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Cover Page Footnote

J.D. Candidate, 2007, Fordham University School of Law. I would like to thank Professor Daniel Richman for his valuable insight and guidance throughout the note-writing process.

SAY HELLO AND WAVE GOODBYE: THE LEGITIMACY OF PLAIN VIEW SEIZURES AT THE THRESHOLD OF THE HOME

*Evan B. Citron**

INTRODUCTION

It was after midnight on a November evening when Patrick McKinnon decided to ignore his date's request that he take her home.¹ After a night of drinking and dancing, McKinnon brought his date, D.V., back to his house, where he pulled her into his bedroom and struggled to begin removing her clothes.² Although D.V. begged McKinnon to take her home, he quickly handcuffed and tied her to his bed.³ McKinnon used two bandanas to blindfold and gag D.V. before he began disrobing her.⁴

When McKinnon released D.V. approximately five hours later, she promptly notified the police of what had occurred.⁵ Without obtaining a warrant, several officers went directly to McKinnon's house, knocked on his door, and identified themselves.⁶ McKinnon opened the door and stood in his doorway as the officers informed him that he was under arrest for rape.⁷

In arresting McKinnon, the officers unwittingly added another chapter to an ongoing debate involving the safety of the public, the sanctity of the home, and a clash between doctrinal approaches to Fourth Amendment analysis. There is a "great dispute among the federal courts" as to whether a person who opens his door in response to a police officer's knock surrenders his privacy interest such that an officer may seize that person in "plain view" without a warrant.⁸ Several U.S. Courts of Appeals have

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1. *McKinnon v. State*, 752 P.2d 833, 834 (Okla. Crim. App. 1988), *aff'd sub nom.*, *McKinnon v. Carr*, 103 F.3d 934 (10th Cir. 1996).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *McKinnon*, 103 F.3d at 935.

7. *Id.* Defendant Patrick McKinnon was ultimately charged with first-degree rape, forcible sodomy, and rape by instrumentation. *McKinnon*, 752 P.2d at 833.

8. See *Breitbart v. Mitchell*, 390 F. Supp. 2d 237, 248 (E.D.N.Y. 2005). It is important to note at the outset that the language used by courts in dealing with this issue can be somewhat confusing. Courts often characterize the issue in dispute as whether an officer can seize an "item" in "plain view" without a warrant. See, e.g., *Hadley v. Williams*, 368 F.3d

found such seizures to be constitutional where a person has opened his door at an officer's beckoning, and the officer has announced the seizure before physically entering the person's dwelling.⁹ This view is referred to as the "voluntary exposure" view.¹⁰ Other circuit courts, following the "sanctity" view, have found that such seizures violate the Fourth Amendment and imperil the heightened constitutional protection provided for individuals within their homes.¹¹ Each view's treatment of the issue is grounded in established U.S. Supreme Court precedent.¹²

The voluntary exposure view recognizes the Court's decisions in *Katz v. United States*¹³ and *United States v. Santana*¹⁴ as the controlling precedent.¹⁵ In *Katz*, the Court established that the "touchstone" of Fourth Amendment analysis is an inquiry into whether a person has a "constitutionally protected reasonable expectation of privacy."¹⁶ If a police inspection does not infringe upon a legitimate expectation of privacy, the

747, 750 (7th Cir. 2004). The term "seizure" encompasses both seizures of persons (i.e., arrests) and seizures of property. *Payton v. New York*, 445 U.S. 573, 587 (1980). Similarly, the term "item" refers to persons as well as to pieces of property. *See, e.g., Hadley*, 368 F.3d at 750. Although in theory cases dealing with this issue could involve the seizure of incriminating property "items" like a cache of weapons or supply of narcotics, in practice that is not so. Rather, the relevant cases exclusively involve the seizure, or arrest, of persons in "plain view." Thus, the competing approaches to the issue have technically only spoken to the seizure of persons (as opposed to the seizure of property "items"). One can speculate, however, that the respective positions of the different approaches extend to encompass the seizure of property "items." In discussing the legal principles that bear on the issue, courts tend to use "seizure" and "arrest" interchangeably, as does this Note. The word "item" as used in this Note should be taken to refer both to persons and pieces of property.

9. *See infra* notes 161-64 and accompanying text.

10. *See infra* Part II.A.

11. The "sanctity" view cites the U.S. Supreme Court's consistent protection of the sanctity of the home to substantiate its approach. *See infra* Part II.B.1.

12. Thus, each circuit is arguably adhering to stare decisis in reaching its respective decisions. The Court has long recognized that stare decisis is a "cornerstone" of the legal system. *See, e.g., Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989). Adhering to stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *see also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (noting that the bases for stare decisis include the aspiration that "the law furnish a clear guide for the conduct of individuals, . . . the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case[,] and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments"). *But see Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (confirming that although "[t]he doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law . . . [i]t is not . . . an inexorable command"); *see also Payne*, 501 U.S. at 828 (noting that "[s]tare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'" (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))).

13. 389 U.S. 347 (1967).

14. 427 U.S. 38 (1976).

15. *See infra* Part II.A.1.a.

16. *Katz*, 389 U.S. at 360 (Harlan, J., concurring); *see infra* notes 83-84 and accompanying text.

inspection is not an unreasonable seizure under the Fourth Amendment.¹⁷ In *Santana*, the Court established that the threshold of a dwelling is a public place and that an individual on the threshold has no legitimate expectation of privacy.¹⁸ Thus, when a person opens the door to his dwelling, he knowingly exposes himself and a section of his home in a public place and retains no expectation of privacy.¹⁹ Consequently, he forfeits Fourth Amendment protection and a police officer is permitted to conduct a plain view seizure.²⁰

In contrast, the sanctity view identifies *Payton v. New York*²¹ and its companion case, *Riddick v. New York*,²² as the governing precedent.²³ In *Payton/Riddick*, the Court emphasized the heightened protection the Constitution provides for individuals within their homes.²⁴ The *Payton/Riddick* opinion communicated that the Fourth Amendment has drawn a clear line at the entrance of a house.²⁵ The Court specifically referred to the doorway, noting that “[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”²⁶ Accordingly, a plain view seizure at the doorway is a Fourth Amendment violation and inconsistent with the spirit of the *Payton/Riddick* decision.²⁷

The principles that shape these competing approaches are generally capable of coexisting peacefully. In addition, the respective facts of cases involving plain view threshold seizures are apt to vary greatly, making it possible to identify bases on which to distinguish and reconcile different decisions. There is a fundamental difference, however, in the way the different approaches evaluate this issue. As the controversy involves critical questions about residential privacy, which goes to the very “core” of the Fourth Amendment,²⁸ it is imperative that the Court establishes clarity in the doctrine.²⁹

17. See *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

18. See *Santana*, 427 U.S. at 42; see *infra* notes 106-08 and accompanying text.

19. See, e.g., *United States v. Gori*, 230 F.3d 44, 52 (2d Cir. 2000).

20. See *Katz*, 389 U.S. at 351.

21. 445 U.S. 573 (1980).

22. *Id.*

23. *Id.* at 590. Although the Court’s decision is universally referred to as *Payton*, the facts of *Riddick* more clearly illustrate the potential for the Court’s opinion to be seen as at odds with the *Katz* and *Santana* decisions. Thus, this Note will refer to the opinion as the “*Payton/Riddick*” decision. See *infra* notes 134-47 and accompanying text.

24. See *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff’d*, 457 U.S. 537 (1982).

25. *Payton*, 445 U.S. at 590.

26. *Id.*

27. See *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004).

28. See *Wilson v. Layne*, 526 U.S. 603, 612 (1999).

29. Furthermore, under the exclusionary rule, any evidence obtained pursuant to an invalid seizure cannot be used in criminal proceedings against the defendant. *United States v. Calandra*, 414 U.S. 338, 347 (1974). The central purpose of the exclusionary rule is to deter unlawful police conduct and effectuate the Fourth Amendment guarantee against unreasonable searches and seizures. *Id.* The rule is applicable in federal and state prosecutions. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

This Note examines whether the plain view doctrine should permit police to seize anything they see through an open doorway where the door has been opened in response to an officer's knock and the officer has announced the seizure before physically entering the dwelling. Part I describes the basis in Supreme Court precedent for the disparate treatment of the issue.

Part II analyzes the conflict between the voluntary exposure view and the sanctity view in determining whether the police may lawfully conduct a plain view seizure at the threshold. Part II.A explores the legal reasoning underlying the voluntary exposure view, and describes the means by which its supporters criticize the sanctity view as a flawed approach. Part II.B discusses the legal bases for the sanctity view and outlines the manner in which its proponents identify the voluntary exposure view as defective. Part III explains why public policy interests demand that, when the door swings open in response to an officer's knock, the law precludes police from seizing an item in "plain view."

I. THE PLAIN VIEW DOCTRINE AND THE BALANCE OF REASONABLE EXPECTATIONS OF PRIVACY WITH THE CONSTITUTIONAL PROTECTION AFFORDED TO INDIVIDUALS WITHIN THE HOME

This part explores the basis in Supreme Court precedent for the conflicting interpretations of whether a person who opens his door in response to a police officer's knock surrenders his privacy interest such to permit a plain view seizure at the threshold. Part I.A details the Court's method of defining the extent of Fourth Amendment protection by an inquiry into a person's reasonable expectations of privacy. Part I.B discusses the heightened constitutional protection provided for individuals within the home.

A. *Defining the Extent of Fourth Amendment Protection as a Reasonable Expectation of Privacy*

This section traces the Court's practice of defining Fourth Amendment protection through an inquiry into an individual's reasonable expectations of privacy. Part I.A.1 reviews the warrant requirement and the development of the plain view doctrine. Part I.A.2 describes the subjective-objective test, which governs the Court's determination of one's reasonable expectations of privacy. Part I.A.3 discusses a person's reasonable expectations of privacy when standing on the threshold of his dwelling.

1. The Development of the Plain View Doctrine

This section addresses the evolution of the plain view doctrine. Part I.A.1.a examines the warrant requirement of the Fourth Amendment. Part I.A.1.b explores the origin of the plain view warrant exception.

a. *The Warrant Requirement*

The Fourth Amendment³⁰ prohibits unreasonable searches and seizures,³¹ and requires that probable cause³² support the issuance of a warrant.³³ The

30. The Fourth Amendment provides,

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

U.S. Const. amend. IV. The Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp*, 367 U.S. at 655. The basic purpose of the Fourth Amendment is to protect the privacy and security of individuals against arbitrary invasions by governmental intrusions. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (noting that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion” by the government). The Amendment thus relates to the personal security of the citizen. *See Boyd v. United States*, 116 U.S. 616, 630 (1886). Constitutional provisions for the security of person and property are to be liberally construed. *Id.* at 635. “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . .” *Id.* at 630. “[I]t is the duty of the courts to be watchful . . . against any stealthy encroachments [on the Fourth Amendment].” *Byars v. United States*, 273 U.S. 28, 32 (1927) (quoting *Boyd*, 116 U.S. at 635); *see also Gouled v. United States*, 255 U.S. 298, 304 (1921) (noting that the Fourth Amendment should receive a liberal construction to prevent a stealthy encroachment on or a “gradual depreciation” of the rights that the Amendment secures). The rights guaranteed by the Fourth Amendment are “to be regarded as of the very essence of constitutional liberty,” and are indispensable to the “full enjoyment of personal security, personal liberty and private property.” *Id.* The Amendment safeguards “not only privacy . . . but ‘conscience and human dignity’” as well. *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (quoting *Frank v. Maryland*, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting)). Fourth Amendment protection applies only to governmental action. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). In *Burdeau*, the Court found that the Amendment was not violated where a private corporation seized private papers from the possession of a director and an employee. *Id.*

31. A search occurs when the government infringes upon an expectation of privacy that society is prepared to consider reasonable. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Oliver v. United States*, 466 U.S. 170, 178 (1984) (noting that a “search” is a governmental infringement upon individual privacy). Seizure of a person occurs when a government agent employs physical force or a show of authority to restrain a citizen’s liberty in some way. *See Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). Not all intercourse between a police officer and a citizen constitutes seizure of a person. *Id.* Seizure of property occurs when the government meaningfully interferes with an individual’s possessory interest in that property. *See Jacobsen*, 466 U.S. at 113. The Court has distinguished a “search” from a “seizure” by noting that a “search” compromises individual interest in privacy, whereas a “seizure” deprives an individual of dominion over his or her person or property. *Horton v. California*, 496 U.S. 128, 133 (1990).

32. Probable cause to obtain an arrest warrant exists when government agents have knowledge of facts based on reasonably trustworthy information sufficient to compel a prudent man to believe that the defendant had committed or was committing an offense. *See Beck v. Ohio*, 379 U.S. 89, 91 (1964); *see also Brinegar v. United States*, 338 U.S. 160, 175 (1949) (noting that “[t]he substance of all the definitions” of probable cause “is a reasonable ground for belief of guilt” (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881))); *Carroll v. United States*, 267 U.S. 132, 161 (1925) (“If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.” (quoting *Stacey v. Emery*, 97 U.S. 642, 645 (1878))).

warrant requirement was designed to serve specific constitutional protections,³⁴ and does not unnecessarily burden law enforcement officers.³⁵ The Court has confirmed that a warrantless search or seizure violates the Fourth Amendment unless a recognized exception applies.³⁶

Probable cause to obtain a search warrant exists when a judge or magistrate finds a "fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Searches and seizures "conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause." *See Katz v. United States*, 389 U.S. 347, 357 (1967) (internal quotation omitted). In *Gates*, the Court found probable cause where an anonymous letter indicated that defendants were violating state drug laws and predicted future violations, and major portions of the predictions were corroborated by federal agents. *Gates*, 462 U.S. at 242-43. The Court abandoned the two-pronged test that it had formulated in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), for determining whether an informant's tip established probable cause, in favor of a totality-of-the-circumstances test. *Gates*, 462 U.S. at 238. Under the two-pronged test, probable cause was established once (1) the informant's basis of information was revealed, and (2) sufficient facts were found to establish the informant's "veracity" or the "reliability" of the informant's report. *Id.* at 228-29. The Court concluded that the test was inflexible and needed to be replaced with a more practical totality-of-the-circumstances test. *Id.* at 238. The totality-of-the-circumstances test requires a judge or magistrate to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him," probable cause is present. *Id.*

33. "The Fourth Amendment was intended partly to protect against the abuses of the general warrants that had occurred in England and of the writs of assistance used in the Colonies." *Steagald v. United States*, 451 U.S. 204, 220 (1981); *see also Payton v. New York*, 445 U.S. 573, 583 (1980) (noting that "[i]t is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment"); *Chimel v. California*, 395 U.S. 752, 761 (1969) (noting that the Amendment was "in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence"); *Warden v. Hayden*, 387 U.S. 294, 301 (1967) (noting that the Fourth Amendment was a response to "the evils of the use of the general warrant in England and the writs of assistance in the Colonies"). *See generally* Richard G. Wilkins, *Defining the 'Reasonable Expectation of Privacy': An Emerging Tripartite Analysis*, 40 Vand. L. Rev. 1077, 1081-86 (1987) (describing the historical origins of the Fourth Amendment). The Fourth Amendment was "a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution." *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). "Since before the creation of [the United States] government, [unreasonable] searches have been deemed obnoxious to fundamental principles of liberty." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931).

34. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The requirement "also may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation." *United States v. Ortiz*, 422 U.S. 891, 895 (1975); *see also Steagald*, 451 U.S. at 215 (asserting that "[t]he [Fourth] Amendment is designed to prevent, not simply to redress, unlawful police action" (quoting *Chimel*, 395 U.S. at 766 n.12 (1969))). The purpose of the Fourth Amendment is effectuated by Rule 41 of the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 41; *Jones v. United States*, 357 U.S. 493, 498 (1958) (noting that Rule 41 implements the Fourth Amendment by requiring that an impartial judge or magistrate determine if the issuance of a warrant is justified).

35. *See United States v. Jeffers*, 342 U.S. 48, 51 (1951).

36. *See Johnson v. United States*, 333 U.S. 10, 14-15 (1948); *infra* notes 50-54 and accompanying text. A violation of the Amendment is "fully accomplished" at the time of an unreasonable governmental intrusion. *United States v. Calandra*, 414 U.S. 338, 354 (1974). Thus, the Amendment prohibits all searches and seizures, regardless of whether or not any evidence obtained is sought to be used in a criminal trial. *United States v. Verdugo-*

The warrant requirement safeguards two well-defined constitutional protections.³⁷ The first protection requires a judge or magistrate to issue a warrant, thus eliminating searches and seizures that are not based on probable cause.³⁸ This protection is rooted in the premise that any type of intrusion in terms of a search or a seizure is an evil.³⁹ "The security of one's privacy against arbitrary intrusion by the police" is "the core of the Fourth Amendment[,] . . . basic to a free society," and "implicit in the concept of ordered liberty."⁴⁰

The warrant requirement provides a second protection: Necessary searches should be as limited as possible.⁴¹ The greater evil implicated by

Urquidez, 494 U.S. 259, 264 (1990). The protection against unreasonable searches and seizures is not limited to tangible items but can extend to oral statements as well. *Hoffa v. United States*, 385 U.S. 293, 301 (1966). The Court has repeatedly "emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes." *Jeffers*, 342 U.S. at 51.

37. *Coolidge*, 403 U.S. at 467.

38. *Id.*; see *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) (noting that the role of a judge or magistrate "was done so that an objective mind might weigh the need to invade . . . privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals"); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (asserting that "the informed and deliberate determinations of magistrates . . . are to be preferred over the hurried action of officers and others who may happen to make arrests"). In *McDonald*, the Court found a warrantless seizure of adding machines, number slips, and money to be unreasonable where officers had been conducting surveillance of the defendant and then entered the defendant's rented room after observing him engaging in the numbers operation. *McDonald*, 335 U.S. at 458-59. The Court used strong language in discussing the need for a judge or magistrate to be involved in the search and seizure process. See *id.* at 456 ("Power is a heady thing; and history shows that the police acting on their own cannot be trusted . . . [S]o the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.").

39. *Coolidge*, 403 U.S. at 467. ("[N]o intrusion at all is justified without a careful prior determination of necessity."). "The reasons for this rule go to the foundations of the Fourth Amendment." *United States v. Ventresca*, 380 U.S. 102, 106 (1965) (quoting *Aguilar v. Texas*, 378 U.S. 108, 110-11 (1964)).

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson, 333 U.S. at 13-14.

40. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); see *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967) (recognizing that the basic purpose of the Fourth Amendment is to protect the privacy and security of individuals against arbitrary invasions by governmental intrusions); see also *Schmerber v. California*, 384 U.S. 757, 767 (1966) (noting that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion" by the government).

