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Abstract: In recent years, Richard A. Posner, a respected federal appellate judge and prolific scholar, has been at the vanguard of a resurgence of interest in legal pragmatism. Posner and other scholars have called for judges to expand their horizons beyond conventional legal reasoning and to embrace interdisciplinary methodology and empirical research in the legal decisionmaking process. At the same time, however, prominent jurisprudential scholars have expressed both practical and philosophical objections to Posner's controversial prescription for increased judicial reliance on social science research. This Article seeks to explore the value and limits of Posner's pragmatism and empirical inquiry in the context of home arrests. In *Payton v. New York*, the Supreme Court held that police may enter a suspect's residence to arrest the suspect when there is "reason to believe" that the suspect is at home. This Article surveys *Payton*'s progeny and demonstrates that judicial application of the *Payton* rule fails to act as a significant check on police authority, in part because of judicial deference to the factual assumptions made by police who seek to arrest suspects at home. In response to this problem, this Article proposes that the United States Marshals Service undertake a study of home arrests that would provide courts with the hard evidence necessary to evaluate police action in *Payton* cases. Although this data would not answer the normative question of whether law enforcement needs or privacy interests should prevail in particular cases, courts would be forced to make their *Payton* judgments out in the open without reliance on potentially unwarranted factual assumptions.

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INTRODUCTION

During the last two decades, one of the widest, most influential, and well-documented philosophical movements in legal academia has been the resurgence of pragmatism.[1] Theorists across the political spectrum have, in one way or another, endorsed tenets associated with pragmatism,[2] leading some scholars to suggest, perhaps facetiously, that the pragmatist movement embraces virtually everyone in the legal

1. *See generally* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE (Morris Dickstein ed., 1998) [hereinafter THE REVIVAL OF PRAGMATISM: NEW ESSAYS]; Symposium, *The Revival of Pragmatism*, 18 CARDOZO L. REV. 1 (1996) [hereinafter *The Revival of Pragmatism*]; Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) [hereinafter *Renaissance of Pragmatism*].

2. Matthew Kramer summarizes three prominent forms of pragmatism as follows:

> "Metaphysical" or "philosophical pragmatism" has been defined as a relativist position which denies that knowledge can be grounded on absolute foundations. Methodological or intellectual pragmatism is a position that attaches great importance to lively debate and open-mindedness and flexibility in the sciences, the humanities and the arts. Political pragmatism is a position that attaches great importance to civil liberties and to tolerance and to flexible experimentation in the discussions and institutions that shape the arrangements of human intercourse.

Matthew H. Kramer, *The Philosopher-Judge: Some Friendly Criticisms of Richard Posner's Jurisprudence*, 59 MOD. L. REV. 465, 476 (1996); *see also* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 227 n.1 (1999) [hereinafter POSNER, PROBLEMATICS] (favorably quoting Kramer's definitions).

academic community.[3] Nevertheless, despite the exuberant cries of pragmatist hegemony, the pragmatist movement has faced several major difficulties.

First, the meaning of pragmatism is incredibly unclear. Although pragmatism usually entails some antifoundational or antiformalist values, it almost seems that each scholar has a different, idiosyncratic notion of what it means to apply pragmatism to law. Second, the plea of some pragmatists for courts to utilize social science methodology and data in legal decisionmaking is problematic. Numerous commentators have expressed grave doubts whether courts can properly and fruitfully incorporate non-legal materials into their decisionmaking and whether law professors are capable of and willing to generate useful social science information for legal decisionmakers.[4] Finally, many of legal academia's most prominent jurisprudential theorists, including Ronald Dworkin, emphatically claim that legal pragmatism is completely useless to legal decisionmakers.[5] These theorists argue that empirical inquiry, however well intentioned, does not relieve judges from making the normative political, moral, and ethical judgments necessary to resolve highly charged constitutional debates.[6] The foregoing bleak landscape may account for why empirical scholarship, which may be seen in some cases as a form of "applied pragmatism," has faced significant hurdles within the legal academy.[7]

This Article will demonstrate how an empirical approach based upon legal pragmatism can help resolve an important issue in Fourth Amendment jurisprudence. By doing so, it advances the cause of scholars who have called for a more empirical and pragmatic approach to constitutional criminal procedure adjudication.[8] In particular, this Article argues that sound social science should guide judicial review of police entries into the home made under the authority granted by *Payton*

3. *See* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 409–10 (1990).

4. *See infra* Parts I.C.1–3.

5. *See infra* Part I.C.4.

6. *See infra* notes 135–140 and accompanying text.

7. *See infra* Part I.C.2.

8. *See* Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000) (calling for "a new generation of criminal procedure jurisprudence . . . that places empirical and social scientific evidence at the very heart of constitutional adjudication" and "a mode of judicial decisionmaking and academic debate that treats social scientific and empirical assessment as a crucial element in constitutional decisionmaking").

v. New York,[9] which permits police to enter a suspect's residence to serve an arrest warrant when there is "reason to believe" that the suspect is at home.[10]

Part I of this Article discusses empirical pragmatism as a model for judicial decisionmaking. The foundation of this methodology will be the version of legal pragmatism elaborated by Richard A. Posner[11] in his provocative book, *The Problematics of Moral and Legal Theory*. Part I will survey both the strengths and weaknesses of utilizing non-legal materials, especially social science research, to resolve disputed legal issues.

Part II of this Article provides the first comprehensive review of state and federal case law applying the *Payton* rule since *Payton* was decided twenty years ago. This discussion will show that courts reviewing police home entries under *Payton* routinely engage in potentially unwarranted conjecture regarding criminal suspects' behavior as part of systemic deference to law enforcement agents who seek to arrest suspects at home. This flawed process has led to a regime where courts have almost never held that an entry into a suspect's residence to serve an arrest warrant was unconstitutional because the police lacked reason to believe the suspect was present at the time of entry. In sum, although the protection of the home from unjustified state intrusion is a core purpose of the Fourth Amendment and central to the American conception of personal liberty,[12] it will be demonstrated that the *Payton* rule, as applied, potentially fails to act as an effective check on police discretion

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9. 445 U.S. 573 (1980).

10. *Id.* at 603.

11. Chief Judge, U.S. Court of Appeals for the Seventh Circuit and Senior Lecturer, University of Chicago Law School.

12. *See* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 588 (1996) ("In contemporary theory, the home is still the place where the Fourth Amendment provides the most protection for privacy and liberty."). Cloud's observation does not contradict the statement found in *Katz v. United States*, 389 U.S. 347, 351 (1967), that "the Fourth Amendment protects people, not places," but recognizes, as the Supreme Court has observed, that "the extent to which the Fourth Amendment protects people may depend upon where those people are." Minnesota v. Carter, 525 U.S. 83, 88 (1998); *see also* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At 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.'") (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)); Wilson v. Layne, 526 U.S. 603, 610 (1999) (observing that "[t]he Fourth Amendment embodies [a] centuries-old principle of respect for privacy of the home . . .") (referring to *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1602) and 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223 (1765–1769)).

and certainly leaves unresolved whether Fourth Amendment rights are sufficiently protected.[13]

Part III addresses the rare attempts of courts to give meaning to *Payton*'s reason to believe language, by comparing it to a better-known Fourth Amendment concept—probable cause. This Part will analyze the potential relationship between reason to believe and probable cause, paying close attention to cases that have applied a probable cause standard to the question of a suspect's presence at a particular residence. It will be demonstrated that efforts to understand or define the *Payton* standard by comparing it to probable cause are misplaced and further illustrate the constraints of traditional legal reasoning in this context.

Finally, in Part IV it will be argued that empirical pragmatism provides a promising start for the resolution of the problems courts have faced in applying *Payton*—even if we accept the validity of the criticisms levied against pragmatism by its prominent critics. This Part endeavors to demonstrate that judges who apply *Payton* would be well served by eschewing the rote application of *Payton* precedent, and instead should adopt a pragmatic empirical approach that explicitly relies upon social-science research. Although empirical study cannot determine whether police officer entries pursuant to *Payton* should be held constitutional, Part IV shows how empirical study can clarify the normative issues faced by the courts reviewing these police actions. This process of "transparent adjudication"[14] permits the courts and society to get on to the more difficult normative endeavor of determining when police entry should be permitted under *Payton*, given the suspects' interests in privacy and law enforcement needs.

I. EMPIRICAL PRAGMATISM

A. *The Pragmatic Movement in Legal Academia*

Over the last two decades, one of the most fascinating stories in legal academia has been the resurgence of "a loosely connected collection of

13. The term "unresolved" is used intentionally in this context. Parts of this Article strongly suggest that Fourth Amendment rights are being insufficiently protected in many cases. However, this Article refrains from arriving at a final normative judgment on that score. Rather, the thesis of this Article is that the decisionmaking process is flawed. *See infra* Parts II & III.

14. *See generally* Meares & Harcourt, *supra* note 8.

antifoundationalist views"[15] known as pragmatism.[16] Implausibly diverse groups of scholars—all across the political spectrum—have in one way or another endorsed pragmatic principles,[17] leading to the impression that the pragmatist movement "arguably encompasses everyone but the

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15. Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 167 [hereinafter Farber, *Reinventing Brandeis*]; *see also* Kramer, *supra* note 2, at 476 (defining metaphysical or philosophical pragmatism as "a relativist position which denies that knowledge can be grounded on absolute foundations").

16. *See generally* THE REVIVAL OF PRAGMATISM: NEW ESSAYS, *supra* note 1; PRAGMATISM IN LAW & SOCIETY (Michael Brint & William Weaver eds., 1991); *The Revival of Pragmatism*, *supra* note 1; *The Renaissance of Pragmatism*, supra note 1.

17. *See* Michel Rosenfeld, *Pragmatism, Pluralist and Legal Interpretation: Posner and Rorty's Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, 99–100 (1996); Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 316 (1996) ("Prominent representatives of the left, center, and right in U.S. legal theory—of critical legal studies, critical feminism, critical race theory, law and economics, and of the mainstream—scholars who otherwise hold sharply divergent opinions about law, have begun to assert that pragmatism points the way.") (footnotes omitted); Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2071–72 (1996):

> Although the legal pragmatists are a diverse lot in many respects—embracing a wide variety of ideologies from neotraditionalism to feminism to critical race theory—they share a general theoretical perspective that weds Aristotle's concept of practical reason with various aspects of, among other things, nineteenth-century utilitarianism, American pragmatism and neopragmatism, and postmodern continental philosophy.

David Luban, *Doubts About the New Pragmatism*, in LEGAL MODERNISM 125, 125 (1994) (noting diversity of today's legal pragmatists); Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 535–36 (observing that "pragmatism's popularity extends to theorists of various jurisprudential allegiances"); Craig Anthony (Tony) Arnold, *How Do Law Students Really Learn? Problem-Solving, Modern Pragmatism, and Property Law*, 22 SEATTLE U. L. REV. 891, 903 (1999) (reviewing EDWARD H. RABIN & ROBERTA ROSENTHAL KWALL, FUNDAMENTALS OF MODERN REAL PROPERTY LAW (3d ed. 1992)) ("The past two decades have witnessed a revival of intellectual interest in, and even enthusiasm for, pragmatism. There has been an attempt to envelop many different legal theories, including feminist jurisprudence, law and economics, and critical theory, into pragmatist thought, or at the very least, the pragmatist label.") (footnotes omitted); *see also* Farber, *Reinventing Brandeis*, *supra* note 15, at 167–68:

> Like most intellectual movements, legal pragmatism is not easy to define. It is part of a loosely connected collection of antifoundationalist views, a category that includes believers in Aristotelian practical reason, some feminist theorists, adherents to literary theories such as hermeneutics and deconstruction, and students of the philosophy of language. Despite earnest arguments among these groups, it is often unclear whether deep philosophical issues are really at stake, or whether they are expressing similar perspectives in different vocabularies. Indeed, the term *legal pragmatism* has sometimes been used as an umbrella for all of these groups.

(footnotes omitted).

most rigid of formalists"[18] in legal academia.[19]

Despite this explosion of academic interest, as a method of adjudication, pragmatism has generated criticism from those on both the left and the right of the political spectrum.[20] In addition, the notion that a philosophical perspective can cover such disparate political interests has engendered the belief that pragmatism "*must* be empty of substance."[21] As one scholar summed it up: "pragmatism is a slippery beast—hard to define and seemingly all things to all people."[22]

Thus, we are left with an odd predicament. Almost everyone claims to be a pragmatist. But almost everyone has a different idea of what it

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18. *See* Rosenfeld, *supra* note 17, at 99–100.

19. *See* Smith, *supra* note 3, at 410 ("[I]t seems only a slight exaggeration to suggest that a movement which five years ago included almost no one today appears to embrace virtually everyone."); Rosenfeld, *supra* note 17, at 99–100:

> [I]f in philosophy pragmatism regroups such diverse figures as [Charles Sanders] Peirce, William James, John Dewey, and Richard Rorty, in contemporary American legal theory it arguably encompasses everyone but the most rigid of formalists. Consistent with this overly broad sweep, pragmatism would appear to embrace any practical, result-oriented approach, as opposed to any systemic approach rooted in fundamental principles. In the words of Cornel West, the "common denominator" of pragmatism amounts to "a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action."

(quoting CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 5 (1989)).

20. *See* Farber, *Reinventing Brandeis*, *supra* note 15, at 163–64:

> Critics on both the Left and the Right argue that pragmatism is bankrupt as a source of legal theory. Opponents on the Left consider it a complacent ideology based on facile acceptance of the status quo. Those on the Right scorn legal pragmatism as unprincipled and incompatible with the rule of law. Thus legal pragmatism stands accused of being on the one hand tradition-bound and on the other a source of unrestrained judicial activism.

(footnotes omitted).

21. Tamanaha, *supra* note 17, at 316 ("The most revealing aspect about this rush to pragmatism is precisely the fact that it can accommodate such divergent positions. Anything which appeals to the entire spectrum of political views *must* be empty of substance."); *see also* Farber, *Reinventing Brandeis*, *supra* note 15, at 167–68; Rosenfeld, *supra* note 17, at 99–100 (observing that "pragmatism radiates so far over the philosophical and legal landscape as to risk becoming devoid of any determinate meaning").

