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Christos Papapetrou

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# Payton, Practical Wisdom, and the Pragmatist Judge: Is Payton's Goal to Prevent Unreasonable Entries or to Effectuate Home Arrests?

## **Cover Page Footnote**

J.D. Candidate, Fordham University School of Law, May 2008. Many thanks to Professor James Kainen for his helpful comments in the writing of this Comment.

## **PAYTON, PRACTICAL WISDOM, AND THE PRAGMATIST JUDGE: IS *PAYTON*'S GOAL TO PREVENT UNREASONABLE ENTRIES OR TO EFFECTUATE HOME ARRESTS?**

*Christos Papapetrou*\*

“What concerns us is not what the historical facts which appear at this or that time *are*, per se, but what they signify, what they point to, by *appearing*.”<sup>1</sup>

### **INTRODUCTION**

Imagine two police officers arrive at a suspect's home to execute an arrest warrant. The first police officer believes the suspect is not home because he knows the suspect often takes walks at this time in the evening. The other officer, without this knowledge, sees the suspect's car in the driveway and the lights on in the living room, and knows that according to an “objective” test this is enough to believe the suspect is inside the residence. If the police officers enter the house (notwithstanding what the first police officer believes) should the objective test be enough to validate this entry?<sup>2</sup> An empirical pragmatic<sup>3</sup> approach to this problem would likely argue that if the facts satisfy the objective, reasonable test then the entry should be upheld. The opposing view would conclude that “there can be no knowledge without belief.”<sup>4</sup>

This Comment examines an empirical pragmatic approach to resolving this controversial issue arising from the Supreme Court's ruling in *Payton v. New York*.<sup>5</sup> Further, it considers how a judge

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1. OSWALD SPENGLER, *THE DECLINE OF THE WEST* 6 (Oxford Univ. Press 1991).

2. See Craig M. Bradley, *Symposium: Programmatic Purpose, Subjective Intent, and Objective Intent: What is the Proper Role of “Purpose” Analysis to Measure the Reasonableness of a Search or Seizure?: The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 *Miss. L.J.* 339, 346-47 (2006) (considering a similar hypothetical, where one police officer knows from a distance that a plant is most likely not marijuana and the other police officer thinks it is, and this was enough to constitute probable cause for the search).

3. An empirical pragmatic approach advocates a more extensive use of social science research to guide court decisions.

4. See Bradley, *supra* note 2, at 347.

5. 445 U.S. 573, 600-02 (1980) (holding that unless there are exigent circumstances the Fourth Amendment prohibits warrantless entries into a suspect's resi-

should approach a constitutional question when that question has not yet been clearly decided by the courts. In *Payton*, the Court held that an arrest warrant implicitly carries with it a right to enter a suspect's home when there is "reason to believe" it is the suspect's residence.<sup>6</sup> Courts since *Payton* have interpreted "reason to believe" as incorporating anything from a simple belief on the part of the police, up to a probable cause standard of proof.<sup>7</sup> This Comment questions how courts should think about this standard and analyzes one approach put forth by Professor Matthew A. Edwards in his article, *Posner's Pragmatism and Payton Home Arrests*.<sup>8</sup> In his article, Edwards proposes that courts could resolve this uncertainty through empirical pragmatism and reliance on social science.<sup>9</sup> This Comment discusses Edwards' proposal and the theory of empirical pragmatism framed within the context of the *Payton* standard. Furthermore, it explores the consequences of relying on empirical pragmatism in a constitutional setting, and suggests that a proper approach to this question must have more substantive beginnings because of the valuable interests involved.

Part I of this Comment discusses the Supreme Court's decision in *Payton*<sup>10</sup> and the lower courts' application of the "reason to believe" standard.<sup>11</sup> Part II examines Edwards' proposed solution that advocates the "Pragmatist Judge" and considers the various criticisms raised by its opponents. Part III posits that before a court can correctly apply any empirical information, it needs to be aware of the different interests involved. This Comment proposes that courts should participate in a legal narrative discussion to arrive at a clear standard, rather than rely on pragmatism.

### I. *PAYTON V. NEW YORK*

This section sets forth the Supreme Court's decision in *Payton* and considers the inconsistencies in applying the "reason to believe" standard.

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dence for the purpose of arrest and that an arrest warrant and a reasonable belief by the police officer could be enough).

6. *Id.* at 603.

7. See *infra* Part I.B (discussing how different courts have applied *Payton*).

8. Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299 (2002).

9. *Id.* at 302-04 ("[The Article] advances the cause of scholars who have called for a more empirical and pragmatic approach to constitutional criminal procedure adjudication.").

10. See *infra* Part I.A.

11. See *infra* Part I.B.

### A. What Does *Payton* Hold?

The question presented in *Payton v. New York*<sup>12</sup> is whether a police officer is authorized to enter a private residence to make an arrest without a warrant.<sup>13</sup> In response to this question, the Supreme Court held that, “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.”<sup>14</sup> The Court created a two-prong inquiry to satisfy this standard.<sup>15</sup> First, the police must have a reasonable belief that the residence is the suspect’s home; and second, the police must have a reason to believe the suspect is inside the residence at that particular time.<sup>16</sup>

Justice Stevens, writing the opinion of the Court, acknowledges the New York Court of Appeals reliance on “apparent historical acceptance”<sup>17</sup> in reaching its decision to uphold warrantless arrests. Justice Stevens examines the history behind the Fourth Amendment, and then spends the majority of the opinion discussing the Fourth Amendment principles the Court has always recognized.<sup>18</sup> As Justice Stevens writes, “[a]lmost a century ago the Court stated in resounding terms that the principles reflected in the Amend-

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12. 445 U.S. 573 (1980). The issue before the Supreme Court was a challenge to a New York statute that authorized police officers to make home arrests without any warrant requirement. *Id.* at 574-75. The Court’s main concern was distinguishing arrests in the home from arrests in public that do not have a warrant requirement. *Id.* at 576.

13. The Fourth Amendment provides that, “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.

14. *Payton*, 445 U.S. at 603.

15. *Id.*

16. *Id.*; Edwards, *supra* note 8, at 336-37 (outlining the criteria required by the *Payton* standard). Edwards focuses on his third requirement which creates the “reasonable belief” standard that the courts have struggled to interpret. *Id.* at 337-38. Edwards argues that it is crucial to understand what the police believe before they enter. He notes that, “it is typically unimportant in the following discussion whether the suspect was indeed found in the residence.” *Id.* at 338. Part III of this Comment argues that an empirical approach could create situations where the police officer’s reasonable belief becomes irrelevant.

17. *Payton*, 445 U.S. at 581. Justice Stevens notes that the New York Court of Appeals relied on historical acceptance derived from the common law, while the dissenters in the lower court noted that the history should not be determinative alone, and that a “reasoned analysis” is always necessary when a grave constitutional question is brought before the court. *Id.* at 581-82 (quoting *Payton v. New York*, 45 N.Y.2d 300, 324 (1978) (Cooke, J., dissenting)).

18. *Id.* at 581-87.

ment ‘reached farther than the concrete form’ of the specific cases that gave it birth.”<sup>19</sup> The Court concretely states in *Payton*: “It is a ‘basic principle of Fourth Amendment’ law that searches and seizures inside a home without a warrant are presumptively unreasonable.”<sup>20</sup>

### B. Applying *Payton* Today

Courts have difficulty applying *Payton* because the Supreme Court did not precisely define “reason to believe.”<sup>21</sup> As a result, courts applying this standard have developed different interpretations of what is required of police officers before they can enter a suspect’s home.<sup>22</sup> The crucial question is which standard of reasonableness satisfies the “reason to believe” language under *Payton*. The majority of courts define the *Payton* standard as embodying a level of reasonableness less than probable cause.<sup>23</sup> These courts interpret the standard as a “common sense approach,” analyzing the totality of the circumstances that may give an officer reason to believe the suspect is at home.<sup>24</sup> In contrast to the majority of courts, the Ninth Circuit has held that “police may enter a home with an arrest warrant only if they have probable cause to believe the person named in the warrant resides there.”<sup>25</sup> The Ninth Cir-

19. *Id.* at 585 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

20. *Id.* at 586. See *infra* note 140 and accompanying text.

21. Edwards, *supra* note 8, at 339-40.

22. *Id.*

23. See *United States v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005) (“We think it more likely, however, that the Supreme Court in *Payton* used a phrase other than ‘probable cause’ because it meant something other than ‘probable cause.’”); *United States v. Davis*, 153 F.App’x 670, 671-72 (11th Cir. 2005) (following the interpretation of the court in *Magluta*); *Valdez v. McPheters*, 172 F.3d 1220, 1224-26 (10th Cir. 1999) (holding that the *Payton* standard requires less than probable cause); *United States v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995) (“[I]t is difficult to define the *Payton* ‘reason to believe’ standard, or to compare the quantum of proof the standard requires with the proof that probable cause requires.”); *Todosijevic v. County of Porter*, 2005 U.S. Dist. LEXIS 36753, at \*16 (N.D. Ind. Dec. 2, 2005) (holding that “reasonable belief” is not the same as the “probable cause” rule applied by the Ninth Circuit).

