy intellectual and emotional needs in the privacy of the home,[139] the right to free association in the marriage relationship,[140] and the right to be left alone.[141] The third party's privacy right which is infringed upon when police enter to arrest is no different than that infringed upon when a search for evidence is conducted. The invasion consists of the embarrassment and humiliation of having an officer of the state come into the house; the exposure of a person's lifestyle to outsiders; the invasion of personal affairs which are intended to be left confidential; the invasion by the government of the one place where a person can go beyond which the eyes of others may not follow. In short, these invasions violate the right to retreat to the home without fear of unreasonable intrusion. "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."[142]

Although the anguish of the third party during the search is not reduced by issuance of a search warrant instead of an arrest warrant, society has historically found the privacy right inherent in the security of one's home to be so important that it has refused to rely on the judgment of police officers alone to intrude upon that right. The purpose of the entry to arrest someone does not diminish the value placed on privacy in the home. The affront to the citizen is the same whether the purpose of the search is to seize evidence or to seize a person.[143]

William Pitt's famous admonition against entry into the home by the King quoted in United States v. Prescott, 581 F.2d at 1349. The notion that one's "castle" could not be invaded actually applied only to civil service of process and not to criminal cases. Commonwealth v. Reynolds, 120 Mass. at 196. After considering the early English history, however, the Court in *Payton* found that the question of whether privacy rights permitted forcible entry of homes to arrest was unsettled at common law. 445 U.S. at 598. *See also* Smith v. United States, 254 F.2d at 761 (Bazelon, J., dissenting). Early American caselaw is inconsistent in its treatment of a person's privacy interest in the home.

139 Stanley v. Georgia, 394 U.S. 557, 565 (1969).

140 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

141 Olmstead v. United States, 277 U.S. at 478 (Brandeis, J., dissenting).

142 Boyd v. United States, 116 U.S. at 630.

143 Some caselaw indicates that society's value of privacy in the home diminishes when the third party has knowledge that an arrest warrant has been issued for a suspect. Underlying this is the notion that because a suspect is committing or has committed a crime his actual expectation of privacy is not one which the law recognizes as legitimate. In Rakas v. Illinois, 439 U.S. 128 (1978), the Court gives the example of a burglar who may have a subjective expectation of privacy which is not recognized or permitted by society. Similarly, in Vance v. North Carolina, 432 F.2d 984, 991 (4th Cir. 1970), the court considered that the defendant

The extensiveness of the search is a critical factor to examine[144] in determining the intrusiveness of the police conduct on third party privacy rights. The search of a home under an arrest warrant for a suspect is at best only slightly less intrusive than that conducted under the authority of a search warrant for evidence. In *Payton*, the Court explicitly rejected the contention that the two searches are substantially different:

> [A]ny differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. . . . [T]he area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant in the home. This difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest.[145]

However, with the plain view[146] and search incident to arrest[147] doctrines, the search of the third party's home, though not unlimited,[148] could be quite extensive.[149] The search for a suspect usually involves

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"of course" knew he had violated probation and "had every reason to expect the knock on the door. It is unlikely that he experienced any sense of outrage or indignation . . . ." *Id.*

In United States v. Boyer, 574 F.2d 950, the court relied on similar reasoning to excuse a failure to announce purpose in arresting a felon on an arrest warrant in a third party's home. Noting that the requirement that officers state their purpose before entry is relaxed when the person within already knows of the officers' authority and purpose, the court said:

> [T]he knowledge of the person arrested is of greater importance than the knowledge of other persons who may be in the residence . . . . The exceptions . . . depend on the officer's knowledge and belief. In the case of an armed felon avoiding arrest, police could often be sure that he knew the purpose of their entry; they would, however, have few indices on which to determine the knowledge of third persons, if any, in the house."

Id. at 954.

This kind of reasoning is extremely dangerous to fourth amendment protections because it assumes the guilt of the suspect and, based on that assumption, diminishes the expectation of privacy in the home. The fourth amendment "guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike." McDonald v. United States, 335 U.S. at 453. The reasoning of such a rule overlooks the fact that more than the suspect's privacy expectation is at stake in a third party home entry. Furthermore, it relies on the officer's belief or suspicion about the suspect and what he believes.

To apply this argument to the third party to diminish his right to privacy in the home when he knows of the arrest warrant is equally untenable. Just as a homeowner's knowledge that evidence of a crime is within his home plays no role in deciding whether a search warrant is necessary to enter the home to seize evidence, neither should the third party's knowledge that a suspect has committed a crime be a factor in deciding whether a search warrant must be obtained before searching for the suspect.