41. *Coolidge*, 403 U.S. at 467. An additional purpose of the warrant requirement is to "prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976); see *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (noting that a warrantless arrest "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on

this maxim is a general, exploratory search through one's belongings.⁴² Such searches "have long been deemed to violate fundamental rights."⁴³ The warrant requirement guards against overbroad searches by requiring a "particular description of the things to be seized."⁴⁴

The warrant requirement "does not place an unduly oppressive weight on law enforcement officers."⁴⁵ The Fourth Amendment does not demand that officers "delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."⁴⁶ Nor does the Amendment prevent officers from conducting otherwise permissible searches in order to

an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment").

42. *Coolidge*, 403 U.S. at 467 ("[T]he specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings.").

43. *Marron v. United States*, 275 U.S. 192, 195 (1927); *see also* *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (confirming that general search warrants are prohibited by the Fourth Amendment); *United States v. Rabinowitz*, 339 U.S. 56, 62 (1950) (noting that general, exploratory searches "cannot be undertaken by officers with or without a warrant").

44. *Coolidge*, 403 U.S. at 467. The particularity requirement limits the authorization to search the specific areas and things for which there is a probable cause to search. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). Thus, the requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id.* (noting that the "manifest purpose" of the particularity requirement was to "prevent general searches"); *see* *Berger v. New York*, 388 U.S. 41, 58 (1967) (acknowledging that the particularity requirement makes general, exploratory searches impossible, prevents the seizure of anything not specified in the warrant, and ensures that "nothing is left to the discretion of the officer executing the warrant") (quoting *Marron*, 275 U.S. at 196); *see also* *United States v. Leon*, 468 U.S. 897, 923 (1984) (noting that "a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid"). The particularity requirement also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh v. Ramirez*, 540 U.S. 551, 561 (2004) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)). The Court has recognized that "[t]he uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Id.* at 565 (quoting *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984)). The Fourth Amendment requires particularity in the warrant itself, not in supporting documents. *Id.* at 557 ("The Fourth Amendment requires that the *warrant* particularly describe the things to be seized, not the papers presented to the judicial officer . . . asked to issue the warrant." (quoting *United States v. Stefonek*, 179 F.3d 1030, 1033 (7th Cir. 1999))). The Fourth Amendment does not demand that the government be factually correct in its projection of what a search will produce. *Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990).

45. *See* *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Rather, it "merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended." *Id.* The prevention of unreasonable searches is "more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." *Johnson v. United States*, 333 U.S. 10, 14 n.3 (1948) (quoting *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)). *But see, e.g.*, Robert A. Hull, Note, "What Hath Hiibel Wrought?": *The Constitutionality of Compelled Self-Identification*, 33 *Pepp. L. Rev.* 185, 207 (2005) (noting that liberties guarded by the Fourth Amendment can impede effective law enforcement).

46. *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); *see infra* note 53.

obtain evidence to aid in apprehending and convicting criminals.⁴⁷ The prospect that law enforcement may operate more efficiently without the warrant requirement is never a sufficient reason to bypass it.⁴⁸

The Court has declared that searches and seizures conducted outside of the judicial process⁴⁹ are per se unreasonable under the Fourth Amendment, subject to “a few specifically established and well-delineated exceptions.”⁵⁰ These exceptions have been “jealously and carefully drawn.”⁵¹ Consent,⁵² exigent circumstances⁵³ and seizures of items in plain view⁵⁴ each constitute valid exceptions to the warrant requirement.

47. *Hayden*, 387 U.S. at 306.

48. See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.”); see also *Berger*, 388 U.S. at 62 (noting that the requirements of the Fourth Amendment cannot be forgiven in the name of law enforcement). In *Mincey*, the Court noted that although crime investigation would be simpler without a warrant requirement, “the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.” *Mincey*, 437 U.S. at 393. The subjective intent of an officer (e.g., whether he was motivated by a law enforcement purpose) is “irrelevant” in determining whether an officer’s conduct violated the Fourth Amendment. *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000).

49. A search conducted without prior approval of a judge or magistrate (a warrantless search) is outside judicial process. *Coolidge*, 403 U.S. at 454-55. Unreasonable searches “are denounced in the constitutions or statutes of every State in the Union.” *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931).

50. *Katz v. United States*, 389 U.S. 347, 357 (1967). The Court has noted that “[t]he Fourth Amendment demonstrates a ‘strong preference for searches conducted pursuant to a warrant.’” *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

51. *Jones v. United States*, 357 U.S. 493, 499 (1958).

52. “It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citation omitted); see *Groh v. Ramirez*, 540 U.S. 551, 559-60 (2004) (noting that consent constitutes a valid exception to the warrant requirement). Consent must be voluntary in order to be valid. See *Schneckloth*, 412 U.S. at 228 (noting that the Fourth Amendment requires that consent not be “coerced, by explicit or implicit means, by implied threat or covert force”). Voluntariness is determined from the totality of the surrounding circumstances. *Id.* at 226. One’s knowledge of the right to refuse consent is not a prerequisite to finding voluntary consent, but is a factor to be considered in the totality-of-the-circumstances analysis. *Id.* at 234.

53. Exigent circumstances connote the type of “‘emergency’” or “‘dangerous situation . . . that would justify a warrantless entry into a home for the purpose of either arrest or search.’” *Welsh v. Wisconsin*, 466 U.S. 740, 742 (1984) (quoting *Payton v. New York*, 445 U.S. 573, 583 (1980)). Such circumstances usually involve the risk of destruction of evidence or the hot pursuit of a fleeing felon. *Id.* at 749-50. The Court first used the term “hot pursuit” in *Johnson v. United States*, 333 U.S. 10, 16 n.7 (1948), noting that such a case usually involves some element of chase. A “hot pursuit” chase, however, “need not be an extended hue and cry ‘in and about [the] public streets.’” *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (alteration in original) (internal quotation omitted).

54. See *infra* Part I.A.1.b.

b. *The Plain View Warrant Exception*

The Court has recognized that, under certain circumstances, police may seize items in plain view without a warrant.⁵⁵ A plain view seizure is not a valid exception to the warrant requirement unless certain conditions are satisfied.⁵⁶ Although inadvertent discovery is a characteristic of most legitimate plain view seizures, it is not a necessary condition.⁵⁷ The rationale for the plain view doctrine is sound in light of the well-defined constitutional protections served by the warrant requirement.⁵⁸

In 1971 in *Coolidge v. New Hampshire*,⁵⁹ the Court first enunciated that police may, under certain circumstances, seize evidence in plain view without a warrant.⁶⁰ The plain view doctrine supplements instances in which justification for an intrusion already exists by permitting an officer to secure incriminating evidence that he encounters.⁶¹ If the initial intrusion is

55. See *Horton v. California*, 496 U.S. 128, 134 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plurality opinion) (acknowledging that "[i]t is well established that under certain circumstances the police may seize evidence in plain view without a warrant"); see also *Harris v. United States*, 390 U.S. 234, 236 (1968) (noting that "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view" may be subject to seizure and introduced as evidence).

56. See *Horton*, 496 U.S. at 136-37; see also *Coolidge*, 403 U.S. at 468 ("[P]lain view alone is never enough to justify the warrantless seizure of [an item]."). An arrest or seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). A person can be seized without being physically restrained where "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion). A display of "official authority such that 'a reasonable person would have believed that he was not free to leave'" is evidence that a seizure has occurred. *Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion) (quoting *Mendenhall*, 446 U.S. at 554). Circumstances that might indicate a seizure, even where an individual did not attempt to leave, include "the threatening presence of several officers, the display of a weapon by an officer . . . or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554.

57. See *Horton*, 496 U.S. at 130.

58. *Coolidge*, 403 U.S. at 467; see *supra* Part I.A.1.a.

59. 403 U.S. at 433.

60. *Id.* at 456. The plurality opinion in *Coolidge* included analysis of the plain view doctrine authored by Justice Potter Stewart, and joined by Justices William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall. *Id.* at 445. In *Texas v. Brown*, 460 U.S. 730, 737 (1983) (plurality opinion), then-Associate Justice William H. Rehnquist authored a plurality opinion which noted that Justice Stewart's discussion in *Coolidge* was "not a binding precedent." In *Horton*, however, the Court acknowledged Justice Rehnquist's opinion in *Brown* but pronounced that "[t]he [*Coolidge*] decision nonetheless is a binding precedent." *Horton*, 496 U.S. at 136.

61. *Coolidge*, 403 U.S. at 466; see *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (pronouncing that the plain view doctrine "authorizes seizure of . . . [an] item . . . visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity"). Accordingly, the plain view doctrine is perhaps better understood "not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." *Brown*, 460 U.S. at 738-39 (plurality opinion).

not justified by warrant or one of the established exceptions to the warrant requirement, a plain view seizure is not authorized.⁶² A straightforward example of the applicability of the plain view doctrine occurs where the police have a warrant to search an area for specified objects, and in the course of the search inadvertently encounter some other piece of evidence of incriminating character.⁶³

The Court has noted that three conditions must be met for the plain view doctrine to apply.⁶⁴ First, the officer must have lawfully arrived at the place from which he viewed the object to be seized.⁶⁵ Second, the incriminating character of the thing to be seized must be “immediately apparent.”⁶⁶ Third, the officer must have a “lawful right of access to the object itself.”⁶⁷

62. See *Coolidge*, 403 U.S. at 465.

63. *Id.*; see, e.g., *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (finding a lawful search and seizure of the defendant's clothing in a duffel bag where the defendant shared use of the duffel bag with his cousin and the defendant's cousin consented to an officer's search of the bag); *Harris v. United States*, 390 U.S. 234, 236 (1968) (holding a lawful search and seizure where a robbery victim's automobile registration card was plainly visible and found by an officer who was removing valuables from the defendant's impounded vehicle but did not have a search warrant). Inadvertent discovery, however, does not have to be present in order for a plain view seizure to be authorized. See *infra* notes 69-71 and accompanying text. The Court has recognized that the plain view doctrine has “an obvious application by analogy” to cases where an officer “discovers contraband through the sense of touch during an otherwise lawful search.” *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). The rationale and practical considerations that accompany the plain view doctrine are no less salient with regards to a “plain touch” or “plain feel” exception. See *id.* at 375-76. Thus, “[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity [as contraband] immediately apparent,” the plain view doctrine justifies the item's warrantless seizure. *Id.*

64. See *Horton*, 496 U.S. at 136.

65. See *id.* (“It is . . . essential . . . that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.”); see also *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (noting that the fact that an individual has taken steps to restrict some views of his activities does not “preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible”).

66. See *Horton*, 496 U.S. at 136. The incriminating nature of an object is immediately apparent if the police have probable cause to believe an object in plain view is contraband. *Dickerson*, 508 U.S. at 375. Accordingly, if police must conduct some further research of an object in plain view to determine if it is contraband, then the plain view doctrine cannot justify the object's seizure. *Id.* In *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987), the Court held that an officer's slight movement of stereo equipment in order to locate the item's serial numbers to determine if it was stolen was prohibited by the Fourth Amendment, despite the fact that the officer was lawfully present within the apartment where the equipment was located in plain view. “Contraband” is property in which the government holds a superior interest, but only because the government elects to vest such an interest in itself. *Warden v. Hayden*, 387 U.S. 294, 306 n.11 (1967). Any interest that a party may have in possessing contraband cannot be deemed “legitimate.” *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). Thus, government action “that only reveals the possession of contraband ‘compromises no legitimate privacy interest.’” *Id.* (emphasis omitted) (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)). Although there may be “limits to what may be declared contraband, the concept is hardly more than a form through which the [g]overnment seeks to prevent and deter crime.” *Warden*, 387 U.S. at 306 n.11.

67. *Horton*, 496 U.S. at 137. This requirement is “simply a corollary of the familiar principle . . . that no amount of probable cause can justify a warrantless search or seizure

An officer has a lawful right of access to the object itself so long as the item seized is in actual plain view at the time it is discovered.⁶⁸

Although inadvertence has been a characteristic common to most legitimate plain view seizures, it is not a necessary condition.⁶⁹ In *Horton v. California*, the Court found that a police officer with a warrant to search a residence for stolen property was permitted to seize weapons found in plain view while searching the dwelling, even though the weapons were not discovered inadvertently.⁷⁰ The plain view doctrine, however, "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."⁷¹

The rationale for the plain view doctrine is sound in light of the two well-defined constitutional protections served by the warrant requirement.⁷² The first protection, requiring a judge or magistrate to issue a warrant, is not compromised because a seizure is only authorized where there is a prior justification for the intrusion.⁷³ The second protection, that searches considered necessary should be as limited as possible, is not jeopardized because the plain view doctrine does not transform the initial search into a general, exploratory one.⁷⁴ Furthermore, if contraband is in open view and is observed by an officer from a lawful vantage point "there has been no invasion of a legitimate expectation of privacy," and thus no Fourth Amendment violation.⁷⁵ Requiring an officer to obtain a warrant under

absent 'exigent circumstances.'" *Id.* at 137 n.7 (quoting *Coolidge*, 403 U.S. at 468); see *Soldal v. Cook County*, 506 U.S. 56, 66 n.10 (1992) (recognizing that if an officer's presence in an area constitutes a Fourth Amendment violation, "no amount of probable cause to believe that an item in plain view constitutes incriminating evidence will justify its seizure").

68. See Michael J. Friedman, Comment, *Another Stab at Schneekloth: The Problem of Limited Consent Searches and Plain View Seizures*, 89 J. Crim. L. & Criminology 313, 327 (1998).

69. *Horton*, 496 U.S. at 130. For an argument that the inadvertent discovery rule must be restored in order to preserve the Fourth Amendment warrant requirement and prohibition against unreasonable seizures, see Robert Eyer, Comment, *The Plain View Doctrine After Horton v. California: Fourth Amendment Concerns and the Problem of Pretext*, 96 Dick. L. Rev. 467 (1992).

70. *Horton*, 496 U.S. at 142. In *Horton*, the officer determined there was probable cause to search the home of a suspected robber for weapons and the proceeds of the robbery. *Id.* at 130-31. The warrant issued to the officer authorized only a search for the proceeds. *Id.* at 130. At trial, the officer testified that while he was searching the suspect's home, he was also "interested in finding other evidence connecting [the suspect] to the robbery." *Id.* at 131. Thus, his discovery of the weapons, which included an Uzi machine gun, a .38 caliber revolver, and two stun guns, was not inadvertent. *Id.*

71. *Coolidge*, 403 U.S. at 466 (plurality opinion). But see *Hicks*, 480 U.S. at 325-26 (acknowledging that the plain view doctrine may legitimize actions beyond the scope of original exigencies that justified a warrantless search).

72. *Coolidge*, 403 U.S. at 467; see *supra* Part I.A.2.a.

73. See *Coolidge*, 403 U.S. at 467.

74. *Id.*

75. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). Where a "search" compromises the individual interest in privacy, a "seizure" deprives the individual of dominion over his or her person or property. *Horton*, 496 U.S. at 133. In *Texas v. Brown*, the Court noted that "[i]t is important to distinguish 'plain view,' as used in *Coolidge* to justify seizure of an

such circumstances is frequently impracticable and does little to promote the objectives of the Fourth Amendment.⁷⁶

2. The Subjective-Objective Test of *Katz v. United States*

In *Katz v. United States*,⁷⁷ the Court established that an individual's Fourth Amendment rights are violated only when the alleged wrongful conduct invaded his legitimate expectations of privacy.⁷⁸ *Katz* marked a departure from an earlier regime of Fourth Amendment doctrine by clarifying that the "touchstone" of Fourth Amendment analysis is an inquiry into whether a person has a "constitutionally protected reasonable expectation of privacy."⁷⁹ To determine whether a person's expectations of privacy are legitimate, the Court employs the two-part test enunciated by Justice John M. Harlan in *Katz* ("the subjective-objective test").⁸⁰ After

object, from an officer's mere observation of an item left in plain view." *Texas v. Brown*, 460 U.S. 730, 738 n.4 (1983) (plurality opinion). Thus, if an article is already in "plain view," neither its observation nor its seizure would involve any invasion of privacy. *Horton*, 496 U.S. at 133. A seizure of an item in "plain view," however, "would obviously invade the owner's possessory interest." *Id.* at 134. Such conduct implicates the Fourth Amendment's prohibition of unreasonable seizures. *Brown*, 460 U.S. at 738 n.4.

76. See *Dickerson*, 508 U.S. at 375; see also *Arizona v. Hicks*, 480 U.S. 321, 327 (1987) (noting that the "practical justification" for the plain view doctrine is "the desirability of sparing police . . . the inconvenience and the risk—to themselves or to preservation of the evidence—of going to obtain a warrant"). But see *Coolidge*, 403 U.S. at 470-71 ("The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se unreasonable' in the absence of 'exigent circumstances.'").

77. 389 U.S. 347 (1967).

78. *Id.* at 353; see *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (noting that *Katz* held that the extent of Fourth Amendment protection depends "upon whether the person who claims the protection . . . has a legitimate expectation of privacy in the invaded place").

79. *Katz*, 389 U.S. at 360 (Harlan, J., concurring); see Tracey Maclin, *Katz, Kyllo, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 Miss. L.J. 51, 61 (2002) (noting that "*Katz* . . . signaled a shift, or readjustment, in Fourth Amendment law"); Peter P. Swire, *Katz Is Dead. Long Live Katz*, 102 Mich. L. Rev. 904 (2004) (arguing that *Katz* effectively began a new regime of Fourth Amendment analysis). *Katz* was "widely believed to be a watershed" decision. Michael Campbell, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-Katz Jurisprudence*, 61 Wash. L. Rev. 191, 193 (1986); see David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 Miss. L.J. 143, 145 (2002) (labeling *Katz* as "perhaps the most influential search-and-seizure decision of the past half-century").

80. See *infra* notes 91-93 and accompanying text. Commentators have referred to Justice John M. Harlan's *Katz* test as the "subjective-objective test." See, e.g., Camille Calman, Note, *Spy vs. Spouse: Regulating Surveillance Software on Shared Marital Computers*, 105 Colum. L. Rev. 2097, 2105 (2005). The test, an "assessment of the subjective and objective expectations of privacy in terms of reasonableness under the Fourth Amendment," is also known as the *Katz* inquiry and the "reasonable expectation of privacy" test. Gregory Gomez, Comment, *Thermal Imaging and the Fourth Amendment: The Role of the Katz Test in the Aftermath of Kyllo v. United States*, 46 N.Y.L. Sch. L. Rev. 319, 325 (2002).