24. *Magluta*, 44 F.3d at 1535 (“[I]n order for law enforcement officials to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect’s dwelling, and that the suspect is within the residence at the time of entry.”). See also *United States v. Pruitt*, 458 F.3d 477, 482 (6th Cir. 2006) (“Reasonable belief is established by looking at common sense factors and evaluating the totality of the circumstances.”); *Valdez*, 172 F.3d at 1226; *United States v. McKinney*, 379 F.2d 259, 264 (6th Cir. 1967).

25. *United States v. Harper*, 928 F.2d 894, 896 (9th Cir. 1991); see also *United States v. Gorman*, 314 F.3d 1105, 1110-12 (9th Cir. 2002) (holding that the “‘reason to

2007] *PAYTON AND THE PRAGMATIST JUDGE* 1521

cuit refused to apply a lesser standard of reasonableness than probable cause.

Courts have applied different factors in determining what constitutes “reason to believe.”<sup>26</sup> The most common factors include: observation of the suspect, the presence of automobiles at the house, lights on within the house, noises from within the residence, and the time of day the police enter.<sup>27</sup> Courts interpret these factors differently, which has led to the current lack of clarity regarding what constitutes “reasonable belief.” Additionally, in situations where there is only one factor present, the analysis of when to uphold a police entry becomes more questionable.<sup>28</sup> The presence, or lack of, these factors leads the police to different assumptions depending on the situation. Additionally, courts have held that the police should consider whether the suspect is aware the police are looking for them. In these cases, the lack of the above factors allows the police to assume the suspect is in the residence.<sup>29</sup> For example, having the lights off and hiding his car permits the police to assume the suspect is inside the home. Courts, however, have generally not applied the lack of factors as an indicator that the person is hiding.<sup>30</sup>

*United States v. Thomas* is another example of a court’s unclear application of *Payton*.<sup>31</sup> In *Thomas*, the government argued that it had satisfied the first prong of the *Payton* standard because it performed an “investigation.”<sup>32</sup> The government simply stated that they investigated and were certain that the home was the defen-

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believe’ or reasonable belief standard . . . embodies the same standard of reasonableness inherent in probable cause”).

26. Edwards, *supra* note 8, at 341-42 (providing a comprehensive analysis of the common factors that have been used by courts in determining the “reason to believe” standard). R

27. *See id.* at 341-48. Edwards explains how these different factors have been applied, and which provide more convincing evidence that the suspect is in the premises. In each of these cases the court applied some combination of these different factors in determining whether the police officers had a “reason to believe” the suspect is in the residence.

28. *See id.* at 349-56 (providing numerous examples of cases where it is far from clear that the police have established a “reason to believe” the suspect is home).

29. *See Magluta*, 44 F.3d at 1535 (acknowledging that in this circumstance the factors would be treated differently); *see also* Edwards, *supra* note 8, at 347-48 (describing how these factors can be used in contrasting ways to satisfy *Payton*, and that it creates a Catch-22 where the suspect may fall underneath *Payton* regardless). This example will be used in Part III.A.3 as a type of circumstance where the application of an empirical approach would be questionable. R

30. *See* Edwards, *supra* note 8, at 348. R

31. 428 F.3d 282, 286 (D.C. Cir. 2005).

32. *Id.*

dant's residence,<sup>33</sup> and as a result they established more than a "mere hunch, surmise, or suspicion."<sup>34</sup> The court, however, implied that since Thomas was a parolee, his parole officer clearly would have had his current address, and thus the government's "investigation" was sufficient.<sup>35</sup> As to the second prong, whether the officers had reason to believe Thomas would be at home when they executed the warrant, the court only considered the time of day that the police entered the home.<sup>36</sup> The court stated that "the early morning hour was reason enough."<sup>37</sup>

These cases exemplify how courts applying *Payton* have become very deferential to the officer's judgment in making factual determinations about the suspect's presence in the residence. As Edwards remarks, "[t]his deference seems to be a reflection of the judiciary's long-standing institutional concerns regarding second-guessing police work."<sup>38</sup> The issue raised is whether the determinations being made are those which courts have traditionally seen as "police work," or rather a lenient approach to police abuse.<sup>39</sup>

## II. THE PRAGMATIC APPROACH TO *PAYTON* AND ITS CRITICS

This Part of the Comment examines Edwards' pragmatic approach to *Payton*, as well as the various anti-pragmatic critiques.

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33. *Id.*

34. *Id.* ("[W]e do not think the absence of testimony about where the marshals got Thomas' address is fatal to the Government's claim of reason to believe Thomas lived in the apartment."). To be clear, Thomas' counsel also did not make a point to question the marshal on the details behind the investigation, so the court may not have felt it was a disputed question. In this case, the court was as deferential to the police as possible.

35. *Id.*

36. *Id.*

37. *Id.* (quoting *United States v. May*, 68 F.3d 515, 516 (D.C. Cir. 1995)) ("The logical place one would expect to find [the defendant] on that . . . morning was at his home."). Edwards provides a similar example where the Massachusetts Supreme Court upheld a police entry where an informant notified the police that he had seen the suspect in his residence four days earlier, and there was no evidence he had left. Again, the early morning timing of the police entry was sufficient to establish "reasonable belief." Edwards, *supra* note 8, at 350-51 (citing *Commonwealth v. DiBenedetto*, 693 N.E.2d 1007 (Mass. 1998)).

38. Edwards, *supra* note 8, at 348-49.

39. Edwards considers these two different possibilities and is not concerned with the increased deference to the police. *See id.* at 349 n.200. He writes, "[a]nother possibility is that these cases were decided correctly and that the *Payton* standard is simply extremely lenient towards police behavior and is satisfied with little evidence of presence. Neither perspective weakens this Article's critique that these opinions lack sufficient factual basis." *Id.* This Comment argues that leniency towards police behavior should be a primary concern because it leads to serious constitutional consequences. *See infra* Part III.

### A. Edwards' Empirical Pragmatism

Edwards suggests using empirical pragmatism to solve the problems of applying *Payton*.<sup>40</sup> He argues that “sound social science” should guide the courts when applying *Payton*.<sup>41</sup> Edwards proposes that if judges were to adopt a method of judicial review that “explicitly relies upon social-science research,” it would clarify the issues faced by the courts when reviewing these police actions.<sup>42</sup> Further, he argues that a database of home arrest statistics should be created for judges to assist them in determining whether it was reasonable for an officer to believe the suspect was at home at the time of entry.<sup>43</sup> He refers to this method of judicial decision-making as one of “transparent adjudication”<sup>44</sup> that will allow the courts to move to more difficult normative questions.<sup>45</sup>

#### 1. *The Pragmatist Judge*

Edwards relies on the model of legal pragmatism espoused by Judge Posner.<sup>46</sup> Edwards creates a “Pragmatist Judge,” based on Posner’s model of pragmatism with the following characteristics:

- (1) Demonstrates respect for, but not blind adherence to, precedent;
- (2) Is willing to look outside of traditional legal sources for guidance in resolving truly novel or difficult cases;
- (3) Uses non-legal methods or information derived from “economists, statistics, game theory, cognitive psychology, political science, sociology, decision theory, and related disciplines,” to resolve legal questions;
- (4) Seeks guidance from empirical research (hopefully conducted by invigorated law professors) to assist with resolving legal issues;
- (5) Attempts to come up with a “decision that will be best with regard to present and future needs;”
- (6) Is willing to rely upon intuition to arrive at a decision when neither traditional legal materials nor extralegal research or

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40. See Edwards, *supra* note 8, at 304.

41. *Id.*

42. *Id.*

43. See *id.* at 375-85.

44. *Id.* at 387-88; see *infra* note 108 and accompanying text (outlining the concept of “transparent adjudication”).

45. See *infra* note 108.

46. See generally RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) [hereinafter POSNER, *PROBLEMATICS*]; see Edwards, *supra* note 8, 304-13 (describing the different elements of Posner’s empirical pragmatism and the pragmatism movement).

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methods suggest the proper outcome; (7) Does not “look to God or other transcendental sources of moral principle.”<sup>47</sup>

Edwards’ Pragmatist Judge reflects Posner’s general principle that the “only sound basis for a legal rule is its social advantage, which requires an economic judgment, balancing benefits against costs.”<sup>48</sup> Edwards focuses on this cost-benefit analysis in his approach to *Payton*.<sup>49</sup> David Luban describes Posner’s pragmatism: “[d]ecisions at law, judicial or otherwise, must be based on a realistic, empirically informed, unsentimental, preferably quantitative comparison of costs and benefits (not limited to monetary costs and benefits however).”<sup>50</sup> The pragmatist will make legal decisions in accordance with the public’s well-being and will only look to “doctrinal integrity” if it will improve that well-being.<sup>51</sup>

## 2. *An Empirical Study of Home Arrests*

Professor Edwards proposes that the United States Marshals Service (the “USMS”) conduct an empirical study to be used in the application of the *Payton* doctrine.<sup>52</sup> Edwards chooses the USMS because it is the most competent institution to research and create an empirical study of suspect behavior,<sup>53</sup> as it accounts for the majority of fugitive arrests in the country.<sup>54</sup> Edwards writes, “the Marshals Service’s unique fugitive-apprehension role gives it a vested interest in determining the safest and most reliable methods

47. Edwards, *supra* note 8, at 313 (quoting POSNER, PROBLEMATICS, *supra* note 46, at 242, 249, 256). Regarding the first two factors, Edwards acknowledges that Posner’s pragmatism does not rely on “precedent, statutes, and constitutional text” in the decision making process. *Id.* The Pragmatist Judge “looks to sources that bear directly on the wisdom of the rule he is being asked to adopt or modify.” POSNER, PROBLEMATICS, *supra* note 46, at 249. Further, the fifth factor proposes that the Pragmatist Judge decides cases in line with what is best for the future. *Id.* Posner writes, “[a] pragmatist will be guided in this decisionmaking process by the goal of making the choice that will produce the best results.” *Id.* This formulation of the Pragmatist Judge will be discussed in Part III of this Comment, specifically the question of what is meant by the best results. *See infra* Part III.B.

