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WARRANTLESS ARRESTS IN HOMES: ANOTHER CRISIS FOR THE FOURTH AMENDMENT

I. Introduction

The fourth amendment to the United States Constitution protects persons against "unreasonable searches and seizures." Although this protection applies to arrests as well as searches, it is not applied to both with equal force. A bifurcated standard has developed between the requirements for searches and those for arrests. A warrantless search, including a search of a private residence, violates the fourth amendment in the absence of certain exigent circumstances. Exigent circumstances, when present, would jeopardize a search or an arrest by a police officer if the officer were required first to obtain a warrant.

The same warrant requirement does not attach to arrests. The United States Supreme Court has held that a warrantless public arrest does not violate the fourth amendment. However, the Court has yet to decide whether a warrantless nonconsensual entry into a private residence to effect an arrest in the absence of exigent cir-

1. The fourth amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.
2. See United States v. Watson, 423 U.S. 411 (1976). "There is no doubt that by the reference to the seizure of persons, the Fourth Amendment was intended to apply to arrests." Id. at 436-37.
6. United States v. Watson, 423 U.S. 411 (1976). The Court did require, however, that the warrantless arrest be based upon probable cause. Id. at 415.
cumstances also violates the fourth amendment. Indeed, the Court has expressly left the issue open.\(^7\)

This Comment will examine the distinction between a forcible entry for an arrest and one for a search. In addition, it will trace, through an analysis of Supreme Court decisions, the historical development of warrantless entries for the purpose of arrest. Furthermore, this Comment will discuss the Court's rationale behind its strict view on warrantless entries to search and will then suggest application of this rationale to warrantless entries for the purpose of arrest. Finally, this Comment will analyze contradictory decisions in the state and lower federal courts and will recommend literal compliance with the fourth amendment, subject to certain exceptions to be considered in light of exigent circumstances.

II. Warrantless Arrests: The Standard of *United States v. Watson*

The Supreme Court first held that the fourth amendment permits a warrantless arrest in a public place absent exigent circumstances in *United States v. Watson*.\(^8\) *Watson* involved a conviction for possession of stolen mail. The defendant was arrested in a public place without an arrest warrant.\(^9\) His motion to suppress evidence seized as a result of the arrest was denied.\(^10\) The Ninth Circuit reversed, holding, *inter alia*,\(^11\) that the arrest was a violation of the fourth amendment because of the absence of an arrest warrant.\(^12\)

The Supreme Court reversed the Ninth Circuit holding that the fourth amendment did not require the procurement of a warrant.

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7. *Id.* at 418 n.6; *Jones v. United States*, 357 U.S. 493, 500 (1958).
9. *Id.* at 413. The events leading up to the arrest were as follows. A reliable informant told a postal inspector that a man named Watson was in possession of a stolen credit card and had asked the informant to cooperate in its unlawful use. A meeting was arranged between the informant and Watson at which time the informant was to signal the inspector if he learned that Watson had additional stolen credit cards. The signal was given at the meeting and Watson was arrested. *Id.* at 412-13.
10. *Id.* at 413-14. After the signal was given, the officers moved in and arrested Watson but a search of his person revealed that he had no additional credit cards with him. An officer asked if he could look inside Watson's car to which Watson replied, "Go ahead." The additional cards were discovered as a result of this search of the car. The Court held that the consent was voluntary. *Id.* at 425.
11. In addition to the holding that the arrest was unconstitutional, the court of appeals held that based on the totality of the circumstances, Watson's consent to search the car was involuntary and as such was not a valid ground to search the automobile. *United States v. Watson*, 504 F.2d 849, 853 (9th Cir. 1974).
12. *Id.* at 852.
The Court relied on previous Supreme Court cases, common law and federal and state statutes.\textsuperscript{13}

Reviewing the previous Supreme Court decisions,\textsuperscript{14} Justice Byron R. White, in his majority opinion, did not require a warrant to make a valid arrest for a felony.\textsuperscript{15} Justice White saw the common law as permitting a peace officer to arrest for a felony even without a warrant where the crime was not committed in the officer's presence.\textsuperscript{16} Justice White took note of the Second Congress's investment of United States marshals and their deputies "with 'the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states.'"\textsuperscript{17} According to Justice White, the common law, authorizing warrantless felony arrests, generally prevailed in the states. Since the Second Congress invested the federal marshals with the same powers the common law invested in peace officers, the Second Congress saw no inconsistency between the fourth amendment and warrantless arrests, thereby implying that warrantless public arrests are lawful under the Constitution.\textsuperscript{18} Justice White then reviewed the current federal statute\textsuperscript{19} authorizing marshals to make warrantless felony arrests and the American Law Institute's \textit{Model Code of Pre-Arraignment Procedure},\textsuperscript{20} which recommended permitting warrantless felony arrests.\textsuperscript{21}

\begin{itemize}
  \item[13.] 423 U.S. at 414-25.
  \item[15.] 423 U.S. at 424.
  \item[16.] Id. at 418. \textit{See generally Wilgus, Arrest Without a Warrant}, 22 Mich. L. Rev. 541 (1924).
  \item[17.] 423 U.S. at 420, quoting Act of May 2, 1792, ch. 28, § 9, 1 Stat. 265.
  \item[18.] 423 U.S. at 420.
  \item[19.] The statute provides:
  United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.
  \item[20.] A \textit{Model Code of Pre-Arraignment Procedure} § 120.1 (1975). \textit{See also} text accompanying note 86 infra.
  \item[21.] 423 U.S. at 421-22. The felony need not have been committed in the officer's presence but there must be probable cause to support the arrest.
\end{itemize}
The opinion of the Court was attacked in both the concurring and dissenting opinions. Justice Lewis F. Powell, in his concurring opinion, saw the cases cited by the Court in support of its conclusion as not squarely facing the issue. Instead, those decisions rested on such issues as probable cause, whether the crime in question had been committed in the officer's presence or the failure to question the validity of the warrant in a lower court.