144 Wyman v. James, 309 U.S. at 320-22. *See also* Terry v. Ohio, 392 U.S. at 25.

145 445 U.S. at 589 (footnote omitted).

146 Coolidge v. New Hampshire, 403 U.S. 443 (1971).

147 Chimel v. California, 395 U.S. 752, 763 (1969); Agnello v. United States, 269 U.S. 20, 30 (1925).

148 Chimel v. California, 395 U.S. at 763.

149 The scope of the search incident to arrest has been broadened by giving wide latitude to officers in deciding what is within the arrestee's "immediate control." *See, e.g.*, United States v. Wysocki, 457 F.2d 1155 (5th Cir. 1972); Etcheverny v. County Court of Nassau County, 415 F. Supp. 232 (E.D.N.Y. 1976). Professor LaFave notes that the *Chimel* rule has

more than a "brief and courteous walkthrough."[150] If the officer may look anywhere the suspect might reasonably be, a very thorough search into closets and beneath beds could be made. This type of search is analogous in intrusiveness to a search for evidence, and may even be more intrusive when the officer has not been limited by a search warrant which names with particularity what or whom is to be seized.

The benefit of having a search warrant lies in the magistrate's neutral determination of the necessity to enter as well as the particularity of the search warrant. A search warrant assures the third person that a neutral magistrate made the probable cause determinations and advises the third party of the scope of the search.[151] When not required to obtain the warrant first, officers could with hindsight claim that they entered searching for what they actually found after an overly-intrusive search. When a search warrant issues, the officer is restricted to looking for those things (or persons) named in it. The particularity of the warrant protects the third person from an exploratory search beyond that necessary to find the suspect. Because the third party home search to arrest is as intrusive as a home search for evidence, the extensiveness of the search weighs heavily in the balance toward a prior judicial determination.

The purpose of the search and who conducts it are important in determining the intrusiveness of the search as well. In *Camara*, for example, the fact that the area inspection was not aimed at the discovery of evidence of a crime supported a finding that the search was a limited invasion of privacy.[152] In *Wyman v. James*,[153] the fact that a welfare visit was not conducted by law enforcement officers looking for criminal violations was a factor supporting the exception.

If searches of homes for administrative or inspection purposes are reasonable without a warrant or probable cause because the Court has construed the intrusion as relatively minor, the search of a third party's home by police officers is more intrusive, with far-reaching ramifications for the third party. Police conduct searches to arrest for the purpose of criminal prosecution. Unlike the welfare recipient,[154] the third party could, as a result of what police find in his home apart from the suspect, be subject to criminal prosecution as well.[155] If the officers find evidence

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been reluctantly applied by the courts and that there is a "tendency to view every arrestee as a combination acrobat and Houdini who might well free himself from his restraints and suddenly gain access to some distant place." 1 W. LAFAVE, SEARCH AND SEIZURE 414 (1978).

150 Wallace v. King, 626 F.2d at 1163 (Hall, J., dissenting).

151 Marshall v. Barlow's, Inc., 436 U.S. at 323.

152 Camara v. Municipal Court, 387 U.S. at 537.

153 400 U.S. at 321.

154 *Id.* at 323.

155 *See, e.g.*, United States v. Gaultney, 606 F.2d 540; United States v. Phillips, 593 F.2d

against the individual, the subsequent arrest infringes on the very liberty of the individual. Were the suspect not in the third person's home, the officers would have to have a search warrant based on probable cause to make an intrusion on the third party's rights. To allow the third party intrusion on the basis of an arrest warrant alone circumvents the procedural protections of the fourth amendment as to the third party. The purpose of the requirement is not to protect criminal conduct, but rather to protect third persons from the serious intrusions which potential criminal prosecution entails by providing appropriate consideration of the third party interests through a prior judicial determination that the person sought is on the third person's premises.

The final interest to weigh in the balance is that of society in deterring police excesses. "The [Fourth] Amendment is designed to prevent, not simply to redress, unlawful police action."[156] Unlike the arrest warrant, the search warrant places limits on when and where the officer may search. When an officer proceeds with only an arrest warrant and a reasonable belief, his actions are less accountable in that a neutral judicial officer has not found probable cause that the suspect is inside. Having to present his claim of a reasonable belief to a magistrate will force the officer to present evidence supporting his desire to enter someone's home. Of course, the third party can bring a tort or civil rights action against police officers for an alleged illegal entry.[157] However, the continuing existence of the exclusionary rule would suggest that the courts have little confidence in the deterrent value of potential civil litigation brought against the police officer.