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48. Edwards, *supra* note 8, at 315 (quoting POSNER, PROBLEMATICS, *supra* note 46, at 208). Edwards’ Pragmatist Judge could both choose and apply the rule that he believed would have the best social advantage. *See id.*

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49. Edwards, *supra* note 8, at 314-15.

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50. David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 STAN. L. REV. 1001, 1005 (1996) (reviewing RICHARD A. POSNER, OVERCOMING LAW (1995)).

51. *Id.*

52. *See* Edwards, *supra* note 8, at 375.

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53. *See id.* at 375-76.

54. *See id.* at 375.

2007] *PAYTON AND THE PRAGMATIST JUDGE* 1525

for apprehending fugitives while preserving evidence for trial and avoiding the suppression of improperly obtained evidence.”<sup>55</sup>

Edwards’ preliminary idea rests on the “common sense” factors stipulated by the majority of *Payton* case law.<sup>56</sup> The USMS would study these factors and “analyze how reliable each factor is as an indicator of presence, with the goal of creating a comprehensive account of the weight of each presence factor, individually and in concert.”<sup>57</sup> This analysis, according to Edwards, would be “rather tame as social science” because of the small amount of recurring factors.<sup>58</sup> Edwards concludes that this type of study would provide police officers, prior to every entry, “a statistically sound basis for determining whether there is reason to believe that the resident is home.”<sup>59</sup> Afterwards, when the court reviews the officer’s conduct, it will be able to accurately evaluate the action based on this empirical information, instead of relying on formalistic evaluations of the “reasonableness” of the conduct.<sup>60</sup>

Next, Edwards proposes how courts should apply the empirical data from the USMS study.<sup>61</sup> He applies a framework developed by John Monahan and Laurens Walker,<sup>62</sup> termed “social

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55. *Id.* at 376. This argument, however, does not encompass all the interests that the courts must consider. Further, the USMS does not have an interest in protecting constitutional rights. The *Payton* standard does not only apply to fugitive suspects, but to anyone subject to an arrest in their home. These concerns will be addressed in Part III. *See infra* note 148 and accompanying text (discussing the limited role of the USMS).

56. *See supra* notes 26-27 and accompanying text. Edwards lists the following factors:

- (1) police or third-party sighting of, or contact with, the suspect at the residence some time prior to the attempted entry;
- (2) light or noise emanating from the residence;
- (3) the presence of vehicles, connected or unconnected to the suspect, at the residence; and
- (4) the time of day the police seek entry in combination with any known information regarding the suspect’s schedule.

Edwards, *supra* note 8, at 376-77. Edwards recognizes that these factors are not exclusive or could be further refined depending on what the USMS knows.

57. *Id.* at 377.

58. *Id.* at 378.

59. *Id.*

60. *Id.* Edwards also recognizes that the study would encompass other circumstances as well. For example, studying whether the police enter certain types of homes more often than others. He gives the example of motels versus single-family homes. *Id.*

61. *See id.* at 378-81.

62. *Id.* at 378 n.359 (referring to various texts of Monahan and Walker discussing how to apply empirical research to a legal context).

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frameworks,”<sup>63</sup> as the correct way to apply emerging empirical data. Monahan and Walker define social framework decision making as “the use of general conclusions from social science research in determining factual issues in a specific case.”<sup>64</sup> Edwards gives the following examples where Walker and Monahan have used empirical research as “social framework:” eyewitness identification, predicting future dangerousness of convicted felons, battered woman syndrome, and child abuse.<sup>65</sup> Edwards maintains that the same approach could be used by courts<sup>66</sup> with general data about home arrests and suspect behavior used to determine whether officers had a “reason to believe” the suspect was present.<sup>67</sup>

Edwards notes, however, an important difference between the *Payton* cases and the normal “social framework” context.<sup>68</sup> The *Payton* determination, “is arguably a mixed question of law and fact reviewed de novo, not a finding of fact reviewed for clear error,”<sup>69</sup> as the social framework examples are. According to Edwards, this is not fatal to the application of the “social framework” context because in the *Payton* context, the legal conclusions are based heavily on the facts of the case.<sup>70</sup>

In addition to laying out his framework for the Pragmatist Judge and proposing that courts use the USMS database, Edwards also engages in a thorough review of the different criticisms of legal pragmatism<sup>71</sup> and identifies two main categories.<sup>72</sup> First, he discusses criticisms concerned with the certainty of the empirical method itself,<sup>73</sup> including: whether social science data can ade-

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63. *Id.* at 379 (quoting Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 563-70 (1987) [hereinafter Walker & Monahan]).

64. Walker & Monahan, *supra* note 63, at 570.

65. Edwards, *supra* note 8, at 379-80 (citing Walker & Monahan, *supra* note 63, at 563-67). R

66. *See id.* at 380.

67. *Id.*

68. *Id.*

69. *Id.* He compares it to the Supreme Court’s decision in *Terry v. Ohio*, 392 U.S. 1 (1968), which distinguished reasonable suspicion from probable cause. *Id.*

70. *Id.* Edwards is not concerned about this distinction because a police officer’s determination of “reason to believe” is so factually sensitive. A court’s decision in the *Payton* context, however, will always be a determination of when the police may enter a person’s home to serve an arrest warrant. Thus, a court cannot escape important Fourth Amendment considerations.

71. *See* Edwards, *supra* note 8, at 318-34. *See infra* Part II.B examining these different critiques. R

72. *See* Edwards, *supra* note 8, at 318-19, 332-34. R

73. *Id.* This Comment will not focus on these types of concerns. As Edwards writes, “[t]he first class of problems concerns the efficacy of utilizing specific social

quately quantify the social interactions that the law governs;<sup>74</sup> whether judges are competent to apply social science research;<sup>75</sup> and whether law professors can handle the type of social science, academic research that the Pragmatist Judge requires in order to make those decisions align with the “best” social costs.<sup>76</sup>

Edwards’ second category deals with the criticism that pragmatism fails because it does not evaluate political, moral, or social goals.<sup>77</sup> For example, can pragmatism be applied to highly charged constitutional issues?<sup>78</sup> This criticism, which Edwards refers to as banality,<sup>79</sup> is that pragmatism is “empty of substance.”<sup>80</sup> Many scholars dislike pragmatism because of its refusal to prefer certain

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science methods to assist with analyzing or resolving legal issues.” *Id.* Edwards accepts the imperfections inherent in relying on social science research, but believes that they do not “doom the entire endeavor of informing legal judgments with the most reliable, current scientific or sociological data or theories available.” *Id.* at 321.

74. *Id.* at 319. Edwards acknowledges that statistics and research founded on poor data will be unreliable. He argues that critics that raise this point are in fact making a more normative argument: that judges should not use social science research at all, because “there is the notion that certain concepts embodied in the law—liberty, justice, equality, fairness, and due process—simply cannot be measured or fruitfully compared.” *Id.* at 320. Edwards describes this argument as the absolutist view of legal rights, which would preclude the use of any empirical research in decisions involving legal rights. *Id.* See also *infra* note 87 and accompanying text (discussing Edwards’ conclusion that this will not be a serious obstacle in applying *Payton*). **R**

75. *Id.* at 324-29. This raises the issue of courts’ institutional competency to apply empirical data to legal problems. Edwards presents examples where courts have misapplied empirical research, but concludes that, “even scholars who have criticized the judiciary’s handling of social science in the past have confidence that, with proper effort, lawyers can handle such materials.” *Id.* at 327. See *infra* note 90 and accompanying text (arguing that judges already analyze these same factors when making *Payton* decisions). **R**

76. Edwards, *supra* note 8, at 322. Edwards discusses Posner’s different reasons for desiring increased empirical study by law professors. Edwards cautions that “any empirical scholarship by law professors must be tempered by an understanding of the professional and institutional limitations on such a movement.” *Id.* at 323. Edwards is not as concerned with this criticism in his article because his proposal does not require any data to be formulated by legal academics, but rather by the USMS. See *infra* note 91 and accompanying text (concluding that this criticism is not applicable in the *Payton* context). **R**

77. See Edwards, *supra* note 8, at 333. This criticism is extensively examined in Part II.B and Part III of this Comment. **R**

78. See *id.* at 318.

79. See *id.* at 328.

80. *Id.* at 329 (quoting Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 328 (1996)). (“Pragmatism does not say what the good is, how to live, what economic or political system to develop, or anything else of that nature.”). *Id.*

ends or goals.<sup>81</sup> These critics argue that “pragmatism collapses on its own weight because pragmatism calls for doing ‘what works best,’ while pragmatists steadfastly refuse to take a position on what is best.”<sup>82</sup> Judge Posner answers this criticism, “by arguing that factual inquiry may lead to common ground for those in the center of a highly charged debate, even if those at either ideological extreme may remain unconvinced.”<sup>83</sup>

While Edwards recognizes these as legitimate concerns, he argues that empirical pragmatism still provides answers in the context of the *Payton* standard.<sup>84</sup>

### 3. *Overcoming the First Criticism: The Certainty of the Empirical Method*

Edwards addresses the first category of criticisms—the lack of certainty in the empirical method itself—and concludes that it does not present an obstacle in the *Payton* context.<sup>85</sup> He suggests that because the factors involved in studying home arrests are not very complicated, the study would not involve complex scientific research.<sup>86</sup> Edwards states, “[n]o one could argue that once the USMS data is collected and studied that there would be an intrinsic problem with understanding the object of study, home arrests.”<sup>87</sup> Edwards answers the criticism that empirical studies are inadequate to comprehend legal issues by arguing that the study would

81. *See id.* at 329. This Comment argues that the pragmatic approach fails to examine what interests the rule of law is meant to protect. *See infra* Part III.B.1.