Justice Thurgood Marshall, in his dissenting opinion, challenged the Court's reliance on the common law and federal and state statutes. Justice Marshall conceded that the common law authorized warrantless felony arrests, but not warrantless misdemeanor arrests. He maintained that the common law should not have been a basis for the Court's decision. The common law was formulated when the number of offenses constituting felonies was far less than the number of offenses classified as statutory felonies today. Justice Marshall attacked the reliance on state and federal statutes: "[I]t is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice."

III. Warrantless Entry for the Purpose of Arrest

A warrantless public arrest in the absence of exigent circumstances is constitutional under United States v. Watson. The Supreme Court has not, however, decided whether a peace officer may forcibly enter private premises to effect an arrest without a warrant absent exigent circumstances. The issue was termed by Justice Harlan "a grave constitutional question," and has been addressed by the Court in dicta and by implication. In the few instances where

22. Id. at 426 n.1 (Powell, J., concurring).
23. Id. Justice Powell concurred in the judgment, however, on the basis of the historical momentum of acceptance of warrantless arrests and the possible damaging impact of a contrary holding on effective law enforcement. Id. at 429-32 (Powell, J., concurring).
24. Id. at 438-41 (Marshall, J., dissenting). The distinction is that crimes which were misdemeanors at common law, and as such required a warrant for an arrest (unless committed in the presence of an officer), are now felonies and as such no longer require a warrant for an arrest.
25. Id. at 443. (Marshall, J., dissenting).
the issue has been considered by the Supreme Court, a clear indication of the outcome has not yet emerged.

In Coolidge v. New Hampshire, Justice Potter Stewart addressed this issue in dictum. In that case, Coolidge was suspected of murder. He was arrested inside his residence and his car, which was parked in the driveway, was towed to the police station. The car was subsequently searched resulting in the introduction of incriminating evidence at trial. The issue was whether the fourth amendment precluded the introduction of this evidence when the arrest was conducted in the absence of a valid warrant. The Court found the evidence inadmissible, but did not rule on the warrantless entry issue. Instead, it relied on the absence of any exigent circumstances which would justify a warrantless search.

Justice Stewart could not reconcile authorizing forcible entries into a residence without a warrant and in the absence of exigent circumstances with the strict requirements established for searches under the fourth amendment:

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

29. Id. at 447-48. The searches occurred two days after the seizure and again in the following year. The evidence consisted of vacuum sweepings taken from the car which indicated that Pamela Mason, the murdered girl, was probably in the car. Id. at 448.
30. There was a search warrant in this case but it was held invalid by the court because it was not issued by a "neutral and detached" magistrate in compliance with the fourth amendment. The warrant here was issued by the Attorney General who was acting as justice of the peace. Id. at 449.
31. See id. at 490.
32. Id. at 455-73. The search was not incident to a lawful arrest because it was too far away from the place of arrest. The automobile exception did not provide a basis for the seizure because there was no hazardous chase, contraband or people waiting to remove the evidence. Nor could the search be justified under the plain view exception. The viewing of the evidence must have been inadvertent for this exception to be applicable. Id. If the search had been legitimate, the Court would have been forced to face the warrantless entry issue. See also cases cited in note 4 supra.
33. 403 U.S. at 477-78. Justice Stewart discussed this issue in response to a dissenting opinion by Justice White, who believed that warrantless arrests on probable cause may be effected in the home. Id. at 510, 511 n.1.

Justice Stewart posited that if Justice White were correct in stating that the courts had assumed that a warrantless entry of one's house for the purpose of an arrest is constitutional then "it might be wise to reexamine that assumption." Id. at 480.
The decision of the Supreme Court in *Warden v. Hayden*\(^3\) supports Justice Stewart's view regarding warrantless entries for arrest. In *Warden*, the police arrested the defendant in his home without a warrant.\(^3\) The Court found the warrantless entry justified by the exigencies of the situation.\(^3\) This decision may suggest, by negative implication, that an arrest warrant is required in the absence of exigent circumstances.\(^3\)

In these cases, the Supreme Court did not conclusively establish its position on this issue. In other cases the contrary implication is suggested. In *Ker v. California*,\(^3\) petitioner Ker was convicted of possession of marijuana. Upon suspicion of marijuana dealings,\(^3\) police went to Ker's apartment,\(^3\) obtained a passkey from the building manager and, without a warrant, entered the apartment. While inside, they arrested the petitioner and seized a quantity of marijuana.\(^4\) The admissibility of this evidence at trial turned on whether the search was valid as incident to a lawful arrest. Before deciding whether the search was valid, therefore, the Court was forced to rule

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34. 387 U.S. 294 (1967).
35. *Id.* at 297-98.
36. *Id.* at 298. The police entered the defendant's premises shortly after having been informed that the defendant fled to a private residence after committing a robbery. Mrs. Hayden answered the door when the police officers knocked and when asked if the officers could search the house, she offered no objection. The Court did not reach the consent issue. Exigent circumstances justified the entry. *Id.* at 297-98.
37. Such a conclusion would be consonant with the construction of *Warden* made by Justice Stewart in his *Coolidge* opinion. See 403 U.S. at 480-81. See also *Wong Sun v. United States*, 371 U.S. 471 (1963). In *Wong Sun*, a suspect was being questioned at the doorstep of his house by a police officer standing just outside. When the police officer identified himself as such, the suspect fled into his house. The officer then followed. Noting that a police officer should state his authority and purpose at the doorstep and be refused admittance before breaking in, the Court found no extraordinary circumstances excusing the officer's failure to explain his presence before forcible entry. *Id.* at 482-84.
39. *Id.* at 26-28. The police followed one Roland Murphy, a suspected marijuana seller, to an area where an undercover policeman had previously purchased marijuana from Murphy through a middleman. There, petitioner Ker was seen sitting in his car when Murphy approached him and appeared to have a conversation with him. The police followed Ker when he drove away but lost sight of him. Later, the police proceeded to Ker's apartment. Other evidence showed that Ker was previously engaged in the sale of marijuana consisting of information given to police by informants.
40. *Id.* at 28. Upon arrival at the apartment building, the police ascertained that Ker's apartment was occupied.
41. *Id.* at 28-29. Conflicting evidence was produced as to whether the marijuana was seen before or after the arrest. Ker said that the arrest took place before the police saw the marijuana. *Id.* at 29.
on the lawfulness of this arrest.