Katz, the Court used the subjective-objective test "almost exclusively" in defining the extent of the Fourth Amendment's protections.⁸¹

In *Katz*, the defendant was convicted for violating a federal statute by transmitting betting information by telephone from Los Angeles to Miami and Boston.⁸² The district court permitted the government to introduce recordings of the defendant's telephone conversations as evidence, which had been overheard by Federal Bureau of Investigation agents who had attached an electronic device to the public telephone booth that Katz used to place his calls.⁸³ After the appellate court affirmed the conviction, the Supreme Court granted certiorari.⁸⁴ The Court held that the government's activities in electronically listening to and recording the defendant's words violated the privacy upon which the defendant justifiably relied while using the telephone booth, thus constituting a "search and seizure" under the Fourth Amendment.⁸⁵

The Court's decision in *Katz* redefined the scope of Fourth Amendment protection to extend to any activity in which an individual has a constitutionally protected reasonable expectation of privacy.⁸⁶ *Katz* explained that the Fourth Amendment "protects people, not places."⁸⁷ Pre-*Katz* Fourth Amendment doctrine was based on a property test that required physical intrusion or confiscation of property in order to find a Fourth Amendment violation.⁸⁸ The *Katz* opinion signaled the Court's shift away

81. Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 Wake Forest L. Rev 307, 328 (1998); see *infra* note 96 and accompanying text.

82. See *Katz*, 389 U.S. at 348.

83. *Id.*

84. *Id.* at 348-49.

85. *Id.* at 353.

86. See *id.* at 351-52. The Court recognized that "reasonable expectations of privacy may be defeated by electronic as well as physical invasion." *Id.* at 362 (Harlan, J., concurring); see also Campbell, *supra* note 79, at 191 (noting that the *Katz* Court expanded the scope of the Fourth Amendment).

87. *Katz*, 389 U.S. at 351. In his concurrence, Justice Harlan responded to this declaration by asserting that the key question in Fourth Amendment analysis, however, is "what protection [the Amendment] affords to those people." *Id.* at 361 (Harlan, J., concurring). Justice Harlan noted that

the answer to that question requires reference to a 'place' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.

Id.

88. See, e.g., *Goldman v. United States*, 316 U.S. 129, 135-36 (1942) (finding no Fourth Amendment violation where federal agents placed a detectaphone on the wall of an office, recorded conversations relating to a conspiracy, and submitted those recordings into evidence); *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967) (holding that wiretapping of defendant's residence did not constitute an unreasonable search or seizure); see Sklansky, *supra* note 79, at 152 (noting that the "trespass" test led the Court to find no unreasonable search or seizure in *Olmstead* because the case involved "neither physical entry into the suspect's house nor an actual confiscation of the suspect's property"); see also Campbell, *supra* note 79, at 192 (noting that "prior to [*Katz*], the Court defined search by

from the property test to a Fourth Amendment analysis grounded in a person's reasonable expectations of privacy.⁸⁹ The Court asserted that "[w]hat a person knowingly exposes to the public, even in his own home[,] . . . is not a subject of Fourth Amendment protection."⁹⁰

The inquiry into whether a person has a legitimate expectation of privacy is steered by the subjective-objective test enunciated by Justice Harlan in *Katz*.⁹¹ First, the person must have exhibited an actual subjective expectation of privacy.⁹² Second, the expectation must be one that society

reference to the literal language of the [F]ourth [A]mendment"); Milton Hirsch & David Oscar Markus, *Should the Katz Test for Fourth Amendment Interest Be Abandoned?*, *Champion*, Nov. 2003, at 36 (noting that under the property test, no Fourth Amendment violation exists absent a physical intrusion "onto the homestead, into the house, by laying hands on the individual or on his private papers, or otherwise").

89. *Katz*, 389 U.S. at 353 (acknowledging that "the 'trespass' doctrine . . . can no longer be regarded as controlling"); see *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (recognizing that "[t]he premise that property interests control the right of the Government to search and seize has been discredited"); Maclin, *supra* note 79, at 55-56 (asserting that *Katz* "purported to clean house on outmoded [F]ourth [A]mendment principles" (citation omitted)); Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 *Hastings L.J.* 1303, 1303, 1307 (2002) (noting that the *Katz* decision represented "a paradigm shift in Fourth Amendment law" in which the Court "reversed nearly a century of Fourth Amendment jurisprudence"); Swire, *supra* note 79, at 904 (observing that *Katz* "struck down the earlier regime of property rules" via its declaration that the Fourth Amendment protects people, not places (citation omitted)). But see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 *Mich. L. Rev.* 801, 809, 813 (2004) (noting that the property approach to the Fourth Amendment has survived the development of the subjective-objective test). For a discussion of the origin, development, and demise of the property test, see Clancy, *supra* note 81. The Court cited multiple reasons for the need to shift away from the property test. Simmons, *supra*, at 1303-04. As information became more valuable as a commodity, the need to protect private speech and conversations became more prevalent. See *Katz*, 389 U.S. at 351. In addition, the location of a person's activity should not be dispositive in determining whether that activity was entitled to Fourth Amendment protection. See *id.* at 361 (Harlan, J., concurring). For an argument that the primary reason for the Court's shift away from the property test is that consideration of the method employed by law enforcement agents in Fourth Amendment-related questions is no longer relevant for determining whether a constitutional violation occurred, see Simmons, *supra*.

90. *Katz*, 389 U.S. at 351. Conversely, "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected under the Fourth Amendment." *Id.* at 351-52.

91. *Id.* at 361 (Harlan, J., concurring). Justice Harlan formulated the two-part test in his concurring opinion as part of his assertion that the "touchstone" of Fourth Amendment analysis is an inquiry into whether a "constitutionally protected reasonable expectation of privacy" exists. *Id.* at 360. The Court has since adopted this test. *E.g.*, *Bond v. United States*, 529 U.S. 334, 338 (2000) (noting that Fourth Amendment analysis "embraces two questions": (1) whether the individual, by his conduct, has exhibited an actual expectation of privacy, and (2) whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable).

92. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); see also *Illinois v. Andreas*, 463 U.S. 765, 771 (1983) (noting that "[t]he threshold question . . . is whether an individual has a legitimate expectation of privacy in the contents of a previously lawfully searched container"). But see Hirsch & Markus, *supra* note 88, at 38 (arguing that "Justice Harlan's two-prong test tests for nothing at all").

is prepared to recognize as objectively reasonable.⁹³ An individual's Fourth Amendment rights are violated "only when the challenged conduct invaded his legitimate expectation of privacy."⁹⁴ If a police inspection does not infringe upon a legitimate expectation of privacy, the activity does not constitute an unreasonable search or seizure under the Fourth Amendment.⁹⁵

The subjective-objective test has become the Court's principal analytical tool for Fourth Amendment questions.⁹⁶ The Court has "created

93. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). "[T]he test of legitimacy is not whether the individual chooses to conceal [an] assertedly 'private' activity," but instead "whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *California v. Ciraolo*, 476 U.S. 207, 212 (1986) (quoting *Oliver v. United States*, 466 U.S. 170, 181-83 (1984)). In *Ciraolo*, the Court held that officers' warrantless aerial observation from 1000 feet above the defendant's fenced-in backyard within the curtilage of the home was not unreasonable under the Fourth Amendment, where marijuana plants in the yard were visible to the naked eye. *Id.* at 213-14.

94. *United States v. Payner*, 447 U.S. 727, 731 (1980) (emphasis omitted). In *Bond*, the Court held that an officer's physical manipulation of a defendant's carry-on bag on a bus violated the Fourth Amendment. *Bond*, 529 U.S. at 338-39. The Court reasoned that although the defendant expected his bag may be handled by another passenger or bus employee, he did not expect his bag to be felt in an exploratory manner. *Id.* A traveler's personal luggage is an "effect" protected by the Fourth Amendment. *See United States v. Place*, 462 U.S. 696, 707 (1983).

95. *Andreas*, 463 U.S. at 771. In *Andreas*, a customs search found that a shipping container addressed to the defendant contained marijuana. *Id.* at 767. The Court held that a warrantless reopening of the container following its re-seizure did not violate the defendant's Fourth Amendment rights. *Id.* at 771; *see also United States v. Jacobsen*, 466 U.S. 109, 117 (1984) (confirming that "when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information").

96. *See Clancy, supra* note 81, at 328 (noting that "[i]t was Justice Harlan's concurring opinion in *Katz* that endured"); *see also Hirsch & Markus, supra* note 88, at 38 (noting that the subjective-objective test "is for many lawyers and judges the principal legacy of the *Katz* opinion"); *cf. Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (noting that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security'" (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968))). Reasonableness depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Id.* at 109 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)); *see also Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (stating that the "touchstone of the Fourth Amendment is reasonableness," which is measured objectively by examining the totality of the circumstances (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991))). Although the Court primarily uses the subjective-objective test to determine whether a Fourth Amendment violation occurred, there are cases where the Court has not administered the test in reaching its decisions. *See, e.g., Oliver*, 466 U.S. at 176-84 (relying on the "open fields" doctrine to conclude that a search of open fields that led to the discovery or seizure of marijuana was valid under the Fourth Amendment). Special protection accorded by the Fourth Amendment to people in their "persons, houses, papers, and effects" does not extend to open fields. *See id.* at 176 (internal quotation omitted). The Court's recent decision in *Kyllo v. United States*, 533 U.S. 27 (2001), has sparked considerable debate amongst commentators regarding the future of the subjective-objective test with respect to Fourth Amendment questions. *See Richard H. Seamon, Kyllo v. United States and the Partial Ascendancy of Judge Scalia's Fourth Amendment*, 79 Wash. U. L.Q. 1013, 1022 (2001) (arguing that *Kyllo* "at least weakly endorsed" criticism of *Katz* and that "the *Kyllo* majority did not apply the [subjective-objective] test to the case before it"); Sklansky, *supra*

a hierarchy of privacy interests”⁹⁷ in using the test, including expectations of privacy that society is prepared to recognize as legitimate,⁹⁸ diminished expectations of privacy,⁹⁹ and expectations of privacy that society is not prepared to recognize as legitimate.¹⁰⁰ Although both prongs of the test “have raised difficulties,” the Court places greater emphasis on the objective prong.¹⁰¹

3. The Expectation of Privacy When Standing on the Threshold

Nine years after Justice Harlan first enunciated the subjective-objective test in *Katz*, the Court revisited critical issues concerning expectations of privacy and Fourth Amendment protection in *United States v. Santana*.¹⁰² In *Santana*, the Court established that the threshold of one’s dwelling is a public place.¹⁰³ An individual in a public place is in an area where he has no expectation of privacy.¹⁰⁴ Consequently, under *Santana*, an individual standing on the threshold has no expectation of privacy and fails the subjective-objective test.¹⁰⁵

note 79, at 147 (asserting that *Kyllo* “throws into doubt . . . the reasoning of *Katz* . . . as it usually has been understood”); *infra* notes 150-54 and accompanying text.

97. Clancy, *supra* note 81, at 331; *see also* Sklansky, *supra* note 79, at 155 (noting that, post-*Katz*, the Court pursued a “sliding scale” approach to Fourth Amendment analysis). For a detailed discussion of the Court’s treatment of the different levels of the privacy interest hierarchy, *see* Clancy, *supra* note 81, at 331-35.

98. The Court provides the strongest Fourth Amendment protection to expectations of privacy that society is prepared to recognize as legitimate. *See* Clancy, *supra* note 81, at 331.

99. The Court has recognized situations where individuals have a diminished expectation of privacy. *Id.* at 333-34. A reduced expectation of privacy is “more easily invaded” when compared with the legitimate expectations of privacy which receive strong Fourth Amendment protection. *Id.* at 331; *see, e.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (noting that one’s expectation of privacy in an automobile is “significantly different from the traditional expectation of privacy and freedom in one’s residence”).

100. Subjective expectations of privacy that society is not prepared to recognize as legitimate receive no Fourth Amendment protection. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that the possession of contraband invokes no legitimate privacy interest protected by the Fourth Amendment); *see also supra* note 66.

101. Sklansky, *supra* note 79, at 157-58. The subjective element can be problematic because, in theory, it “has the odd consequence that people who suspect the government are spying on them may lose, for that very reason, much of their protection against what they fear.” *Id.* at 157. Critics of the second prong, that an expectation of privacy be one that society is prepared to recognize as objectively reasonable, argue that its circular because an “expectation of privacy is reasonable if the Court is willing to protect it.” *Id.* at 158.

102. 427 U.S. 38 (1976). In *Santana*, the Court found that police officers did not violate the Fourth Amendment where they made a warrantless arrest of the defendant in her home, after they attempted to arrest the defendant while she stood on the threshold of her home, and then pursued the defendant into her home as she attempted to evade the officers. *Id.* at 42.

103. *Id.*

104. *Id.*

105. *See id.*; *United States v. Watson*, 423 U.S. 411 (1976). In *Watson*, the Court held that the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment. *Id.* at 425 (finding the warrantless arrest of the defendant by postal officers in a restaurant at midday was valid under a statute authorizing postal officers

In *Santana*, police officers traveled to the defendant's home after learning that she had been involved in a heroin transaction.¹⁰⁶ As the officers approached the residence "[t]hey saw Santana standing in the doorway of the house with a brown paper bag in her hand."¹⁰⁷ The officers were within fifteen feet of Santana when they got out of their van, shouted "police," and displayed their identification.¹⁰⁸ As the officers approached, Santana retreated into the house.¹⁰⁹ The officers pursued Santana through the open door, "catching her in the vestibule."¹¹⁰

In deciding *Santana*, the Court identified the threshold as a public place, as it "was not . . . an area where [Santana] had any expectation of privacy."¹¹¹ Although under common-law property principles the threshold of one's dwelling is "private," the line of cases interpreting the Fourth Amendment confirms it is a "public place."¹¹² The Court reaffirmed that "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."¹¹³ Santana's position on the threshold rendered her "not merely visible to the public," but as "exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house."¹¹⁴

The Court ultimately upheld the defendant's arrest by finding it appropriately within the scope of the "hot pursuit" exception.¹¹⁵ By retreating into her home, the defendant attempted to evade a valid arrest in a

to make warrantless arrests for felonies, provided they are performing duties related to the inspection of postal matters and have reasonable grounds to believe that the person to be arrested has committed or is committing a felony). While the *Santana* Court established that the doorway is a public place, the Supreme Court upheld the defendant's arrest by concluding that the officers involved acted in hot pursuit. *Santana*, 427 U.S. at 42-43; see *infra* notes 115-17 and accompanying text. Although the threshold itself is a public place, the Court has recognized that it marks the clear boundary of the home's zone of privacy, and cannot be crossed without a warrant absent exigent circumstances. See *infra* notes 142-44.

106. *Santana*, 427 U.S. at 39-41. In *Santana*, an undercover police officer gave marked bills to Patricia McCafferty as part of a drug transaction. *Id.* at 39-40. After paying her, the officer and McCafferty drove to Dominga Santana's residence, where McCafferty entered the house with the marked bills and soon returned with several envelopes of heroin. *Id.* at 40. After taking McCafferty to the police station, the officers returned to Santana's residence. *Id.*

107. *Id.* at 40. At trial an officer testified that Santana was standing directly on the threshold. *Id.* at 40 n.1 ("[O]ne step forward would have put her outside, one step backward would have put her in the vestibule of her residence.").

108. *Id.* at 40.

109. *Id.*

110. *Id.* As the officers apprehended her, Santana tried to resist and the envelope in her hand spilled "two bundles of glazed paper packets with a white powder" to the floor. *Id.* (internal quotation omitted). The substance in the packets was later discovered to be heroin. *Id.* at 41. One hundred thirty-five dollars was found on Santana's person, of which seventy dollars consisted of marked bills. *Id.*

111. *Id.* at 42.

112. *Id.*

113. *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

114. *Id.* Thus by seeking to arrest Santana, the officers "merely intended to perform a function which [the Court] approved in *Watson*." *Id.*; see *supra* note 105 and accompanying text.

115. See *id.* at 42-43; *supra* note 53; *infra* note 117.

public place by finding sanctuary in a private place.¹¹⁶ “[A] suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *United States v. Watson*, by the expedient of escaping to a private place.”¹¹⁷

B. The Heightened Constitutional Protection Afforded to Individuals Within the Home

Threshold cases such as *Santana* in no way undermine, and actually reinforce, the line of authority emphasizing the sanctity of the home. The law has long recognized that the home occupies a special place in the spectrum of constitutional protection.¹¹⁸ The importance of the right to residential privacy is “at the core” of the Fourth Amendment.¹¹⁹ In *Payton v. New York*, the Court declared that warrantless searches and seizures inside the home are presumptively unreasonable.¹²⁰ The Court has identified the threshold of the home as a bright line for heightened Fourth Amendment protection.¹²¹ In recent years, the Court has used unambiguous language in reaffirming the strong constitutional protection afforded to the home.¹²²

116. *Santana*, 427 U.S. at 43.

117. *Id.*; see *supra* note 105. Once the defendant had been arrested, “the search, incident to that arrest, which produced the drugs and money was clearly justified.” *Id.* *Santana* involved a true “hot pursuit” as “[o]nce [the defendant] saw the police, there was . . . a realistic expectation that any delay would result in destruction of evidence.” *Id.* at 42-43; see also *Warden v. Hayden*, 387 U.S. 294 (1967) (recognizing that police were permitted to make a warrantless entry to arrest a suspect and search for weapons where the officers had probable cause to believe that an armed robber had entered the house a few minutes earlier). Although the police conduct in *Warden* fell under the exigent circumstances exception, its conclusion verifies that one’s act of “retreating into her house” could not “thwart an otherwise proper arrest.” See *Santana*, 427 U.S. at 42.

118. See William Blackstone, 4 Commentaries *223 (noting that the law has “so particular and tender a regard to the immunity of a man’s house, that it styles it his castle, and will never suffer it to be violated with impunity”).

119. See *Wilson v. Layne*, 526 U.S. 603, 612 (1999).

120. *Payton v. New York*, 445 U.S. 573, 586 (1980).

121. See *id.* at 590; see also *Kirk v. Louisiana*, 536 U.S. 635, 636 (2002) (reaffirming that the Fourth Amendment has drawn a clear line at the threshold of the house).

122. See, e.g., *Groh v. Ramirez*, 540 U.S. 551, 558 (2004) (holding a residential search conducted pursuant to a facially invalid warrant, which failed to describe the persons or things to be seized, could not be regarded as reasonable for Fourth Amendment purposes, despite the fact that the items to be seized were described in the search warrant application and the officers conducting the search exercised restraint in limiting the search’s scope to that indicated in the application); *Kirk*, 536 U.S. at 635-36 (finding that absent exigent circumstances, officers’ warrantless entry into a suspected cocaine dealer’s apartment violated the Fourth Amendment); *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that police engaged in an unlawful “search” when, without a warrant, they used a thermal imaging device to scan the defendant’s home in order to determine whether heat emanating from the home was consistent with the use of high-intensity lamps employed in an indoor marijuana-growing operation); *Wilson*, 526 U.S. at 611 (finding a homeowner’s Fourth Amendment rights were violated when law enforcement officers brought media reporters into the home to observe and record the attempted execution of an arrest warrant on the homeowner’s son).