22. Susan M. Wolf, *Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism*, 20 AM. J.L. & MED. 395, 398 (1994). An additional complication is that pragmatism has many forms. Take for example, Michel Rosenfeld's astonishing article where he mentions, in turn, pragmatism, comprehensive pragmatism, mere pragmatism, intermediate pragmatism, philosophical pragmatism, legal pragmatism, mere legal pragmatism, scientific pragmatism, pragmatic skepticism, neopragmatism, critical pragmatism, and constructive pragmatism. *See* Rosenfeld, *supra* note 17.

means to apply pragmatism to law.[23] Even more disturbing is the vague sense, ever present under the surface of these discussions, that there is no such thing as legal pragmatism.[24] To avoid this definitional quagmire, we shall investigate the value of pragmatism by utilizing the writings of the most notable advocate of the application of pragmatism to law—Richard A. Posner.[25]

B. Posner's Pragmatism

1. Background

Richard A. Posner, the Chief Judge of the United States Court of Appeals for the Seventh Circuit, has gained respect for his contributions to the law as both a scholar and as a federal appellate judge. One need not endorse the view that Judge Posner was "the most extraordinary academic lawyer" of the second half of the twentieth century[26] or consider him to be a personal hero[27] to accept Posner's importance in the legal community. It is enough to note that Posner is an influential and

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23. *See* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 208 (1993) ("Legal pragmatism has not been, and cannot be defined precisely in a simple maxim. Disagreement even exists about the appropriate label for the body of ideas comprising pragmatism theory.") (footnotes omitted).

24. *See* Smith, *supra* note 3, at 410 ("What exactly *is* legal pragmatism? This preliminary question is particularly troublesome because there is an emerging suspicion that if we look too closely for legal pragmatism, we might not find anything—or at least not anything worth discussing.").

25. *See* Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1414 (2000) (referring to Posner as "the leading judicial advocate of legal pragmatism").

26. Laura Kalman, *Eating Spaghetti with a Spoon*, 49 STAN. L. REV. 1547, 1574 (1997) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)).

27. As one scholar exuberantly proclaimed:

> Richard Posner is one of my heroes. I mean, the guy has written 23 books, he's Chief Judge on the prestigious 7th Circuit U.S. Court of Appeals, he was one of the most famous law professors at the University of Chicago, and if he didn't invent it, he certainly did more to popularize law and economics than any man alive. Perhaps it does not go too far to say that most late twentieth century legal scholarship is really a dialogue with Posner, who has taken on virtually every trendy theory in the legal academy, and found it wanting.

Stephen B. Presser, *The Ordinary, the Exceptional, the Corrupt, and the Moral: What DID the Impeachment of Bill Clinton Mean for America and Americans?*, 17 CONST. COMMENT. 149, 149 (2000) (book review of RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999) [hereinafter POSNER, AFFAIR OF STATE]).

extraordinarily prolific scholar, perhaps best known as the de facto dean of the law and economics movement in the United States. He is also considered by many to be a brilliant jurist, having served on the U.S. Court of Appeals for the Seventh Circuit since his appointment to the bench by President Reagan in 1981.[28]

The publication of Posner's book, *The Problematics of Moral and Legal Theory*,[29] reflected the culmination of his academic writings and lectures over the past decade on two related major themes. The first theme is an extraordinarily intense[30] criticism of moral theory[31] and, more particularly, the application of moral theory to law.[32]

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28. *See* Peter Berkowitz, *Reduction and Betrayal*, THE NEW REPUBLIC, Aug. 23, 1999, at 38 (noting Posner's "staggering" output and "his reputation as perhaps the leading legal thinker of his generation"); Rosenfeld, *supra* note 17, at 110 ("[Posner] is the preeminent exponent of the law and economics school, and is one of the leading federal judges in the United States."); Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1221–22 (1991) (book review of RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)) (describing Posner's significance within the legal academy and beyond).

29. POSNER, PROBLEMATICS, *supra* note 2. To avoid confusion, it should be noted that Posner also published an article with the same title. *See* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1638 (1998) (expanded version of Holmes lectures delivered at Harvard Law School in October 1997). Posner's book, however, encompasses more than those two lectures. *See* PROBLEMATICS, *supra* note 2, at vii. References to "PROBLEMATICS" will be to the book. When necessary, the article will be cited to in full.

30. *See A Case Too Far*, THE ECONOMIST, at 8, Sept. 18, 1999 ("[T]he first part of this book [PROBLEMATICS] is a near hysterical attack on Ronald Dworkin."); Anthony J. Sebok, *The Flattening of Reason*, Jurist: Books on Law, Oct. 1999, v.2, n.8, *available at* http://www.jurist.law.pitt.edu/lawbooks/revoct99.htm (book review of POSNER, PROBLEMATICS, *supra* note 2) (noting that Posner's "infamous Harvard Law Review article," which "mocked not only moral philosophy, but a large number of its leading practitioners. . . . elicited responses from parties offended by its tone and content, and for a while it caused a stir"); *see also* Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998) [hereinafter Dworkin, *Darwin's New Bulldog*] ("Posner's Lectures are characteristically entertaining, hasty, picaresque, and punchy. They are packed with a great variety of relevant and irrelevant excursions, references, and insults.").

The lively and enlightening jurisprudential debate between Posner and Dworkin later turned nasty. Dworkin accused Posner of arguably violating the Code of Judicial Conduct by writing a book on President Clinton's impeachment. *See* Ronald Dworkin, *Philosophy and Monica Lewinsky*, N.Y. REV. OF BOOKS, Mar. 9, 2000, at 48–49 (book review of POSNER, PROBLEMATICS, *supra* note 2, and POSNER, AFFAIR OF STATE, *supra* note 27). Posner responded angrily by suggesting that it was unethical for Dworkin to review a book written by his "enemy." *See* Neil A. Lewis, *Watching 2 Legal Minds Square Off Over Clinton*, N.Y. TIMES, Feb. 19, 2000, at B9; *see also* Steven Lubet, *Ethics Clash of Two Giants*, NAT'L L.J., Apr. 3, 2000, at A22. Posner summed up his relationship with Dworkin as follows:

> I have for many years now in books and articles been challenging Dworkin's pretensions as a constitutional scholar and public intellectual, though I have been respectful of his contributions to jurisprudence. He cannot help regarding me as an intellectual enemy and treating me accordingly. Most journals don't give books to the authors' enemies to review, especially if the

Posner's second theme is primarily[33] constructive, rather than critical. Posner has vigorously advocated utilizing a form of legal pragmatism, or pragmatic adjudication,[34] to resolve contested questions of federal or constitutional law.[35] In so doing, Posner has become the foremost judicial and scholarly advocate of the application of pragmatism to law.

"enemy" is a principal target of criticism in the very book that he is being asked to review. If scrupulous, a person asked to review an enemy's book turns down the invitation or, at the very least, is "up front" about his relationship with the author. Dworkin's review acknowledges that PROBLEMATICS criticizes him, but it does so in a flippant way that conceals the twenty years of mutual intellectual enmity, punctuated by increasingly acrimonious exchanges, that has defined our relationship.

Richard A. Posner, *Dworking, Polemics, and the Clinton Impeachment Controversy*, 94 NW. U. L. REV. 1023, 1032 (2000) (footnotes omitted).

31. For our purposes, it is not necessary to get into the particular types of moral theory that Posner finds objectionable, or how moral theory can be broken down into other sub-categories. *See* POSNER, PROBLEMATICS, *supra* note 2, at 5 ("My particular target is the branch of moral theory I shall call 'academic moralism.'"); *see also* Dworkin, *Darwin's New Bulldog*, *supra* note 30, at 1721 n.11 (expressing difficulty understanding Posner's usage of "metaphysics," "moral realism," and "right answers"); Richard A. Posner, *On the Alleged 'Sophistication' of Academic Moralism*, 94 NW. U. L. REV. 1017, 1017–18 (2000) (further explaining his meaning of "academic moralism"); Brian E. Butler, *Posner's Problem with Moral Philosophy*, 7 U. CHI. L. SCH. ROUNDTABLE 325, 330 (2000) (referring to Posner's version of "moral philosophy" as a caricature to which no one subscribes) (book review of PROBLEMATICS).

32. The critical aspects of Posner's work—his vigorous and spirited attacks on his philosophical opponents—have engaged him in a debate with some of the nation's most prominent scholars and jurists. *See* Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1739 (1998); Anthony T. Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751 (1998); John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768 (1998); Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776 (1998); Richard A. Posner, *Reply to the Critics of "The Problematics of Moral and Legal Theory,"* 111 HARV. L. REV. 1796, 1796 (1998) (praising critics of his lectures). This Article will not address Posner's criticisms of moral philosophy. For two in-depth analyses of Posner's critique of academic moralism, see Ryan Fortson, *Other Rising Legal Issues: Problems with Richard Posner's The Problematics of Moral and Legal Theory*, 27 WM. MITCHELL L. REV. 2345, 2349–59 (2001), and Laura Carrier, Note, *Making Moral Theory Work for Law*, 99 COLUM. L. REV. 1018, 1021–30 (1999); *see also* Butler, *supra* note 31, at 325–33.

33. "Primarily," because Posner's advocacy of pragmatism often contains elements of criticism regarding non-pragmatic approaches.

34. Posner's version of pragmatism will be referred to herein as pragmatic adjudication, Posnerian pragmatism, or empirical pragmatism. *See* Daniel A. Farber, *Shocking the Conscience: Pragmatism, Moral Reasoning, and the Judiciary*, 16 CONST. COMMENT. 675, 682 (1999) (book review of POSNER, PROBLEMATICS, *supra* note 2) (using term "Posnerian pragmatism").

35. *See, e.g.*, Posner, *The Problematics of Moral and Legal Theory*, *supra* note 29; Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) (revised text of the James Madison Lecture on Constitutional Law at New York University School of Law); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996) (adapted from presentation at "The Revival of Pragmatism" Symposium); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653 (1990) (from *Renaissance of Pragmatism*, *supra* note 1); *see also* RICHARD A. POSNER, OVERCOMING LAW 387–405 (1995). Posner recently renewed his call for pragmatic

2. *Identifying the Elements of Posner's Empirical Pragmatism*

In *Problematics*, Posner initially defines his pragmatism in two ways: negatively[36] and by example.[37] First, he strenuously articulates what his pragmatism *does not* embody. Most notably, Posner's pragmatism is not: (1) philosophical pragmatism[38] (although philosophical and legal pragmatism may be related[39]); (2) judicial positivism;[40] (3) academic

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adjudication against the backdrop of the 2000 presidential election. *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION AND THE COURTS 169–75, 185–89 (2001) [hereinafter POSNER, BREAKING THE DEADLOCK]. This Article focuses on PROBLEMATICS because it reflects Posner's deepest and most sustained treatment of his version of pragmatism.

36. One scholar has observed that pragmatism's tendency for defining itself negatively is not unique. *See* Farber, *Reinventing Brandeis*, *supra* note 15, at 168 ("As with many intellectual movements, pragmatism is partly defined in opposition to other views."); *see also* Cloud, *supra* note 23, at 214 ("[P]ragmatists frequently do not define their theory solely on its own terms. Pragmatism often takes a form most clearly when used to criticize another theory, particularly one asserting some absolute foundational theory or value."); Catharine Pierce Wells, *Pragmatism, Feminism, and the Problem of Bad Coherence*, 93 MICH. L. REV. 1645, 1648 (1995) (book review of MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993)) ("It is sometimes easier to describe what pragmatism rejects than to identify its affirmative claims.").

37. More recently, Posner has proffered a more concrete description of pragmatism.

> All that pragmatic adjudication need mean, however—all that I mean by it—is adjudication guided by a comparison of the consequences of alternative resolutions of the case rather than by an algorithm intended to lead the judges by a logical or otherwise formal process to the One Correct Decision, utilizing only the canonical materials of judicial decision making, such as statutory or constitutional text and previous judicial opinions. The pragmatist does not believe that there is or should be any such algorithm. He regards adjudication, especially constitutional adjudication, as a practical tool of social ordering and believes therefore that the decision that has the better consequences for society is the one to be preferred.

POSNER, BREAKING THE DEADLOCK, *supra* note 35, at 186.

38. *See* Posner, PROBLEMATICS, *supra* note 2, at 227–28.

39. Several authors have explored the relationship between philosophical pragmatism and legal pragmatism. *See, e.g.*, Thomas C. Grey, *Freestanding Legal Pragmatism?*, 18 CARDOZO L. REV. 21, 42 (1996) ("[L]egal pragmatism can and should stand free from the philosophical commitments that are generally understood to define pragmatism today, and from philosophically comprehensive views more generally."); David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 72 (1996) (expressing doubts that legal pragmatism can be "freestanding" from philosophical pragmatism); Posner, *Pragmatic Adjudication*, *supra* note 35, at 20 ("Philosophical pragmatism does not dictate legal pragmatism or any other jurisprudential stance. But it may play a paternal and enabling role in relation to pragmatic theories of law. . . ."); Rosenfeld, *supra* note 17, at 103–10; *see also* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 229 (1999) (describing the relationship between philosophical and legal pragmatism as "loose, and at times no more than a family resemblance"); Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 596 (1999) (contrasting different forms of legal and philosophical pragmatism); Kramer, *supra* note 2, at 478 (arguing that although philosophical pragmatism—as a doctrine about the status of truth—may be consistent with methodological pragmatism, each form of pragmatism still remains logically independent); Gene R. Shreve, *Rhetoric, Pragmatism and the Interdisciplinary Turn in*

moralism, which Posner skewers in the first half of his book;[41] and (4) current Supreme Court jurisprudence,[42] as exemplified by two Equal Protection clause cases: *United States v. Virginia*[43] and *Romer v. Colorado*.[44]

Second, Posner provides examples of legal pragmatism at work. He discusses how pragmatism has been already applied successfully by academics in the cases of antitrust[45] and administrative law[46] and provides concrete examples of how a pragmatist judge would approach several contested questions of federal or constitutional law.[47] In each case, Posner attempts to contrast pragmatic and formalist approaches to these issues. The primary lesson that Posner imparts is that the pragmatist judge in each case takes into account the factual bases and the effects or consequences[48] of a particular judicial approach, while the

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Legal Criticism—A Study of Altruistic Judicial Argument, 46 AM. J. COMP. L. 41, 57 (1998) ("The philosophical community has never arrived at a settled definition of 'pragmatism.' Nor have legal scholars been able to agree what they mean when they appropriate pragmatism. Nor have scholars been able to agree whether or how pragmatism in legal theory differs from philosophical pragmatism.") (footnotes omitted); Arnold, *supra* note 17, at 903 (observing that "scholars have distinguished between legal pragmatism—pragmatic legal analysis and adjudication—and philosophical pragmatism—an antifoundational philosophical perspective").