82. Edwards, *supra* note 8, at 330. This is the argument of the Pragmatist Judge, in that he decides according to what is “best” for the future. Edwards acknowledges that this is a major criticism of pragmatism, and Posner himself admits that “[p]ragmatism will not tell us what is best,” however, Posner believes there is a fair degree of value among judges so that it will not be a serious problem. *Id.* at 330 n.134. *See infra* Part III.B. R

83. Edwards, *supra* note 8, at 332 (citing Richard A. Posner, *On the Alleged “Sophistication” of Academic Moralism*, 94 Nw. U. L. REV. 1017, 1020 (2000)). Posner defends pragmatism against the criticism of banality stating, “[t]he pragmatists’ hope is rather that by abstaining from moral disputation and focusing instead on the facts—by being, in short, a pragmatist—the judge or legislator may find some common ground after all.” *Id.* R

84. *See id.* at 333.

85. *See id.* at 381-84; *see supra* notes 71-76 and accompanying text. R

86. *See* Edwards, *supra* note 8, at 381. R

87. *Id.* This Comment proposes that it may be more difficult than Edwards suggests to create a comprehensive empirical study, especially one that will reach conclusions of law. *See infra* Part III.A.2 (describing how a pragmatic approach may not be as helpful in certain, more difficult cases).

be uncomplicated and clear.<sup>88</sup> He also dismisses the argument that judges may not be competent to apply this data to cases of law.<sup>89</sup> Instead, he argues that judges are already very comfortable with analyzing cases involving *Payton*.<sup>90</sup> Additionally, Edwards argues that the criticism that law professors would make errors conducting empirical research is not applicable in this context because it is not law professors, but rather the USMS that would conduct the research.<sup>91</sup> Edwards also addresses the problem of “causation,”<sup>92</sup> and argues it is not a real concern because determining the presence of a factor (such as a vehicle in the driveway) does not cause the suspect to be present.<sup>93</sup> This is an important distinction for Edwards, as he concludes, “[i]f one does not believe that the challenged action causes a result, then one may dispense with [the] normative question of whether the result is desirable.”<sup>94</sup>

Edwards raises another important concern: the USMS may not have the correct motivation to participate in this type of study.<sup>95</sup> The USMS is a law enforcement agency whose primary concern is apprehending suspects, not protecting a suspect’s constitutional rights.<sup>96</sup> Edwards points out, however, that the USMS would have a strong interest in embracing the study because it would prevent unwarranted entries into private homes which would result in a decrease in future litigation costs.<sup>97</sup> In addition, he argues that “Posner’s pragmatism calls for reconceptualizing the roles played by various players in the legal system.”<sup>98</sup> The USMS, therefore, would adapt to a more innovative role.

88. See Edwards, *supra* note 8, at 381; see also *supra* note 74 and accompanying text. R

89. See Edwards, *supra* note 8, at 382. R

90. See *id.*; *supra* note 75 and accompanying text (raising the argument that judges may not know how to apply this data correctly). R

91. See Edwards, *supra* note 8, at 382. Edwards comments that because the USMS is performing the study it “circumvents the institutional barrier against empirical legal research.” *Id.* He advises that some form of legal academic oversight should take place, though it’s not clear what that would entail. See *id.*; *supra* note 76 and accompanying text (discussing the role of law professors in performing empirical research). R

92. See Edwards, *supra* note 8, at 382-83. R

93. *Id.* The presence of these factors, car in the driveway, etc., correlates to the presence of the suspect in the residence, but does not cause him to be there. R

94. *Id.* at 383. See *infra* notes 157-60 and accompanying text (arguing that this result more than correlates to a court’s analysis of these factors; the result determines a person’s constitutional rights). R

95. Edwards, *supra* note 8, at 383-84. R

96. See *id.* at 383. R

97. See *id.* R

98. *Id.*; see *infra* notes 162-63 and accompanying text (discussing the role of the USMS and whether we want our law enforcement agencies to be “innovative”). R

#### 4. *Overcoming the Second Criticism: Banality*

For Edwards, the focus of the disagreement between pragmatists and their critics<sup>99</sup> is an initial disagreement about what is actually disputed in these cases.<sup>100</sup> Ronald Dworkin argues that the disagreement deals with which normative ends should be pursued.<sup>101</sup> Pragmatists believe enough value consensus usually exists on the ends, and the disagreement is about the correct means to achieve those ends.<sup>102</sup> Pragmatism may also be valuable in “revealing situations where doctrine or legal categories obscure a complete understanding of the underlying legal problem.”<sup>103</sup> Where formalism might categorize the problems too much, pragmatism offers an “antidote for excessive abstraction.”<sup>104</sup> Louis Menand critiques all theory, pragmatism and non-pragmatism alike:<sup>105</sup>

It is sometimes complained that pragmatism is a bootstrap theory—that it cannot tell us where we should want to go or how we can get there. The answer to this is that theory can never tell us where to go; only we can tell us where to go. Theories are just one of the ways we make sense of our choices. We wake up one morning and find ourselves in a new place, and then we build a ladder to explain how we got there.<sup>106</sup>

Menand further adds, “[t]he pragmatist is the person who asks whether this is a good place to be. The non-pragmatist is the person who admires the ladder.”<sup>107</sup>

Edwards argues that pragmatism can overcome the banality concern because it forces judges into a mode of “transparent adjudication.”<sup>108</sup> For Edwards, this is the most valuable reason for applying

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99. See Edwards, *supra* note 8, at 385-87. Edwards addresses Ronald Dworkin as one of the main critics of pragmatism. Dworkin objected to Posner’s pragmatism and argued that empirical research cannot resolve debates over fundamental values. See *id.* Dworkin’s critique of pragmatism will be discussed in Part B of this section. R

100. See *id.* at 386.

101. See *supra* note 99. R

102. Edwards, *supra* note 8, at 386. R

103. *Id.*

104. *Id.* at 387. Edwards notes, however, that this may not be successful unless pragmatism itself can offer a normative goal.

105. See Edwards, *supra* note 8, at 329 n.129. R

106. Louis Menand, *Pragmatists and Poets: A Response to Richard Poirer*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAY ON SOCIAL THOUGHT, LAW, AND CULTURE* 362, 369 (Morris Dickstein ed., 1998).

107. Louis Menand, *An Introduction to Pragmatism*, in *PRAGMATISM: A READER* xxxiv (Louis Menand ed., 1997).

108. Edwards, *supra* note 8, at 387-88 (citing Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000) R

2007] *PAYTON AND THE PRAGMATIST JUDGE* 1531

pragmatism in the *Payton* context. He recognizes that empirical pragmatism is not a normative theory, but rather a theory that forces the courts “to reveal the motivations for their decisions, by stripping away the guise of ill-supported factual assumptions.”<sup>109</sup> The benefits of “transparent adjudication” will be considered in Part III.

### 5. *A Theoretical Test of the USMS*

In order to further expound on his theory and refute his critics, Edwards provides several hypothetical situations, which we will examine here and revisit in Part III, to see what effect a pragmatic jurisprudence may have on the elusive *Payton* standard. In the first example: “[a] reliable and scientifically valid study of home arrests<sup>110</sup> indicates that the presence of a vehicle connected to the suspect and light emanating from a residence indicates a 95% chance that a suspect will be at home before 8 a.m. on a week-day.”<sup>111</sup> In this scenario, if the police were to enter a residence before 8 a.m., a court would find they had satisfied the “reason to believe” standard;<sup>112</sup> otherwise, the court would require more than a 95% certainty to satisfy *Payton*.<sup>113</sup>

In the second hypothetical, the police attempt to enter the suspect’s home in the middle of the afternoon, when there are no vehicles parked outside and no lights are on inside the home.<sup>114</sup> The

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[hereinafter Meares & Harcourt, *Transparent Adjudication*]. Meares and Harcourt define the term “transparent adjudication” as “adjudication that expressly and openly discusses the normative judgments at the core of constitutional criminal procedure. Judicial decisions that address the relevant social science and empirical data are more transparent in that they expressly articulate the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved in criminal procedure decision making.” Meares & Harcourt, *Transparent Adjudication, supra*. This definition infers that the normative debate should occur simultaneously with a consideration of relevant empirical information. *See infra* note 183 and accompanying text (proposing that where the only concern is transparency the courts will overlook the normative aspect).