It was established as early as 1604 that the privacy of the home merited substantial protection.¹²³ The precept that “a man’s house is his castle” is “one of the oldest and most deeply rooted principles in Anglo-American jurisprudence.”¹²⁴ The home’s physical structure provides shelter and physical safety, and its physical space is a source of privacy, comfort and freedom.¹²⁵ The sacred and special nature of the home was of critical importance to the founders.¹²⁶

123. See *Ker v. California*, 374 U.S. 23, 47 (1963) (“It was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries.”); see also *Wilson*, 526 U.S. at 610 (recognizing that “[t]he Fourth Amendment embodies [the] centuries-old principle of respect for the privacy of the home”). In *Wilson*, the Court quoted *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 194-95 (K.B.), in discussing the widely accepted view that a man’s home is his castle. See *Wilson*, 526 U.S. at 609-10. The well-known passage from *Semayne’s* reads,

[T]he house of every one is to him as his . . . castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of a man is a thing precious and favoured in law . . . if thieves come to a man’s . . . house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing . . .

Semayne’s Case, 77 Eng. Rep. at 194-95. But see *id.* (“In all cases when the King . . . is party, the Sheriff (if the doors be not open) may break the party’s house, either to arrest him, or to do other execution of the K[ing]’s process, if otherwise he cannot enter.”). This language “established the Crown’s power to enter a dwelling in criminal cases.” *Payton v. New York*, 445 U.S. 573, 605 (White, J., dissenting). In *Wilson*, the Court held that a homeowner’s Fourth Amendment rights were violated when law enforcement officers brought media reporters into the home to observe and record the attempted execution of an arrest warrant on the homeowner’s son. *Wilson*, 526 U.S. at 611.

124. Jonathan L. Hafetz, “A Man’s Home Is His Castle?”: *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 Wm. & Mary J. Women & L. 175, 175 (2002). The precept “was enacted into the fundamental law in the Fourth Amendment.” *Weeks v. United States*, 232 U.S. 383, 390 (1914). The Court has noted that this principle is “‘jealously insisted upon.’” *Id.* (quoting Francis Lieber, *On Civil Liberty and Self-Government* 62 (2d ed. 1874)); see *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) (recognizing that the Fourth Amendment “gives the guarantee that a man’s home is his castle beyond invasion either by inquisitive or by officious people”); see also Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* 425-26 (7th ed. 1903) (noting that “[t]he maxim that ‘every man’s house is his castle,’ is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen”). But see David Cole, *Scalia’s Kind of Privacy*, *Nation*, July 23-30, 2001, at 6, available at 2001 WLNR 10081370 (arguing that the notion “a man’s house [is] his castle” may effectively mean that “the streets [will] belong to the police”).

125. D. Benjamin Barros, *Home as a Legal Concept*, 46 Santa Clara L. Rev. (forthcoming Jan. 2006) (manuscript at 4 & n.10), available at <http://ssrn.com/abstract=801245> (arguing that the unique nature of the home justifies additional legal protection in some, but not all, circumstances). “A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.” *Silverman v. United States*, 365 U.S. 505, 512 n.4 (1961) (quoting *United States v. On Lee*, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting)).

126. See, e.g., David H. Flaherty, *Privacy in Colonial New England* 45 (1967); Barros, *supra* note 125 (manuscript at 8) (“[T]he ‘historical record . . . reveals that the Framers focused their concerns and complaints [about government searches and seizures] rather precisely on searches of houses under general warrants,’ and reference to the importance of home was common in Revolutionary-era rhetoric attacking excessive government searches.”

The sanctity of the home is afforded the most stringent Fourth Amendment protection.¹²⁷ The unwarranted “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”¹²⁸ The Court’s decisions have consistently emphasized that the

(quoting Thomas Y. Davies, *Rediscovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 601 (1999)); Maclin, *supra* note 79, at 51-52 (noting that “[d]uring the Framers’ era, the home was the focal point of privacy and personal security”); *supra* note 123 and accompanying text. *But cf.* James J. Tomkovicz, *Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 Hastings L.J. 645, 668-77 (1985) (arguing that the Framers were principally concerned with a right to privacy related to certain information within the home as opposed to a general right of privacy in the home).

127. *See* *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). “Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.” *Payton*, 445 U.S. at 587 (quoting *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970)). *But see* *Katz v. United States*, 389 U.S. 347, 351 (1967) (noting that the Fourth Amendment protects people, not places); *supra* note 87 and accompanying text. The Fourth Amendment relates to the personal security of the citizen. *See* *Boyd v. United States*, 116 U.S. 616, 630 (1886); *supra* note 30 and accompanying text. The Court has confirmed that a guest in a hotel room is also entitled to constitutional protection against unreasonable searches and seizures. *Stoner v. California*, 376 U.S. 483, 490 (1964). *But see* *United States v. Jeffers*, 342 U.S. 48, 51 (1951) (noting that “[t]he law does not prohibit every entry, without a warrant, into a hotel room”); *see also* *Stoner*, 376 U.S. at 489 (noting that “when a person engages a hotel room he undoubtedly gives ‘implied or express permission’ to ‘such persons as maids, janitors or repairmen’ to enter his room ‘in the performance of their duties’” (quoting *Jeffers*, 342 U.S. at 51)).

128. *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972). It is “axiomatic” that defending the home from unjustified physical entry is the central aim of the Fourth Amendment. *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984); *see* *Berger v. New York*, 388 U.S. 41, 58 (1967) (asserting that proceeding by search warrant “must be carefully circumscribed so as to prevent unauthorized invasions of ‘the sanctity of a man’s home and the privacies of life’” (quoting *Boyd*, 116 U.S. at 630); *Warden v. Hayden*, 387 U.S. 294, 301 (1967) (noting that the Fourth Amendment was “intended to protect against invasions of ‘the sanctity of a man’s home and the privacies of life’” (quoting *Boyd*, 116 U.S. at 630); *Lewis v. United States*, 385 U.S. 206, 211 (1966) (confirming that “[w]ithout question, the home is accorded the full range of Fourth Amendment protections”); *Ker*, 374 U.S. at 47 (noting that “[t]he Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim ‘every man’s home is his castle’” (quoting Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 365 (1921))); *Jones v. United States*, 357 U.S. 493, 498 (1958) (noting that if officers were permitted to conduct a warrantless search of an individual’s home, “the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified”). The recognized need for heightened legal protection of the home is also evident in the principle that a person has no duty to retreat from an attack that occurs in his own home. Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes*, 790-91 (7th ed. 2001). In such cases, the “castle exception” permits a person under attack to use deadly force to repel his attacker. *Id.* In *People v. Tomlins*, 107 N.E. 496 (N.Y. 1914), then-Judge Benjamin N. Cardozo articulated the reasoning of the “castle exception”:

It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than 200 years ago it was said by Lord Chief Justice Hale: In case a man “is assailed in his own house, he need not flee as far as he can, as in other cases . . . for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight.” Flight

cardinal purpose of the Fourth Amendment is to defend the citizen from unwarranted intrusions into his privacy.¹²⁹ An invasion of the sanctity of the home is "simply too substantial" to allow without a warrant absent exigent circumstances, even when probable cause is indisputable.¹³⁰

In *Payton v. New York* and its companion case, *Riddick v. New York*, the Court reinforced the heightened protection the Constitution provides for individuals within their homes,¹³¹ and confirmed that "searches and seizures inside a home without a warrant are presumptively unreasonable."¹³² In *Payton*, New York law enforcement officers

is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is . . . the settled law in the United States as in England.

Id. at 497 (citation omitted). In *Tomlins*, the court held that a father being threatened by his son in his home could kill the son rather than retreat. *Id.* at 497-98. For an in-depth study of the retreat issue, see Garrett Epps, *Any Which Way but Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American "Retreat Rule,"* Law & Contemp. Probs., Winter 1992, at 303.

129. *Jones*, 357 U.S. at 498; see William Blackstone, 1 Commentaries *139 (noting that "[s]o great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community").

130. See *Payton*, 445 U.S. at 588-89 (quoting *United States v. Reed*, 572 F.2d 412, 423 (2d Cir. 1978)); *supra* note 32.

131. See *Minnesota v. Carter*, 525 U.S. 83, 100 (1998) (noting that the *Payton* decision "strengthen[s] and protect[s] the right of the homeowner to privacy in his own home"); see also *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd*, 457 U.S. 537 (1982). This Note refers to the opinion as the "*Payton/Riddick*" decision. See *supra* note 23. In *Payton/Riddick*, the Court uses "strong language" in discussing Fourth Amendment rights in the context of the home. *Johnson*, 626 F.2d at 757. *Payton/Riddick* was a "landmark ruling" which clarified the strong constitutional protection provided against warrantless arrests in the home. Linda Greenhouse, *Court Increases Arrest Restraints*, N.Y. Times, May 16, 1984, at B26. In *Oliver v. United States*, 466 U.S. 170, 180 (1984), the Court noted that the "curtilage," the land immediately surrounding and associated with the home, "warrants the Fourth Amendment protections that attach to the home." Under the common law, "the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes." *Id.* at 180 (citation and internal quotation omitted).

132. *Payton*, 445 U.S. at 586. The Court noted that this standard is a "basic principle of Fourth Amendment law." *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971) (plurality opinion)). Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property—his home or office—and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." *Coolidge*, 403 U.S. at 474-75; see also *Agnello v. United States*, 269 U.S. 20, 33 (1925) (noting that the "[b]elief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant"). This basic rule "has never been questioned" by the Court. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) (quoting *Stoner*, 376 U.S. at 487 n.5). But see *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (noting that what a citizen is "assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is unreasonable"); see also *Payton*, 445 U.S. at 603-04 (White, J., dissenting) (noting that a "rigid" rule that "absent exigent circumstances officers may never enter a home . . . to arrest for a dangerous felony unless they have first obtained a warrant" is "founded on erroneous assumptions concerning the intrusiveness of home arrest entries" and "finds little or no support in the common law or in

possessed sufficient evidence to believe that the defendant Payton had murdered a gas station manager.¹³³ Without obtaining a warrant, several officers went to Payton's apartment in the Bronx intending to arrest him.¹³⁴ The officers found light and music emanating from the apartment, but there was no response to their knock on Payton's door.¹³⁵ Ultimately, the officers used crowbars to break open the door and enter the apartment.¹³⁶ In plain view, the officers saw a gun shell casing that was seized and eventually admitted into evidence.¹³⁷

Whereas *Payton* involved the plain view seizure of a tangible item, *Riddick v. New York* involved the plain view seizure of a person.¹³⁸ In *Riddick*, Riddick's young son opened their front door in response to the knock of the police.¹³⁹ Through the open doorway, the police could see Riddick sitting inside the apartment on a bed, covered by a sheet.¹⁴⁰ Without a warrant, the police entered the home and arrested Riddick.¹⁴¹

In deciding *Payton/Riddick*, the Court communicated that for Fourth Amendment purposes, a clear line is drawn at the entrance of a house.¹⁴² The Court specifically referred to the doorway, noting that "[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant."¹⁴³ Although the Fourth Amendment protects privacy in various

the text and history of the Fourth Amendment"); *id.* at 620 (Rehnquist, J., dissenting) (calling attention to the "social implications" of the *Payton/Riddick* decision, which resulted in the freedom of a convicted murderer and an armed robber).

133. *Payton*, 445 U.S. at 576.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 576-77. The trial court held that the officers' entry was authorized under the New York Code of Criminal Procedure and the evidence in plain view was properly seized. *Id.* at 577. After the Appellate Division of the New York State Supreme Court and the New York Court of Appeals affirmed *Payton*, the U.S. Supreme Court granted certiorari and reversed. *Id.* at 577-78, 603.

138. *Id.* at 578. The Court notes that "the critical point is that any differences in the intrusiveness of entries to search [as in *Payton*] and entries to arrest [as in *Riddick*] are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home." *Id.* at 589.

139. *Id.* at 578.

140. *Id.*

141. *Id.* Although the door was voluntarily opened, it did not preclude the Court from finding that Obie Riddick had suffered a Fourth Amendment violation, nor from employing strong language in explaining in its ruling that the Constitution has drawn a "firm line" marked by the threshold. *See id.* at 590; *infra* notes 142-44 and accompanying text.

142. *Payton*, 445 U.S. at 590 ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house.").

143. *Id.* "In *Payton*, the Court drew a bright line at the identifiable threshold of a protected dwelling and said such a line cannot be crossed to arrest a suspect inside, absent consent or exigent circumstances." United States v. Vaneaton, 49 F.3d 1423, 1425 (9th Cir. 1995). The Court has acknowledged the importance of the threshold by quoting statements made by William Pitt, Earl of Chatham, in Parliament:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

settings, "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."¹⁴⁴

In recent opinions the Court has employed unambiguous language in reaffirming the strong constitutional protection afforded to individuals within the home.¹⁴⁵ In *Groh v. Ramirez*, the Court reinforced "the basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable."¹⁴⁶ In *Kirk v. Louisiana*, the Court reaffirmed that "the Fourth Amendment has drawn a

Miller v. United States, 357 U.S. 301, 307 (1958) (quoting William Pitt, Earl of Chatham, Speech on the Excise Bill to British Parliament (1763)); see also *Steagald v. United States*, 451 U.S. 204 (1981) (holding that absent exigent circumstances, a law enforcement officer could not legally search for the subject of an arrest warrant in the home of a third party).

144. *Payton*, 445 U.S. at 589. The Court has asserted that "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" is "[a]t the very core" of the Fourth Amendment. *Silverman v. United States*, 365 U.S. 505, 511 (1961); see also *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (noting that an individual in an industrial complex carries a diminished expectation of privacy because such a structure "does not share the Fourth Amendment sanctity of the home"); *United States v. Dunn*, 480 U.S. 294, 301-03 (1987) (finding that a barn is not within the curtilage of a "house" with regards to Fourth Amendment protection); *California v. Carney*, 471 U.S. 386, 393 (1985) (finding that one possesses a "reduced" expectation of privacy in a mobile home); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (noting that one's expectation of privacy in an automobile is "significantly different from the traditional expectation of privacy and freedom in one's residence"); Elizabeth Austin, *A Man's Home Is His Castle*, Legal Affairs, July/Aug. 2005, at 14-15 (noting that as mobile homes are legally defined as chattel, they receive significantly less protection from local, state, and federal laws relative to traditional homes). But see *Lewis v. United States*, 385 U.S. 206, 211 (1966) (finding that "when [a] home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street"). Additionally, the Court has noted that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

145. See *supra* note 122; *infra* notes 146-49 and accompanying text.

146. *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (quoting *Payton*, 445 U.S. at 586). The Court also reaffirmed the principle that the "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" stands "[a]t the very core of the Fourth Amendment." *Id.* (internal quotation omitted). "[T]he presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant." *Id.*; see *supra* note 122. Four years after deciding *Payton/Riddick*, the Court held that police are almost never justified in making a warrantless entry into a private home to arrest someone for a minor offense. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) ("Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor."). In *Welsh*, the Court held that a warrantless, nighttime entry into the defendant's home to arrest him for driving under the influence of an intoxicant was prohibited by the Fourth Amendment. See *id.* at 754-55. In so holding, the Court rejected the state's argument that exigent circumstances justified the officer's entry, because it was necessary to obtain evidence of the defendant's blood-alcohol level before it dissipated. *Id.* at 754. The Court noted that "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." *Id.* at 753. The *Welsh* opinion "strengthened the constitutional protection against arrests without warrants in private homes." Greenhouse, *supra* note 131.

firm line at the entrance to the house,” and “[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”¹⁴⁷ In *Kyllo v. United States*, the Court declared that “[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”¹⁴⁸ In *Wilson v. Layne*, the Court confirmed that “the importance of the right of residential privacy [is] at the core of the Fourth Amendment.”¹⁴⁹

The decision in *Kyllo*, in particular, is recognized as confirming that the Court treats the home “as a special place for Fourth Amendment purposes.”¹⁵⁰ In *Kyllo*, the Court held that police engaged in an unlawful “search” when, without a warrant, they used a thermal imaging device to scan the defendant’s home in order to determine whether heat emanating from the home was consistent with the use of high-intensity lamps employed in an indoor marijuana-growing operation.¹⁵¹ In discussing the subjective-objective test of *Katz*, the Court noted that with regards to the interior of homes, “the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*”¹⁵² is well established and deeply rooted. The Court emphasized the sanctity and constitutional protection of the home in reasoning that any act which undermines the minimum expectation of privacy in the home would “permit police technology to erode the privacy guaranteed by the Fourth Amendment.”¹⁵³ Although the intrusion in *Kyllo* was not physical, the Court announced that “any physical invasion of the structure of the home, ‘by even a fraction of an inch,’ was too much.”¹⁵⁴

This judicial practice of recognizing the sanctity of the home has led several courts to conclude that a person retains strong constitutional protection as he stands in the doorway of his home.¹⁵⁵ Accordingly, courts adhering to the sanctity view find that where a person has opened his door in response to a police officer’s knock, the Fourth Amendment does not permit the officer to seize an item in plain view at the threshold.¹⁵⁶ Conversely, other courts follow the voluntary exposure view and emphasize

147. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (quoting *Payton*, 445 U.S. at 590); see *supra* note 122.

148. *Kyllo*, 533 U.S. at 31; see *supra* note 122.

149. *Wilson v. Layne*, 526 U.S. 603, 612 (1999); see *supra* note 123.

150. Sklansky, *supra* note 79, at 147; see also Maclin, *supra* note 79, at 117 (noting that “*Kyllo*’s emphasis on the home is understandable” given the “textual, historical and practical reasons why the Court’s Fourth Amendment jurisprudence has afforded the home special protection”).

151. *Kyllo*, 533 U.S. at 34-35.

152. *Id.* at 34. But see Seamon, *supra* note 96, at 1022 (arguing that “the *Kyllo* majority did not apply the *Katz* [subjective-objective] test to the case before it”); Gomez, *supra* note 80, at 320-21 (arguing that the *Kyllo* Court did not actually conduct a proper subjective-objective test in its reasoning).

153. *Kyllo*, 533 U.S. at 34.