The California Penal Code permitted officers to break into a residence after demanding admittance and explaining their purpose. A judicial exception to the notice requirement was created by California courts where certain circumstances existed. The circumstances which justified the entry without notice in Ker were the ease with which the evidence could be destroyed and the danger to the officers. The Supreme Court held, "in the particular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment. . . ." The presence of exigent circumstances as justifying the warrantless arrest generally was not the basis of the Court's holding. Instead, it relied on the presence of exigent circumstances as justifying the exception to the notice requirement. This holding may suggest that the warrantless entry would have been ruled constitutional even if no exigent circumstances were present if the officers had complied with the notice requirement.

Other cases contribute to the confusion over the Supreme Court rulings in this area. In Johnson v. United States, the constitutionality of a warrantless arrest in private premises was at issue. The Court struck down the arrest but did so on the basis of the absence of probable cause, possibly suggesting that if probable cause had been present, the entry would have satisfied the fourth amendment. In Miller v. United States, the Court held that an officer could not break down a door to effect a non-exigent arrest without

42. To make an arrest, . . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which [he has] reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which the admittance is desired.


43. 374 U.S. at 39-40 (citing People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6, cert. denied, 352 U.S. 858 (1956)).

44. 374 U.S. at 40.

45. Id. at 40-41.

46. Id. at 39-40.

47. 333 U.S. 10 (1948).

48. In Johnson, officers entered a hotel room upon detecting the smell of burning opium and arrested the sole occupant of the hotel room. Id. at 12.

49. Id. at 16-17.

50. Id. at 17, construed in Brief for Appellee at 22, United States v. Reed, 572 F.2d 412 (2d Cir. 1978).

51. 357 U.S. 301 (1958).
an announcement of the officer's presence. Thus, an implication may exist that given an announcement of purpose, a warrantless arrest in a dwelling is constitutional even if achieved by forcible entry.\textsuperscript{2}

Although the Supreme Court has refrained from deciding whether warrantless entries in order to arrest are constitutional, the rationale behind the Court's decisions regarding warrantless searches is relevant to the resolution of this problem. The reasons for prohibiting entries to search without a warrant apply with equal force to entries for the purpose of arrest without a warrant.

The aim of the fourth amendment is illustrated by the Court's opinion in \textit{Katz v. United States}.\textsuperscript{5} In that case, the petitioner was convicted of transmitting wagering information. Evidence was gathered as a result of a listening device placed on a public telephone which recorded Katz's conversations concerning wagering information. The agents had not obtained a valid warrant. In striking down this action, the Court recognized the protection of one's reasonable expectation of privacy. The fourth amendment protection was held to extend not to places but to people.\textsuperscript{54}

\textit{Camara v. Municipal Court}\textsuperscript{56} involved the conviction of a man who refused to allow a Department of Public Health inspector to enter his private premises because the inspector did not have a search warrant. A warrantless entry for the purpose of inspection was authorized by statute.\textsuperscript{52} The Court held this statute unconstitutional even though a "routine inspection" of this nature involved a "less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime."\textsuperscript{57} The Court regarded the

\textsuperscript{52.} Brief for Appellee at 21, United States v. Reed, 572 F.2d 412 (2d Cir. 1978). This construction of \textit{Miller} is not an obvious one. The Court expressly refrained from deciding under what circumstances an arrest made after breaking into a dwelling might be constitutional: "Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission." 357 U.S. at 308.

\textsuperscript{53.} 389 U.S. 347 (1967).

\textsuperscript{54.} \textit{Id.} at 351-52. "For the Fourth Amendment protects people, not places . . . . What a person seeks to preserve as private . . . may be constitutionally protected." Justice Harlan, in his concurring opinion, construed this wording as meaning that one's reasonable expectations of privacy are protected. \textit{Id.} at 361 (Harlan, J., concurring).

\textsuperscript{55.} 387 U.S. 523 (1967). \textit{See also} notes 136 & 137 \textit{infra} and accompanying text.

\textsuperscript{56.} 387 U.S. at 526.

\textsuperscript{57.} \textit{Id.} at 531.
individual as having a "very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority."\(^{58}\)

The Court had occasion to discuss the purpose of a search warrant in *McDonald v. United States*\(^{59}\). In *McDonald*, the petitioner was convicted of gambling violations on the basis of evidence seized during a warrantless search. In holding the search unconstitutional, the Court stressed the seriousness of the privacy invasion of the home in words that could apply with equal urgency to an entry for the purpose of an arrest: \(^{60}\)

The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals... And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

Similarly, in *Silverman v. United States*,\(^{61}\) a case involving warrantless eavesdropping, the Court again affirmed the special importance of the home: "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."\(^{62}\)

The Supreme Court cases dealing with searches indicate that the individual's interest in the sanctity of his home is protected by the

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58. *Id.*. In *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), the Supreme Court relied on *Camara* in holding that a warrantless inspection of work areas of employment facilities within the jurisdiction of the Occupational Safety and Health Act of 1970 (codified in scattered sections of Titles 5, 15, 18, 29, 42 & 49 of the United States Code) is unconstitutional. *See also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976), where the Court passed on the validity of the Border Patrol's routine stops of vehicles at a permanent checkpoint. In upholding the constitutionality of these stops, the Court dealt neither with "searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection." *Id.* at 561. *See also* *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).


60. *Id.* at 455-56.


62. *Id.* at 511.
fifth amendment. This interest cannot be fully protected by requiring a warrant for a search but not for an arrest. The warrant requirement should extend to both.

IV. The Development of Standards in Lower Courts

Despite the avoidance of the issue by the Supreme Court, the lower courts have faced the problem more directly. No uniform rule, however, has resulted. The United States Court of Appeals for the District of Columbia Circuit, for example, addressed the issue unequivocally in Accarino v. United States.