109. Edwards, *supra* note 8, at 388.

110. *Id.* at 389. Edwards assumes in these examples there are no flaws with the empirical nature of the study and the resulting data. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* What about a situation where the officer knows or has a fairly good reason to believe the suspect is not home, but according to the factors present there is a 95% chance he is in the home? Should we care about the 95% probability then? *See* Bradley, *supra* note 2, at 346-47. Bradley argues that in certain circumstances a police officer’s subjective knowledge must be relevant to the court’s determination. *See also infra* Part III.A.

114. Edwards, *supra* note 8, at 389.

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empirical study states that these factors indicate less than a 2% chance that the suspect is in the residence.<sup>115</sup> Therefore, in this situation a court would most likely find that the *Payton* standard was not satisfied.

In the third scenario, a confidential informant reports that he saw the suspect at his residence at 3 p.m. on a Saturday.<sup>116</sup> The police arrive at 7:30 p.m. the same day. The suspect's car is not there, but cars they know belong to his acquaintances are parked outside. The lights are not on, but the police hear a television or radio playing indoors. The empirical study provides that these factors indicate an 18% chance that the suspect is at home. Now the court must ask, "[i]s 18% high enough for 'reason to believe'?"<sup>117</sup>

It is in this third scenario where the banality problem arises.<sup>118</sup> Edwards acknowledges that the empirical study may no longer be useful at this point,<sup>119</sup> as the court must first "explicitly hold what level of certainty is required to satisfy *Payton*."<sup>120</sup> Once the courts make this determination, then the "normative battle"<sup>121</sup> can begin regarding appropriate policy concerns.

## 6. *Edwards' Conclusion*

Edwards acknowledges that a study of home arrests will not help define "reason to believe."<sup>122</sup> The importance of empirical pragmatism is that it forces the courts' decisions into the open by "creating a process of transparent adjudication."<sup>123</sup> Only through a comprehensive analysis of the underlying facts can we then engage in a normative discussion about the *Payton* standard itself.<sup>124</sup>

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115. *Id.*

116. *Id.*

117. *Id.*

118. *See id.*

119. *See id.* at 390.

120. *Id.* For example, Edwards suggests that if courts were to determine that a 25% certainty will satisfy the *Payton* standard then it would resolve the dispute. But what does 25% exactly mean? Should we care about the percentile because it means the police may be right more often, or are we really concerned with what the officer believes before he enters a person's home?

121. *Id.* The "normative battle" would be a discussion about how much we value a specific constitutional right against the interests of law enforcement in arresting suspects in their homes.

122. *Id.* at 392 ("No matter how accurate and comprehensive a study of home arrests is, facts about suspect behavior will not answer the question of what the *Payton* standard should mean.").

123. *Id.*

124. *See id.* at 393 ("Until the facts are in, though, the debate cannot be joined.").

## B. The Anti-Pragmatists: Dworkin and Posner's Best Results

One of the characteristics of Edwards' Pragmatist Judge is that he looks to the future and makes his decisions according to what will produce the best results for society.<sup>125</sup> Posner writes, "[p]ragmatism will not tell us what is best; but provided there is a fair degree of value consensus among the judges, as I think there is, it can help judges seek the best results unhampered by philosophical doubts."<sup>126</sup> Dworkin calls this issue of the best results "the standard pragmatist dilemma,"<sup>127</sup> which is central to his criticism of pragmatism.

Dworkin describes this dilemma:

Pragmatists argue that any moral principle must be assessed only against a practical standard: does adopting this principle help to make things better? But if they stipulate any particular social goal—any conception of when things are better—they undermine their claim, because that social goal could not itself be justified instrumentally without arguing in a circle.<sup>128</sup>

Dworkin's criticism of Posner is that he has taken a "moral stance" himself and is predetermining the ends that society should strive for.<sup>129</sup> He remarks that Posner criticizes reflective people and "assumes that their sole motive is to convince everyone else in the world that they are right—time and again [Posner] says that disagreement proves that moral theory has failed."<sup>130</sup>

Dworkin's own reflective approach to adjudication is his process of "justificatory ascent."<sup>131</sup> He argues that most people have different convictions and only wish to try to explain their positions in a way that "displays reflection, sincerity, and coherence."<sup>132</sup> A reflective person wishes to challenge his own theory and convictions, and will put his normative beliefs to a rigorous analysis.<sup>133</sup> For this reason, a person turns to outside sources (including political,

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125. See *supra* note 47 and accompanying text.

126. POSNER, PROBLEMATICS, *supra* note 46, at 262; see *supra* notes 99-109 and accompanying text (revealing Edwards' response to this criticism).

127. Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1735 (1998) [hereinafter Dworkin, *Darwin*].

128. *Id.*

129. *Id.* at 1725 ("Posner could defend his strong thesis only with a substantive moral theory of his own.").

130. *Id.* at 1723 (citing POSNER, PROBLEMATICS, *supra* note 46, at 1656-57).

131. *Id.*

132. *Id.*

133. *Id.* ("When their responsibility is particularly great—as it is for political officials—they might well think it appropriate to test their reflections against the more comprehensive and developed accounts of other people, including moral and legal

moral, and legal scholars) to try and justify his own convictions.<sup>134</sup> This normative debate exists before a judge makes a decision and it continues after his ruling. The form of the debate provides the most transparent, yet substantive, reasoning behind a decision.<sup>135</sup> Dworkin's "ascent" does not have a fixed ending in some perfect moral order, because it cannot be stipulated beforehand where this process should extend.<sup>136</sup>

Dworkin argues that pragmatists focus on the right "means" while no one actually disagrees about the means, only the ends.<sup>137</sup> He describes Posner's pragmatism: "[Posner's] brand of pragmatism is empty because it instructs lawyers to attend to facts and consequences, which they already know they should, but does not tell them which facts are important or which consequences matter, which is what they worry about."<sup>138</sup> The disagreement is often not how to reach a certain result, but about the actual result itself.<sup>139</sup>

David Cole also critiques Posner's pragmatism, but through the lens of constitutional law:

[T]he problem with Posner's approach is that it does away with the animating idea of the Constitution—namely, that it represents a collective commitment to principles. The genius behind the Constitution is precisely that recognition that 'pragmatic' cost-benefit decisions will often appear in the short term to favor actions that may turn out in the long term to be contrary to our own best principles.<sup>140</sup>

Cole suggests that if we always knew what was best for society and individuals, we most likely would never need a Constitution.<sup>141</sup> Daniel A. Farber, in a critical review of Posner's *Problematics*, comments:

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philosophers, who have devoted a great deal of time to worrying about the issues in play.").

134. *See id.* Dworkin proposes that people turn to other sources of theory not because they expect to find the correct answer, but because they know that disagreement exists, and the disagreement is important for testing their own ideas. *See id.*

135. *Id.*

136. *Id.* at 1723-24.

137. *See generally* Ronald Dworkin, *Reply*, 29 ARIZ. ST. L.J. 431 (1997) [hereinafter Dworkin, *Reply*].

138. *Id.* at 433.

139. *See id.*

140. David Cole, *How to Skip the Constitution*, N.Y. REV. BOOKS, Nov. 16, 2006, at 20 (reviewing Judge Posner's most recent book: NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (criticizing Posner's "pragmatic" approach to national security issues and constitutional civil rights)).

141. *See id.* at 21.

2007] *PAYTON AND THE PRAGMATIST JUDGE* 1535

Constitutional law is largely a matter of governance, but it is also an important part of our national identity and culture. The Court needs to provide a convincing interpretation of our constitutional history, telling a believable story about how it is carrying forward the project of American constitutionalism begun by the Framers. Thus, as with individuals, continuity with the past is not simply a prejudice; it is a way of maintaining and redefining national identity.<sup>142</sup>

Farber remarks that Posner ignores this independent factor of history as a consideration in the decision-making process.<sup>143</sup>

### III. A MORE IMAGINATIVE APPROACH TO EMPIRICAL PRAGMATISM AND *PAYTON*

The Pragmatist Judge cannot adequately capture the American jurisprudence identity because he does not value the importance of normative disagreements. In contrast to Edwards' argument that pragmatism can lead to "transparency," pragmatism creates the danger of arbitrary, bright line rules for judges based on a vague concept of "what is good for society." This Comment cautions that a proper judicial analysis is aware of these traps, and is willing to confront the normative disagreements that have always existed in judicial debates. These normative disagreements have led to an American legal narrative that courts have a duty to comprehend.

#### A. Why Pragmatism Will Not Clarify *Payton*

This section examines difficulties in creating a reliable empirical study, revisits Edwards' theoretical scenarios, and finally addresses other situations where a pragmatic approach may not be helpful.

##### 1. *The Difficulties in Creating a Reliable Study*

Edwards comments that it would not be difficult for the USMS to create an accurate and reliable empirical study of home arrests.<sup>144</sup> While the presence factors<sup>145</sup> seem clear enough, it is questionable whether the USMS could quantify how much a police

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142. Daniel A. Farber, *Book Reviews: Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary, the Problematics of Moral and Legal Theory*, 16 CONST. COMMENT. 675, 686 (1999).

143. *See id.*

144. *See supra* note 101 and accompanying text. Edwards remarks that the analysis would actually be rather "tame" and that the factors considered are fairly straightforward.