40. *See* POSNER, PROBLEMATICS, *supra* note 2, at 241.

41. *See id.* chs. 1 & 2.

42. *See id.* at 165–82. Posner's discussion of *United States v. Virginia*, 518 U.S. 515 (1996) ("*V.M.I.*"), and *Romer v. Evans*, 517 U.S. 620 (1996), is infused with criticism that the Court's jurisprudence is insufficiently empirically grounded and ignorant of "the social realities behind the issues with which judges grapple." POSNER, PROBLEMATICS, *supra* note 2, at 164. Thus, the *V.M.I./Romer* section of PROBLEMATICS complements Posner's examples of how pragmatism would work in practice.

43. 518 U.S. 515 (1996) (holding that the Commonwealth of Virginia violated the equal protection guarantees of the Fourteenth Amendment by excluding female students from the Virginia Military Institute, a public institution of higher education).

44. 517 U.S. 620 (1996) (striking down as unconstitutional, under the Equal Protection clause of the U.S. Constitution, an amendment to the Colorado State Constitution that prohibited any branch of the state government from providing legal protection to homosexuals).

45. *See* POSNER, PROBLEMATICS, *supra* note 2, at 228–29.

46. *See id.* at 229–39.

47. Posner uses the following examples: (1) hypothetical jurisdiction, *id.* at 243–44; (2) prospective overruling, *id.* at 244; (3) the *Swift* and *Erie* doctrines, *id.* at 245–46; (4) oil and gas law, *id.* at 246–47; (5) surrogate motherhood contracts, *id.* at 247; and (6) homosexual marriage, *id.* at 249–52.

48. This is why Posner is sometimes referred to as a "consequentialist." *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1020 n.114 (2001) (stating that "Posner clearly endorses consequentialism"). Jeremy Waldron points out that Posner denies this characterization. *See* Jeremy Waldron, *Ego Bloated Hovel*, 94 NW. U. L. REV. 597, 601 (2000) (book review of POSNER, PROBLEMATICS, *supra* note 2)).

formalist judge is unconcerned with the potential costs—administrative and otherwise—of his or her decisions. For example, in the case of homosexual marriage, Posner argues that courts should be reticent to recognize a federal constitutional right to homosexual marriage because "[i]ts moorings in text, precedent, public policy, and public opinion would be too tenuous to rally even minimum public support."[49] In Posner's estimation, when the Supreme Court determines whether to create a new constitutional right, part of the calculus should involve an examination of the likely social or political reaction to the Court's decision.[50] Thus, Posner seems to argue that those in favor of extending constitutional laws by judicial fiat bear a high burden of proving that the decision is prudent. Therefore, Posner's argument rests on the proper allocation of burdens of proof in the constitutional realm.[51]

Posner rarely affirmatively describes the elements of his version of pragmatism in *Problematics*,[52] although, from the perspective of adjudication,[53] we can say that the pragmatist judge:[54]

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49. *See* POSNER, PROBLEMATICS *supra* note 2, at 249.

50. *See id.* at 250–51.

51. *But see* Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287, 1287–91 (1999) (arguing that Posner's critique of *V.M.I.* is not empirically based, but rather rests on a competing theory of equal protection jurisprudence); Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 52 n.266 (1998) (criticizing Posner's "unabashedly utilitarian" analysis of *V.M.I.* for giving "no weight at all to the right of women to be free from sex discrimination").

52. This is not a criticism of Posner; difficulties defining pragmatism are connected to its very nature. *See* Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 103 n.229 (1998) ("Pragmatism can be more feasibly described than defined. It stresses faith in the need for community and seeks to supplant the formalist conception of rules with more realistic interpretive practices. Pragmatist goals include the fostering of some degree of social progress.").

However, Jeremy Waldron claims that "Posner's writing—like that of almost all self-styled pragmatists—turns slippery and evasive (by analytical standards) when the time comes to explain what 'pragmatism' amounts to." Waldron, *supra* note 48, at 600.

53. Discussing Posnerian pragmatism from the perspective of adjudication, or what a judge might do in a particular situation, leaves open the possibility that pragmatism might mean something different to another player in the legal system. For example, a pragmatic law professor might suggest a solution to a legal dilemma, but a pragmatic judge might decline to implement the professor's suggestion (pragmatic though it might be), given the judge's societal role. The potential cognitive dissonance caused by a pragmatist deciding not to do something "pragmatic" for pragmatic reasons will not be resolved here. *See* POSNER, PROBLEMATICS, *supra* note 2, at 241 (explaining that a "rule pragmatist" might think that the best results, system-wide, might be achieved if "judges did not make pragmatic judgments but simply applied rules"); *see also* BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY 37 (1997) (explaining that a pragmatist might support some level of formalism to serve the interests of a well-functioning system).

54. Elements two, three and four are arguably different facets of the same point.

1. Demonstrates respect for, but not blind adherence to, precedent;[55]
2. Is willing to look outside of traditional legal resources for guidance in resolving truly novel or difficult cases;[56]
3. Uses non-legal methods or information derived from "economics, statistics, game theory, cognitive psychology, political science, sociology, decision theory, and related disciplines,"[57] to resolve legal questions;[58]
4. Seeks guidance from empirical research (hopefully conducted by invigorated law professors[59]) to assist with resolving legal issues;[60]
5. Attempts to come up with a "decision that will be *best* with regard to present and future needs;"[61]

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55. On precedent, Posner writes:

> [The judicial pragmatist] wants to come up with the decision that will be best with regard to present and future needs. He is not uninterested in past decisions, in statutes, and so forth. Far from it. For one thing, these are repositories of knowledge, even, sometimes, of wisdom; so it would be folly to ignore them even if they had no authoritative significance. For another, a decision that destabilized the law by departing too abruptly from precedent might on balance have bad consequences.

POSNER, PROBLEMATICS, *supra* note 2, at 242; *see also* Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 593 (2000) ("The pragmatic judge uses history as a resource, but does not venerate the past or believe that it ought to have a 'special power' over the present.").

56. *See* POSNER, PROBLEMATICS, *supra* note 2, at 242 (explaining that a pragmatist judge does not depend on "precedent, statutes, and constitutional text" to supply the rule of decision in a truly novel case, but instead "looks to sources that bear directly on the wisdom of the rule he is being asked to adopt or modify").

57. *Id.* at 211. This Article expresses no opinion on whether game and decision theory are empirical.

58. Posner recently published a book that builds upon the philosophical perspective enunciated in PROBLEMATICS and explores the value of using various interdisciplinary approaches to resolve legal problems. *See* RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY (2001) (including sections on economics, history, psychology, epistemology, and empiricism).

59. *See* POSNER, PROBLEMATICS, *supra* note 2, at 247 (observing that judges will have difficulty assuming the pragmatist mantle "until changes in legal education and practice make law a more richly theoretical and empirical, and less formal and casuistic, field").

60. *See id.* at xiii, 164, 216, 226; *see also id.* at 213–17 (describing "incontestably valuable" contributions by sociologists of law).

61. *Id.* at 242 (emphasis added); *see also id.* at 249 ("A pragmatist will be guided in this decisionmaking process by the goal of making the choice that will produce the best results.").

> I leave open the criteria for the "best results" for which the pragmatic judge is striving, except that, *pace* Dworkin, they are not simply what is best for the particular case without regard for the implications for other cases. Pragmatism will not tell us what is best; but provided there is a

6. Is willing to rely upon intuition to arrive at a decision when neither traditional legal materials nor extralegal research or methods suggest the proper outcome;[62]
7. Does not "look to God or other transcendental sources of moral principle."[63]

Posnerian pragmatism thus scorns grand moral theory and formalism, and instead advocates fact gathering and empirical analysis in support of Posner's general principle that "the only sound basis for a legal rule is its social advantage, which requires an economic judgment, balancing benefits against costs."[64] As David Luban explains:

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fair degree of value consensus among the judges, as I think there is, it can help judges seek the best results unhampered by philosophical doubts.

Id. at 262. The problem with utilizing a standard based on what is "best" is discussed *infra* Part I.C.4.

62. *Id.* at 256–57. Posner's endorsement of judicial intuition is closely linked to his support of the "outrage" school of constitutional interpretation, whose judicial practitioners, Posner asserts, included Justices Holmes, Cardozo, Frankfurter, and the second Harlan. *Id.* at 147.

> The school of outrage holds that for a court to be justified in stymieing the elected branches of government, it isn't enough that the litigant claiming a constitutional right has the better argument; it has to be a *lot* better. The violation of the Constitution has to be morally certain ([James Bradley] Thayer's position), or stomach turning (Holmes's 'puke' test), or shocking to the conscience (Frankfurter's test) or the sort of thing no reasonable person could defend.

Id. Posner, however, readily acknowledges: "[I] cannot pretend that outrage or even self-restraint furnishes much in the way of guidance to courts grappling with difficult issues. . . . I am also mindful that one person's outrage is another's ecstasy." *Id.* at 148.

63. *Id.* at 256.

64. *Id.* at 208. Some authors have surmised that Posner's philosophy may have changed since adopting the mantle of pragmatism. *See* Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 564 (1999).

> In some writings [Posner] has championed the position that judges should so decide cases as to promote wealth maximization. In his methodologically pragmatist work, however, Judge Posner has argued much more abstractly that judges should decide cases in whatever way will be best for the future . . . he specifically puts to one side the question of the criteria by which to measure what would count as "best." . . . Methodological pragmatism, then, is a theory distinct from "wealth maximization" or from theories advancing other substantive claims under the "pragmatist" mantle. It consists in the bracing, distinctly methodological, starkly negative claim that judges are not bound by methodological rules.

Id. (footnotes omitted); *see also* Dworkin, *Darwin's New Bulldog*, *supra* note 30, at 1735 (asserting that Posner seems to have renounced community wealth maximization as a substantive societal goal, without offering a "substitute account of proper social goals").

However, other scholars remain unconvinced. *See* Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 703 n.61 (observing that although Posner has shifted towards using economic analysis as a tool of pragmatic reasoning, he still supports a theory of wealth maximization and has not redefined his concept of wealth).

> Posner's argument is this: Decisions at law, judicial or otherwise, must be based on a realistic, empirically informed, unsentimental, preferably quantitative comparison of costs and benefits (not limited to monetary costs and benefits, however). Legal decisions should aim at the public's well-being; doctrinal integrity or intellectual elegance are desirable only if they contribute to that well-being.[65]

The antagonistic relationship between Posner's pragmatism and formalism is crucial.[66] In an earlier article on pragmatism, Posner explained: "Legal formalism is the idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact. It is, therefore, anti-pragmatic as well as anti-empirical."[67] We thus see that Posner endorses empiricism[68] as an

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> One should not be misled . . . by Posner's affirmation of pragmatism or by his new enthusiasm for sociology. His interpretation of morality has not changed. . . . As always, he strives to vindicate the economic analysis of law: his pragmatism affirms economics as the master science, and his sociology provides some of the factual knowledge that economics authoritatively interprets.

Berkowitz, *supra* note 28, at 41. For a less critical, but skeptical view, see BIX, *supra* note 39, at 230 (observing that "one would imagine that a devoted pragmatist would be more willing to look to sources and resources other than economics more frequently than Posner seems to do"); *see also* Butler, *supra* note 31, at 342 (explaining that the "blandness" of Posner's call for judges to do what is best raises the "suspicion that Posner's pragmatism, like many other pragmatisms of the past and present, serves only as a mask to cover an underlying set of substantive values").

65. David Luban, *The Posner Variations (Twenty-Seven Variations on a Theme by Holmes)*, 48 STAN. L. REV. 1001, 1005 (1996) (book review of POSNER, OVERCOMING LAW, *supra* note 35).

66. We must keep in mind, of course, that other scholars may have a different take on formalism. *See* DUXBURY, *supra* note 26, at 1 ("Terms like 'formalism' and 'realism' are rarely used in an homogenous fashion: every expositor of American jurisprudence seems to have his or her own personal slant on what these and other terms signify.").

67. Posner, *What Has Pragmatism to Offer Law?*, *supra* note 35, at 1663–64.

68. A useful definition of empirical approaches can be found in Laurens Walker & John Monahan, *Daubert and the Reference Manual: An Essay on the Future of Science in Law*, 82 VA. L. REV. 837, 848 (1996) [hereinafter Walker & Monahan, *Daubert*] ("An empirical approach is often contrasted with a 'rational' one. A rational approach 'rests on the belief that people can understand through reason and intuition alone.' An empirical approach, in contrast, 'begins with the assumption that direct observation and experience provide the only firm basis for understanding nature.'") (footnotes omitted) (quoting JOHN M. NEALE & ROBERT M. LIEBERT, SCIENCE AND BEHAVIOR: AN INTRODUCTION TO METHODS OF RESEARCH 2 (2d ed. 1980)); *see also* Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 152 (2000) ("Empiricism is a way of knowing or understanding the world that relies directly or indirectly on what we experience through our senses . . . . In other words information or data are acceptable in science only insofar as they can be observed or 'sensed' in some way . . . .") (quoting SELLTIZ ET AL., RESEARCH METHODS IN SOCIAL RELATIONS 22 (3d ed. 1976)).

antidote to formalism, because once decisionmakers commit to looking at the real world, they have rejected the confining universe of legal concepts and theories.[69] Thus, pragmatism's greatest strength is often perceived as its robust role as a tool for criticizing formalist legal reasoning.[70]

If one places to the side his attacks on moral philosophers, Posner's main prescription—a call for increased use of social science and empirically-based theories to assist with the resolution of legal problems—fits well within the mainstream of American legal thought.[71] Beginning with the Legal Realists in the early part of the twentieth century,[72] and culminating with the interdisciplinary Law and Society[73]

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69. *See* Farber, *supra* note 25, at 1415 (noting that Posner's approach would be "heresy to formalists"). Farber cites as an example Posner's statement that "a pragmatist judge would not stomach a sentence of life without parole to a sixteen-year-old who sold a single marijuana cigarette." *Id.* (citing POSNER, PROBLEMATICS, *supra* note 2, at 258).