In Accarino, the defendant was suspected of violating certain gambling laws. After being placed under police observation for a number of days, officers went to Accarino’s apartment, knocked on the door and shouted to him. When he failed to answer the door, the officers broke it down and arrested him. The court struck down the validity of the arrest by forcible entry. It pointed to the presence of the following circumstances showing the need for a search warrant: adequate opportunity to procure a search warrant, the non-violent nature of the offense, adequate opportunity to arrest before Accarino entered his apartment and the absence of evidence of defendant’s fleeing the police.

According to the Accarino court, breaking into a dwelling is unlawful unless certain exceptional circumstances exist making this action necessary. In the court’s judgment, the rules governing a

63. See notes 50-62 supra and accompanying text.
64. See, e.g., United States v. Santana, 427 U.S. 38 (1976). In that case, the defendant was suspected of certain narcotics offenses. Police went to Santana’s residence and saw her standing in the doorway to her house. After the police identified themselves, Santana stepped back into the vestibule of the house where she was arrested. The Supreme Court upheld this arrest, finding that Santana was in a public place where she had no expectation of privacy and an arrest at this point did not violate the fourth amendment. The subsequent entry by the police was justified by Warden. See notes 34-36 supra and accompanying text.
65. 179 F.2d 456 (D.C. Cir. 1949).
66. As a result of this observation, the officers conducting the investigation saw and took evidence of a gambling violation from Accarino’s car. The evidence consisted of gambling papers known as “numbers slips.” Id. at 456-57.
67. The officers saw appellant just before he was about to enter his apartment and shouted, “Wait a minute, police,” whereupon appellant proceeded to enter his apartment. Id. at 457. The court of appeals could not justify the warrantless entry on the basis of pursuing a fleeing criminal because the two or three steps which appellant took after being told to stop did not amount to a flight in this case. Id. at 464-65.
68. Id. at 465.
69. Id. at 464.
warrantless entry for an arrest should be substantially similar to those governing a warrantless entry for a search.70

A similar approach was taken in Dorman v. United States71 which concerned an armed robbery of a clothing store and several of its customers by four men.72 The police discovered the identity and address of one of the men,73 Dorman, proceeded to his residence and entered without consent in order to arrest him.74 The court held the entry lawful by creating certain exceptions to the general rule that warrantless entries to effect an arrest are unconstitutional.75 Judge Leventhal emphasized that warrantless entries in order to arrest suspects did not meet the requirements of the Constitution:76

[T]he basic principle, the constitutional safeguard that, with room for exceptions, assures citizens the privacy and security of their homes unless a judicial officer determines that it must be overridden, is applicable not only in case of entry to search for property, but also in case of entry in order to arrest a suspect.

The entry here was found lawful, however, in light of the exigencies of the situation. The opinion listed six considerations which are useful in determining whether the warrant requirement may be dispensed with: gravity of the offense, reasonableness of the belief that the suspect is armed, clearness of the showing of probable cause, reasonableness of the belief that the suspect is on the premises, likelihood of escape and peacefulness of the entry.77 In addition to these six criteria, the court considered the importance of the time of entry, that is, whether the entry was made at night or during the day.78

70. See note 4 supra.
71. 435 F.2d 385 (D.C. Cir. 1970) (en banc).
72. Id. at 387.
73. The police found copies of Dorman’s probation report showing his name and address.
74. Id. at 388. The detective on the investigation was typing out an affidavit for an arrest warrant but was told by an Assistant United States Attorney that no magistrate was available and that Dorman could be arrested without a warrant. Id. at 387-88. The subsequent search of the home confirmed Dorman’s absence but resulted in the discovery of a suit from the clothing store. Id. at 388. Though Dorman was not arrested in the home, the entry by the police was for the purpose of arrest, raising the issue of whether this entry to effect an arrest was lawful.
75. Id. at 390-94.
76. Id. at 390.
77. Id. at 392-93.
78. Id. at 393. The court stated that this factor could serve to legitimize the warrantless
The *Dorman* criteria were adopted by the Second Circuit in *United States v. Jarvis*. In *Jarvis*, FBI agents broke into defendant's home and arrested him with probable cause but without a valid warrant. Recognizing the arrest as not meeting the *Dorman* standards for warrantless private arrests, the court perceived a "serious question" as to the validity of the entry into the defendant's home without a valid warrant and in the absence of exigent circumstances. Despite the "serious question" as to the validity of the arrest, the conviction was upheld because evidence obtained as a result of the arrest was harmless.

Although many circuit courts require a warrant for forcible entries into private dwellings when exigent circumstances do not exist, authority to the contrary is present. The American Law Institute, for instance, considered the question in the *Model Code of Pre-Arraignment Procedure*. The *Model Code* recommends authorization of warrantless entries to effect an arrest where reasonable cause exists, and in certain cases of necessity, notification and demand for entry should not be required. Moreover, the statutes of many states, including New York, permit warrantless entries for the purpose of arrest, and some state decisions have assumed the

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79. 560 F.2d 494 (2d Cir. 1977). Other circuits have adopted the *Dorman* criteria. See *Salvador v. United States*, 505 F.2d 1348, 1351-52 (8th Cir. 1974); *United States v. Phillips*, 497 F.2d 1131, 1135 (9th Cir. 1974); *United States v. Shye*, 492 F.2d 886, 891 (6th Cir. 1974); *Vance v. North Carolina*, 432 F.2d 984, 990-91 (4th Cir. 1970).

80. 560 F.2d at 496. Jarvis was suspected of bank robbery. A warrant for the arrest was issued but was ruled invalid as not sufficiently particularized. Id. at 496-97.

81. Id. at 498. The court originally used the term "holding" when speaking of the arrest without a warrant, but that terminology was deleted and the "serious question" wording was used instead. See Brief for Appellee at 20, *United States v. Reed*, 572 F.2d 412 (2d Cir. 1978).

82. 560 F.2d at 499. Palm prints and a photo which were taken from within the dwelling would have been obtained when Jarvis came outside. Id. at 498.