145. *See supra* note 94 and accompanying text (discussing the common sense factors outlined by *Payton* case law).

officer relied on each one of these factors in making a “reason to believe” determination. Most courts have relied on an overarching analysis of the totality of the circumstances.<sup>146</sup> Edwards also notes that the USMS is the “ideal law enforcement partner for a study of home arrests”<sup>147</sup> because of its unique role in apprehending fugitives.<sup>148</sup> *Payton*, however, encompasses more than fugitives. Courts have recognized that a fugitive—a person who knows he is being pursued by the police—will act differently than a person who is not a fugitive.<sup>149</sup> The USMS would have to create separate studies about the significance of factors in both fugitive and non-fugitive cases.<sup>150</sup>

The USMS study would also not be limited to those common sense factors discussed in Part II.B.<sup>151</sup> The study would have to be refined as courts encountered new and unexpected circumstances. For example, Edwards speculates that learning the amount of time from informant contact to the time of entry could be important or that the nature of the offense may play a role in the determination of whether the fugitive is present in the residence.<sup>152</sup> These are only a few of the factors we could consider in determining whether it is reasonable to assume a person is home.

Edwards’ analysis does not really consider that *Payton* cases result in a police entry into the home, which courts should consider a graver consequence. Should a court be concerned with how often officers appear to be right, or what the police officer actually reasonably believed at the time? Home entries are different from situations where the suspect is stopped in public by police officers.<sup>153</sup>

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146. See *supra* note 24 and accompanying text.

147. Edwards, *supra* note 8, at 375.

148. See *id.* at 376; see *supra* note 93 and accompanying text (discussing the competency of the USMS because of its unique role in law enforcement).

149. See *supra* notes 29-30 and accompanying text. In *U.S. v. Magluta*, 44 F.3d 1530, 1535 (11th Cir. 1995), the court recognized that the factors would be treated differently where the suspect was aware of the police officers. Edwards also recognizes that it creates a problem for the suspect, and it is not clear how the USMS would take this into account in creating the study. See *infra* note 177 and accompanying text (examining how a pragmatic approach may not correctly guide an officer where he believes a suspect is aware the police are searching for him).

150. This would force the police and the courts to review how the empirical evidence should be applied in the two different scenarios.

151. Edwards, *supra* note 8, at 377; see *supra* Part II.B.

152. See Edwards, *supra* note 8, at 377 (providing these two as examples, “[b]ut in one form or another, the list above contains most of the commonly used indicators of suspect presence”).

153. See *id.* at 377-78 (comparing the factor analysis to police stops in public, and how it would also work the same way in *Payton* contexts because enough of the same factors appear in each case). The Supreme Court in *Payton* noted the significant dif-

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The unique factors that may not be expressed in the USMS study, and only exist in particular cases, are vital to the *Payton* context. Edwards' conclusion that "the event being studied—the presence of a suspect—is rather uncomplicated" may be more complicated because of the many different situations that could arise.<sup>154</sup>

Edwards proposes that the home arrest study will allow the courts "to honestly evaluate" police action instead of relying on "formalistic evaluations."<sup>155</sup> If courts always rely on the study, then what is left for the courts to review? If the judge assumes the police officer was aware of the USMS study and relied on those empirical statistics in effectuating a *Payton* arrest, then the judge will always validate those actions. Further, if police officers are aware of the study, they could make entries on the pretext of relying on the study even though they knew it was not a reasonable entry.<sup>156</sup> The danger is that it will create a "good-faith" exception to *Payton* where police action will always be upheld because of the empirical study.

The courts must also consider that the *Payton* determination is not only a finding of fact, but also results in a conclusion of law.<sup>157</sup> Whether there is "reason to believe" a suspect is in the residence is clearly a factual question, yet it ultimately results in important consequences involving a person's constitutional rights. This makes the determination distinctly different from, for example, studies on child abuse, battered woman syndrome, and eyewitness identifications.<sup>158</sup> These studies do not result in a determination of a person's constitutional rights. Edwards dismisses the issue of causation because the determination of these factors does not cause the suspect to be present at the home.<sup>159</sup> Thus, he dismisses any normative issues regarding the consequences.<sup>160</sup> While the

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ference between arrests in public and arrests in a person's home because of the historical, legal protection afforded a person in his home. *See supra* notes 12-20 and accompanying text.

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154. *Id.* at 381.

155. *Id.* at 378. *See supra* note 60 and accompanying text.

156. *See* Bradley, *supra* note 2, at 343 ("While police intent may be difficult to ascertain and easy to fabricate, there are numerous cases in which it is, or should be, the key to the outcome.").

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157. *See supra* notes 68-70 and accompanying text. Edwards concedes this point, but does not believe that it is a serious obstacle because the legal conclusions the courts reach in *Payton* are so heavily dependent on the facts of the case. *Id.*

158. *See id.*

159. *See supra* notes 93-94 and accompanying text.

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

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study will not cause the effect, it will have a serious result that deserves a debate of the knowledge and belief a court requires.

Moreover, conducting the empirical study may not be a role that we want to entrust to a law enforcement agency.<sup>161</sup> Edwards argues that pragmatism welcomes a changing of the roles played by institutions within the legal system.<sup>162</sup> How the USMS addresses these different legal interests, however, is a different question from whether the USMS should be concerned with interests that would interfere or conflict with its law enforcement capabilities.<sup>163</sup> Also, it is controversial whether it is prudent to introduce a seemingly judicial role into an executive law enforcement agency. More importantly, this is a normative question regarding the role of law enforcement agencies. This debate would have to be much more extensive before courts allow an executive agency a more expansive legal role. The next section argues that even if we accept that the USMS is a capable institution for this task, difficulties still exist when using a pragmatic approach.

## 2. Revisiting Edwards' Theoretical Cases

Edwards offered examples of how the USMS study could be applied in practice.<sup>164</sup> In the first scenario, the USMS study tells us that there is a 95% certainty that the suspect is in his home, therefore police entry will always be upheld by the courts in this particular case.<sup>165</sup> In the next example, there is only a 2% chance according to the study;<sup>166</sup> therefore, a court would strike down the police action under the *Payton* standard.<sup>167</sup> In the third hypothetical, the problem of interpretation arises as the empirical statistics

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161. See *supra* notes 95-98 and accompanying text.

162. See Edwards, *supra* note 8, at 384; see *supra* notes 95-98 and accompanying text.

163. The USMS is a law enforcement agency that apprehends fugitives. Thus, it is not as much "reconceptualizing" its legal role, as it is expanding its role to give it the responsibility to formulate the legal justifications for those arrests.

164. See *supra* notes 110-21 and accompanying text for a discussion of the three different hypothetical scenarios Edwards examines, and how the empirical evidence should be applied. In these scenarios, we are assuming the study of home arrests is accurate and reliable.

165. See *supra* notes 111-13 and accompanying text. In this example the study provided that where there were lights on in the house, a car parked in the driveway, and it was before 8 a.m., there was a 95% certainty that the suspect was home.

166. See *supra* notes 114-15 and accompanying text. In the second scenario the study provided that where the police entered in the afternoon, and there were no lights on or vehicles present, there was only a 2% chance that the suspect was in the residence.

167. *Id.*

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2007] *PAYTON AND THE PRAGMATIST JUDGE* 1539

tell us that there is an 18% certainty that the suspect is home.<sup>168</sup> The significance of the third hypothetical for Edwards is that the court must now ask, “[i]s 18% high enough for ‘reason to believe?’”<sup>169</sup> The court, however, cannot answer this question until it decides exactly what “reason to believe” means.<sup>170</sup> In the difficult situations, therefore, pragmatism does not offer an alternative solution but rather disguises the normative question as an empirical one. The USMS study only brings us full circle to our original starting position. Courts must first resolve what *Payton* requires as its standard before an empirical study can be applied correctly. Empirical evidence, such as the USMS study, could be a valuable source of information to help guide the courts in clear cases. There are circumstances, however, where the statistics may not help bring us any closer to a solution. The following section discusses some of these scenarios.

### 3. *Difficult Cases for an Empirical Approach*

It is extremely rare for courts to invalidate an entry based on *Payton*.<sup>171</sup> There are many cases where the police had almost no reason to believe the suspect was home and the courts still upheld the police entries.<sup>172</sup> One example of the few cases where the court

168. See *supra* notes 116-17 and accompanying text. In this last example, the USMS study informs us that if police act on an informant’s tip hours later the same day, and the suspect’s car is not there but other vehicles that belong to his associates are parked outside, and there are no lights on but the police hear a television or radio playing then there is an 18% chance that the suspect is in the residence.

169. Edwards, *supra* note 8, at 389; see *supra* note 117 and accompanying text.

170. See *supra* notes 119-21 and accompanying text. Edwards concedes that the study may no longer be useful at this point and that the courts must decide where the line should be drawn. He stipulates that if the courts decided on a 25% threshold this would allow them to consistently apply *Payton*. Once the courts settled on, for example, 25%, then the normative questions regarding policy can be argued. The problem is that setting a 25% standard is a normative question. There is a risk these percentiles will become bright lines for applying *Payton*, and will have the unwanted result of moving the courts away from that normative debate. A court will not be concerned with what “reason to believe” should mean, where the USMS study informs them of a more than 50% certainty the suspect was at home, regardless of the actual knowledge and beliefs of the police officers.

171. See Edwards, *supra* note 8, at 355-57 (providing a few examples where police entries have been invalidated under *Payton*).