70. Some scholars have expressed doubt over the extent to which the type of formalism Posner refers to ever reigned supreme. *See* Cloud, *supra* note 23, at 218–19 ("[W]ithin the American legal system today ideas about formalism are more likely to derive from a familiarity with the pragmatist critique of formalism than from reading either the original works of scholars like Langdell and Beale, or the judicial opinions of the formalist era.") (footnotes omitted); Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, *in* PRAGMATISM IN LAW & SOCIETY, *supra* note 16, at 368 (opining that battle against formalism, as defined by pragmatists, was "a famous victory over straw persons"); Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 649 (1998) ("[T]he 'formalist' account of legal reasoning—a syllogistic application of rules requiring no discretion and only rudimentary rational ability—has become a straw man, never defended and often abused."); Smith, *supra* note 3, at 428 (arguing that Posner is attacking "a straw man formalism that no one actually advocates"); *see also* Butler, *supra* note 31, at 337 ("A caricature of past legal thinkers as believing in law as a deductive science is put forward in order to create an easy target to show off our analytical skills and progression toward real informed and enlightened positions."). *But see* Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1861–62 (1988) (asserting that formalism never truly died in the judiciary, despite its repudiation by legal scholars, but that rather, judges have retained formalist analysis as a "framework for legal reasoning, while modifying it in order to achieve normatively acceptable results").

71. *See* Patricia Ewick et al., *Legacies of Legal Realism: Social Science, Social Policy, and the Law*, *in* SOCIAL SCIENCE, SOCIAL POLICY AND THE LAW 1–9 (Patricia Ewick et al. eds., 1999) ("The dream of enlisting social science in efforts to understand law and inform legal policy is not new.") (tracing lineage of legal realism and law and society movements).

72. The connection between legal realism and latter "movements" such as Law and Society and Law and Economics is obviously rather complex. *See* DUXBURY, *supra* note 26, at 301–02:

> American legal theorists have hardly been hesitant to discern some sort of relationship between legal realism and the emergence of economic analysis as a distinctive form of interdisciplinary legal study. Yet the nature of this relationship remains unclear. . . . In modern American jurisprudence, it appears, law and economics simultaneously represents realism fulfilled and realism thwarted.

and Law and Economics movements[74] of the latter part of the twentieth century,[75] legal scholars have often implored the courts and other scholars to look outside of the realm of legal doctrine and case law to find the most beneficial[76] solutions to legal dilemmas. And since 1908, when Louis Brandeis filed a brief in *Muller v. Oregon*[77] filled with social science data[78] (the type of brief that now bears his name[79]), courts have recognized the legitimacy of considering such extra-legal authority.[80]

Posner's call for increased reliance on social science materials (if not his harsh criticisms of moral theorists) thus seems rather tame. In fact, many prominent constitutional law and criminal procedure scholars have called for such an approach, even if not under the banner of pragmatism

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73. The primary thrust of proponents in the Law and Society movement has been the use of the social sciences to study the American legal system and its participants from an outsider's perspective. *See* STEWART MACAULAY ET AL., LAW AND SOCIETY: READINGS ON THE SOCIAL STUDY OF THE LAW 1-8 (1995); *see also* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW, at v (4th ed. 1998) (contrasting, without criticism, Monahan and Walker's inside perspective on the relationship of social science and the law with the law and society approach).

74. *See* Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 202 (1998) (contending that economic analysis of law "has a direct and obvious lineage to progressive realism"). *But see* POSNER, OVERCOMING LAW, *supra* note 35, at 3 ("The law and economics movement owes little to legal realism . . . .").

75. For an excellent collection of articles on the relationship between these two movements, see Symposium, *Law and Society & Law and Economics, Common Ground and Irreconcilable Differences, New Directions*, 1997 WIS. L. REV. 375. *See also* Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law Ands*, 1997 WIS. L. REV. 375, 376–78 (explaining features common to the Law and Society and Law and Economics schools of thought, including the desire to use science of differing types to uncover facts that can inform legal decisionmaking).

76. This is obviously a loaded term. For a discussion of the difficulties with determining the "best" solutions to a problem, see *infra* notes 135–144 and accompanying text.

77. 208 U.S. 412 (1908).

78. The quality of Brandeis's data seems suspect in retrospect. *See* MONAHAN & WALKER, *supra* note 73, at 8 (noting that, "ironically," although his brief in *Muller v. Oregon* ushered in the era of social science in U.S. courts, Brandeis's social science methods would not be considered as valid social science today); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 106 (1993) (acknowledging that Brandeis's brief "was a brilliant break with the formalist tradition and had a significant impact on legal thought," but arguing that it "would be assessed harshly as junk social science by today's standards").

79. *See* CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., 21 FED. PRAC. & PROC. § 5102 ("[I]t is still common to refer to a brief which contains factual data as a 'Brandeis brief.'"); Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 199 n.12 (2000) (explaining genesis of the term "Brandeis brief").

80. Whether judicial consideration of non-legal materials has been successful is discussed *infra* Part I.C.3.

or any specific philosophical school.[81] One might wonder why those in the business of resolving thorny societal disputes[82] should not attempt to learn as much about the factual background of the disputes and the potential consequences of their decisions.[83] Who could object to well-informed decisionmakers? We now turn to potential problems.

C. *Problems with Empirical Pragmatism*

There are two major classes of problems with the empirical-pragmatic approach endorsed by Posner. The first class of problems concerns the efficacy of utilizing specific social science methods to assist with analyzing or resolving legal issues.[84] We might say that these are problems with the "empirical" side of empirical pragmatism. These related problems include whether (1) empirical data can capture the legal or social phenomena to be analyzed; (2) professors can generate the empirical data necessary to aid judges in making legal determinations; and (3) judges can understand and apply empirical data. Thus, the first class of problems is concerned with the availability, quality, and practical utility of empirical data.

The second class of problems is less concerned with the efficacy of particular social science methods, but more broadly questions whether pragmatism can help resolve highly charged constitutional dilemmas. This argument therefore is not an objection to the quality of the data or the ability of judges to understand the data. Rather, it is a global condemnation of the uselessness of "facts," however accurate, in resolving fundamental disagreements over legal, moral, or political issues.

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81. *See* Meares & Harcourt, *supra* note 8, at 742–44 (noting different groups of commentators from varying philosophical perspectives who have called for increased attention to social science research in constitutional decisionmaking).

82. For the moment, this blurring of the distinctions between judges, legislators, and executive branch officers by referring to them together as "decisionmakers" is intentional.

83. *See* Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 349–50 (1995) ("Judges, legislators, and practitioners want to know, and in fact, should know, the societal effects of their decisions and actions.") (footnotes omitted).

84. A leading casebook on utilizing social science methodologies in the law is MONAHAN & WALKER, SOCIAL SCIENCE IN LAW, *supra* note 73, which both explains and differentiates the different contexts and purposes for using social science in law and serves as an excellent introduction to the voluminous literature in the field. A representative collection of essays on social science and the law can be found in SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW, *supra* note 71.

1. *Data Failure: Whether Social Science Data Can Adequately Capture the Legal and Social Phenomena To Be Studied*

The first complaint about the use of empirical methods is that these approaches may fail to adequately capture the complexity of the phenomena being analyzed,[85] either because the research on the phenomena is nonexistent or immature,[86] or because the legal or social phenomena contain elements that elude quantification.[87] There is obviously some validity to the complaint that a decision, legal or otherwise, based on poor data is intrinsically unreliable.[88]

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85. To the extent that this complaint asserts that social science studies are insufficiently descriptive, this objection is related to the natural limits of theory, a point that Posner has persuasively refuted:

> [A]n economic theory of law will not capture the full complexity, richness, and confusion of the phenomena—criminal or judicial or marital or whatever—that it seeks to illuminate. But its lack of realism in the sense of descriptive completeness, far from invalidating the theory, is a precondition of theory. A theory that sought faithfully to reproduce the complexity of the empirical world in its assumptions would not be a theory—an explanation—but a description.

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.3, at 18 (5th ed. 1998).

86. *See* POSNER, PROBLEMATICS, *supra* note 2, at 256 (observing that because judges often must make decisions prior to the creation of "any body of organized knowledge to turn to for help" they must rely on their intuitions); *id.* at 255 ("Cases do not wait upon the accumulation of a critical mass of social scientific knowledge that will enable the properly advised judge to arrive at the decision that will have the best results.").

87. Faigman states:

> Many legal scholars will respond by insisting that human behavior in areas such as domestic violence, rape, and child sexual abuse is 'impossible' to study given the contexts involved. After all, in contrast to DNA, we obviously cannot carry out controlled experiments on such phenomena. This reaction, however, not only shows the lack of scientific imagination of the speakers but also is a testament to the lack of scientific training of most legal scholars. A science is not defined as such by virtue of its ability to be studied in controlled experiments. If that were the case, most areas of biology, chemistry, and physics would not qualify. Part of a sophisticated understanding of science includes a complex appreciation of the difficulties of the subject.

David L. Faigman, *The Syndromic Lawyer Syndrome: A Psychological Theory of Evidentiary Munificence*, 67 U. COLO. L. REV. 817, 820 (1996) [hereinafter Faigman, *Syndrome*] (footnote omitted); *see also* David L. Faigman, *The Evidentiary Status of Social Science Under Daubert: Is It "Scientific," "Technical," or "Other" Knowledge?*, 1 PSYCHOL. PUB. POL'Y & L. 960, 963 (1995) [hereinafter Faigman, *Evidentiary Status*] (noting that "many of the factual questions the law raises about human behavior are examples of complex phenomena not easily studied") (restating point first made in David L. Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 561 (1995) [hereinafter Faigman, *Mapping*]).

88. *See also* Faigman, *Evidentiary Status*, *supra* note 87, at 962–63 ("[S]cience is slow, even plodding, and it often requires ideal conditions that rarely exist or studies only small numbers of variables that limit the ability to generalize any findings.") (restating point first made in Faigman, *Mapping*, *supra* note 87, at 560).

Several other related complaints lurk under the surface of this charge. First, there is the notion that certain concepts embodied in the law—liberty, justice, equality, fairness, and due process—simply cannot be measured[89] or fruitfully compared.[90] It is also possible that some who would make this point are not really complaining that the comparisons are invalid because they are empirically flawed—they are making a broader normative point that the balancing should not take place in the first instance.[91] For example, someone who believes in an absolutist view of the First Amendment probably would not be moved by arguments that certain forms of speech might cause societal harm.[92] The adoption of the absolutist view on the issue basically precludes accepting a state ban on speech no matter what the empirical proof demonstrates. Therefore, this is not truly an argument about data failure—it is an argument that judicial reliance on social science data is just the first step towards

89. As one commentator has observed:

> It is one thing to stress the importance of attending to consequences, and it is quite another to insist that the only meaningful consequences are those that are amenable to economic analysis, or capable of mathematically precise measuring and weighing, or available for collection and examination by the latest innovations in social scientific method.

Berkowitz, *supra* note 28, at 45.

In a recent essay, Ward Farnsworth argued that Posner's analysis of the 2000 presidential election demonstrates the weakness of Posner's pragmatism. *See* Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227 (2001). Although he attacks Posner's pragmatism on a variety of grounds, one of Farnsworth's primary arguments is that reliance on a cost-benefit analysis based upon extralegal materials is especially fraught with peril when the purported benefits are as dubious as the ones pressed by Posner and the Court. *Id.* at 240–48; *id.* at 265 ("It was both empirically and conceptually difficult to determine whether the benefits of the Court's remedial decision outweighed the costs."). Farnsworth's point is well taken. As will be made clear below, however, the point of this Article is to demonstrate the value of Posner's pragmatism, even if we accept the validity of the criticisms levied by commentators such as Farnsworth. This Article does not purport to endorse cost-benefit analysis in all cases.

90. *See* Meares & Harcourt, *supra* note 8, at 795 (noting that a "likely criticism is that most of the values of interest—especially personal liberty and efficient law enforcement—are incommensurable and therefore cannot properly be compared"); Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 157 (1984) ("The values of process are hardest to weigh in a calculus of costs and benefits.").

91. *See generally* Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111 (1988) (arguing that resistance to formalized methods for judicial reception of legislative facts is due, in part, to the fact that pragmatic balancing has not supplanted other forms of judicial decisionmaking).

92. There is a large literature on the concept of rights as "trumps," which will not be recounted here. *See, e.g.*, Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727–33 (1998) (describing view of constitutional rights set forth in RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1977)).

violating rule of law principles because it leads to judges making policy decisions outside of their proper role, in derogation of established legal rights.[93]

More generally, one might argue that certain constitutional disputes cannot be reduced to the types of questions that social science favors.[94] As Deborah Merritt asks: "If we cannot count the number of people inhabiting a state without controversy, how can we hope to generate clear answers to the hundreds of social questions informing constitutional law?"[95]

Finally, others have noted the complaint that certain social scientists or social science methodologies are biased, and thus that the promise of objective scientific data to inform legal decisionmaking is elusive.[96] If taken to its logical conclusion, this argument can be rather radical—it essentially means that we should never trust the "facts" that social scientists proffer because the scientific method is too easily corrupted.[97] Defenders of the scientific method, however, readily acknowledge its imperfections—they just do not agree that such broad, anti-empirical assertions are enough to doom the entire endeavor of informing legal judgments with the most reliable, current scientific or sociological data or theories available.[98]

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93. *See* Fallon, *supra* note 64, at 574 ("By inviting judges to act on their personal views of what would make the future better, pragmatism would authorize judicial behavior that offends both rule-of-law and democratic values; it would also devalue the notion of a constitutional 'right.'").