83. See note 81 supra.

84. *Model Code of Pre-Arraignment Procedure* § 120.6 (1975).

85. Id. §§ 120.1, 120.6.

86. Id. § 120.6(2).

87. Section 140.15 of the New York Criminal Procedure Law provides, in pertinent part:

4. In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest.
validity of these statutes. 88

Common law antecedents supporting the lawfulness of warrantless arrests in private dwellings are reviewed in Commonwealth v. Phelps. 80 In that case, the Supreme Judicial Court of Massachusetts, citing several common law authorities, 80 was convinced that if an officer had the right to arrest without a warrant on probable cause, he had the right to break open doors. 91

While the common law applying to warrantless public arrests was settled, 92 that applying to warrantless arrests in a dwelling was not. In Accarino, Judge E. Barrett Prettyman considered the common law authorities cited in Phelps. 83 In Judge Prettyman's opinion, the common law authorities do not authorize warrantless entries for the purpose of arrest. Judge Prettyman maintained that according to the common law, warrantless entries to effect an arrest are lawful

N.Y. CRIM. PROC. LAW § 140.15 (McKinney 1971).

Subdivisions four and five of section 120.80 provide:

4. In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes the defendant to be present. Before such entry, he must give, or make reasonable effort to give, notice of his authority and purpose to an occupant thereof, unless there is reasonable cause to believe that the giving of such notice will:
   (a) Result in the defendant escaping or attempting to escape; or
   (b) Endanger the life or safety of the officer or another person; or
   (c) Result in the destruction, damaging or secretion of material evidence.

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

Id. § 120.80.

For a listing of other states' statutes, see Comment, Watson and Ramey: The Balance of Interests in Non-Exigent Felony Arrests, 13 SAN DIEGO L. REV. 838, 847-48 n.70 (1976).

88. People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395 (1978), probable jurisdiction noted, 47 U.S.L.W. 3408 (U.S. Dec. 11, 1978) (Nos. 78-5420, 78-5421); People v. Eddington, 23 Mich. App. 210, 178 N.W.2d 686 (1970), rev'd on other grounds, 387 Mich. 551, 198 N.W.2d 297 (1972); contra, People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976) ("warrantless arrests within the home are per se unreasonable in the absence of exigent circumstances"); cf. State v. Anonymous (1977-5), 34 Conn. Supp. 531, 542, 375 A.2d 417, 423 (Super. Ct. 1977) ("even if we were to follow the view that a warrant must be obtained before forcibly entering a dwelling in order to make an arrest, the circumstances of this case would fall within the 'exigent circumstances' exception to that rule.")

89. 209 Mass. 396, 95 N.E. 868 (1911).


91. 209 Mass. at 407-08, 95 N.E. at 873.

92. See note 16 supra.

93. Judge Prettyman's opinion was cited favorably in Miller v. United States, 357 U.S. 301, 306 (1958).
only if circumstances exist making this action necessary.94

The approach taken by the circuit courts on the issue of warrantless entries to arrest, as shown by Accarino, Dorman and Jarvis, represents a well-reasoned manner in which to deal with the problem. The important interest of the individual in the privacy of his home is recognized while the governmental interest in the apprehension of criminals is adequately met by the creation of certain instances where a warrant is not required.

V. Recent Decisions: Payton and Reed

The state of the law regarding entry into a private dwelling for the purpose of arrest is confused. With the contradicting decisions of state and federal courts, the lawfulness of an entry for the purpose of an arrest may be determined not solely by the actions of the peace officers but also by the source of their authority, that is, whether they are federal or state officers. As the next section will illustrate, a local police officer in New York State is permitted to enter a home without a warrant to arrest while a federal agent is not allowed to take such action unless exigent circumstances are present.95 The two decisions producing this anomalous result are People v. Payton96 and United States v. Reed,97 the former decided by the New York Court of Appeals and the latter by the United States Court of Appeals for the Second Circuit.

In Payton, the New York Court of Appeals, in a four to three decision, stated:98

94. 179 F.2d at 463. For example, Blackstone said that in the case of certain felonies, a constable may arrest the felon upon probable cause "and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken." Id. at 461-62 (quoting 4 W. BLACKSTONE, COMMENTARIES *292). After quoting this passage, Judge Prettyman said that although Blackstone did not mention necessitous circumstances in joining the breaking of the door and the killing of the felon, he did contemplate the existence of these circumstances. 179 F.2d at 462.

Reliance on the common law as justifying warrantless entries for the purpose of arrest is also subject to the same attack as Justice Marshall made against warrantless arrests in general in Watson. See note 24 supra and accompanying text.

95. The federal courts' decisions would presumably be applicable to federal agents and the state courts' decisions would be applicable to state and local officers. But unless there is a federal statute dealing with the warrantless entries, state law governs even in cases in federal courts. See United States v. Di Re, 332 U.S. 581, 589 (1948).


97. United States v. Reed, 572 F.2d 412 (2d Cir. 1978).

98. 45 N.Y.2d at 305, 380 N.E.2d at 225, 408 N.Y.S.2d at 396.
[A]n entry made for the purpose of effecting a felony arrest within the home of the person to be arrested by a police officer who has entered without permission of the owner, if based on probable cause, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances.

In a similar case decided three months before Payton, the Second Circuit reached a different result: "warrantless felony arrests by federal agents effected in a suspect's home, in the absence of exigent circumstances, even when based upon statutory authority and probable cause, are unconstitutional."99

The New York State decision covered the consolidated appeals of two cases, People v. Payton and People v. Riddick. In Payton, the defendant was convicted of felony murder in connection with an armed robbery of a service station. His name and address were given to the police by two witnesses to the crime who knew Payton.100 The police went to his home, and, noticing that a light was on and a radio playing, they knocked on the door. When the door was not answered, other officers were summoned to aid in breaking it open. Upon their arrival, the door was forced open and the officers entered.101 A search of the apartment revealed Payton's absence, but in the course of this search, the police seized a shell casing found on top of a stereo set.102 This shell casing was introduced as evidence

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99. 572 F.2d at 418.
100. 45 N.Y.2d at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 396.
101. Id. at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 396-97.
102. Id. at 305, 380 N.E.2d at 226, 408 N.Y.S.2d at 397. After seizing the shell casing, the police conducted a "full scale" search of the apartment which resulted in the seizure of a shotgun with ammunition, a sales receipt for a rifle and photographs of Payton with a ski-mask. All of these articles were suppressed following a pretrial suppression hearing but the court allowed the introduction of the shell casing, justifying the seizure under the "plain view" exception to the search warrant requirement. That is, if the officers have a right to be where they are, then they may seize evidence of a crime which is in plain view. See cases cited in note 145 infra.
103. 45 N.Y.2d at 306, 380 N.E.2d at 227, 408 N.Y.S.2d at 398.