154. *Id.* at 37 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

155. See *infra* Part II.B.

156. See *infra* Part II.B.

the *Santana* decision in concluding that a person standing in a doorway maintains no reasonable expectation of privacy and is susceptible to a plain view seizure.¹⁵⁷ Part II discusses the competing approaches to plain view threshold seizures and the manner in which supporters of each view criticize the legal reasoning of the other.

II. THE CIRCUIT DISPUTE OVER PLAIN VIEW SEIZURES AT THE THRESHOLD

This part describes the conflict between the different interpretations of whether a person who opens his door in response to a police officer's knock surrenders his privacy interest such to permit a plain view seizure at the threshold. Part II.A explores the view that such seizures do not violate the Fourth Amendment because when a person opens his door to public view, he retains no expectations of privacy as to what may be seen from the other side of the threshold (the voluntary exposure view). Part II.B examines the position that such seizures violate the Fourth Amendment by infringing the constitutional protection for the sanctity of the home (the "sanctity" view).

A. *The Voluntary Exposure View*

This section discusses the position that plain view seizures at the threshold do not violate the Fourth Amendment because Fourth Amendment protection extends only to a person's legitimate expectations of privacy, the threshold is a public place, and an individual in a public place possesses no legitimate expectations of privacy. Part II.A.1 details the legal reasoning that forms the groundwork for the voluntary exposure view. Part II.A.2 considers the principal defects of the sanctity view, the competing approach to this line of plain view seizures at the threshold.

1. Voluntary Exposure Defines the Extent of Fourth Amendment Protection

This section explores the legal rationale of the voluntary exposure view. Part II.A.1.a discusses how proponents of this view identify the Court's decision in *Santana* as dispositive where plain view threshold seizures are concerned. Part II.A.1.b describes the elements of a valid plain view threshold seizure under the voluntary exposure view.

157. See *infra* Part II.A.

a. *Santana as Controlling Precedent*

The U.S. Courts of Appeals for the Second,¹⁵⁸ Fifth,¹⁵⁹ Ninth,¹⁶⁰ and Tenth¹⁶¹ Circuits have adopted the voluntary exposure view. These courts have identified *Santana* as the controlling precedent for plain view threshold seizures.¹⁶² Proponents of the voluntary exposure view apply a straightforward syllogism to this line of seizures. The subjective-objective test dictates that if a police activity does not infringe upon a legitimate expectation of privacy, the activity does not constitute a seizure under the Fourth Amendment.¹⁶³ *Santana* established that the threshold is a public place and that an individual in his doorway is exposed to public view and has no legitimate expectation of privacy.¹⁶⁴ Thus, so long as an individual

158. See *United States v. Gori*, 230 F.3d 44, 54 (2d Cir. 2000) (concluding that officers' seizure of individuals in a suspected drug den did not offend the Fourth Amendment where a suspect voluntarily opened the door to the dwelling).

159. See *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987) (finding no unreasonable seizure where federal agents arrested a suspected drug dealer in the doorway of his hotel room); *United States v. Mason*, 661 F.2d 45, 47 (5th Cir. 1981) (holding that a suspect in a counterfeit currency scheme had no protected expectation of privacy when he answered his door as federal agents approached, and thus his warrantless arrest in the doorway did not violate the Fourth Amendment).

160. See *United States v. Vaneaton*, 49 F.3d 1423, 1426 (9th Cir. 1995) (finding no Fourth Amendment violation where the defendant voluntarily exposed himself to a warrantless arrest by freely opening the door of his motel room); see also *United States v. Botero*, 589 F.2d 430 (9th Cir. 1978). In *Botero*, officers that had not obtained a warrant knocked on the defendant's door, and arrested the defendant when he opened it. *Id.* at 431-32. Citing *Santana*, the U.S. Court of Appeals for the Ninth Circuit held that the doorway Botero was standing in was a public place. *Id.* at 432. Therefore, the court found Botero's arrest proper under the Fourth Amendment. *Id.*; see also *United States v. Whitten*, 706 F.2d 1000 (9th Cir. 1983). In *Whitten*, the court affirmed the warrantless arrest of defendant John Gaiefsky in the doorway of a hotel room. *Id.* at 1015. The court cited *Santana* in noting that "[a] doorway . . . unlike the interior of a hotel room, is a public place." *Id.* Gaiefsky was suspected of operating illegal methamphetamine laboratories in Texas and California and selling the drug in several states. *Id.* at 1005.

161. See *McKinnon v. Carr*, 103 F.3d 934, 935 (10th Cir. 1996) (holding that a suspect's arrest while he stood in the doorway of his residence did not violate the Fourth Amendment, where the suspect had opened his door when the police knocked); see also *United States v. Herring*, 582 F.2d 535, 543 (10th Cir. 1978) (finding that a warrantless arrest made in the entrance of a hotel room was valid because it was based on probable cause and occurred in a public place).

162. The reasoning of *Santana* follows closely from the *Katz* decision, and *Santana* itself quotes *Katz*. See *United States v. Santana*, 427 U.S. 38, 42 (1976). The Second Circuit cited directly to *Santana* and *Katz* in its *Gori* opinion. See *Gori*, 230 F.3d at 51-52. The Fifth Circuit relied on *Santana* in deciding *Carrion* and *Mason*. See *Carrion*, 809 F.2d at 1128; *Mason*, 661 F.2d at 47. The Ninth Circuit cited *Santana* in upholding plain view threshold seizures in *Vaneaton*, *Botero*, and *Whitten*. See *Vaneaton*, 49 F.3d at 1426; *Whitten*, 706 F.2d at 1015; *Botero*, 589 F.2d at 432. The Tenth Circuit identified *Santana* as controlling precedent in its *McKinnon* and *Herring* opinions. See *McKinnon* 103 F.3d at 935-36; *Herring*, 582 F.2d at 543.

163. *Illinois v. Andreas*, 463 U.S. 765, 771 (1983).

164. See *supra* notes 103-05 and accompanying text.

is freely opening his door, he is voluntarily exposing himself to public view and warrantless arrest.¹⁶⁵

The subjective-objective test governs Fourth Amendment analysis and instructs that the Amendment's protection exists only in the presence of a legitimate expectation of privacy.¹⁶⁶ No legitimate expectation of privacy exists in anything exposed to the view of others.¹⁶⁷ Thus, "[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."¹⁶⁸ Once a house is opened to public view through an open doorway, there is no expectation of privacy as to what could be seen from the other side of the threshold.¹⁶⁹

In light of the subjective-objective test, the Court's decision in *Santana* dictates that an officer may seize an item in plain view where a person has opened the door in response to an officer's beckoning.¹⁷⁰ A warrantless arrest in a public place upon probable cause is not an unreasonable seizure.¹⁷¹ *Santana* established a "bright-line rule that a doorway is a public place" for the purposes of the Fourth Amendment.¹⁷² Thus, an

165. See *Vaneaton*, 49 F.3d at 1426 (noting that if the defendant freely opened the door of his motel room to the police, then he "voluntarily exposed himself to warrantless arrest" (quoting *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd*, 457 U.S. 537 (1982))); see also *Johnson*, 626 F.2d at 757 (finding the warrantless arrest of a defendant in his doorway violated the Fourth Amendment because officers used subterfuge to get the defendant to open his door).

166. *Gori*, 230 F.3d at 50 (noting that the "[t]hreshold question" was "whether the defendants exhibited a legitimate expectation of privacy when they were ordered out of their apartment") (citation and internal quotation omitted); see *supra* notes 78-80 and accompanying text.

167. *Gori*, 230 F.3d at 50 (noting that "[n]o reasonable expectation of privacy inheres in what is left 'visible to the naked eye'" (quoting *Florida v. Riley*, 488 U.S. 445, 450 (1989))).

168. *Id.* at 51 (quoting *United States v. Santana*, 427 U.S. 38, 42 (1976) (emphasis omitted)).

169. See *id.* at 53-54; *McKinnon v. Carr*, 103 F.3d 934, 935 (10th Cir. 1996) (noting that a person standing in his doorway is "in a place sufficiently public that he [has] no legitimate expectation of privacy"); *United States v. Peters*, 912 F.2d 208, 210 (8th Cir. 1990) (concluding that "[w]hen an individual voluntarily opens the door of his [dwelling] in response to a simple knock, the individual is knowingly exposing to the public anything that can be seen through that open door and thus is not afforded [F]ourth [A]mendment protection").

170. See, e.g., *United States v. Mason*, 661 F.2d 45, 47 (5th Cir. 1981) (noting that "*Santana* controls" where officers lacking a warrant arrest an individual at the door of his home). In *Mason*, Lois Ann Mitchell, the defendant's lover, attempted to purchase a ring with a counterfeit bill. *Id.* at 46. Mitchell was detained and ultimately informed federal agents that Mason had given her the bill and possessed more. *Id.* The agents, without a warrant, went to Mason's house. *Id.* at 47. Mason came to the front door as the officers approached the house, and was arrested at the doorway. *Id.* The court held that Mason's warrantless arrest in the doorway was valid under *Santana*. *Id.*

171. See *Santana*, 427 U.S. at 42; *supra* note 105.

172. *Honeycutt v. Gillespie*, Nos. 97-35287, 97-35288, 97-35630, 1998 WL 391470, at *1 (9th Cir. June 10, 1998); see *Gori*, 230 F.3d at 52 (noting that "[w]hile it may be true that under the common law of property the threshold of one's dwelling is 'private,' . . . it is nonetheless clear that under the [Court's] cases interpreting the Fourth Amendment [the threshold is] a 'public' place"). In *Gillespie*, the Ninth Circuit cited *Santana* and *Vaneaton* to conclude that an officer's reach through the doorway to grab the defendant's wrist for the purposes of arresting her did not violate the Fourth Amendment. *Gillespie*, 1998 WL

individual in his doorway is in a public place and has no legitimate expectation of privacy.¹⁷³ A seizure at the threshold therefore does not infringe upon a defendant's legitimate expectation of privacy nor offend the Fourth Amendment.¹⁷⁴

Commentators' discussions of the principles behind *Katz* and *Santana* substantiate the voluntary exposure view's use of those cases to justify its position. It has been emphasized that *Katz* found that although the home receives a special degree of constitutional protection, a person could not "use the Fourth Amendment as a shield when [he or she exposes] activities or objects to 'plain view.'"¹⁷⁵ By focusing on one's expectations of privacy, the *Katz* decision "undermined the theoretical basis for protecting the house . . . from invasions."¹⁷⁶ Because the Amendment protects people rather than places, anything an individual exposes to the public is not a subject of Fourth Amendment protection.¹⁷⁷ Thus, commentators argue that a plain view seizure at the doorway does not violate the Fourth Amendment so long as the arrest is accomplished before an officer crosses the threshold.¹⁷⁸

391470, at *1. The court noted that because the officer "did not use force or a ruse to get [the defendant] to open the door," the defendant voluntarily exposed herself to a valid warrantless arrest. *Id.*

173. See *Gori*, 230 F.3d at 52 (reinforcing that a person in her open doorway is "'as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house'" (quoting *Santana*, 427 U.S. at 42)); see also *United States v. Herring*, 582 F.2d 535, 543 (10th Cir. 1978) (noting that "it cannot be said" that a defendant arrested in the entrance to his motel room was arrested "in a private place"); *supra* notes 103-05 and accompanying text.

174. See *supra* note 105 and accompanying text.

175. See Quin M. Sorenson, Comment, *Losing a Plain View of Katz: The Loss of a Reasonable Expectation of Privacy Under the Readily Available Standard*, 107 Dick. L. Rev. 179, 184 (2002). Although "'a man's home is, for most purposes, a place where he expects privacy . . . objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited.'" *Id.* at 192 n.101 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). But see Campbell, *supra* note 79, at 198 (noting that "individual expectations of privacy are not expectations that specific contexts will be private, but expectations that certain conduct will not occur within those contexts").

176. Clancy, *supra* note 81, at 360. The Court's recognition that Fourth Amendment protection extends beyond physical entry onto private property or confiscation of personal property was "strikingly forward-looking." See Sklansky, *supra* note 79, at 153 (noting the foresight of the Court's decision in *Katz*). But see Clancy, *supra* note 81, at 360 (noting that "despite its lack of theoretical justification under *Katz*, the house has remained a core protected place").

177. See Maclin, *supra* note 79, at 61. But see Sklansky, *supra* note 79, at 160 (noting that although the Court has repeatedly reaffirmed that the Fourth Amendment protects people, not places, it "has simultaneously made clear" that the extent of the protection generally requires reference to a place). Professor Tracey Maclin notes that *Katz* rests on "simple, but persuasive logic." Maclin, *supra* note 79, at 71.

178. See Bryan Murray, Note, *After United States v. Vaneaton, Does Payton v. New York Prevent Police from Making Warrantless Routine Arrests Inside the Home?*, 26 Golden Gate U.L. Rev. 135, 142 (1996); *infra* notes 197-200.

b. *The Elements of a Valid Threshold Seizure*

Courts employing the voluntary exposure view identify multiple factors as elements of valid threshold seizures. These courts devote more attention to a person's reasonable expectation of privacy at the time of seizure than a person's specific position in relation to the threshold.¹⁷⁹ In addition, an exposure must be knowing and voluntary to be considered valid; an officer cannot coerce an individual into appearing at the doorway.¹⁸⁰ Finally, absent exigent circumstances, an officer must announce or conduct the seizure before he physically enters the suspect's dwelling in order for it to be upheld under the voluntary exposure view.¹⁸¹

In deciding plain view threshold cases, the voluntary exposure view places greater weight on an individual's reasonable expectation of privacy than an individual's specific location with regards to the doorway at the time of the seizure.¹⁸² Determining whether a plain view seizure violated the Fourth Amendment does not require placing emphasis on the individual's exact location relative to the doorway.¹⁸³ It is not appropriate to resolve a plain view seizure "on the basis of a suspect's placement within a visible scene."¹⁸⁴ A person who voluntarily opens the door to his dwelling "create[s] a vista from a public place or common area."¹⁸⁵ An individual located in a place opened to public view cannot maintain any legitimate expectation of privacy in that place and at that time.¹⁸⁶ Consequently, an individual standing at an open front door is located in a

179. See *infra* notes 182-87 and accompanying text.

180. See *infra* notes 187-94 and accompanying text.

181. See *infra* notes 195-99 and accompanying text.

182. See *United States v. Gori*, 230 F.3d 44, 52 (2d. Cir. 2000) (asserting that "[t]he facts critical to the analysis" are whether "the interior of [the residence] was exposed to public view" and if the door was voluntarily opened).

183. See *United States v. Vaneaton*, 49 F.3d 1423, 1426 (9th Cir. 1995) (noting that these cases are not just decided on where an individual was standing relative to the threshold, but on "whether he 'voluntarily exposed himself to warrantless arrest' by freely opening the door of his [dwelling]" (quoting *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff'd* 457 U.S. 537 (1982))).

184. *Gori*, 230 F.3d at 54. Although *Santana* established that the defendant was standing directly in her doorway, the Court's discussion of her position was descriptive, and "not as the formulation of a rule under the Fourth Amendment." *Id.*; see also *Honeycutt v. Gillespie*, Nos. 97-35287, 97-35288, 97-35630, 1998 WL 391470, at *1 (9th Cir. June 10, 1998) (noting that courts should "not engage in an individualized inquiry as to the amount of privacy or exposure at the particular doorway at issue" because "[s]uch an inquiry would be highly unworkable in practice").

185. *Gori*, 230 F.3d at 52; see *Vaneaton*, 49 F.3d at 1427 (noting that when the defendant saw officers approaching his hotel room through a window, "he voluntarily opened the door and exposed both himself and the immediate area" to the officers). The *Gori* court asserted that "a suspect exposed to public view through an open doorway, even at home, cannot claim a protected privacy interest." *Gori*, 230 F.3d at 52.

186. *Gori*, 230 F.3d at 54. The *Gori* court asserts that in a dwelling, no one exposed to public view possesses any expectation of privacy, regardless of "whether the [individual] is on the threshold, in the vestibule or at the far end of an exposed interior room." *Id.*

public place and subject to seizure “even if his feet were planted slightly back of the door frame.”¹⁸⁷

For a person to forfeit Fourth Amendment protection of the privacy interest in his home, he must knowingly and voluntarily expose the interior of his home to public view.¹⁸⁸ If a person was led to open his door by an officer’s act of coercion or subterfuge, then he did not voluntarily place himself in a public place and relinquish his expectation of privacy in the home.¹⁸⁹ Any use of force or threats may constitute “coercion,”¹⁹⁰ including a demand for an individual to open his door under color of

187. *United States v. Carrion*, 809 F.2d 1120, 1128 n.9 (5th Cir. 1987). Therefore an officer is permitted to seize an individual that is standing behind the threshold rather than directly on it. *See Vaneaton*, 49 F.3d at 1425 (finding valid warrantless arrest where officers stood outside the defendant’s hotel room and arrested him while he was standing “at the doorway but just inside the threshold.”); *supra* note 56. In *Vaneaton*, the police had probable cause to suspect the defendant of committing a series of thefts outside of Portland, Oregon. *See Vaneaton*, 49 F.3d at 1424. The defendant, a notorious burglar, had attracted police attention by repeatedly selling goods to various pawn shops in the Portland area. *Id.* The items sold included pieces of jewelry that had been stolen during recent unresolved burglaries in the area. *Id.* The police began to search area motels for evidence and discovered that Jack Palmer Vaneaton was staying as a guest at the first hotel they visited. *Id.* at 1425. The police were surprised to find that Vaneaton was a guest at the hotel; they believed he was already in police custody for a parole violation, and it was counterintuitive that he would return to the scene of the crime. *Id.* Without a warrant, the officers approached Vaneaton’s room and knocked on the door. *See id.* When the officers approached Vaneaton’s room they were wearing uniforms and had their guns in their holsters, and upon knocking, the officers did not make any verbal demands nor identify themselves. *Id.* Vaneaton saw the officers through a window, opened the door, and was arrested when he confirmed his identity to the police. *Id.* At the moment of arrest, Vaneaton was “standing at the doorway but just inside the threshold.” *Id.* The arresting officer was standing immediately outside the threshold, and entered the room after informing Vaneaton that he was under arrest. *Id.* The court relied on its own precedent and *Santana* in holding that the defendant voluntarily exposed himself in a public place by opening the door; consequently, his warrantless arrest did not offend the Fourth Amendment. *See id.* at 1423, 1426-27.