94. *See* Merritt, *supra* note 51, at 1292–93 ("Human beings and the societies they form are too complex and changeable to generate precise social science answers to constitutional controversies.").

95. *Id.* at 1293 n.25 (citing Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999); Wisconsin v. City of New York, 517 U.S. 1 (1996)).

96. *See* Fortson, *supra* note 32, at 2364–65 (arguing that social science is no more useful to judges than moral argumentation because social science is based on non-objective presumptions); Richard E. Redding, *Reconstructing Science Through Law*, 23 S. ILL. U. L.J. 585, 593–97 (1999) (explaining how objectivity of social science can be threatened by researchers' values and biases); Tamanaha, *supra* note 17, at 340–41 (explaining that social science has been criticized for being inherently conservative, and thus favoring the status quo).

97. This argument clearly has more validity if the amicus briefs filed by the parties are the main source of scientific data. *See* Rustad & Koenig, *supra* note 78, at 100 (explaining that amicus curiae briefs filled with social science data are "too often designed to persuade rather than to inform the Court" and that "[m]ost authors . . . are lobbyists whose primary goal is to advance the interests of their clients . . . not guided by the scientific norms of neutrality and objectivity").

98. Faigman, *Evidentiary Status*, *supra* note 87, at 964 (arguing that "the proper response to empirical complexity . . . [is] to demand the best science available and remain aware of its limitations").

2. *The Dilettantism Dilemma: Whether Law Professors Can Generate the Social Science Research Necessary To Support an Empirical-Pragmatic Judicial Approach*

Judge Posner believes that the legal academy should "redirect its research and teaching efforts toward fuller participation in the enterprise of social science (broadly conceived, and certainly not limited to quantitative studies) and by doing so give judges help in understanding the social problems that get thrust on the courts."[99] Given Posner's explicit call for law professors to engage in more empirical research to support the judiciary in its pursuit of pragmatism, it must be noted that whether law professors should or can successfully produce interdisciplinary and empirical scholarship[100] has been debated extensively over the last ten years.[101]

If we assume that Posner is correct that increased empirical study in legal academia is desirable, the question still remains whether law professors are up to the task—whether they are capable[102] and willing to

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99. POSNER, PROBLEMATICS, *supra* note 2, at 164.

100. Interdisciplinary scholarship need not be empirical (indeed, it may be purely theoretical). The two forms of scholarship are grouped together here because, as a practical matter, legal scholarship that goes outside of traditional doctrinal boundaries is likely to have interdisciplinary foundations.

101. The debate gathered steam and found its voice in 1992, when D.C. Circuit Judge Harry T. Edwards commented in a famous law review article: "Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it." Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992). Responses to Judge Edwards may be found in Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993); *see also* J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 950 (1996) (noting two trends: profound disagreement over the direction of legal scholarship and increase in interdisciplinary scholarship, especially at "elite" institutions); Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 79 (1991) ("[T]he dramatic rise in interdisciplinary work has witnessed a considerable amount of sub-standard scholarship. This work likely would not find a home in the professional journals of the associated disciplines, but appears all too often in leading law journals."); Steven Lubet, *Is Legal Theory Good for Anything?*, 1997 U. ILL. L. REV. 193, 193–95 (describing symposium responses to Edwards's article).

102. *See, e.g.*, Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 817 (1999) ("[M]ost law professors do not possess the requisite training or background that most sophisticated statistical work requires. Fewer still possess the inclination and energy to acquire, update, or retool their research skills or analytical repertoire."); Nard, *supra* note 83, at 361–66 (outlining various explanations for the lack of empirical scholarship, based in part upon an informal telephone survey with law professors); *id.* at 368 ("[T]he legal profession is bereft of empirical scholarship, and the primary reason for this is that law professors are not well trained in the empirical method."); Rubin, *supra* note 70, at 1899 ("Pragmatically, legal scholars are not trained to

produce high quality interdisciplinary empirical scholarship in support of their theoretical claims.[103]

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be social scientists and do not have the necessary resources available to them in their institutional setting."); Steven L. Schwarcz, *Introduction: Is Law An Autonomous Discipline?*, 21 HARV. J.L. & PUB. POL'Y 83, 87 (1997) ("[L]aw professors often lack both training in empirical methods and the funding necessary to perform empirical studies."). Dworkin explains:

> Most legal scholars are poorly equipped, in training and time, to produce original research about complex empirical issues—they must rely on reports of the research or arguments of experts. But on many important issues experts disagree, and justifying reliance on one set of experts rather than another is as demanding a task, as much beyond most lawyers' competence, as original research would be. A scholar must often take refuge in obviously unsatisfactory claims that his view is supported by "most" experts, or by the "weight of expert opinion," or something of the sort.

Ronald Dworkin, *Reply*, 29 ARIZ. ST. L.J. 431, 443 (1997) [hereinafter Dworkin, *Reply*]. Also, there are many different forms of mastery, as J.M. Balkin astutely points out:

> Lawyers are particularly good at applying principles worked out in one fact situation to different fact situations, but not particularly good at statistical or empirical study. They are good at simple mathematical reasoning, but not particularly good at more complex models. They are good at reading books that have facts in them, but not particularly good at designing and implementing studies or experiments that would discover new facts.

Balkin, *supra* note 101, at 968.

103. *See, e.g.*, Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323 (1989) (explaining and criticizing lack of academic empirical research). J.M. Balkin, in discussing the law and economic movement, observes:

> The kind of economic analysis that spread most easily and effectively through the legal academy reflected the comparative advantages of lawyers. It was a sort of rhetoricized, arm-chair law and economics. It was an economics in which one made certain empirical assumptions, and one's opponent countered by making different empirical assumptions, but neither was actually going to go out and test the assumptions because neither was trained to do any such thing.

Balkin, *supra* note 101, at 968. Dorf also contends:

> Despite legal realism's successful critique of the conception of the legal enterprise as a search for "the one true rule of law which, being discovered, will endure, without change, forever," to a significant degree, American legal education and American legal reasoning continue to proceed from Langdell's premise that the answers to difficult legal questions are to be found in the reports of judicial decisions.

Dorf, *supra* note 51, at 38 (footnotes omitted) (quoting GRANT GILMORE, THE AGES OF AMERICAN LAW 43 (1977)). *But see* Heise, *supra* note 102, at 812 ("Although empirical legal scholarship remains the overwhelming exception to the general rule favoring non-empirical research, evidence suggests that the production of empirical evidence is on the rise."); Nard, *supra* note 83, at 360 (making same point).

A prominent example of empirical scholarship in the area of criminal procedure involves the intense scholarly debate over the effects of the *Miranda* decision. For a summary of the empirical evidence, see Richard A. Leo, Miranda's *Irrelevance: Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1005–11 (2001); *see also* Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (1996); Paul G. Cassell, Miranda*'s Social Costs: An Empirical*

A scholar who recently surveyed the rich literature on the subject pointed to six reasons for the dearth of empirical research by law professors: (1) empirical work is hard;[104] (2) law professors are not well-trained in empirical methods;[105] (3) empirical work is risky because, unlike more conceptual work, it is falsifiable;[106] (4) empirical legal scholarship is less prestigious than theoretical scholarship;[107] (5) there is a lack of internal institutional incentives for empirical research;[108] and (6) there is a lack of external institutional incentives, such as funding support.[109] Whether these reasons are legitimate or not, any call for empirical scholarship by law professors must be tempered by an understanding of the professional and institutional limitations on such a movement.[110]

3. *The "Ignorance Hypothesis": Whether Courts Can Understand and Apply Empirical Data or Scientific Research*

Another problem with utilizing empirical methodology or social science research to help analyze or resolve legal disputes is that judges might be unable to interpret the relevant data. J. Alexander Tanford has labeled the group of theories that posit judicial incompetence with empirical social science as the "ignorance hypothesis."[111] As Monahan and Walker explain:

Reassessment, 90 NW. U. L. REV. 387 (1996); John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1147 n.4 (1998) (citing Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996); Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278 (1996); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996)). A demonstration of "applied pragmatism" outside of the area of criminal procedure can be found in Susan M. Wolf, *Pragmatism in the Face of Death: The Role of Facts in the Assisted Suicide Debate*, 82 MINN. L. REV. 1063 (1998).

104. Heise, *supra* note 102, at 816.

105. *Id.* at 817–18.

106. *Id.* at 818–19.

107. *Id.* at 819–20.

108. *Id.* at 820–22.

109. *Id.* at 822–24.

110. Although Posner calls for law professors to generate this research, it should be noted that there may be other institutions adept at handling this type of empirical research, either alone or in concert with law professors. For example, this Article will suggest that the United States Marshals Service, a federal law enforcement bureau, would be capable of undertaking research useful to the resolution of certain criminal procedure cases. *See infra* Part IV.

111. J. Alexander Tanford, *The Limits of Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 154–55 (1990) ("The ignorance hypothesis holds that judges, despite

> The fundamental objection that can be raised to any scheme that requires courts to evaluate social science research is that serious errors will be made in the evaluations. Armed with little knowledge, either courts will rely on research containing undetected flaws, or they will discount meritorious studies. In either case, a rule of law may come to be premised on an erroneous empirical foundation.[112]

Concerns regarding judicial competence in this realm are not new—when one surveys the long history of the courts and science[113] two broad themes emerge: first, the judiciary is often assailed for failing to turn to science where it might be of use in resolving legal or factual issues,[114] and second, courts are criticized for improperly using scientific information when they avail themselves of that data.[115] The Supreme Court has been a frequent target in this regard. Monahan and Walker explain:

> The Court has often relied upon the conclusions of scientific research without any consideration of the validity of the methods that produced those conclusions. And on those relatively rare occasions when the Court did not offer conclusory scientific judgments, but rather undertook its own examination of science, the Court did so in an ad hoc and unsystematic manner.[116]

Numerous other scholars have lodged similar complaints regarding the federal judiciary's many failed efforts at interpreting or applying social science or scientific data.[117] David Faigman points to two of the most well known Supreme Court efforts:

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a generally high level of education and intelligence, are inexperienced with, and do not understand empirical social science, especially its statistical language.").

112. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 509 (1986) [hereinafter Monahan & Walker, *Social Authority*].

113. Science here includes all branches of the social sciences.

114. For a summary and critique of the various theories advanced for why the courts have been inhospitable to social science, see Tanford, *supra* note 111, at 151–57.

115. These concerns are not new. *See generally* THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS (Michael J. Saks & Charles H. Baron eds., 1980) (papers and dialogues adapted from 1978 Conference sponsored by Council for Applied Research).

116. Walker & Monahan, *Daubert*, *supra* note 68, at 840–41.

117. *See* David L. Faigman, *"Normative Constitutional Fact Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 549 (1991) [hereinafter Faigman, *Normative Constitutional Fact-Finding*] (noting persistent criticism of the Supreme Court's misuse of empirical research); Merritt, *supra* note 51, at 1292 ("Any attempt to rely

> Occasionally, the Court fashions its constitutional decisions in accordance with the contemporary consensus of scientific opinion. The two cases which best exemplify this practice are also the cases which have led the Court to avoid it. By far the most notorious use of social science in constitutional law is footnote 11 of *Brown v. Board of Education*, and the most notorious use of biological science in constitutional law is *Roe v. Wade*. In both cases, the Court seemingly crafted its opinions in light of scientific consensus, and in both instances the Court lost credibility in doing so.[118]

Others question whether the institutional barriers for properly incorporating social science into constitutional decisionmaking may be too great. Deborah Merritt surmises:

> It is tempting to solve this problem by simply imploring the Court to work harder at getting social science right.... The courts, however, face substantial barriers in attempting to answer constitutional questions with social science: judges are not trained in the scientific method, they depend upon equally untrained parties to present empirical evidence, and the social science itself is too often flawed and malleable.[119]

Even Monahan and Walker, two of the foremost proponents of the use of social science materials in law, admit that their

> confidence is not without limits. Whether a judge can adequately evaluate social science research used as a social framework depends upon both the particular judge doing the evaluation and the particular piece of research being evaluated. Occasions may

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exclusively, or even primarily, upon social science to answer constitutional questions is likely to generate bad science and bad law. The Supreme Court has a rather poor record in this regard—even in answering relatively concrete constitutional questions.");Wolf, *Pragmatism in the Face of Death*, *supra* note 103, at 1066 n.7 (1998) ("A copious literature critiques the Court's approach to data, especially social science data since that data's first use in *Muller v. Oregon*, 208 U.S. 412 (1907)") (citing, as examples, Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. Chi. [Roundtable] 278 (1995); Faigman, *Normative Constitutional Fact-*Finding, *supra*; Tanford, *supra* note 111).

118. Faigman, *Normative Constitutional Fact-Finding*, *supra* note 117, at 565–66 (footnotes omitted). David Faigman has been writing on the intersection of science and the law for over fifteen years. He recently published a book on the topic, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW (1999).

119. Merritt, *supra* note 51, at 1292; *see also* Rubin, *supra* note 70, at 1882–83 (noting conceptual and organizational limitations on judiciary's ability to explore empirical issues).

arise when the complexity of the research exceeds the ability of the judge to evaluate it intelligently.[120]

Posner himself acknowledges that "[a] danger of inviting the judge to step beyond the boundaries of the orthodox legal materials of decision is that judges are not trained to analyze and absorb theories and data of social science."[121] Some might assert that this skepticism is well founded. After all, even Posner has been charged with dilettantism, in part based upon some alleged misstatements he made regarding monkeys, chimpanzees, and bonobos.[122] Regardless of the importance of Posner's error, it does highlight the perils associated with attorneys attempting to master non-legal disciplines and methodologies. As Michael Dorf postulates: "If so extraordinary a judge as Posner cannot avoid misapprehending important details of the specialized fields with which he grapples, his claim that courts generally have great assimilative powers must be an overstatement."[123]

At the same time, even scholars who have criticized the judiciary's handling of social science in the past have confidence that, with proper effort, lawyers can handle such materials.[124] Monahan and Walker have argued that

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120. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 591 n.113 (1987).