The Code of Criminal Procedure was in effect at the time of this entry. Those sections dealing with warrantless arrest entries provided:

§ 177. In what cases allowed.
A peace officer may, without a warrant, arrest a person,
1. For an offense, committed or attempted in his presence, or where a police officer . . . , has reasonable grounds for believing that an offense is being committed in his presence;
2. When the person arrested has committed a felony, although not in his presence;
at trial. The defendant attacked the introduction of this evidence on the ground that the police had no authority to be in the apartment because the warrantless entry for the purpose of arrest was unlawful. 103

Riddick involved slightly different facts but the same issue. The victims of two armed robberies identified Riddick as the perpetrator of those robberies. 104 At a later date, the police went to the defendant's home to arrest him. After ascertaining Riddick's presence, they knocked on the door, which was opened by Riddick's three year old son. 105 Seeing Riddick sitting on a bed, the police entered and arrested him. 106 Because the defendant had to dress, the officer searched the bed, a nearby chest of drawers and the defendant's clothing. The officer seized a quantity of narcotics and a hypodermic syringe. 107 Riddick's motion to suppress this evidence was based in part on the contention that warrantless entry for the purpose of making an arrest was unlawful. 108 Payton's and Riddick's motions were denied, and both were convicted.

The court of appeals affirmed the convictions upholding the va-

3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it;
4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it;
5. When he has reasonable cause for believing that a person has been legally arrested by a citizen . . . .
§ 178. May break open a door or window, if admittance refused.
To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.
104. 45 N.Y.2d at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 397.
105. Id. at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 398. The defendant's parole officer, who accompanied the police to Riddick's home, went into the defendant's home first and when he learned that Riddick was present, signalled the other officers, indicating Riddick's presence.
106. Id.
107. Id.
108. Id. The suppression court found that the evidence was lawfully seized because the search came under the "search incident to a lawful arrest" exception to the search warrant requirement. The defendant's specific contentions, that the arrest was unlawful because it was effected without a warrant and without an announcement by the police of their purpose before they entered, were not addressed by the suppression court. Id. at 308, 380 N.E.2d at 227, 408 N.Y.S.2d at 398. For the statute dealing with warrantless arrest entries, see note 87 supra.
WARRANTLESS ARRESTS IN HOMES

lidity of warrantless entries and arrests. The court relied on the "substantial difference" between the intrusion associated with a search and that associated with an arrest, and the "significant difference" in the governmental interest in the two types of entries.\(^\text{109}\)

In the court's view, a search involves "a possibly thorough rummaging through possessions" and disclosure of articles which the victim of the search would "expect to be free from scrutiny by uninvited eyes." But in the case of an entry for the purpose of arrest, "there is no accompanying prying into the area of expected privacy attending [the victim's] possessions and affairs."\(^{109}\) In addition, the court saw the risk associated with the warrant requirement for a search—the failure to recover evidence—as less important than the risk associated with a warrant requirement for an arrest, namely, the failure to apprehend criminals.\(^{110}\) The court also relied on the common law,\(^{111}\) the relevant statutes, both in New York and other jurisdictions and the Model Code which authorizes warrantless entries to arrest.\(^{112}\)

The three dissenting judges wrote separate opinions. Judge Lawrence H. Cooke vigorously disagreed with the distinction drawn by the majority between entries to arrest and entries to search.\(^{114}\) Regarding the initial entry into one's home as the intrusion with which the fourth amendment is concerned, Judge Cooke said, "[r]easoning that the intrusion which attends entry into the home to effect a warrantless arrest is somehow less egregious than entry to conduct a search, the majority simply reads the warrant require-

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109. 45 N.Y.2d at 310, 380 N.E.2d at 228-29, 408 N.Y.S.2d at 399.
110. Id. at 310, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.
111. Id. at 311, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.
112. See notes 16, 24 & 94 supra.
113. 45 N.Y.2d at 311-12, 380 N.E.2d at 229-30, 408 N.Y.S.2d at 400-01. In the Payton case, one of the suppressed items which was seized in the full-scale search was a sales receipt for a rifle from a sporting goods shop in Peekskill, N.Y. See note 102 supra. The owner of this store was called as a witness in Payton's trial. Payton claimed that the testimony of this witness was "tainted fruit" of the unlawful search, but the court disagreed, holding that the testimony was admissible under the "inevitable discovery" doctrine. 45 N.Y.2d at 306, 313, 380 N.E.2d at 226, 231, 408 N.Y.S.2d at 397, 402.
114. Id. at 319, 380 N.E.2d at 234, 408 N.Y.S.2d at 406.
ment out of the Fourth Amendment.” To Judge Cooke, the interest of the individual is equal in both an entry to effect an arrest and an entry to search the premises. As to the governmental interest in entering premises to arrest, Judge Cooke stressed that the warrant requirement would be dispensed with in the presence of exigent circumstances. He also addressed the majority’s reliance on the common law and on statutes which authorize warrantless entries by urging that neither “antiquity” nor “legislative unanimity” should displace an analysis based upon reason. Both Judge Wachtler and Judge Fuchsberg concurred in these views.

In United States v. Reed, a case involving the same issue as Payton, the Second Circuit arrived at the opposite conclusion. Appellants Nancy Reed and Morris Goldsmith were both convicted of distributing heroin and conspiracy to distribute heroin.