188. *Gori*, 230 F.3d at 51; *see also Gillespie*, 1998 WL 391470, at *1. In *Gillespie*, the Ninth Circuit asserted that if a person opened her front door in response to a knock, it is not necessary to find that she actually knew that a police officer was standing behind the door in order to conclude that she had voluntarily exposed herself to public view. *Id.* “Without checking to see who was behind the door before opening it, [the defendant] voluntarily exposed herself to whomever was standing behind the door.” *Id.*; *see also Vaneaton*, 49 F.3d at 1426 (concluding that the presumption of unreasonableness of a warrantless seizure in the home is overcome where a defendant voluntarily opened his door in response to an officer’s knock). *But see United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990) (declaring that “[w]e do not expect others to walk in to our homes, even if the door is open, without first requesting permission to enter”).

189. In *United States v. Johnson*, the Ninth Circuit held that a defendant’s warrantless arrest as he stood at an open doorway within his home violated the Fourth Amendment because the arresting officers misrepresented their identities in order to compel the defendant to open the door. *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), *aff’d*, 457 U.S. 537 (1982). In *Vaneaton*, the court remarked that “implicit in *Johnson* is approval of the warrantless arrest of a suspect who voluntarily opens the door of his dwelling in response to a noncoercive knock by the police.” *Vaneaton*, 49 F.3d at 1426.

190. *Vaneaton*, 49 F.3d at 1426.

authority.¹⁹¹ Courts have also found coercion to exist where officers have brandished weapons at the doorway.¹⁹²

Courts have found subterfuge where officers misrepresent their identities in order to compel an individual to open his door.¹⁹³ Yet in *Gori*, the Second Circuit found that officers had not employed subterfuge in causing a suspected drug dealer to open his apartment door where the officers intercepted a woman delivering food to the apartment, stood behind her as she knocked on the door, and ordered the suspects out of the apartment once the door was open.¹⁹⁴ The court reasoned that "[a] person who opens the door to a dwelling in response to a knock by an invitee opens to view whatever can be seen by a nosy neighbor or an observant police officer," and thus individuals inside the dwelling retain no legitimate expectation of privacy.¹⁹⁵ Similarly, in *United States v. Carrion*, the Fifth Circuit found no subterfuge where officers traveled to a hotel to arrest a suspected drug dealer and asked a housekeeping employee to knock on the suspect's door and check whether the room was occupied.¹⁹⁶

Courts that adopt the voluntary exposure view also assert that, absent exigent circumstances, an officer must announce or conduct the plain view seizure before stepping across the threshold; thus the seizure precedes an

191. *United States v. Conner*, 127 F.3d 663, 666 (8th Cir. 1997).

192. *See Johnson*, 626 F.2d at 757 (noting that a defendant's behavior was "hardly voluntary in light of the coercive effect of the weapons brandished by . . . agents"); *see also Vaneaton*, 49 F.3d at 1427 (finding an absence of coercion where uniformed officers did not "draw weapons" and "used no force or threats" when they knocked on defendant's hotel room door).

193. *See Johnson*, 626 F.2d at 757 (labeling agents' behavior as an act of "subterfuge" where they identified themselves by fictitious names in order to persuade the defendant to open the door to his dwelling); *see also McKinnon v. Carr*, 103 F.3d 934, 935-36 (10th Cir. 1996) (finding an absence of coercion and subterfuge where officers knocked on defendant's door, properly identified themselves, and neither committed nor threatened violence); *Vaneaton*, 49 F.3d at 1425, 1427 (finding that officers who knocked on the defendant's door and "said nothing" did not "resort to a subterfuge or a ruse").

194. *See Gori*, 230 F.3d at 47, 54. In *Gori*, two officers arrested Julio Gori outside a New York City apartment building for selling cocaine. *Id.* at 46-47. Gori insisted that someone in the apartment building had given him the cocaine, and the officers set up surveillance in the building lobby. *Id.* at 47. Soon after a delivery woman entered the lobby, carrying an order to the apartment identified as the drug den. *Id.* Although they had no warrant, the officers followed the woman to the apartment door and waited until the occupants opened the door in response to the woman's knock before ordering all of the occupants out into the hallway and arresting them. *Id.* At trial, one officer testified that he followed the woman to the door for two reasons: concern that (1) if he prevented the delivery, the apartment occupants "would be alerted to the officers' presence," and (2) if the delivery was made, the delivery woman might betray the officers' presence, "inadvertently or otherwise." *Id.* As the delivery woman knocked on the door, "[b]oth officers had their guns drawn but at their sides and pointed to the floor." *Id.*

195. *Id.* at 54. When the door was voluntarily opened, the apartment's occupants forfeited the heightened constitutional protection that might flow from an actual expectation of privacy in the dwelling. *Id.*

196. *United States v. Carrion*, 809 F.2d 1120, 1123 (5th Cir. 1987). "The employee knocked, saying, 'Housekeeping,' and [the suspect] opened the door," leading to his warrantless arrest. *Id.*

officer's entry into the dwelling.¹⁹⁷ An arrest is "announced" or "effected" once an officer informs a person that he is under arrest.¹⁹⁸ Proponents of the view acknowledge that the Fourth Amendment prohibits the converse, which would entail an officer making a warrantless entry into a dwelling and then conducting a seizure inside the dwelling.¹⁹⁹ Proponents thus argue that so long as the seizure precedes entry, there is no Fourth Amendment violation.²⁰⁰

2. The Principal Flaws of the Sanctity View

This section reviews the means by which proponents of the voluntary exposure view label the sanctity view as inconsistent with the Court's

197. See *Murray*, *supra* note 178, at 135-36 (noting that the Ninth Circuit would permit an officer to make a warrantless entry into a dwelling provided he did not employ coercion and that he "announce the arrest before stepping inside").

198. See *Vaneaton*, 49 F.3d at 1425, 1427 (concluding that an arrest was effected where an officer advised a suspect who had opened his front door that he was under arrest); see also *Carrion*, 809 F.2d at 1128 (finding that an arrest was effected where an officer drew his weapon and ordered a suspect who had opened his front door to raise his hands).

199. See *Anderson v. Long Beach City*, 81 F. App'x 703 (9th Cir. 2003). In *Anderson*, defendant Deborah Anderson opened her door in response to an officer's knock and immediately backed away from her doorway and into her residence. See *id.* at 705. The Ninth Circuit found an unreasonable seizure where the officers crossed the threshold and walked several feet inside Anderson's home before placing her under arrest. *Id.* at 706. The court reasoned that the officer's conduct violated the Court's decision in *Kirk* that a warrantless arrest within one's home violated the Fourth Amendment absent exigent circumstances. *Id.*; see also *United States v. Flowers*, 336 F.3d 1222, 1227 n.3 (10th Cir. 2003) (concluding that defendant Willie Earl Flowers suffered a Fourth Amendment violation where officers ordered him to open his door and then entered his house and arrested him in his "living room area"); *Loria v. Gorman*, 306 F.3d 1271, 1276-77 (2d Cir. 2002) (finding an officer violated the Fourth Amendment where he stood outside of an open side door to defendant Theodore E. Loria's house, and as Loria approached the door and attempted to close it, the officer stuck out his arm to prevent the door from closing, pushed the door back at Loria so that it struck him in the face, and then entering the foyer of Loria's house); *Honeycutt v. Gillespie*, Nos. 97-35287, 97-35288, 97-35630, 1998 WL 391470, at *1 (9th Cir. June 10, 1998) (finding no Fourth Amendment violation where an officer reached across the threshold to grab the defendant's wrist for purposes of effecting her arrest). In *United States v. Quampits*, the court concluded that a defendant living in a small trailer home who had opened his front door while he was still lying in bed did not waive his Fourth Amendment expectation of privacy. 411 F.3d 1046, 1048 (9th Cir. 2005). The court reasoned that although the defendant had voluntarily opened his door, he remained in his bed, which is "the sanctuary of the right to privacy." *Id.*

200. See *Vaneaton*, 49 F.3d at 1427 (noting that officers who did not enter a suspect's dwelling until they formally placed the suspect under arrest did not violate *Payton*); see also *United States v. Peters*, 912 F.2d 208, 210 (8th Cir. 1990). In *Peters*, the defendant voluntarily opened his hotel room door in response to an officer's knock. *Id.* at 210. Through the open door police were able to view crack cocaine, a razor blade, and a scale inside the room. *Id.* The court found no Fourth Amendment violation where police subsequently arrested the defendant and entered the apartment to seize the contraband. *Id.*; see also *Carrion*, 809 F.2d at 1128 (noting that the *Payton* rule prohibiting warrantless entry across the threshold is inapplicable where the "arrest was effected before the agents entered [the defendant's] hotel room").

precedent and thus fundamentally flawed.²⁰¹ The main critique of the sanctity view is two-pronged: (1) The sanctity view misinterprets the applicability of the *Santana* decision to the current controversy,²⁰² and (2) the sanctity view misapplies the *Payton/Riddick* decision as controlling precedent.²⁰³ Part II.A.2.a explains how proponents of the sanctity view misconstrue *Santana* in their Fourth Amendment analysis of threshold seizures. Part II.A.2.b clarifies why the sanctity view's use of *Payton/Riddick* as controlling precedent is misguided.

a. *Mistaken Interpretation of Santana*

Proponents of the voluntary exposure view argue that the sanctity view does not properly incorporate the *Santana* opinion into its analysis of reasonable expectations of privacy.²⁰⁴ The cornerstone of Fourth Amendment analysis is an inquiry into an individual's legitimate expectation of privacy,²⁰⁵ and in *Santana* the Court confirmed that the threshold was a public place in which a person retained no legitimate expectations of privacy.²⁰⁶ The sanctity view, however, disregards the holding of *Santana* as governing precedent by emphasizing that the Court upheld *Santana*'s arrest on the basis of exigent circumstances,²⁰⁷ rather than affirming the arrest because *Santana* was located in a "public place" when officers initially approached her.²⁰⁸ By focusing on exigent circumstances, the sanctity view neglects the fact that the Court "ruled that the warrantless arrest did not violate the heightened . . . protections of *Payton*, because a suspect exposed to public view through an open doorway, even at home, cannot claim a protected privacy interest that triggers the warrant requirement."²⁰⁹ Accordingly, the sanctity view fails to appreciate that a

201. The entire circuit dispute regarding plain view seizures at the threshold is based on tensions in a line of Supreme Court cases: *Katz*, *Santana*, and *Payton*. See *supra* Part I. Although in theory each side of the split finds justification for its approach in the Court's precedent, in practice each side is critical of the other for a flawed interpretation of the relevant cases. See, e.g., *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004) (criticizing the voluntary exposure view as being wrongfully inconsistent with the Court's precedent).

202. See *infra* notes 204-10 and accompanying text.

203. See *infra* notes 211-25 and accompanying text.

204. See *United States v. Gori*, 230 F.3d 44, 52 (2d Cir. 2000) (noting that "the principle that governs [the] facts [of plain view threshold seizures] is found in *United States v. Santana*, not *Payton*").

205. *Gori*, 230 F.3d at 50.

206. See *supra* notes 103-05 and accompanying text.

207. See *supra* notes 115-17 and accompanying text.

208. See *United States v. Vaneaton*, 49 F.3d 1423, 1429 n.5 (9th Cir. 1995) (Tashima, J., dissenting); see also *United States v. McCraw*, 920 F.2d 224, 229 (4th Cir. 1990). The sanctity view also distinguishes *Santana* by the fact that the defendant in that case was standing on her threshold and exposed to public view when the agents approached her house. *Id.* In contrast, the cases at issue involve situations where defendants came to the doorway in response to a knock on the door. *Id.*

209. *Gori*, 230 F.3d at 52. Consequently, the sanctity view bypasses analyzing these cases through the *Santana* lens, which confirms that an individual who opens his door is exposed to public view and has no reasonable expectation of privacy. See *id.* at 52-53.

person who opens his door in response to an officer's knock is in a public place and thus surrenders his privacy interest such that an officer may conduct a plain view seizure.²¹⁰

b. *A Mistaken Application of Payton/Riddick*

Rather than analyze threshold seizures through the appropriate voluntary exposure lens of *Santana*, proponents of the voluntary exposure view believe that the sanctity view wrongfully identifies *Payton/Riddick* as the controlling authority.²¹¹ The *Payton/Riddick* rule is directed primarily at warrantless physical intrusion into the home, which is not implicated by the current controversy.²¹² Moreover, the threshold seizure line of cases is factually distinguishable from *Payton/Riddick*, solidifying that it is inappropriate to designate *Payton/Riddick* as the controlling precedent.²¹³

Although the sanctity view regards *Payton/Riddick* as governing precedent, *Payton/Riddick* was not designed to decide scenarios involving an individual who voluntarily opens the door to his dwelling and exposes himself to public view.²¹⁴ The purpose of *Payton/Riddick* was “to protect the physical integrity of the home.”²¹⁵ Knocking on a door to contact a person inside is an everyday, “common event,” and is “hardly a hallmark of a police state.”²¹⁶ Furthermore, the voluntary exposure view does not compromise *Payton/Riddick*'s declaration that the Fourth Amendment has

210. See *id.*

211. See, e.g., *id.* at 51; see also *United States v. Mason*, 661 F.2d 45, 47 (5th Cir. 1981) (noting that under these circumstances, “Santana controls”). But see *Murray*, *supra* note 178, at 135-36 (arguing that in deciding *Vaneaton*, “the Ninth Circuit ignored the firm line drawn in *Payton*”); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (“The security of one’s privacy against arbitrary intrusion by the police . . . is basic to a free society . . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned.” (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949))).

212. *Gori*, 230 F.3d at 52. Proponents of the voluntary exposure view assert that the *Payton/Riddick* rule would govern the case where an officer makes an unwarranted physical entry into a dwelling and then attempts to conduct a seizure. *Id.* at 51. However, *Payton/Riddick* is inapplicable where an arrest is effected before an officer makes an unwarranted physical entry into a dwelling. See *United States v. Carrion*, 809 F.2d 1120, 1128 (5th Cir. 1987); *supra* notes 197-200 and accompanying text.

213. *Vaneaton*, 49 F.3d at 1427.

214. In *Vaneaton*, the Ninth Circuit noted that this type of scenario “does not materially resemble the kinds of ‘invasions’ or ‘intrusions’ against which *Payton* seeks to guard.” *Id.* at 1427; see also *United States v. Whitten*, 706 F.2d 1000, 1015-1017 (9th Cir. 1983) (noting that the arrest of a person standing in his doorway did not violate *Payton/Riddick* because a “doorway . . . unlike the interior of a hotel room, is a public place”).

215. *Gori*, 230 F.3d at 51 (quoting *New York v. Harris*, 495 U.S. 14, 17 (1990)). To support its assertion, the Second Circuit quotes from *Payton/Riddick*: “[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *Id.* (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

216. *Vaneaton*, 49 F.3d at 1427. But see *id.* at 1430 (Tashima, J., dissenting) (noting that the voluntary exposure view will discourage citizens from answering their doors when police knock from fear of liability).

drawn a clear line at the threshold of a dwelling.²¹⁷ *Payton/Riddick* neither holds nor suggests "that the home is a sanctuary from reasonable police investigation."²¹⁸ Anything that a person "knowingly exposes to the public, *even in his own house or office*," does not qualify for Fourth Amendment protection.²¹⁹

On this view, *Payton/Riddick* can also be factually distinguished from the cases involved in the current circuit dispute.²²⁰ In both *Payton* and *Riddick*, warrantless entries preceded the defendants' arrests.²²¹ In the cases at issue, officers have announced or effected the seizure before physically entering the home.²²² *Payton/Riddick* thus cannot be the controlling precedent.²²³ Proponents of the voluntary exposure view recognize that a warrantless entry across the threshold followed by a seizure within the home violates the Fourth Amendment.²²⁴ So long as the seizure precedes the entry, there is no Fourth Amendment violation.²²⁵

B. The Sanctity View

This section explores the position that a person who opens his door in response to a police officer's knock does not surrender his privacy interest such that an officer may conduct a plain view seizure at the threshold. Part II.B.1 details the legal reasoning which forms the groundwork for the

217. *Gori*, 230 F.3d at 51. Courts that have adopted the voluntary exposure view acknowledge that *Payton/Riddick* prevents an officer's warrantless entry into a person's dwelling for the purposes of effecting a plain view seizure. See *supra* notes 197-200 and accompanying text. These courts only recognize an officer's ability to make a warrantless seizure at the doorway where the announcement of the seizure precedes entry across the threshold. See *supra* note 200 and accompanying text.

218. *Gori*, 230 F.3d at 51. Rather, the Fourth Amendment merely protects the right to be free from "unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). In *Gori*, the Second Circuit quotes the Court in noting that "[t]he Fourth Amendment protects legitimate expectations of privacy rather than simply places." *Gori*, 230 F.3d at 50 (quoting *Illinois v. Andreas*, 463 U.S. 765, 771 (1983)).

219. *Gori*, 230 F.3d at 51 (quoting *United States v. Santana*, 427 U.S. 38, 42 (1976)).

220. See *Vaneaton*, 49 F.3d at 1426.

221. See *id.* (noting that "in both [*Payton* and *Riddick*], the entries preceded the arrests"); *supra* text accompanying notes 134-37, 139-41, 197-200.

222. See, e.g., *McKinnon v. Carr*, 103 F.3d 934, 935-36 (10th Cir. 1996) (finding no Fourth Amendment violation where officers stood outside the threshold and arrested a person standing inside the doorway); see also *supra* notes 197-200 and accompanying text.

223. See *Gori*, 230 F.3d at 52 ("[T]he principle that governs [these] facts is found in *United States v. Santana*, not *Payton*."); *McKinnon*, 103 F.3d at 936 ("*Payton* contains language that describes the Fourth Amendment as drawing a firm line at the entrance to one's house, but, on its facts, it has no application to a doorway arrest made in [these] circumstances . . .").

224. See, e.g., *United States v. Flowers*, 336 F.3d 1222, 1227 (10th Cir. 2003) ("As *Payton* and *Kirk* make plain, 'police officers need either a warrant or probable cause *plus exigent circumstances* in order to make a lawful entry into a home.'" (quoting *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002))); see also *supra* note 199 and accompanying text.

225. See *Vaneaton*, 49 F.3d at 1427 (finding that a warrantless doorway arrest did not violate the Fourth Amendment in part because "[t]he police did not enter the house until they formally placed [the defendant] under arrest").

sanctity view. Part II.B.2 considers the principal defects of the voluntary exposure view, the competing approach to this line of plain view seizures.