121. POSNER, PROBLEMATICS, *supra* note 2, at 255. Although he concedes that "[t]he courts' capacity to conduct empirical research is extremely limited, perhaps nil," Posner believes that the courts possess greater "assimilative powers." *Id.* at 164. One scholar, though, has aptly wondered if this confidence in the judiciary is based "perhaps on Judge Posner's projection of his own eclectic intellectual appetite onto his colleagues on the federal bench." Dorf, *supra* note 51, at 53; *see also id.* at 54 n.278 (opining that "most judges and academics would fail" at trying to acquaint themselves with "'a vast multidisciplinary literature on sex, a literature to which medicine, biology, sociobiology, psychiatry, psychology, sociology, economics, jurisprudence, theology, philosophy, history, classics, anthropology, demography—even geography and literary criticism'" as Judge Posner claims to have done in writing about sex) (quoting RICHARD A. POSNER, SEX AND REASON 2 (1992)).

122. Michael Dorf cites two examples of Posner's purported dilettantism. *See* Dorf, *supra* note 51, at 53 n.278. First he notes Martha C. Nussbaum's contentions that Posner inaccurately portrays academic philosophy. *See id.* (citing Nussbaum, *supra* note 32, at 1782). Second, Dorf asserts that Judge Posner has erroneously referred to bonobos as "a species of monkey," and has incorrectly grouped together "chimpanzees and other monkeys" even though chimpanzees and bonobos are hominoid apes, not monkeys. *See id.* (citing Posner, *The Problematics of Moral and Legal Theory*, *supra* note 29, at 1661 and Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1565 (1998)). This Article expresses no opinion regarding the proper classification of any primates.

123. *See* Dorf, *supra* note 51, at 53 n.278.

124. For example, Faigman states:

> [a]cquiring the knowledge of social science necessary to evaluate most research studies is no more difficult than acquiring the knowledge of economics necessary to adjudicate many antitrust cases or the knowledge of chemistry necessary to resolve much environmental litigation. Anyone who can comprehend the Federal Tort Claims Act can learn what standard deviation and statistical significance mean.[125]

If any conclusions can be drawn on this point, it is that the ability of judges (and lawyers) to understand social science data cannot easily be generalized—too much depends on the capability of the judges involved and the complexity of the particular non-legal concepts before the court. Just as it would probably be incorrect to assume that judges are wholly incapable of mastering anything other than legal doctrine, it would be naïve to assume that every judge and every lawyer has the potential to master sophisticated non-legal concepts. Lawyers and judges have struggled on more than one occasion with traditional doctrinal legal concepts with which they are generally familiar, so it is logical that they might have heightened (but not necessarily insurmountable) difficulty dealing with non-legal concepts.

4. *Banality: Empirical Study Fails To Provide Constitutional Policy Preference*

We now turn to the most potent and persistent criticism of pragmatism—banality.[126] Pragmatism's detractors argue that pragmatism is useless or banal because it endorses no substantive legal,

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> Presenting the problem as concern over the ability of lawyers to comprehend social science minutiae misstates the issue. Even the most difficult concepts used by social scientists are no more difficult than the more esoteric legal concepts lawyers employ regularly. The proper question is whether lawmakers have the inclination or motivation to devote the time necessary to learn the methods of social science.

David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1080 (1989).

125. Monahan & Walker, *Social Authority*, *supra* note 112, at 511 n.119. Of course, one could accept the basic truth of this observation, yet still believe that a substantial number of lawyers and judges are unable to handle complex antitrust and environmental law matters.

126. *See* Farber, *Reinventing Brandeis*, *supra* note 15, at 164–65 (observing the existence of a "view—common among both its critics and supporters—that legal pragmatism is essentially banal") (citing Dworkin, *supra* note 70, at 359; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 814 (1989); Posner, *What Has Pragmatism To Offer Law?*, *supra* note 35, at 1653; Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, *in* PRAGMATISM IN LAW & SOCIETY *supra* note 16, at 89; Smith, *supra* note 3, at 410).

constitutional, or philosophical positions.[127] In sum, unlike "top-down" constitutional theories,[128] pragmatism does not compel legal conclusions or outcomes in specific cases,[129] and it may even possess a tendency towards deferring important value judgments.[130] As one scholar puts it:

> [P]ragmatism is empty of substance: a methodology of inquiry and a theory of truth do not themselves present any truths about the world (other than the theory of truth itself). Pragmatism does not say what the good is, how to live, what economic or political system to develop, or anything else of that nature.[131]

This agnosticism towards ends or results—an adamant refusal to express a preference for desired goals or outcomes—either renders pragmatism useless according to its critics,[132] or merely reinforces

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127. *See* Fallon, *supra* note 64, at 562–64 (contrasting "substantive" constitutional theories that "aim to promote transparent substantive goals" with formal theories such as "methodological pragmatism" that attempt to prescribe a proper procedure for constitutional decisionmaking).

128. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 927 (1999) ("Judge Posner characterizes Dworkin's approach to constitutional law as 'top-down' meaning it starts with a theoretical derivation of constitutional rights or principles and then proceeds to apply these abstractions to decide actual cases.").

129. Louis Menand has argued that this is true for all theory:

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

Louis Menand, *Pragmatists and Poets: A Response to Richard Poirier*, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS, *supra* note 1, at 369. Menand makes the same statement in Louis Menand, *An Introduction to Pragmatism*, *in* PRAGMATISM: A READER xxxiv (Louis Menand ed., 1997), with the added observation: "The pragmatist is the person who asks whether this is a good place to be. The nonpragmatist is the person who admires the ladder."

130. Fallon, *supra* note 64, at 564–65:

> First, anyone who adopts a constitutional theory embraces a set of commitments against which she invites her own future arguments and actions to be tested for consistency and inconsistency, and possibility for dishonesty, fecklessness, or breach of trust. . . . In this context, substantive theories may call for a greater depth of precommitment than many participants in constitutional debates are conscientiously prepared to make. It is often difficult to specify in advance how far particular substantive ends should be pursued, and what attendant costs should be accepted, in varied and frequently unknown factual contexts. By contrast, it may be easier to subscribe to a decision procedure that reserves substantive judgment.

131. Tamanaha, *supra* note 17, at 328 (1996) (footnotes omitted); *see also* Arnold, *supra* note 17, at 904 ("[T]he modern pragmatist values rational thinking, empirical inquiry, and human judgment about what is good and useful.").

132. Even strong proponents of scientific and empirical research note this potential weakness. *See* Faigman, *Mapping*, *supra* note 87, at 560 ("[S]cience provides no assistance over broad and

existing legal structures.[133] In fact, these critics would argue, pragmatism collapses on its own weight because pragmatism calls for doing "what works best," while pragmatists steadfastly refuse to take a position on what is best.[134] As Jeremy Waldron explains:

> Anyone who says that the aim of law is to 'make things better' must be able to offer us two things: a way of arguing about what counts as an improvement (when there is a disagreement about this—as there is in our society); and a way of arguing about questions of distribution and fairness for cases (almost all the cases that the law addresses) in which making things better for some people means making them worse for others. Posner sometimes gives the impression that he thinks anyone who addresses these questions has crossed the line from the practical to the impractical, from pragmatism to moralism. If he thinks this, he is wrong (and wrong on perhaps the most important challenge that pragmatism faces in a legal context). In the disputes that face courts and legislatures, debates about what would count as making things better and debates about the fair distribution of improvements are

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profoundly important areas of human concern, particularly that of values."); Nard, *supra* note 83, at 360 ("[O]nce the results of an empirical survey have been obtained, the question remains: What are we to do now? . . . [A] guiding principle is needed to achieve or remedy what the empirical study uncovers.").

133. *See* Farber, *Reinventing Brandeis*, *supra* note 15, at 170 ("In more simplistic terms, by adopting as a standard 'whatever works,' pragmatism may seem to reinforce existing social values, or perhaps to reduce law to a series of cost-benefit analyses (based, of course, on existing economic values)."); *see also* Rosenfeld, *supra* note 17, at 151 ("[P]ragmatism's propensity to draw attention to means is not only inadequate but can also be downright harmful. Submersion or concealment of ends most often boosts the status quo, and thus exacerbates the obstacles encountered by those who are disfavored by prevailing institutional arrangements.").

134. Posner himself indicates that he is "guided mainly by the kind of vague utilitarianism, or 'soft core' classical liberalism that one associates with John Stuart Mill, especially the Mill of ON LIBERTY." POSNER, PROBLEMATICS, *supra* note 2, at xii. Significantly, Posner has explained what he does not mean by doing what is "best":

> I leave open the criteria for the 'best results' for which the pragmatic judge is striving, except that, *pace* Dworkin, they are not simply what is best for the particular case without regard for the implications for other cases. Pragmatism will not tell us what is best; but provided there is a fair degree of value consensus among the judges, as I think there is, it can help judges seek the best results unhampered by philosophical doubts.

Id. at 262.

Dworkin, on the other hand, accuses Posner of being in the intuitive but hidden grips of Darwinian pragmatist theory, that "presupposes that certain kinds of human lives and certain states of human societies are intrinsically superior to others." Dworkin, *Darwin's New Bulldog*, *supra* note 30, at 1736.

> more or less unavoidable. It is simply question-begging to think that such debates can be superseded by a good-natured commitment to pragmatic amelioration.[135]

The essential question is put artfully by Michel Rosenfeld, who asks: "In short, is pragmatism self-sufficient or is it merely *parasitic* on certain contestable conceptions of the good?"[136] Ronald Dworkin, a fierce critic of pragmatism, refers to this as "the standard pragmatist dilemma."[137] Dworkin explains:

> Pragmatists argue that any moral principle must be assessed only against a practical standard: does adopting that principle help to make things better? But if they stipulate any particular social goal—any conception of when things are better—they undermine their claim, because that social goal could not itself be justified instrumentally without arguing in a circle. So, typically, they decline to say what making things better means: Richard Rorty and the other leaders of Posner's antitheory army seem to assume, contrary to all political experience, that it is obvious to all when a situation is improving or, in a word they believe useful, whether a particular strategy "works." But moral disagreements necessarily include disagreement about what counts as "working." "Pro-life" and "pro-choice" activists would give a very different account of what form of abortion regulation "works," for example. So moral pragmatism has seemed to many critics an empty theory: it encourages forward-looking efforts in search of a future it declines to describe.[138]

Dworkin has repeatedly and vigorously expressed similar sentiments in a variety of writings,[139] and in a book review of *Problematics*, he

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135. Waldron, *supra* note 48, at 601; *see also* Shreve, *supra* note 39, at 65 (noting difficulty with pragmatists calling something a problem, or identifying a solution to a problem, if pragmatism lacks substantive reference points).

136. *See* Rosenfeld, *supra* note 17, at 100 (emphasis in original). He later concludes that pragmatism is parasitic. *Id.* at 151.

137. Dworkin, *Darwin's New Bulldog*, *supra* note 30, at 1735.

138. *Id.* (footnotes omitted).

139. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1265–66 (1997) [hereinafter, Dworkin, *Arduous Virtue*]; Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L. J. 353, 366–67 (1997) (explaining "emptiness" in advising lawyers and judges to seek a decision that "works"); Dworkin, *Reply*, *supra* note 102, at 431; Dworkin, *Reply*, *supra* note 102, at 433:

argues that Posner has conceded the point.[140] However, more recently Posner has attempted to answer this criticism by arguing that factual inquiry may lead to common ground for those in the center of a highly charged debate, even if those at either ideological extreme may remain unconvinced.[141]

D. Pragmatism's Pitfalls in Sum

The foregoing discussion obviously does not resolve the many complex questions surrounding Posnerian pragmatism's exhortation to use social science materials in resolving legal issues. The intent is simply to highlight the strongest and most persistent complaints on the matter, which fall into two broad classes. First, we are faced with

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> [Posner's] brand of pragmatism is empty because it instructs lawyers to attend to facts and consequences, which they already know they should, but does not tell them which facts are important or which consequences matter, which is what they worry about. Of course, in some circumstances, pointing out that a doctrine will have surprising consequences—that a welfare program designed to help a particular group will actually harm that group, for example—is obviously immensely helpful. But these circumstances are rare: most often the controversy is not about what means will in fact achieve an agreed end, but about what end should be agreed upon—about how high efficiency should rank, for example, against social or distributive goals or the protection of rights or goals of integrity.

See also Dworkin, *Philosophy and Monica Lewinsky*, *supra* note 30. Other scholars have made similar points. *See, e.g.*, Dorf, *supra* note 51, at 80 ("Figuring out what 'works' in practice only makes sense if one has a normative framework for measuring success. Jim Crow worked reasonably well as a system of social control, but disastrously as measured by a norm of human dignity.") (footnotes omitted); Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 546 ("There is no scientific fact about human gestation that is likely to resolve the abortion debate one way or another; there is no analysis of human preferences and macroeconomic structure that is likely to determine how redistributive our economic policies should be."); *see also* Butler, *supra* note 31, at 342; Cloud, *supra* note 23, at 213–14 (arguing that pragmatism's exhortation to proceed empirically and seek the "best" results provides little guidance to judges); Fortson, *supra* note 32, at 2348 ("Social science can offer guidance in achieving the goals that society sets, but it can offer no guidance in setting those goals.").

140. *See* Dworkin, *Philosophy and Monica Lewinsky*, *supra* note 30, at 48.

141. *See* Posner, *On the Alleged "Sophistication" of Academic Moralism*, *supra* note 31, at 1020. Posner observes:

> The pragmatists' hope is rather that by abstaining from moral disputation and focusing instead on the facts—by being, in short, a pragmatist—the judge or legislator may find some common ground after all. It is possible, for example, that if more people knew how partial-birth abortion does—and does not—differ from other forms of late-term abortion, and knew too the circumstances under which women decide to have such abortions, the people who are not at either extreme of the abortion debate but rather are centrists (that is, the majority) would discover once that they actually agreed about how it ought to be approached.