Upon suspicion of these violations, appellants Reed and Goldsmith were arrested at Reed’s apartment. While inside the apartment, an agent seized a telephone and address book later used as evidence at the trial. The introduction of this evidence was at

115. Id. at 321, 380 N.E.2d at 236, 408 N.Y.S.2d at 407 (Cooke, J., dissenting).
116. Id. at 321-23, 380 N.E.2d at 236-37, 408 N.Y.S.2d at 408 (Cooke, J., dissenting).
117. Id. at 324, 380 N.E.2d at 238, 408 N.Y.S.2d at 409 (Cooke, J., dissenting).
118. See id. at 318, 380 N.E.2d at 234, 408 N.Y.S.2d at 405 (Fuchsberg, J., dissenting); id. at 315, 380 N.E.2d at 232, 408 N.Y.S.2d at 403 (Wachtler, J., dissenting). Judge Wachtler thought that the warrantless entry in Riddick was unconstitutional but that the one in Payton was constitutional because there were exigent circumstances. He reached substantially the same result as Judge Cooke, however, because he would not have upheld the admissibility of the gun receipt which was allowed by the majority under the inevitable discovery rule. Id. (Wachtler, J., dissenting).
119. 572 F.2d 412 (2d Cir. 1978).
120. Id. at 414. Much of the evidence introduced by the government was testimony of Dwight Hammonds, a federal undercover agent who had been buying heroin from the appellants. Id. at 415.
121. Id. There was contradictory evidence as to events surrounding the entry of the apartment by the agents and the seizure of the telephone and address book. One agent testified that he knocked on the door and after Ms. Reed opened the door, the agents told her that they were arresting her and Goldsmith. Reed said that her daughter approached the door first, and thereafter Reed opened the door and the agents rushed in. The district court found that Reed was arrested when she opened the door. Id. at 415-16.

As to the seizure of the address book, the agent indicated that the seizure was after Reed was read her rights whereas Reed said that the seizure occurred before the rights were read. Id. at 416.

The Government first argued that the arrest had taken place in a public place under United States v. Santana, 427 U.S. 38 (1976), and as such was justified under Watson. 572 F.2d at 419-20. See note 8 supra. The court held that no matter which version of the entry was correct,
tacked by the appellants who contested the lawfulness of the entry to arrest.

After determining that the arrest in *Reed* took place in a private place, the court addressed the principal question of whether a nonconsensual entry into private premises without a warrant to effect an arrest in the absence of exigent circumstances complies with the fourth amendment. Following the lead of *Jarvis*, the court held that it does not.

The fourth amendment was viewed as protecting citizens' reasonable expectations of privacy and prohibiting unreasonable physical entry of the home. Citing numerous Supreme Court cases in support of this proposition, the court concluded that an arrest inside the home contravenes this reasonable expectation of privacy:

To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances.

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the arrest was made in a place protected by the fourth amendment. 572 F.2d at 422-23. For the facts of *Santana*, see note 64 supra.

Drug Enforcement Agents were authorized to arrest without a warrant under 21 U.S.C. § 878 (Supp. V 1975), which provides:

§ 878. Powers of enforcement personnel.

Any officer or employee of the Bureau of Narcotics and Dangerous Drug designated by the Attorney General may—

(3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony.

Id.


122. See notes 64 & 121 supra.

123. 572 F.2d at 422-23. The court noted that the Second Circuit had not decided this issue, as the "precise issue presented by this case has been avoided, reserved or referred to in dictum, or has been considered in circumstances involving consent or exigent circumstances, or has not been raised by the parties." *Id.* at 420 n.7.

124. *Id.* at 422.


126. 572 F.2d at 423.
of exigent circumstances, even when it is accomplished under statutory au-

thority and when probable cause is clearly present.

The court did not consider in depth the governmental interest in

ffecting warrantless entries for the purpose of arrest. It did, how-

ever, adopt the Dorman test to determine whether the warrant re-

quirement should be dispensed with in any given case.127

The court found the arrest unlawful, rendering the telephone and

address book inadmissible as evidence.128 Reed's conviction was re-

versed and the case was remanded for a new trial.129

An examination of Payton reveals that the court's reasoning used

in arriving at its conclusion is questionable.130 The court relied on

both the difference in the degree of intrusion and the extent of

governmental interest between searches and arrests. The court

viewed the intrusion associated with an entry for arrest as

"minimal."131 In its consideration of this issue, the court focused on

the "rummaging through possessions" as the intrusion to be

guarded against. A search was seen as a great intrusion into an

individual's life with the "upheaval of the owner's chosen or random

placement of goods,"132 whereas an arrest involves no such upheaval.

The court may have been correct in saying that a search entails

more of a physical "upheaval" than an arrest but surely one re-

ceives more constitutional protection in his home than on the

street.133 In analyzing this issue, the court of appeals unduly mini-

mizes the importance of the basic protection of the fourth amend-

ment, which is privacy.134 Although an individual's possessions are

interfered with more during a search than in an arrest,135 this inter-

127. Id. at 424. See text accompanying note 77 supra.
128. 572 F.2d at 425.
129. Id. at 427. The court found that the introduction of the telephone and address book
was not a harmless error. Id. at 425. The telephone and address book was only applicable to
Reed's conviction. Goldsmith argued that the statements he made to the Assistant United
States Attorney after his arrest were involuntary, a prior conviction should not have been
allowed to be used to impeach him, and the district court's charge with respect to the
voluntariness of his statements were improper. The court rejected all three of these conten-
tions. Id. at 425-26.
130. See text accompanying note 109 supra.
131. 45 N.Y.2d at 310, 380 N.E.2d at 299, 408 N.Y.S.2d at 400.
132. Id.
133. An arrest on a public street is valid without a warrant as long as probable cause
exists. See note 8 supra and accompanying text.
134. See notes 52-62 supra and accompanying text.
135. But see notes 143-45 infra and accompanying text.
ference takes place after the initial intrusion, the entry into the home. This entry invades the privacy protected by the fourth amendment. The physical invasion of the home is the “chief evil against which the wording of the Fourth Amendment is directed.” As Justice Jackson pointed out, “[t]he right of officers to thrust themselves into a home is . . . of grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.” The most harmful intrusion restrained by the fourth amendment, the invasion of the home, is the same in both an entry to search and an entry to arrest. This was recognized by the Second Circuit in Reed.