1. The Constitutional Protection for Individuals Within the Home Defines the Extent of Fourth Amendment Protection

This section examines the legal rationale of the sanctity view. Part II.B.1.a discusses how proponents of the view assert that the principles behind the *Payton/Riddick* decision govern plain view threshold seizures. Part II.B.1.b outlines the policy considerations that proponents cite in advocating judicial adoption of the sanctity view.

a. *Payton/Riddick as Controlling Precedent*

The Fourth,²²⁶ Seventh,²²⁷ and Eighth²²⁸ Circuits have adopted the sanctity view.²²⁹ These courts find that the principles underpinning *Payton/Riddick* preclude officers from conducting plain view seizures at the threshold.²³⁰ The heightened constitutional protection provided for individuals within the home is not surrendered simply by answering a knock at the door.²³¹ Nor does an individual forfeit all of his privacy rights merely by placing himself in public view.²³² The Court has used unambiguous language in confirming that the threshold of a dwelling

226. See *United States v. McCraw*, 920 F.2d 224, 229 (4th Cir. 1990) (recognizing that a person who responds to a knock maintains an expectation of privacy).

227. See *Sparing v. Vill. of Olympia Fields*, 266 F.3d 684, 690 (7th Cir. 2001) (recognizing that “a person does not surrender reasonable expectations of privacy in the home by simply answering a knock at the door”).

228. See *Duncan v. Storie*, 869 F.2d 1100, 1103 (8th Cir. 1989) (asserting that an individual who opened his door but remained in his dwelling would not be vulnerable to a seizure).

229. Dissenting opinions in *Gori* and *Vaneaton* are also representative of the sanctity view. See *United States v. Gori*, 230 F.3d 44, 57 (2d Cir. 2000) (Sotomayor, J., dissenting); *Vaneaton*, 49 F.3d at 1427 (Tashima, J., dissenting). Proponents of the sanctity view assert that a person who opens his door in response to a police officer’s knock retains his privacy interest such that an officer may not conduct a plain view seizure without a warrant.

230. *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004) (noting that the sanctity view adheres to the principles that underlie *Payton/Riddick*); see also *Gori*, 230 F.3d at 57-58 (Sotomayor, J., dissenting) (noting that a plain view seizure at the threshold “trigger[s] the heightened protection offered by *Payton* against warrantless entry into the home”); *Vaneaton*, 49 F.3d at 1427 (Tashima, J., dissenting) (asserting that permitting a plain view seizure at the threshold yields a result that is “flatly contrary to *Payton v. New York*”).

231. See *Sparing*, 266 F.3d at 690. In *Sparing*, an officer had probable cause to arrest Sparing but did not have a warrant. *Id.* at 687. After the officer knocked on defendant Eugene Sparing’s door, Sparing opened his front door but remained standing behind his closed screen door as he identified himself. *Id.* The officer advised Sparing that he was under arrest, and Sparing asked if the officer had a warrant. *Id.* The officer responded that he did not have a warrant but did have probable cause. *Id.* When Sparing turned and walked away from the screen door, the officer opened the screen door, took several steps inside the residence, and ultimately completed the arrest. *Id.* The Seventh Circuit held that the officer’s act of crossing the threshold was a clear violation of *Payton* and the heightened constitutional protection for the home. *Id.* at 690.

232. *Gori*, 230 F.3d at 58 (Sotomayor, J., dissenting).

cannot be crossed absent exigent circumstances.²³³ Furthermore, guarding the sanctity of the home from threshold seizures defends the principle that, absent exigent circumstances, any entry into the home requires a warrant.²³⁴

It is well established that "there is no place where a person's expectation of privacy is greater than in his own home."²³⁵ This expectation of privacy is sufficiently strong that a person does not abandon it by opening his door to answer a knock.²³⁶ Although consent is an exception to the warrant requirement, answering a knock at the door is not commensurate with agreeing to allow the person who knocked to enter.²³⁷ Society recognizes "a person's right to choose to close his door on and exclude people he does not want within his home."²³⁸ When a person opens his door, he has not relinquished his right to close the door on an unwanted visitor and thus "has not forfeited his privacy interest in the home."²³⁹

233. See *United States v. Berkowitz*, 927 F.2d 1376, 1385 (7th Cir. 1991).

234. *Hadley*, 368 F.3d at 750.

235. *Berkowitz*, 927 F.2d at 1387; see also *Gori*, 230 F.3d at 58 (Sotomayor, J., dissenting) (noting that "[t]he Supreme Court has recently re-emphasized that 'the importance of the right to residential privacy is at the core of the Fourth Amendment'" (quoting *Wilson v. Layne*, 526 U.S. 603, 612 (1999))).

236. *Berkowitz*, 927 F.2d at 1387; see also *Gori*, 230 F.3d at 59 (Sotomayor, J., dissenting) (asserting that an individual who voluntarily opens his door still possesses "an expectation of privacy against government entry into [his] home and seizure[] of [his] person[]"); *United States v. Vaneaton*, 49 F.3d 1423, 1427 (9th Cir. 1995) (Tashima, J., dissenting) (noting that a citizen inside his home does not forfeit expectation of privacy "merely because that citizen opens the door in response to [an officer's] knock"). An individual may "voluntarily expose oneself to arrest only by stepping *outside* of one's home not by remaining within it." *Id.* at 1429.

237. *Hadley*, 368 F.3d at 750 (noting that where an individual is in his dwelling and tells someone else to "answer the door," he does not necessarily mean that he consents to let the person at the door enter his dwelling); see also *Berkowitz*, 927 F.2d at 1387 (noting that "[a]nswering a knock at the door is not an invitation to come in the house"); *United States v. McCraw*, 920 F.2d 224, 229 (4th Cir. 1990) (finding that, where an officer was knocking on the defendant's door, the defendant did not consent to the officer's entry when he opened his door halfway in an attempt to determine who was knocking); *United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990) (noting that an individual does not expect another person to walk into his home, even if the door is open, without first requesting permission to enter); *Duncan v. Storie*, 869 F.2d 1100, 1103 (8th Cir. 1989) (concluding that the defendant did not consent to the officers' entry where the defendant had answered the door, refused a request to come outside, and immediately stepped farther back into his house and attempted to close the door).

238. *Berkowitz*, 927 F.2d at 1387. In *Berkowitz*, the court noted that the "right to exclude is one of the most—if not the most—important components of a person's privacy expectation in his home." *Id.* With a plain view threshold seizure, an officer has not even given the defendant an opportunity to exercise the right to exclude. *Id.* The Court has recognized that "[t]he right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead v. United States*, 277 U.S. 438, 478 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

239. *Berkowitz*, 927 F.2d at 1387. In *State v. Santiago*, the Supreme Court of Connecticut discussed an individual's expectations of privacy when he answers a knock at his door:

We answer our doorbells under a variety of circumstances, ranging from the situation where we expect a visit by family or friends, to the unexpected and

In addition, proponents of the sanctity view recognize that the Fourth Amendment has drawn “a firm line at the entrance to the house.”²⁴⁰ That threshold may not reasonably be crossed without a warrant unless exigent circumstances are present.²⁴¹ The line has not been drawn “one or two feet into the home;” rather, it resides directly at the home’s entrance.²⁴² Any

unwanted attempted intrusion of the door-to-door solicitor. We open the door in a variety of ways and to a variety of degrees, ranging from the opening wide in order to welcome the visiting friend, to the wary and narrow opening in order to ward off politely but firmly the unwelcome stranger. When we open the door, we may stand just inside the threshold or may place ourselves squarely thereon. In all of these situations, however, we do not abandon our right to close the door and exclude the person at the door simply because we have opened it and are standing there briefly. By opening the door in response to a ring or knock, and standing there briefly so that our feet are on the threshold rather than just inside it, we do not abandon our heightened expectation of privacy in our homes and place ourselves in a public place.

619 A.2d 1132, 1141-42 (Conn. 1993).

240. *Gori*, 230 F.3d at 58 (Sotomayor, J., dissenting) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)) (emphasis omitted); see *United States v. Vaneaton*, 49 F.3d 1423, 1427 (9th Cir. 1995) (Tashima, J., dissenting) (recognizing that “[i]n *Payton*, the Court drew a bright line at the physical entrance to the home”).

241. See *Duncan*, 869 F.2d at 1102. Thus, entering a person’s home without a warrant to conduct a seizure, where no exigent circumstances exist, violates the clear command that the Court made in *Payton/Riddick*. *Berkowitz*, 927 F.2d at 1386-87. The Court implicitly held that an officer can cross the threshold to effect a seizure when his entry into the home was consensual. *Vaneaton*, 49 F.3d at 1428 n.1 (Tashima, J., dissenting). The Seventh Circuit has set the standard for when an officer can cross the threshold to conduct a seizure as acquiescence. *Sparing v. Vill. of Olympia Fields*, 266 F.3d 684, 690 (7th Cir. 2001). Acquiescence exists where an individual recognizes and submits to the authority that the officer asserts from outside the home. See *Berkowitz*, 927 F.2d at 1387; see also *Gori*, 230 F.3d at 60 (Sotomayor, J., dissenting) (acknowledging the Seventh Circuit position as permitting an officer to cross the threshold where an individual has recognized and submitted to that officer’s authority). “Acquiescence” is a slightly less stringent standard than “consent.” See *Sparing*, 266 F.3d at 690.

242. *Berkowitz*, 927 F.2d at 1388. But see *Sparing*, 266 F.3d at 689-90 (noting that “[t]he lines are not so clear” exactly where the “outside” ends and where the “entrance to the home” begins). In *Sparing*, the Seventh Circuit asserted that where an individual voluntarily stands “fractions of an inch” behind an open doorway, he stands in a “public place” for purposes of the Fourth Amendment. *Id.* at 690. The court stated that an individual standing in that position is exposed to public view, speech, hearing, and touch as if he was standing outside in a public place. *Id.* But that does not change the fact that for purposes of the subjective-objective test, an individual standing just behind the threshold has not surrendered the reasonable expectation of privacy in the home. *Id.* In contrast to the Seventh Circuit, the dissenting opinions in *Gori* and *Vaneaton* do not regard any area in the home, including the space slightly behind the threshold, as a “public place.” See *Gori*, 230 F.3d at 61 (Sotomayor, J., dissenting) (noting that the heightened constitutional protection provided for individuals within the home applies to anyone located within the boundaries of a dwelling); *Vaneaton*, 49 F.3d at 1427 (Tashima, J., dissenting) (arguing that the Fourth Amendment protects an individual who is inside his home from being subject to a warrantless seizure). In her dissent in *Gori*, Judge Sonia Sotomayor quoted a New Hampshire Supreme Court decision that the Second Circuit had agreed with in deciding *United States v. Crespo*, 834 F.2d 267, 270 (2d Cir. 1987): “[I]n the face of the [*Payton*] Court’s holding that the [F]ourth [A]mendment establishes a zone of privacy bounded by the *unambiguous physical dimensions of an individual’s home*, it becomes very difficult to contend that *an individual*

violation of this "bright line" rule constitutes a Fourth Amendment violation.²⁴³ Thus, even where an individual has opened his door and stands just behind the threshold, the Fourth Amendment guarantees that no officer will invade the sanctity of his home by crossing the threshold.²⁴⁴

Preventing plain view seizures at the threshold thus also protects the principle that a warrant is required for entry into the home.²⁴⁵ Voluntarily exposing oneself to the view of a person standing outside the home does not directly translate into making oneself "available to be physically touched or otherwise seized."²⁴⁶ plain view by itself is "never enough to justify [a] warrantless seizure."²⁴⁷ A plain view observation may help establish the probable cause necessary to obtain a warrant²⁴⁸ or permit an officer to seize

located entirely within that boundary . . . is in a public place." *Gori*, 230 F.3d at 61 (Sotomayor, J., dissenting) (quoting *State v. Morse*, 480 A.2d 183, 186 (N.H. 1984)); *see also* *United States v. Whitten*, 706 F.2d 1000, 1015 (9th Cir. 1983) (noting that "[a] doorway . . . unlike the interior of a hotel room, is a public place"). *Crespo* involved the warrantless arrest of an individual that began at the open door to his home. *See Crespo*, 834 F.2d at 269. Although the individual's position relative to the threshold of his home was unknown, the Second Circuit decided to apply the warrant and probable cause requirements set forth in *Payton/Riddick* in reaching its holding. *See id.* at 270-71. The court ultimately upheld the individual's arrest under exigent circumstances. *See id.* at 271.

243. *See Vaneaton*, 49 F.3d at 1430 (Tashima, J., dissenting).

244. *See Gori*, 230 F.3d at 59 (Sotomayor, J., dissenting).

245. *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004). In *Payton/Riddick*, the Court set forth warrant and probable cause requirements to protect the home against unreasonable searches and seizures. *Gori*, 230 F.3d at 57 (Sotomayor, J., dissenting); *see supra* notes 130-32 and accompanying text. In *Hadley*, a police detective ordered officers to bring the defendant in for questioning after receiving multiple reports that the defendant had had sex with minors. *Hadley*, 368 F.3d at 748. When Sean Hadley saw the police approach the house, he went to his bedroom and instructed his sister to answer the door and tell the police that he was not home. *Id.* at 748-49. Hadley's sister opened the door and the police entered the house. *Id.* at 749. Once inside the house, officers saw Hadley through the open door to his bedroom, went inside, and arrested him. *Id.* The Seventh Circuit found that the officers violated Hadley's Fourth Amendment rights under the Court's decision in *Payton/Riddick*. *Id.* at 750. The court asserted that "when the front door swings open in response to the knock of the police, the police [cannot], by virtue of the 'plain view' doctrine, seize anything they see through the open doorway." *Id.* In explaining its reasoning, the court explicitly rejected the voluntary exposure view, and specifically mentioned decisions of the Second and Ninth Circuits as representative of that view. *Id.*

246. *See Gori*, 230 F.3d at 58 (Sotomayor, J., dissenting); *see also Hadley*, 368 F.3d at 750 (noting that the voluntary exposure view wrongfully "equate[s] knowledge (what the officer obtains from the plain view) with a right to enter, and by doing so permit[s] the rule of *Payton* to be evaded"). When the door to a dwelling is open, the occupants have no expectation of privacy in what an individual standing outside the door may see, smell, or hear from his position. *Gori*, 230 F.3d at 59 (Sotomayor, J., dissenting). Such an expectation of privacy (or lack thereof) is, however, "distinct and separate" from a person's reasonable expectation that "no one would invade the sanctity of [his] home without a warrant or warrant exception and probable cause." *Id.*

247. *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971). In *Katz*, the Court noted that what an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. 347, 351-52 (1967); *see supra* note 90 and accompanying text.

248. *Hadley*, 368 F.3d at 750 ("If the officer knocks, sees something inside when the door is opened, and then turns on his heel and uses the information he's just obtained to get a warrant, no one's rights have been violated."); *see also Gori* 230 F.3d at 59 (Sotomayor, J.,

an item pursuant to a valid warrant exception.²⁴⁹ Such observation, however, “does not dispose of the probable cause and warrant requirements for the entry into the home.”²⁵⁰

Legal scholars’ discussions of the principles underpinning *Payton/Riddick* validate the sanctity view’s use of the decision to justify its treatment of plain view threshold seizures. Commentators identify the home’s status as a “sanctuary,” and note that it has “retained [its] special status despite the contentions that people, not places” receive Fourth Amendment protection.²⁵¹ Personal security, freedom, and privacy interests “are strongly reflected in the psychology of [the] home.”²⁵² Accordingly, commentators assert that the sanctity of the home should protect a person who answers his door when the police knock.²⁵³

b. Policy Interests Related to the Sanctity View

In addition to the legal rationale of the sanctity view, proponents note that public policy concerns warrant judicial adoption of the position.²⁵⁴ Principally, preventing plain view threshold seizures protects the potency of the warrant requirement.²⁵⁵ Permitting a warrantless seizure at the doorway would “undermine” the warrant requirement “for no good reason.”²⁵⁶ If an officer goes to a person’s house to make an arrest, and has reason to believe that he may have to enter the home to carry out the arrest, he should obtain a warrant.²⁵⁷ Obtaining a warrant avoids potential problems that may arise if a suspect refuses to open his door or if another individual opens the suspect’s door and the suspect refuses to come to the door.²⁵⁸ In such

dissenting) (confirming that plain view observations “may permissibly form the basis for a warrant authorizing officers to enter the home to seize evidence or arrest suspects”).

249. *Gori*, 230 F.3d at 59 (Sotomayor, J., dissenting); see *infra* notes 261-64 and accompanying text.

250. *Gori*, 230 F.3d at 59 (Sotomayor, J., dissenting).

251. See Clancy, *supra* note 81, at 345. Special legal protection for the home is justified because of the “personal security, freedom and privacy” issues that are at stake. See Barros, *supra* note 125 (manuscript at 4).

252. Barros, *supra* note 125 (manuscript at 4).

253. See, e.g., Murray, *supra* note 178, at 149.

254. See *infra* Part III.

255. See *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004); *supra* Part I.A.1.a.

256. See *Hadley*, 368 F.3d at 750. Undermining the warrant requirement is “inconsistent with the spirit of *Payton v. New York*.” *Id.*

257. *United States v. Berkowitz*, 927 F.2d 1376, 1388 (7th Cir. 1991). Where no exigent circumstances exist, officers have “no reason . . . not to get a warrant, and plenty of reason to obtain a warrant.” *Id.*; see *Sparing v. Vill. of Olympia Fields*, 266 F.3d 684, 691 (7th Cir. 2001) (noting that “[w]hen time permits, officers who elect not to obtain a warrant unnecessarily risk the type of constitutional violation [that is] involved in [these] case[s]”). *Id.* If a magistrate is not nearby, a telephonic search warrant can usually be obtained. Fed. R. Crim. P. 41(d)(3)(A); see also *Steagald v. United States*, 451 U.S. 204, 222 (1981) (recognizing that an officer can obtain a search warrant via telephone if necessary).

258. *Berkowitz*, 927 F.2d at 1388; see also Jack E. Call, *The Constitutionality of Warrantless Doorway Arrests*, 19 Miss. C. L. Rev. 333, 340 (1999) (discussing some of the potential problems faced by officers who go to a suspect’s dwelling without a warrant intending to make an arrest). Obtaining a warrant also saves time at trial and on appeal for

cases, the police may be forced to return and obtain a warrant anyway, and their initial attempt to arrest the suspect effectively warns the suspect of looming liability.²⁵⁹ By alerting the suspect of an impending arrest, the officers risk the possibility that the suspect will attempt to destroy evidence or flee the area.²⁶⁰

Along these lines, the presence of the exigent circumstances doctrine ensures that the sanctity view does not "hamstring" efficient law enforcement or compromise public safety.²⁶¹ The law permits an officer to consider any information he may gather from plain view²⁶² to determine if exigent circumstances exist.²⁶³ If an officer standing outside the threshold sees contraband, evidence of a crime, or a suspected criminal, and reasonably fears there is a risk that before he can obtain a warrant the contraband or evidence will be destroyed or the suspect will flee, exigent circumstances permit the officer to secure the evidence or the person.²⁶⁴ Because the exigent circumstances exception remains available to officers, maintaining the potency of the warrant requirement does not jeopardize law enforcement efficiency or the public safety.²⁶⁵

2. The Principal Defects of the Voluntary Exposure View

This section outlines the manner in which proponents of the sanctity view characterize the voluntary exposure view as unsound in light of the Court's precedent and relevant policy considerations.²⁶⁶ Proponents of the sanctity view argue that the voluntary exposure view incorrectly identifies the controlling precedent.²⁶⁷ Sanctity view followers believe that proponents of

the purposes of litigating the legality of seizures at the threshold. *Berkowitz*, 927 F.2d at 1388.