172. See *supra* note 31 and accompanying text (In *U.S. v. Thomas*, 429 F.3d 282, (D.C. Cir. 2005), the court had hardly any facts at all and still upheld the police actions under the *Payton* standard.); see also *supra* note 37 (In *U.S. v. May*, 68 F.3d 515, 516 (D.C. Cir. 1995), the court upheld a police entry where all the police did was enter early in the morning, and the court found that to be enough. This illustrates the very low threshold in applying *Payton*).

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did not find the arrest valid under *Payton* is *People v. Jacobs*.<sup>173</sup> There, the police attempted to arrest Jacobs at home in the middle of the afternoon. His eleven-year-old daughter answered the door and told the police that her father would be back in an hour. The suspect's vehicle was not present and there were no other factors on the record that would lead police to suspect he was hiding inside the house.<sup>174</sup> The police relied on the fact that Jacobs did not have a day job to determine it would be reasonable to believe that he would be home during the day.<sup>175</sup> This decision is surprising because courts almost always side with the police in these cases.<sup>176</sup>

A pragmatic approach fails because it cannot account for subjective inquiries which might be necessary to reach an accurate "reasonable belief." Clearly all relevant empirical evidence would be valuable in these cases, especially when different courts analyzing the same sets of factors arrive at different conclusions of law. How will an empirical approach, however, also take into account the reasonableness of the individual police officer's actions? For example, in *Jacobs*, if the police had argued that it is unreasonable to believe that an eleven-year-old would be home alone, could the study take that into account? What if the police believed the daughter was lying and Jacobs was hiding inside? These questions indicate that a more case-sensitive approach is required. Should courts rely on the study because we want the police to be right as often as possible? Or should courts be more concerned that in every individual instance a police officer can articulate the reasonableness of his actions? Within the constraints of an empirical study it may be difficult to answer the latter question.

In addition, the pragmatic approach may not be useful in "fugitive" cases<sup>177</sup> because the absence of factors creates a presumption that the suspect is hiding within the residence.<sup>178</sup> An empirical approach would be difficult to apply to these circumstances, as the police could make a negative inference, from the lack of factors,

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173. 729 P.2d 757 (Cal. 1987). This case was actually decided under §884 of the California Penal Code, which provides for a similar standard to the *Payton* rule, but it is an example of where a court has invalidated a police entry to execute an arrest warrant under the "reason to believe" framework.

174. *See id.* at 761.

175. *See id.* at 760-61.

176. *See, e.g.*, U.S. v. Thomas, 429 F.3d 282, 286 (D.C. Cir. 2005); U.S. v. May, 68 F.3d 515, 516 (D.C. Cir. 1995).

177. *See supra* note 29 and accompanying text. Edwards acknowledges how, in these circumstances, police can infer from the absence of these factors that the suspect is within the residence.

178. *Id.*

2007] *PAYTON AND THE PRAGMATIST JUDGE* 1541

that the suspect is inside. Police entries could always be justified in every circumstance where officers believe the suspect is hiding. In these types of situations, “the subjective knowledge, recklessness (also a subjective concept), or negligence as to facts on the part of the police is certainly a legitimate subject for inquiry.”<sup>179</sup> This argument is qualified by the requirement that the police believe in the objective evidence.<sup>180</sup> There will be situations where a police officer may know that a suspect is home or not home regardless of anything the empirical evidence suggests.<sup>181</sup> Bradley very pointedly comments that “[r]eason to believe should be read literally to require a belief based on reason.”<sup>182</sup> While valid and reliable empirical research on home arrests would be a valuable source of information, there are open questions as to its application.

## **B. Practical Wisdom to Replace a Pragmatist Judge**

### *1. A More Substantive Method of Adjudication*

Courts applying an empirical study to determine if *Payton* has been satisfied would, at the same time, stipulate that the objective determination protects all the necessary interests involved. The application of the USMS study implies that a person’s constitutional interests are only triggered when below a certain arbitrary percentile.

Most people would not disagree with the objective facts of a valid and reliable empirical study. Edwards’ hypothetical involving a 95% certainty is a very persuasive case for adopting an empirical approach to *Payton*. In this manner, Edwards is correct that the USMS study would create transparency in the judicial decision-making of the courts regarding *Payton*. The high level of probability, however, does not tell us the particular reasons why the officer believed the suspect was at home, or whether what the officer believed about the presence of the suspect was reasonable. While it is important to encourage “transparent adjudication”<sup>183</sup> in judicial decisions, it must accompany a substantive method of adju-

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179. Bradley, *supra* note 2, at 348.

180. *See id.* at 357 (“The notion that probable cause requires not only the existence of objective facts, but also that the police believe those facts, is as ancient as the concept of probable cause itself.”).

181. *See id.* at 370.

182. *Id.*

183. *See supra* notes 108-09 (discussing “transparent adjudication” and how it should be applied in this context).

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dication. Transparency is very desirable but it needs to reflect Dworkin's "justificatory ascent."<sup>184</sup>

## 2. *Introducing a Legal Narrative*

One response to Menand's critique of theory<sup>185</sup> is that we need to be continually asking whether this is a "good place to be," fully aware of how we ascend the ladder. Both the means and ends are intricately important aspects of a judicial discourse. Encouraging a discourse about the disagreement in the ends to be achieved or the interests to be protected is a valuable form of reasoning. Dworkin's "justificatory ascent" is a form of legal interpretation that allows a transparent view of the existing disagreements. The form of reasoning applied is more important than being able to stipulate what is "best for society."<sup>186</sup> When deciding a *Payton* case, the court should require an analysis that takes into account, on a case-by-case basis, the specific articulated reasons behind the officer's actions. The Pragmatist Judge, because he is "forward-looking,"<sup>187</sup> lacks the imaginative capability to recognize that empirical evidence, when taken alone, will only hide the actual substantive issues.

A judge needs to do more than a balancing of costs (as the court would do here by applying the USMS study) as the decision process "requires an effort, guided by text, precedent, and history, to identify the higher principles that guide us as a society."<sup>188</sup> The decision-making process should comprehend a legal narrative and it is a judge's particular role to contemplate this narrative through "text, tradition, precedent, and reason."<sup>189</sup> Judges should strive to apply principles, which are more important than a cost-benefit analysis that involves the "weighing of imponderables."<sup>190</sup> For ex-

184. *See supra* notes 131-36 and accompanying text.

185. *See supra* notes 106-07 and accompanying text.

186. *See* Dworkin, *Darwin*, *supra* note 127, at 1734-35 ("We cannot evaluate a morality by asking whether it helps a society to 'survive,' because the morality a society adopts will almost always determine not whether it survives, but the form in which it does so.").

187. *Id.* at 1735 (concluding that moral pragmatism is an empty theory because "it encourages forward-looking efforts in search of a future it declines to describe").

188. Cole, *supra* note 140, at 21-22.

189. *Id.* at 22.

190. *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). David Cole quotes Harlan's dissent where he discusses the constitutional significance of interpreting the due process clause. Justice Harlan says: "The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. The tradition is a living thing." *Id.*

ample, in the *Payton* context, a judge is considering whether to validate the government's entry into a person's home to make an arrest. The constitutional interests require a judge to contemplate that legal narrative which in this context would include the Fourth Amendment jurisprudence of the court. As Justice Harlan once said, "[n]o formula could serve as a substitute, in this area, for judgment and restraint."<sup>191</sup> Dworkin's "justificatory ascent" is an attempt to embrace both judgment and restraint as integral to a legal narrative.

### 3. *Applying a Legal Narrative*

This section suggests that a judge should feel responsible to interpret a legal narrative<sup>192</sup> that is both transparent and fully reflective (not simply forward-looking) because it provides a clearer understanding of the law. This is especially true in constitutional law because of the insight that it gives to the legal rule or principle. A legal narrative recognizes a culture and identity that is inherent in the law-making process.

Posner disagrees<sup>193</sup> with Dworkin's definition of pragmatic adjudication, which is: "[t]he pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principles with what other officials have done or will do."<sup>194</sup> Posner argues that this is the definition of a positivist judge and not a pragmatic judge. Posner's definition of a pragmatic judge is one that "always tries to do the best he can do for the present and the future, unchecked by any felt duty to secure consistency in principles with what other officials have done in the past."<sup>195</sup> Posner sees the Pragmatist Judge as being unchecked by a duty to authority while Dworkin interprets the Pragmatist Judge as one completely unrestrained. For Posner, "[the judge] is concerned with securing consistency with the past only to the extent that such consistency may happen to conduce to producing the best results for the future."<sup>196</sup> This statement is not

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191. *Poe*, 367 U.S. at 542.

192. While the idea of a legal narrative seems ingenuous to applying law, there is an important historical and legal progression of the law that jurists should interpret.

193. Richard A. Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1, 3-4 (1996) [hereinafter Posner, *Pragmatic Adjudication*].

194. RONALD DWORKIN, *LAW'S EMPIRE* 161 (1986).

195. Posner, *Pragmatic Adjudication*, *supra* note 193, at 4. Posner argues that the distinction between the positivist judge and the pragmatic judge is that the positivist judge simply makes decisions for the purpose of securing consistency, while the pragmatist judge only does so if it will be better for society. *Id.*

196. *Id.*

very reassuring, as it implies that a judge will only value the legal narrative when it is in line with his own views as to what is best.<sup>197</sup>

Posner's Pragmatist Judge does not feel a responsibility to the legal history that has preceded him. Posner does not go so far as to cast out the Constitution, but notes that the Pragmatist Judge, "regards precedent, statutes, and constitutions both as sources of potentially valuable information about the likely result in the present case and as signposts that must not be obliterated or obscured gratuitously, because people may be relying upon them."<sup>198</sup> This is a troublesome description of our legal history and the value of the Constitution. In Posner's view, the only reason the Pragmatist Judge should hesitate before discarding them as authorities is that it may be possible that someone is relying on the Constitution. A judge, however, should consider more than reliance when ruling a law unconstitutional, or deciding against established legal precedent. Posner also reflects (Dworkin would likely say he unconsciously reflects) the concept of a legal narrative in the preceding description when he refers to these "authorities" as signposts.<sup>199</sup> The purpose of a signpost is to provide direction, and most prudent travelers would be wary to disregard them as cavalierly as Posner.