Id.

questions regarding the empirical methods themselves. In this category, we have addressed whether social science data can adequately reflect or illuminate the social interactions or phenomena that law seeks to govern, whether law professors can produce the social science research necessary to support a pragmatic judicial approach and, if so, whether judges are capable of understanding and utilizing social science research.

A second category of philosophical complaints is more fundamental. Here we see the assertion from prominent critics of pragmatism, exemplified by Jeremy Waldron and Ronald Dworkin, that pragmatism is useless because it expresses no preference for any political, moral, or social goals. This criticism questions whether, in the final analysis, even accurate social science research can help resolve fundamental disagreements over highly disputed moral and legal questions. Both categories of complaints are potent, but in the remainder of this Article, we will investigate what empirical pragmatism has to offer us in the context of home arrests under *Payton*, even if we assume the validity of these complaints.

II. JUDICIAL ACCEPTANCE AND APPLICATION OF *PAYTON*

A. *Background: The Rules Governing Home Arrests*

In successive terms, nearly twenty years ago, the Supreme Court handed down two opinions establishing the basic constitutional rules for when police may enter a residence to arrest a criminal suspect. In *Payton v. New York*,[142] the Court held that, absent exigent circumstances, the Fourth Amendment[143] prohibits warrantless police entry into a suspect's residence for the purpose of arresting the suspect.[144] The *Payton* Court

142. 445 U.S. 573 (1980).

143. 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.

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

then went further, holding[145] that police in possession of an *arrest warrant* may enter a suspect's dwelling to arrest the suspect if there is reason to believe the suspect is within the residence.[146] One term later, in *Steagald v. United States*,[147] the Supreme Court built upon *Payton*'s limitation on police authority and held that a search warrant, issued by a neutral and detached magistrate, is constitutionally required to permit entry into a third-party's residence to arrest a non-resident suspect.[148]

Although *Payton*[149] and *Steagald* appear to set down fairly straightforward rules governing police conduct, over the last two decades the implementation of *Payton* and *Steagald* has raised several difficult issues. Observers have questioned: (1) whether it is justified to permit entry into a suspect's own residence based upon an arrest warrant, as opposed to a search warrant;[150] (2) whether the privacy

145. See Part II.B, *infra*, for a discussion of whether the Court's statement regarding arrest warrants constitutes a holding or dictum.

146. *Payton*, 445 U.S. at 603 ("[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.").

147. 451 U.S. 204 (1981).

148. *Id.* at 205–06. As in *Payton*, neither consent nor exigent circumstances were at issue. *Id.* at 211.

149. The extent to which *Payton* created or merely clarified the law is open to debate. *Compare* Note, *Arrest Warrants Required for Arrests Within the Home*—Payton v. New York, 30 DEPAUL L. REV. 207, 208 (1980) ("The decision overturned statutes in twenty-three states and settled an issue extensively debated in the federal courts of appeals. In addition, this holding reversed what many commentators and courts considered 'text book law for centuries'—the right of law enforcement officers to arrest without a warrant in the home.") (footnotes omitted), *with* United States v. Johnson, 457 U.S. 537, 552–53 (1982) (holding that *Payton* should be applied retroactively because "its ruling rested on both long-recognized principles of Fourth Amendment law" and "overturned no long-standing practice approved by a near-unanimous body of lower court authority").

150. *See* Note, *Warrantless Entry To Arrest in Suspect's Home*, 94 HARV. L. REV. 178, 186 (1980) (arguing that an arrest warrant does not sufficiently protect a suspect's rights and that the Court should require either "probable cause to believe the suspect is at home or uses his home regularly" and "some valid reason to make a home arrest if a public arrest were feasible"); *see also* Roger D. Groot, *Arrests in Private Dwellings*, 67 VA. L. REV. 275, 281 (1981) ("[T]he *Payton* Court assumed that a prior independent finding of probable cause to arrest renders unnecessary a prior independent finding of probable cause to enter. That assumption assigns an important factual inquiry to the police and undermines traditional fourth amendment procedures.") (footnote omitted); Edward G. Mascolo, *Arrest Warrants and Search Warrants in the Home:* Payton v. New York *Revisited and Modified Under State Constitutional Law*, 66 CONN. B.J. 333, 341–42 (1992) (arguing that allowing entry upon an arrest warrant, which reflects a determination of probable cause to arrest, is illogical when the stated purpose of the warrant requirement is protecting the home from unreasonable searches); George R. Nock, *The Point of the Fourth Amendment and the Myth of Magisterial Discretion*, 23 CONN. L. REV. 1, 25–26 (1990) (referring to the Supreme Court's *Payton* explanation for why an arrest warrant suffices, as a "lame effort at reason"); Steven W. Skinner, Note, *Police Officers Acting Pursuant to an Arrest Warrant May Pursue a Fleeing*

interests of a suspect's cohabitants are sufficiently protected when police seek entry into a suspect's residence pursuant to an arrest warrant;[151] and (3) how courts should determine resident status in this context, and thus whether *Payton* (permitting entry with an arrest warrant) or *Steagald*[152] (requiring a search warrant) controls in a particular case.[153]

This Article addresses a vexing, related question—how certain must police be that a suspect is present prior to entering his residence to effectuate arrest? As noted above, *Payton* permits police, armed with a valid arrest warrant, to enter into a suspect's residence when they have "reason to believe" that the suspect is present. Since 1980, numerous state and federal courts have applied *Payton*'s "reason to believe"

Suspect into a Private Residence and Forcibly Enter the Dwelling Without Knowing the Underlying Offense of the Warrant and Without First Knocking and Announcing Their Presence—State v. Jones, *143 N.J. 4, 667 A.2d 1043 (1995)*, 26 SETON HALL L. REV. 1736, 1760 n.98 (1996) ("[T]he *Payton* Court failed to explain why sufficient probable cause for an arrest warrant justifies entry into the home. An arrest warrant bestows no authority for a search of a suspect, but rather, an arrest warrant is more concerned with identity and guilt of the individual to be seized.") (citations omitted); *cf.* Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 453, 457–59 & n.156 (1993) (advocating a search warrant requirement for entries to effectuate arrest, as part of a proposal geared towards the clarification and simplification of Fourth Amendment law).

151. *See* Groot, *supra* note 150, at 285 (contending that *Payton* should be restricted "to situations in which the suspect lives alone"); Mascolo, *supra* note 150, at 343, 350 (arguing that *Payton* does not sufficiently protect the privacy rights of a suspect's co-residents); Michael Verde, Comment, *The Unwarranted Choice: Arrest Warrants and Problems Inherent in the* Payton *Doctrine*, 32 N.Y.L. SCH. L. REV. 169, 178 (1987) (suggesting that *Payton* may rely on faulty assumptions regarding suspect behavior which fail to adequately protect "the fourth amendment rights of those unfortunate enough to live with an individual wanted by the police"); *see also* Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1638 n.199 (1987) ("[E]very search of the home of a suspect who lives with nonsuspects involves an incursion on the privacy interests of innocent persons that is justified solely by their relationship with the suspect."). For a fascinating multi-resident case, see *Community for Creative Non-Violence v. Unknown Agents of the United States Marshals Service*, 797 F. Supp. 7, 13 (D.D.C. 1992) (stating that execution of arrest warrant at homeless shelter must not "unreasonably infringe on the rights of innocent third parties who live in the shelter").

152. It has also been asked whether *Steagald* sufficiently ensures that the invasion of a third party's privacy is justified, absent a requirement of showing that less intrusive alternatives, such as public arrest or arrest at the suspect's residence, are not possible. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1680–81 (1998).

153. *See* Mascolo, *supra* note 150, at 343–44 (contending that inconsistency between *Payton* and *Steagald* "creates confusion in the lower courts, and breeds disrespect for Supreme Court edicts and the privacy interests in the activities that take place in the home"); Sarah L. Klevit, Note, *Entry To Arrest a Suspect in a Third Party's Home: Ninth Circuit Opens the Door*, 59 WASH. L. REV. 965, 972–74 (1984) (arguing that *Steagald* and not *Payton* should be applied to suspects staying with a third party homeowner).

standard—usually with meager discussion or elaboration. Moreover, as opposed to other questions of Fourth Amendment law,[154] judicial application of *Payton*'s "reason to believe" rule has received virtually no academic consideration.[155]

At the outset, it might be helpful to note a few points that will frame the following discussion. First, three conditions must be met to satisfy *Payton* literally: (1) the police must have a valid arrest warrant; (2) the suspect must live at the dwelling to be entered;[156] and (3) the police must

154. There is a substantial body of literature intensely criticizing the Supreme Court's Fourth Amendment jurisprudence. *See* Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1149 (1998) ("The commentators are remarkably unanimous: The Supreme Court cases construing the Fourth Amendment are a mess that lacks coherence and predictability, and fails to communicate the contours of the field.") (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759–61 (1994); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349–52 (1974); Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 399 (1994); Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 384 (1991); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 474–75 (1991); Bradley, *supra* note 150, at 1468–70; Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 VILL. L. REV. 1267, 1268–69 (1991); Cloud, *supra* note 23, at 200–02; Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1564 (1996); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201–02 (1993); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 587 (1989); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 4 (1991); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1174 (1988); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 383–86 (1988); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 19–20 (1988); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974)).

Fourth Amendment scholarship has taken some hits as well. *See, e.g.*, Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 532 (1992) ("Fourth Amendment law review scholarship is, on the whole, the worst example of analytic jurisprudence—empty assertions of deontological rights theory versus empty utilitarianism.").

155. One exception is an article surveying Eleventh Circuit case law. *See* James P. Fleissner, *Annual Eleventh Circuit Survey January 1, 1995–December 31, 1995: Constitutional Criminal Procedure*, 47 MERCER L. REV. 765, 778–80 (1996) (discussing interpretation and application of *Payton* in *United States v. Magluta*, 44 F.3d 1530 (11th Cir. 1995)). In the interests of full disclosure, it should be noted that the author clerked for the Honorable Phyllis A. Kravitch, United States Court of Appeals for the Eleventh Circuit, during the term in which *Magluta*, one of the cases discussed herein, was decided. However, this Article neither reflects Judge Kravitch's beliefs about the issues raised in *Magluta*, nor any part of the decisionmaking process in chambers or among the other members of the panel.

156. Though *Payton* seems to apply an absolute standard of certitude as to the suspect's residence, every court applying the *Payton* rule also has applied the "reason to believe" language of

have *reason to believe* that the suspect is at home.[157] For the purposes of this Article, we will assume that the first two conditions have been satisfied: police have obtained an arrest warrant and sufficiently linked the premises to the suspect. The only remaining issue is thus proof of presence. This Article will not focus upon cases where police do not possess an arrest warrant; it will also not address the proof that goes into establishing residence for the *Payton* rule.

Second, it might also be helpful to note that *Payton* issues arise in both civil and criminal cases. The standard is implicated in civil rights actions—most often brought under 42 U.S.C. § 1983[158]—alleging law enforcement violations of a plaintiff's Fourth Amendment rights, and in evidence suppression hearings (and appeals therefrom) in criminal prosecutions.[159] Both types of *Payton* cases are discussed together in this Article, although it is recognized that differing procedural postures could affect the precise issue being addressed by the courts. Where necessary, it will be noted, for example, if a court is discussing the sufficiency of

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the presence prong to the resident status requirement. *See* Valdez v. McPheters, 172 F.3d 1220, 1225 (10th Cir. 1999):

> There is no substantial reason to believe that the standard of knowledge should be different or greater when it comes to . . . whether the suspect resides at the house. It would be curious indeed if the two prongs of the test were governed by two different standards of proof. More importantly, requiring actual knowledge of the suspect's true residence would effectively make *Payton* a dead letter.

State v. Miller, 777 A.2d 348, 359 (N.J. Super. Ct. App. Div. 2001) ("As far as we are able to determine, no court which has applied the *Payton* standard has regarded the first element to be as absolute as its text suggests. Most courts have held it to be governed by the same reasonable belief test as informs the second element.") (collecting federal and state cases); *see also* United States v. Route, 104 F.3d 59, 62–63 (5th Cir. 1997) (applying reason to believe to residence prong); United States v. Lauter, 57 F.3d 212, 214 (2d Cir. 1995) (same); *Magluta*, 44 F.3d at 1535 (same).

157. Payton v. New York, 445 U.S. 573, 603 (1980). For the purposes of this Article, this three-prong rule will be referred to as either the "*Payton* rule" or the "*Payton* standard." In other contexts, when courts and scholars speak of the rule established by *Payton*, they are often referring to *Payton*'s primary holding that the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." *Id.* at 576.

158. *Payton* cases can also be brought as *Bivens* actions. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (authorizing civil suits for damages against federal law enforcement officers for violations of Fourth Amendment rights); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.1, at 573 (3d ed. 1999) (noting expansion of *Bivens* damages actions to violations of other constitutional rights). But most *Payton* cases appear to arise under § 1983.

159. *See, e.g.*, United States v. Gay, 240 F.3d 1222, 1224–25 (10th Cir. 2001); *Route*, 104 F.3d at 62–63; *Lauter*, 57 F.3d at 214; *Magluta*, 44 F.3d 1530, 1533 (11th Cir. 1995). It is worth noting that the Supreme Court has made clear that a *Payton* violation will never lead to the invalidation of the arrest itself. *See* New York v. Harris, 495 U.S. 14, 18 (1990).

evidence to withstand a motion to dismiss or for summary judgment, rather than making a final *Payton* determination on the merits. It is also worth mentioning that the person arguing that *Payton* has been violated may or may not be the suspect named in the arrest warrant. For example, someone residing with the suspect may argue that police entered the residence in violation of the *Payton* rule. Finally, it is typically unimportant in the following discussion whether the suspect was indeed found in the residence. The crucial question usually revolves around what police believed prior to the entry—not whether those beliefs were confirmed later.