259. *Berkowitz*, 927 F.2d at 1388.

260. *Id.*

261. *Id.*; see *supra* note 53.

262. See *supra* Part I.A.1.b.

263. See *United States v. Gori*, 230 F.3d 44, 59 (2d Cir. 2000) (Sotomayor, J., dissenting).

264. *Hadley v. Williams*, 368 F.3d 747, 750 (7th Cir. 2004); see, e.g., *United States v. Cephas*, 254 F.3d 488 (4th Cir. 2001) (holding an officer's warrantless entry into the defendant's apartment justified by exigent circumstances where the defendant voluntarily opened his door in response to the officer's knock and the officer smelled marijuana and saw a fourteen year-old girl inside).

265. *Berkowitz*, 927 F.2d at 1388. Although in theory it may appear that the exigent circumstances doctrine could swallow the sanctity view, in practice that is not the case. The doctrine does permit officers to use their discretion in shaping their conduct. See *Hadley*, 368 F.3d at 750. To allow atypical police activity, however, the circumstances must be characteristic of an "emergency or dangerous situation." *Welsh v. Wisconsin*, 466 U.S. 740, 742 (1984) (quoting *Payton v. New York*, 445 U.S. 573, 583 (1980)). The current controversy contains several examples of seizures that occurred under conditions that did not require such immediacy. See, e.g., *Hadley*, 368 F.3d at 750 (holding the officers' doorway arrest of a suspect invalid where the suspect was unarmed and posed no immediate flight risk). In such cases, the exigent circumstances doctrine provides no shelter for offending officers. See *id.*

266. See *supra* note 201.

267. See, e.g., *Hadley*, 368 F.3d at 750 (criticizing the voluntary exposure view as inconsistent with the Court's precedent).

the voluntary exposure view wrongfully classify *Santana* as controlling precedent²⁶⁸ by confusing dicta in the case with its actual holding.²⁶⁹ Consequently, the voluntary exposure view's analysis under the subjective-objective test is incorrect.²⁷⁰ Advocates of this view also wrongfully manufacture a new exception to the warrant requirement.²⁷¹ Finally, the voluntary exposure view adversely affects public policy because it makes law enforcement more difficult and it erodes the privacy interests protected by the Fourth Amendment.²⁷²

The voluntary exposure view identifies the Court's decision in *Santana* as controlling precedent for plain view seizures at the threshold,²⁷³ but it mistakes dicta in *Santana* for the case's actual holding.²⁷⁴ In *Santana*, the Court held that the officers' entry into Santana's home to complete her warrantless arrest was justified under the exigent circumstances exception to the warrant requirement.²⁷⁵ Although the Court noted that a dwelling's threshold is a "public place,"²⁷⁶ the Court "did not say that no warrant was required because Santana's open door vitiated her expectation of privacy in her home."²⁷⁷ The voluntary exposure view incorrectly focuses on the Court's discussion of the doorway as a public place and wrongfully concludes that *Santana* is dispositive of a person's expectations of privacy while answering a knock at his door.²⁷⁸ Scholars assert that in terms of an

268. See *supra* notes 170-74 and accompanying text.

269. See *United States v. Gori*, 230 F.3d 44, 57 (2d Cir. 2000) (Sotomayor, J., dissenting).

270. See *Berkowitz*, 927 F.2d at 1387-88.

271. See *United States v. Vaneaton*, 49 F.3d 1423, 1428 (9th Cir. 1995) (Tashima, J., dissenting).

272. See *id.* at 1430.

273. See *Berkowitz*, 927 F.2d at 1386.

274. See *Gori*, 230 F.3d at 60 (Sotomayor, J., dissenting). The voluntary exposure view's "reading of *Santana* is not only incorrect but is irreconcilable with decades of Supreme Court Fourth Amendment jurisprudence." *Id.* at 57 (recognizing that the principles of *Payton* "apply" to "plain view" threshold seizures); *Vaneaton*, 49 F.3d at 1427 (Tashima, J., dissenting) (identifying *Payton* as the controlling precedent for plain view threshold seizures).

275. The Court found that Santana's case was one of true "hot pursuit." See *Gori*, 230 F.3d at 60 (Sotomayor, J., dissenting); *Berkowitz*, 927 F.2d at 1388 (noting that "[m]oreover, the entry in *Santana* was justified by hot pursuit"); *United States v. McCraw*, 920 F.2d 224, 229 (4th Cir. 1990) (noting that the Court identified *Santana* as "involving a true 'hot pursuit'" and "went on to hold that the police were justified in pursuing [Santana] into the vestibule of her home without a warrant because they had a realistic expectation that any delay would result in the destruction of evidence"); *supra* notes 115-17 and accompanying text.

276. See *supra* Part I.A.3.

277. *Gori*, 230 F.3d at 60 (Sotomayor, J., dissenting).

278. See *id.* at 57 (majority opinion). This view "purports to base [an] endorsement of police intrusion into the home on the Supreme Court's decision in . . . *Santana*." *Id.* (Sotomayor, J., dissenting). Because proponents of the sanctity view believe that the voluntary exposure view incorrectly reads *Santana*, they find that the voluntary exposure view thus neglects to appreciate that *Payton/Riddick*, not *Santana*, is the governing precedent. See *id.* at 57-58; see also *Sparing v. Vill. of Olympia Fields*, 266 F.3d 684, 690 (7th Cir. 2001) (noting that the court declined to view *Santana* as controlling precedent to a plain view threshold seizure).

individual's reasonable expectations of privacy, "there is a significant difference between a person who for no reason voluntarily decides to stand in his open doorway, and a person who merely answers a knock on his door."²⁷⁹

The inaccurate conclusion of the voluntary exposure view followers that an individual maintains no expectation of privacy when he answers a knock at his door leads to a flawed Fourth Amendment analysis under the subjective-objective test.²⁸⁰ Proponents of the view thus erroneously conclude that an individual at the threshold has forfeited the heightened constitutional protection associated with the home and cannot suffer a Fourth Amendment violation in the event of a seizure.²⁸¹ A proper inquiry into reasonable expectations of privacy shows that an individual who answers a knock at the door has not relinquished his expectation of privacy in the home and still enjoys "an especially heightened Fourth Amendment protection."²⁸² It follows that a plain view seizure at the threshold constitutes a Fourth Amendment violation.²⁸³

The voluntary exposure view also creates a new exception to the warrant requirement.²⁸⁴ In *Payton/Riddick*, the Court declared that a warrantless seizure inside the home is presumptively unreasonable unless exigent circumstances are present or there is a showing of consent to enter the home.²⁸⁵ The voluntary exposure view has concluded that a warrantless seizure inside the home is reasonable, even where there is no showing of exigent circumstances or consent.²⁸⁶ The view thus "manufactures" a new exception to the "firm line" established in *Payton/Riddick*, asserting that an individual can "voluntarily expose[]" himself to arrest by answering a

279. *Berkowitz*, 927 F.2d at 1388. The person who voluntarily decides to stand in his open doorway voluntarily relinquishes his expectation of privacy in his home by "exposing himself 'to public view, speech, hearing, and touch as if [he is] standing completely outside [his] house.'" See *id.* (quoting *Santana*, 427 U.S. at 42). The person who answers a knock at his door and stays within the house is not voluntarily exposing himself to the public as if he is standing completely outside his house, and thus not voluntarily relinquishing his privacy expectation in his home. See *id.*; *McCraw*, 920 F.2d at 229. In *McCraw*, the Fourth Circuit noted that "*Santana* . . . is distinguishable" from this line of cases because the defendants involved in these cases were "not standing on the threshold of the doorway at the time the [officers] arrived" at the dwelling. See *id.* Rather, the defendants involved in these cases have come to the door in response to an officer's knocking. *Id.*; see also *Sparing*, 266 F.3d at 689-90 (noting the distinction between a case where an individual is voluntarily standing in a open doorway, as in *Santana*, versus answering a knock at the door).

280. See *Sparing*, 266 F.3d at 690 (noting that "a person does not surrender reasonable expectations of privacy in the home by simply answering a knock at the door").

281. See *id.* at 690 n.3.

282. See *id.* at 689-90.

283. See *id.* at 690.

284. See *United States v. Vaneaton*, 49 F.3d 1423, 1428 (9th Cir. 1995) (Tashima, J., dissenting).

285. *Id.* at 1427-28.

286. See, e.g., *id.* at 1425-27 (majority opinion) (finding no Fourth Amendment violation where officers announced a seizure while they stood outside the threshold and then crossed the threshold to complete the arrest of the defendant, who was standing just inside the threshold).

knock at his door.²⁸⁷ The Court's decisions "do not support the existence of a 'voluntary exposure' exception."²⁸⁸ Consequently, creating such an exception is "flatly contrary" to the Court's precedent.²⁸⁹

Moreover, the voluntary exposure view is "bad policy" because it makes law enforcement more difficult and erodes the privacy interests protected by the Fourth Amendment.²⁹⁰ The approach discourages citizens from answering knocks on the door by police officers, because it subjects them to warrantless seizures inside their own homes in exchange for their showing of common courtesy in responding to an officer's knock.²⁹¹ It also "provides a justification for refusing to answer a police officer's knock."²⁹² As a result, the voluntary exposure view makes routine police investigation more challenging and strains relations between police officers and private citizens.²⁹³

The approach also "erodes the privacy interests protected by the Fourth Amendment."²⁹⁴ The Court has consistently reaffirmed that "[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."²⁹⁵ The voluntary exposure view ignores the heightened constitutional protection provided for individuals within the home²⁹⁶ by permitting warrantless seizures within the most sacred zone of privacy.²⁹⁷

Each perspective on plain view threshold seizures thus finds justification in judicial precedent and policy matters, and offers a multifaceted criticism of the competing approach. While proponents of the voluntary exposure view assert that a person on the threshold maintains no

287. *Id.* at 1428 (Tashima, J., dissenting).

288. *Id.* The Court's decision in *Santana* made the "sanctity of the firm line at the doorway" quite evident. *Id.* at 1429. *Santana*'s warrantless arrest inside her house was upheld because of exigent circumstances. *Id.*; see *supra* notes 115-17 and accompanying text. In addition, the Court has consistently reaffirmed its holding in *Payton/Riddick* that warrantless seizures inside the home are presumptively unreasonable. See, e.g., *New York v. Harris*, 495 U.S. 14, 16-17 (1990). *Payton/Riddick* clearly established that exigent circumstances and consent are the "only two ways" for the government to overcome the presumption that warrantless seizures within the home are unreasonable. *Vaneaton*, 49 F.3d at 1428 (Tashima, J., dissenting).

289. *Vaneaton*, 49 F.3d at 1427 (Tashima, J., dissenting).

290. See *id.* at 1430.

291. *Id.* In *Vaneaton*, the majority noted that "[k]nocking on a door to attempt to contact a person inside is a common event and hardly a hallmark of a police state." *Id.* at 1427 (majority opinion).

292. *Id.* at 1430 (Tashima, J., dissenting).

293. *Id.* The voluntary exposure view will also confuse officers rather than provide clear guidance for how to determine whether a person has voluntarily exposed himself to a warrantless seizure. *Id.* at 1430 n.9. Officers and courts will be faced with several issues, including how far away from the doorway an individual must be in order to escape being voluntarily exposed, and whether there are different rules for screen doors, glass doors, and windows. *Id.*

294. *Id.* at 1430.

295. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (citations omitted).

296. See *Murray*, *supra* note 178, at 135-36.

297. See *supra* note 144 and accompanying text.

expectation of privacy and is vulnerable to seizure,²⁹⁸ supporters of the sanctity view conclude that the heightened constitutional protection provided for individuals within the home renders such seizures invalid.²⁹⁹ The next part discusses why policy considerations demand that courts certify the sanctity view as the appropriate method for adjudicating threshold seizure cases.

III. COMPELLING POLICY INTERESTS WARRANT JUDICIAL ADOPTION OF THE SANCTITY VIEW

This Note advocates that future judicial treatment of warrantless seizures at the threshold conform to the sanctity view. This part explains why a person who opens his door in response to a police officer's knock should not be susceptible to a plain view threshold seizure.³⁰⁰ To the extent that one of the approaches to plain view threshold seizures should be certified, significant public policy concerns justify judicial adoption of the sanctity view.³⁰¹ The competing approach undermines the warrant requirement by providing a disincentive for officers to obtain warrants before attempting a seizure.³⁰² It also adversely affects law enforcement efficiency, makes police investigation more difficult, and strains relations between private citizens and the police.³⁰³ In addition, the voluntary exposure view fails to offer clear guidance to officers on how to determine if an individual has voluntarily exposed himself to a warrantless seizure.³⁰⁴ Finally, the view erodes the most important privacy interest protected by the Fourth Amendment: the right to residential privacy.³⁰⁵

The voluntary exposure view undermines a core principle of Fourth Amendment jurisprudence by providing a disincentive for officers to satisfy

298. See *supra* Part II.A.

299. See *supra* Part II.B.

300. By definition, widespread adoption of the sanctity view necessitates rejection of the voluntary exposure view, which is used by, among other circuits, the Ninth Circuit. The Ninth Circuit is "the most overturned appeals court in the country." CNN.com Law Center, Lawmakers Blast Pledge Ruling, <http://archives.cnn.com/2002/LAW/06/26/pledge.allegiance> (last visited Feb. 16, 2006); see also FOXNEWS.com, Flap After Court Rules Pledge of Allegiance Unconstitutional, <http://www.foxnews.com/story/0,2933,56310,00.html> (last visited Feb. 16, 2006) (noting that "[t]he 9th Circuit is the nation's most overturned appellate court"). But see LaborLawTalk.com, The U.S. Court of Appeals for the Ninth Circuit, http://encyclopedia.laborlawtalk.com/United_States_Court_of_Appeals_for_the_Ninth_Circuit (last visited Feb. 16, 2006) (asserting that the Ninth Circuit's reputation as the most frequently reversed appellate court is "mostly a product of its high caseload" and that "[o]n a percentage basis, the circuit is not overturned much more than any other"); see also FOXNEWS.com, *supra* (acknowledging that part of the Ninth Circuit's reversal rate may be attributed to the fact that it is the largest circuit in the nation).

301. See *supra* note 290 and accompanying text.

302. See Call, *supra* note 258, at 340.

303. See *supra* note 293 and accompanying text.

304. See *id.*

305. See *supra* note 294 and accompanying text.

the warrant requirement.³⁰⁶ If plain view seizures at the threshold are reasonable, an officer may be more likely to bypass obtaining a warrant in an effort to conduct a seizure.³⁰⁷ So long as officers do not employ coercion or deception,³⁰⁸ a warrantless seizure will be permitted once a person opens his door in response to the officer's knock. Decreasing an officer's incentive to obtain a warrant dilutes one of the cardinal principles of Fourth Amendment law and is contrary to the spirit of the Court's precedent.³⁰⁹

The voluntary exposure view also compromises law enforcement efficiency by making routine police investigation more difficult and deterring productive relations between private citizens and officers.³¹⁰ The approach will discourage citizens from answering knocks on the door by police officers because it subjects them to the possibility of a warrantless doorway seizure.³¹¹ The view thus "protects only those who refuse to answer their doors when the police knock."³¹² It will jeopardize an officer's ability to obtain useful information from private citizens, and hinder his capacity to maintain healthy communication with members of the community.

Additionally, the voluntary exposure view introduces uncertainty into police work, rather than offering clear guidance to officers as to exactly how to determine whether a person has voluntarily exposed himself to a warrantless seizure.³¹³ Officers, and ultimately courts, will be faced with a host of questions:³¹⁴ Must a door be completely open to qualify as a voluntary exposure, or does a half-opened door suffice? How far inside the home and away from the doorway must a person be to escape being exposed? Is a person exposed if he is standing at a partially open sliding glass door?³¹⁵ In contrast, the sanctity view provides officers with clear guidance, namely that a person's heightened expectation of privacy is bounded "by the unambiguous physical dimensions of an individual's home."³¹⁶

Finally, the voluntary exposure view erodes the most sacred privacy interest protected by the Fourth Amendment.³¹⁷ The Supreme Court has noted that physical intrusion into the home "'is the chief evil against which the wording of the Fourth Amendment is directed.'"³¹⁸ It cannot be

306. See Call, *supra* note 258, at 340.

307. *Id.*

308. See *supra* note 165 and accompanying text.

309. See *supra* notes 255-60 and accompanying text.

310. See *supra* note 293 and accompanying text.

311. See *supra* note 291 and accompanying text.

312. See Murray, *supra* note 178, at 149; *supra* note 292 and accompanying text.

313. See *supra* note 293.

314. *Id.*

315. *Id.*

316. Payton v. New York, 445 U.S. 573, 589 (1980).

317. See *supra* note 294 and accompanying text.

318. Payton, 445 U.S. at 585 (quoting United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972)).

disputed that the voluntary exposure view makes the home more vulnerable to warrantless physical invasions.³¹⁹ The view compromises the privacy interest in the home, and consequently imperils the core of the Fourth Amendment.

CONCLUSION

The underlying principles that guide the competing approaches to plain view threshold seizures have long played a critical role in Fourth Amendment jurisprudence, and, most of the time, can coexist peacefully without discord.³²⁰ Still, there is a clear tension between the sanctity view and the voluntary exposure view; each view approaches the issue from a fundamentally different angle and each view is well-founded in established Supreme Court precedent and possesses strong justification—both in terms of law and policy—for its position. By certifying one approach, the Court will clarify judicial treatment of the issue, alert citizens to their liberties and liabilities, and ensure that defendants at the trial and district court levels are afforded the full breadth of their options in generating a defense.

This Note suggests that in light of the policy issues implicated by the circuit dispute, the sanctity view's treatment of plain view threshold seizures should receive widespread judicial adoption. The sanctity view protects incentives for officers to comply with the warrant requirement, promotes law enforcement efficiency, and defends the most sacred of Fourth Amendment privacy interests, the sanctity of the home.

319. *See supra* notes 284-88 and accompanying text.

320. The facts of cases involving plain view threshold seizures tend to vary greatly, so a court or commentator could parse the law and the facts of decisions from each side of the split and reconcile disparate results.