The Payton court weighed the governmental interest in warrantless entries to arrest with the individual interest of privacy and sound the interest of the former more important. The community’s interest in the apprehension of criminal suspects “is of a higher order than is its concern for the recovery of contraband or evidence; normally the hazards created by the failure to apprehend far exceed the risks which may follow non-recovery.” This approach assumes that a warrant requirement for an arrest inside a home would necessarily result in the failure to apprehend criminals. It disregards what courts imposing a warrant requirement have accepted: the presence of exigent circumstances—one of which is the likelihood of escape—would render a warrantless entry lawful. It is not clear, therefore, that the government’s interest in apprehending criminals is substantially effected by a warrant requirement for an entry to arrest.

The court in Payton also placed some reliance on a Model Code commentary, stating in part, “it is far from clear that an arrest in

138. “The right of police officers to enter into a home, for whatever purpose, represents a serious governmental intrusion into one’s privacy. It was just this sort of intrusion that the Fourth Amendment was designed to circumscribe by the general requirement of a judicial determination of probable cause.” 572 F.2d at 422 (quoting Commonwealth v. Forde, 367 Mass. 798, 805, 329 N.E.2d 717, 722 (1975)). The court also quoted Dorman, “ ‘Freedom from intrusion into the home ordinarily is the archetype of the privacy protection secured by the Fourth Amendment.’ ” 572 F.2d at 422. See also text accompanying note 115 supra.
139. 45 N.Y.2d at 311, 380 N.E.2d at 229, 408 N.Y.S.2d at 400.
140. E.g., Reed, 572 F.2d 412 (2d Cir. 1978); Dorman, 435 F.2d 385 (D.C. Cir. 1970); Accarino, 179 F.2d 456 (D.C. Cir. 1949).
141. See text accompanying note 77 supra.
one's home is so much more threatening or humiliating than a street
arrest as to justify further restrictions on the police." This reliance
is misplaced. The fourth amendment does not protect against hu-
miliation; it protects the privacy of a person's home. Privacy is not
invaded by a street arrest but is by an arrest in a private place.

As important as the individual's interest in the privacy of his
home is, it is not the only interest affected by the failure to extend
the warrant requirement to entries for the purpose of arrest. The
"plain view" and "search incident to an arrest" exceptions to the
search warrant requirement point out a probable intrusion into the
individual's personal effects as well.

Under the "search incident to an arrest" exception to the search
warrant requirement, an officer may search, upon a lawful arrest,
not only the arrested person but also "the area from within which
he might gain possession of a weapon or destructible evidence." An
d example of the extent of a search incident to a lawful arrest is
shown by Riddick, where police lawfully searched a chest of drawers
in the petitioner's bedroom. If a warrant is not required to enter a
home for an arrest, an officer may gain entry to a private home,
arrest an individual and search the surrounding area when no war-
rant has issued and no exigent circumstances exist.

Under the plain view doctrine, "objects falling in the plain view
of an officer who has a right to be in the position to have that view
are subject to seizure and may be introduced in evidence." Despite
the limited extent of this exception, the possibility of serious
infringement on one's personal life exists, especially since the sei-
zure results from the police officer's subjective notion of probable
cause to arrest.

142. 45 N.Y.2d at 312, 380 N.E.2d at 230, 408 N.Y.S.2d at 401.
143. Chimel v. California, 395 U.S. 752, 763 (1969). This case limited the permissible
scope of a search incident to a lawful arrest. Previous cases had allowed more extensive
searches. See Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz, 339
U.S. 56 (1950).
144. 45 N.Y.2d at 307, 380 N.E.2d at 227, 408 N.Y.S.2d at 397-98.
145. Harris v. United States 390 U.S. 234, 236 (1968); see also Coolidge v. New Hamp-
shire, 403 U.S. 443 (1971). Not only must the officer have a right to be where he is, but the
observance of the object must be inadvertent. Id. at 466. See also United States v. Beren-
guer, 562 F.2d 206 (2d Cir. 1977); United States v. Martin, 560 F.2d 673 (D.C. Cir. 1977);
United States v. Mason, 523 F.2d 1122 (D.C. Cir. 1975); United States v. Sheard, 473 F.2d
146. See Comment, Watson and Ramey: The Balance of Interests in Non-Exigent Felony
VI. Conclusion

Warrantless public arrests on probable cause were authorized by the Supreme Court in *Watson.*\(^4\) The reason lies in the balance between governmental interest in apprehending criminals and individual privacy interest while in public. The scale is tipped in favor of the government. Arrests inside a suspect's home involve a much weightier individual interest: the legitimate fourth amendment interest in the sanctity of one's home. The considerations enunciated in *Dorman* and accepted by *Reed*\(^4\) would allow a warrantless entry for the purpose of arrest whenever necessity exists.\(^4\) However, the same considerations would also recognize that the governmental interest in warrantless entries to effect arrests is, in other cases, less than the constitutionally protected individual interest in the sanctity of the home. The scale would be correctly tipped in favor of the individual.

The Supreme Court has not resolved this issue, leaving this area of law undefined.\(^5\) The Supreme Court cases construing the search and seizure clause of the fourth amendment show that the purpose of requiring a warrant for non-exigent searches is to protect the privacy of one's home. An entry to arrest violates this privacy to the same extent as does an entry to search. Under the fourth amendment, the interest of the individual in both situations is the same.

The New York Court of Appeals decision in *Payton* should be reversed. The fourth amendment necessitates a warrant for entry into a home for the purpose of arrest, subject to the exceptions laid down in *Dorman.*


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147. See notes 8-21 *supra.*
148. See notes 77 & 127 *supra* and accompanying text.
149. See text accompanying notes 140-41 *supra.*
150. See note 7 *supra.*