Posner's pragmatism can be contrasted with a different description of pragmatism that is not justified by achieving the best results, but only that it is the best current option.<sup>200</sup> In the *Payton* context, this means the USMS study is not providing us with a way out, but only a temporary remedy. Edwards acknowledges the fact that empirical pragmatism will not provide us with a normative answer to the problem. Edwards' pragmatism, however, also creates a danger that the judge will cease to be concerned with any normative questions.<sup>201</sup>

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197. This is the argument that pragmatism is an empty theory because it returns you full circle to the question of how a judge can make these determinations without answering normative questions. See *supra* Part II.B.

198. Posner, *Pragmatic Adjudication*, *supra* note 193, at 5 ("[B]ecause the pragmatist judge sees these 'authorities' merely as sources of information and as limited constraints on his freedom of decision, he does not depend upon them to supply the rule of decision for the truly novel case.").

199. *Id.*

200. DAVID LUBAN, *LAWYERS AND JUSTICE, AN ETHICAL STUDY* 104 (1998) [hereinafter LUBAN, *LAWYERS AND JUSTICE*] ("To provide an institutional excuse, an institution must be justified in a stronger way by showing that it constitutes a positive moral good. A pragmatist argument, by contrast, need only show that it is not much more mediocre than its rivals.").

201. See Edwards, *supra* note 8, at 304 (commenting that empirical pragmatism will not determine when *Payton* arrests will be constitutional, but will clarify the courts' review of these cases).

Pragmatism as a general theory includes a wide variety of perspectives embodying differing aspects of society and the law.<sup>202</sup> Edwards, for example, discusses Aristotle's concept of practical reason.<sup>203</sup> Daniel Farber also discusses the general nature of legal pragmatism: "[pragmatism] is part of a loosely connected collection of antifoundational views, a category that includes believers in Aristotelian practical reason, some feminists [sic] theorists, adherents to literary theories such as hermeneutics and deconstruction, and students of the philosophy of language."<sup>204</sup> All of these descriptions touch upon the concept of a "practical reasoning," which the Pragmatist Judge too easily overlooks when depending closely on empirical evidence.

Aristotle's concept of "phronesis," is best defined as "a form of practical wisdom capable of respecting the singularity of situations as well as the nascent universality of values aimed at by human actions."<sup>205</sup> Phronesis is a mode of interpretation that is "forward-looking" but also recognizes a responsibility, or duty, to higher principles, as in our case an ever-developing legal system.

A legal narrative is an incorporation of practical wisdom and a hermeneutic approach to our legal history and principles. Richard Kearney defines a hermeneutic approach in a literary context as "the view that the retelling of the past is an interweaving of past events with present readings of those events in the light of our con-

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202. *Id.* at 305 n.17 (discussing how legal pragmatists are in fact very diverse, and that "they share a general theoretical perspective that weds Aristotle's concept of practical reason with various aspects of, among other things, nineteenth-century utilitarianism, American pragmatism and neopragmatism, and postmodern, continental philosophy."). Edwards describes pragmatism as a combination of Aristotle's "practical reason," and yet the pragmatist judge, I would argue, is removed from this concept of Aristotelian "phronesis" (practical wisdom).

203. *See id.*

204. Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 167-68. Edwards' Pragmatist Judge and Posner's empirical pragmatism do not take into account this concept of practical reason, which does not rely solely on the empirical evidence presented, but is a hermeneutic interpretation.

205. RICHARD KEARNEY, ON STORIES 143 (2002). Richard Kearney, a professor of philosophy at Boston College and University College Dublin, advocates phronesis as a mode of understanding history, and distinguishing history from fiction. It is opposed to the concept that we cannot really know what is true, and therefore we must trade in historical truth for "pragmatic effectiveness." Moreover, it is not simply enough that a historical account is "right if it works." *Id.* at 145. While Kearney discusses phronesis as a form of reasoning in a literary and historical context, "practical wisdom" is a desirable form of interpretation for a judge that must review the "authorities" of the past and present in order to better understand the problem presented.

tinuing existential story.”<sup>206</sup> This definition of hermeneutics could be applied to judicial decision-making because it recognizes the past legal history (the authorities that Posner’s pragmatic judge only cursorily reviews) in the practical context of the present. This approach moves beyond a formalistic argument for originalism, and recognizes its effect on a continuing legal narrative. Moreover, it is an informed mode of adjudication that fully recognizes the existence and importance of normative disagreement. If we now return to Posner’s general principle (which Edwards relies upon) that the only reason for a legal rule is its “social advantage,”<sup>207</sup> we realize it is not concerned with the practical wisdom that provides a more judicious approach. Luban comments that in Brandeis’ view, “this unique combination of abstract reasoning ability and empirical keenness, debarred from the ivory tower by the press of circumstances, teaches the lawyer judgment.”<sup>208</sup> A judge should continually strive to reach that unique combination.

One of the arguments for pragmatism is that it reveals situations where doctrines have become so abstract that the “process of compartmentalizing legal controversies into existing categories of legal doctrine carries with it some risk of losing touch with important features of the underlying issue.”<sup>209</sup> These are the different situations where legal scholars fall back on the ivory towers for answers. Likewise, the Pragmatist Judge fails to provide a solution because he lacks any “substantive reference points.”<sup>210</sup> The Pragmatist Judge suffers from the same temptation for excessive abstraction in

206. *Id.* at 146. Kearney describes a hermeneutic approach to fiction, history, and stories in general, yet this mode of interpretation can be applied to our own continually developing legal history. This interpretation is important because it recognizes the past in the context of the present, and is aware of the future consequences. Kearney writes, “[m]oreover I would insist that in addition to the *epistemological* criteria for evaluating rival accounts of history . . . it is necessary to add *ethical* ones, that is, to serve justice as well as truth. We need to invoke as many solid criteria as possible—linguistic, scientific and moral—if we are able to say that one historical account is more ‘real’ or ‘true’ or ‘just’ than another . . . . [a]nd we should be able to say that.” *Id.* at 146 (emphases in original).

207. See Edwards, *supra* note 8, at 314 n.64; see also Luban, *supra* note 50 and accompanying text.

208. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 200, at 169.

209. Edwards, *supra* note 8, at 386.

210. *Id.* (quoting Gene R. Shreve, *Rhetoric, Pragmatism, and the Interdisciplinary Turn in Legal Criticism: A Study of Altruistic Judicial Argument*, 46 AM. J. COMP. L. 41, 65-66 (1998)). Shreve recognizes that pragmatism cannot provide solutions if it does not have “substantive reference points.” He explains, “[p]ragmatism is often thought to eschew moral (substantive) values, but it must have a moral base somewhere to escape relativism . . . [i]f pragmatism is substantive, does it contradict itself? If pragmatism lacks substantive reference, is it not hopelessly relativistic?” *Id.*

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2007] *PAYTON AND THE PRAGMATIST JUDGE* 1547

creating categories and relying on empirical evidence that is not grounded to a hermeneutic understanding of the consequences.

In the *Payton* cases, the USMS study would create categories to determine whether the “reason to believe” standard has been satisfied. Courts would refer to these categories to make legal determinations, even though they have no substantive reference to the constitutional considerations. Especially in this context, where the empirical research is most likely to result in conclusions of law regarding a person’s rights, the “ivory towers” on both sides of the spectrum should be avoided. One of the questions to always consider is what interests are specifically being protected? Empirical pragmatism may ensure that the majority of times the police enter a suspect’s home they will be right, but the courts do not demand that the police be right. Rather, courts should demand that the police are able to articulate the reasonableness of their actions. The *Payton* rule is meant to ensure that their actions have been reasonable.

### CONCLUSION

Imagine the perfect judicial system that always resolves controversies according to what is best for society. Imagine the perfect judge who always intuitively knows (and is never wrong) what is best for the individuals standing in his courtroom. Empirical pragmatism is a legal theory focused on the idea that judges should always rule according to the best interests of society (as in our imaginary world). This perfect world unfortunately does not exist, and the question of what is best for society and individuals is more complicated than the pragmatist theory portrays. The pragmatic approach can be compared to an economist’s attempt to discern the costs and benefits of a rule to society.

Edwards asks the pointed question: “One might wonder why those in the business of resolving thorny societal disputes should not attempt to learn as much about the factual background of the disputes and the potential consequences of their decisions.”<sup>211</sup> There is little doubt that everyone desires judges who are as well-informed as possible, including any valid empirical research. This Comment asks whether we wish our “well-informed decision makers”<sup>212</sup> to be Pragmatist Judges, or rather judges that exercise a “practical wisdom” that will continue the long legal history of this country as it develops into what society deems best.

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211. Edwards, *supra* note 8, at 318.

212. *Id.*