Considering all of these factors on balance, the burden upon law enforcement interests of requiring search and arrest warrant determinations by a neutral magistrate before the entry of a third person's home is minimal in comparison with the nature and intrusiveness of the search. The exigent circumstances and consent exceptions to the warrant requirement provide police officers with the kind of flexibility they need to capture dangerous criminals when time is of the essence and to protect themselves and citizens. The delay caused by getting a warrant in

553; United States v. Hammond, 585 F.2d 26 (2d Cir. 1978); United States v. Harper, 550 F.2d 610 (10th Cir. 1978); United States v. James, 528 F.2d 999 (5th Cir. 1976); Rice v. Wolff, 513 F.2d 1280.

The third party could also be subject to prosecution for harboring a fugitive. *See, e.g.*, United States v. Adams, 621 F.2d 41; United States v. Prescott, 581 F.2d 1343; Michael v. United States, 393 F.2d 22 (5th Cir. 1968); United States v. McKinney, 379 F.2d 259.

Of course, the question also arises on the suspect's motion to suppress evidence found in the third party's home pursuant to an arrest. *See, e.g.*, United States v. Williams, 612 F.2d 735; United States v. Cravero, 545 F.2d 406; United States v. Brown, 467 F.2d 419.

156 Chimel v. California, 395 U.S. at 766.

157 *See* Wallace v. King, 626 F.2d 1157; Fisher v. Volz, 496 F.2d 333; Rodriguez v. Jones, 473 F.2d 599; Lankford v. Gelston, 364 F.2d 197.

nonexigent circumstances is relatively minor and is a small price to pay to preserve an individual's historic right to privacy in the home. For these reasons, it is not unreasonable to require police to obtain determinations from a neutral magistrate as to whether there is probable cause to believe the suspect committed the crime and that he is in the third person's home.

While this requirement sets forth a higher standard for entry of a third person's home to arrest than for entry of a suspect's house to arrest, the difference in requirements will not cause suspects to hide in the third persons' homes. In going to a third party's home a suspect will not "escape the ordinary process of law" as *Semayne's Case* suggested years ago.[158] Rather, suspects against whom the proper probable cause can be found by a magistrate will be arrested upon the proper authority. The warrant merely formalizes and verifies the officer's reasonable belief, which would be the same with or without the requirement. What the requirement will do is lend judicial scrutiny to the officer's suppositions, and provide a check against poor judgment or sham use of an arrest warrant.[159]

Even though the requirements for entry to arrest in a third party's home will not create safe harbors for suspects, there are legitimate reasons to make the same requirements applicable to the suspect's own home. First, a person's actual expectation of privacy in his own home is no less than in a third party's home, and that expectation is one which society should recognize as legitimate. Second, even in the entry of a suspect's home third party privacy interests are potentially at stake. That is, a suspect may live with a family or spouse whose privacy interests should be considered separately via a search warrant inquiry. Finally, to retain a distinction between the two types of entries would undoubtedly lead to irresolvable questions about what constitutes a third party. For example, is someone's roommate a third party; is the mother of a suspect who has his own apartment a third party, etc.? Fourth amendment rights should not turn on such subtle nuances when what is truly at stake is the privacy of the occupants, no matter what their relation to the suspect.

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158 Semayne's Case, 11 Eng. Rul. Cas. at 635.

159 *Cf.* Fisher v. Volz, 496 F.2d at 341:

> A requirement that the officer must also have probable cause to believe that the suspect is in the dwelling will not unduly restrict the effectiveness of police action but will reduce the obvious risks of abuse. It offers police considerable latitude but also requires a necessary amount of restraint. It should enable police to act reasonably, but not oppressively . . . .

IV. CONCLUSION

In order to realize the framers' special place for the privacy of the home in fourth amendment law, police entry of a third party home in nonexigent circumstances must be accompanied by a magistrate's determination of the questions involved in issuing a search and arrest warrant. That is, the magistrate must decide whether there is probable cause to believe this suspect committed a crime and that he is on the third person's premises. To protect the third parties' privacy interests and the purposes of requiring such a warrant determination, the exigent circumstances which would justify an entry without these prior determinations must be narrowly defined. A rule vesting in the magistrate the determination to enter will promote the basic purpose of the fourth amendment to safeguard the privacy and security of individuals against arbitrary invasions by government officials.[160]

LINDA IMES

[160] Camara v. Municipal Court, 387 U.S. at 528.