B. Judicial Acceptance of the Payton *Standard*

Because the police in *Payton* and its companion case *New York v. Riddick*[160] concededly acted without warrants of any kind,[161] and in both cases it was undisputed that the police had probable cause to believe that the suspects were present at the time of entry,[162] courts initially had to determine whether the *Payton* rule, which sets a standard for police entries *with* a warrant, was binding precedent or dicta.[163] On this score,

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

161. *Id.* at 576, 578.

162. *Id.* at 583 ("We also note that in neither case is it argued that the police lacked probable cause to believe that the suspect was at home when they entered.").

163. *See* Klevit, *supra* note 153, at 967 n.14 ("Arguably, this language from *Payton* is dicta because in the case itself the police acted without any warrant at all. *Payton* could be narrowly construed to hold only that statutes authorizing police entry without any warrant are unconstitutional. This argument was considered but rejected by the Ninth Circuit. . . ."). As the Ninth Circuit reasoned:

> The second possible ground for avoiding the application to this case of the Supreme Court's positive statement in *Payton* that an arrest warrant plus reason to believe the suspect is present are sufficient to permit entry without a search warrant is that the statement was merely dictum that need not be followed by this court because the officers in *Payton* had neither a search warrant nor an arrest warrant. This restrictive interpretation of *Payton* has been rejected by every court of appeals and every state court that has considered the issue. We reject it as well.

United States v. Underwood, 717 F.2d 482, 484 (9th Cir. 1983) (en banc); *see also* Lyles v. City of Barling, 181 F.3d 914, 917 (8th Cir. 1999) (stating that the *Payton* standard is "clearly established Fourth Amendment law"). *But see* O'Rourke v. City of Norman, 875 F.2d 1465, 1468 n.7 (10th Cir. 1989) (dictum in footnote referring to *Payton* language as dictum); People v. Jacobs, 729 P.2d 757, 761 n.4 (Cal. 1987) (referring to *Payton*'s reason to believe standard as dictum); State v. Jones, 995 P.2d 571, 573 (Or. Ct. App. 2000) (before deciding the matter on state constitutional grounds, observing that the Supreme Court's "statement in *Payton* is technically dictum, because the police in *Payton* did not have an arrest warrant," but acknowledging that "the Court later cited *Payton* as controlling authority in a case in which the police did have an arrest warrant") (citing Steagald v. United States, 451 U.S. 204, 214 n.7 (1981)).

the courts have been nearly unanimous: *Payton*'s *reason to believe* formulation has prevailed in virtually every federal and state court to consider the matter.[164] Moreover, recent Supreme Court case law demonstrates unequivocal support for *Payton*,[165] although unfortunately

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An inscrutable description of *Payton* was provided by way of an oddly accurate oxymoron in Nash v. Douglas County, 733 F. Supp. 100, 105 (N.D. Ga. 1989) (describing *Payton* as "*holding in dictum* that for Fourth Amendment purposes, an arrest warrant carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within") (emphasis added). Of course, a court could conceivably determine that the *Payton* rule is dicta, but still follow it on the theory that it elaborates the correct standard.

164. The rule in the Ninth Circuit can be questioned due to an errant case that referred to the standard as "probable cause." *See* United States v. Harper, 928 F.2d 894, 896 (9th Cir. 1991) (citing Perez v. Simmons, 900 F.2d 213 (9th Cir. 1990), *amending* 884 F.2d 1136 (9th Cir. 1989)). As the Tenth Circuit has pointed out, though, *Perez*—which was amended to state a "reasonable grounds for believing" standard—does not stand for the proposition for which it is cited by *Harper*, and more recent Ninth Circuit authority embraces the reason to believe language. *See* Valdez v. McPheters, 172 F.3d 1220, 1224–25 & n.1 (10th Cir. 1999) (citing *Perez* and United States v. Albrektsen, 151 F.3d 951 (9th Cir. 1998)). Several other Ninth Circuit cases have also referred to the standard as "reason to believe" or cited *Payton* for that proposition. *See* Watts v. Sacramento, 256 F.3d 886, 889–90 (9th Cir. 2001); United States v. Cunningham, No. 91-50044, 1993 WL 27016, at *3 (9th Cir. Feb. 4, 1993) (quoting *Payton*); United States v. Litteral, 910 F.2d 547, 553–54 (9th Cir. 1990); United States v. Ramirez, 770 F.2d 1458, 1460 (9th Cir. 1985); United States v. Underwood, 717 F.2d 482, 484 (9th Cir. 1983) (en banc). Moreover, although *Harper* purports to apply a "probable cause" standard, it is a remarkably lenient version of probable cause. *See infra* footnotes 318–322 and accompanying text.

In addition, a recent Oregon Supreme Court opinion decided not to follow *Payton* on state constitutional grounds. *See* State v. Jones, 27 P.3d 119, 123 (Or. 2001) (holding that probable cause was required under Article I, section 9 of the Oregon Constitution, which is analogous to U.S. Const. amend. IV), *aff'g* State v. Jones, 995 P.2d 571, 574 (Or. Ct. App. 2000) (2–1 decision) ("*Jones I*"). Because the state conceded the absence of probable cause, *Jones*, 27 P.3d at 121, 123, the court held that the police had violated section 9 of the Oregon Constitution. *See id.* at 123. The Oregon Supreme Court conceded that its holding was inconsistent with federal case law applying *Payton*. *See id.* Moreover, the *Jones* court's assertion that Oregon precedent had adopted a clear probable cause test is itself open to dispute. *See Jones I*, 995 P.2d at 575–76 (Linder, J., dissenting); *see also infra* Part III.C.1 (discussing State v. Jordan, 605 P.2d 646 (Or. 1980)). Finally, it should be noted that, on occasion, courts have referred to the standard as probable cause, but without citation to, or discussion of, *Payton*. *See, e.g.*, Doby v. Decrescenzo, No. Civ. A. 94-3991, 1996 WL 510095 at *33 (E.D. Pa. Sept. 9, 1996) ("Police officers acting under a valid arrest warrant are permitted to enter that person's residence if they have probable cause to believe that the person is there.") (civil action brought under Pennsylvania state law), *aff'd*, 171 F.3d 858 (3d Cir. 1999).

165. *See* Wilson v. Layne, 526 U.S. 603, 610–11 (1999) (citing *Payton* rule and noting that police "were undoubtedly entitled to enter the Wilson home in order to execute the arrest warrant for Dominic Wilson" because Supreme Court "decisions have applied . . . basic principles of the Fourth Amendment to situations, like the one in this case, in which police enter a home under the authority of an arrest warrant in order to take into custody the suspect named in the warrant"); *Steagald*, 451 U.S. at 221 ("As noted in *Payton v. New York* . . . an arrest warrant alone will suffice to enter a suspect's own residence to effect his arrest."); *see also* Michigan v. Summers, 452 U.S. 692, 704 (1981):

without providing much guidance as to the content of the *Payton* standard.

Accepting the *Payton* standard raises the question of what facts or evidence will satisfy the standard. *Payton*, courts have noted, provides little guidance as to the meaning of "reason to believe,"[166] as Justice Stevens included this term without reference to Supreme Court precedent or other authority.[167] Therefore, it has been up to courts applying *Payton* to divine its meaning and place it within the context of other Fourth Amendment standards.[168]

> In *Payton v. New York* . . . we held that police officers may not enter a private residence to make a routine felony arrest without first obtaining a warrant. In that case we rejected the suggestion that only a search warrant could adequately protect the privacy interests at stake, noting that the distinction between a search warrant and an arrest warrant was far less significant than the interposition of the magistrate's determination of probable cause between the zealous officer and the citizen.

Unfortunately, the Supreme Court's support of *Payton* has not required further elaboration on the content of the standard. In *United States v. Magluta*, 44 F.3d 1530, 1534 (11th Cir. 1995), one of the parties cited *Maryland v. Buie*, 494 U.S. 325 (1990), in support of a probable cause standard, because of the *Buie* Court's observation that police in possession of "an arrest warrant and *probable cause* to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found." *Buie*, 494 U.S. at 332–33 (emphasis added). The Eleventh Circuit disagreed with this reading of *Buie*, noting that the Supreme Court's conclusion that probable cause was sufficient did not lead to the conclusion that probable cause was required. *See Magluta*, 44 F.3d at 1534:

> [T]he Court's language in *Buie* is not dispositive, because the Court there merely reasoned that based on the facts of *Buie* the police officers' possession of probable cause entitled them to enter and sweep the residence—the Court did not and has not, ever held that probable cause is *required* to enter a residence to execute an arrest warrant for the resident.

166. *See* Smith v. Tolley, 960 F. Supp. 977, 985 (E.D. Va. 1997) ("The Supreme Court did not define the 'reason to believe' standard which it articulated in *Payton*, and the circuits have not provided much guidance.") (citing *Magluta*, 44 F.3d at 1534 (citing *Payton*, 445 U.S. at 603)); Skinner, *supra* note 150, at 1760 n.98 ("In declining to require a search warrant to enter the dwelling of a subject of an arrest warrant, the Court referred to no authority for the ruling, but simply asserted that entry with merely an arrest warrant is 'constitutionally reasonable.'"); *see also* Mascolo, *supra* note 150, at 335–36:

> In rejecting the requirement of a search warrant to enter the residence of a suspect for purposes of arrest, the *Payton* Court cited no authority for this dismissal, but simply concluded that entry with an arrest warrant is 'constitutionally reasonable.' This summary dismissal of the search warrant requirement, and incomplete treatment of this issue, laid the groundwork for much of the confusion among lower courts subsequently applying the *Payton* Rule.

(footnotes omitted).

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

168. Judicial acceptance of *Payton*'s "reason to believe" language is accompanied with the explicit or implicit rejection of a higher, more onerous burden of proof—typically "probable cause." The relationship between *Payton*'s "reason to believe" language and "probable cause" is discussed extensively, *infra* Part III.

Admittedly, the question of whether someone is at home (or more properly stated, whether there is reason to believe that fact) appears to be a common-sense inquiry rather than the type of substantial philosophical or interpretative question that puzzles courts and leads to intense academic debate. Still, because the *Payton* standard governs whether police can intrude into the home, and the Supreme Court has observed that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,"[169] it is important to determine what *Payton* embodies.[170]

C. *Factors Commonly Considered by the Courts in* Payton *Cases*

Most courts resolve *Payton* cases without the pretense of analysis. Instead, one approach typically dominates—courts state the *Payton* standard, list the factors that supported the belief that the suspect was home[171] (perhaps adding a statement cautioning courts to be "sensitive to common sense factors indicating a resident's presence"[172]), and then they conclude that the standard has been met.[173] The most commonly noted factors, which are discussed below, include: (1) suspect contact or

169. United States v. United States District Court, 407 U.S. 297, 313 (1972).

170. William Stuntz, who properly questions the fairness of current Fourth Amendment jurisprudence due to its emphasis on the home, states that: "Fourth Amendment law regulates house searches more than anything else. Not only is probable cause required, but so is a warrant; indeed homes are almost the only place where the warrant requirement remains meaningful." William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1269 (1999). Thus, one might wonder what remains of the Fourth Amendment's protections if even the sanctity of the home is not free from concern.

171. My decision to organize this discussion by the factors the courts have considered creates a slight problem: it may not be clear how much weight a particular factor carried when considered in tandem with other factors. *See* Valdez v. McPheters, 172 F.3d 1220, 1226 (10th Cir. 1999) ("No single factor is, of course, dispositive. Rather, the court must look at all of the circumstances present in the case to determine whether the officers entering the residence had a reasonable belief that the suspect resided there and would be found within."); *cf. id.* at 1229–30 (Ebel, J., concurring in part and dissenting in part) (noting "myriad ways to infer presence" but observing that time of day cases all "had other indicia of presence besides the time of day at which they conducted their search"). Therefore, as factors supporting a reasonable belief of presence are discussed in the following subsections, readers are strongly cautioned that in many cases multiple factors are present and the weight of a single factor may be minimal.

172. *Id.* at 1226 (quoting United States v. Magluta, 44 F.3d 1530, 1538 (11th Cir. 1995)).

173. On occasion, courts conclude that *Payton's* presence prong has been satisfied without detailing the evidence in support of that conclusion. *See, e.g.*, State v. Wright, 419 S.E.2d 334, 337 (Ga. Ct. App. 1992) ("There is no contention that the federal arrest warrant was not valid and the undisputed evidence of record shows that the F.B.I. agents had reason to believe that Wright was in his apartment when they entered.").

observation; (2) the presence of noise, lights and cars; and (3) the time of day the police seek entry, especially in light of any information regarding the suspect's schedule.

1. Suspect Contact or Observation

A relaxed approach to applying *Payton* is least likely to cause concern in cases where the defendant is actually seen by police, or a third party, in or at the residence immediately prior to entry. In the most convincing *Payton* cases, either the suspect answers the door when police knock,[174] or a cohabitant answers the door and indicates that the suspect is present, either verbally[175] or with a non-verbal cue.[176] In such cases, the accepted

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174. *See* United States v. Cunningham, No. 91-50044, 1993 WL 27016, at *1, *3 (9th Cir. Feb. 4, 1993) (suspect opened and attempted to shut door); State v. Coma, 981 P.2d 754, 755 (Idaho Ct. App. 1999) (defendant answered door when police knocked); Commonwealth v. Rivera, 710 N.E.2d 950, 953 (Mass. 1999) (after noting that the issue was waived on appeal, the court held that police had "more than a reasonable belief; they had probable cause," that defendant was present where he answered door in response to vigorous knocking and kicking by officers, who possessed photograph of suspect and had just captured, as of yet unidentified, fleeing co-resident suspect outside of apartment building); Commonwealth v. Acosta, 627 N.E.2d 466, 467–68 (Mass. 1993) (defendant answered door when police knocked); State v. Cota, 675 P.2d 1101, 1102 (Or. Ct. App. 1984) (en banc) (same); State v. Watson, No. 17606-1-III, 2000 WL 300814, (Wash. Ct. App. Mar. 23, 2000) (suspect answered door and as police entered to arrest subject, they pursued a woman who moved suspiciously through the residence); *see also* Archer v. Commonwealth, 492 S.E.2d 826, 830–31 (Va. Ct. App. 1997) (police saw white male who "perfectly" matched suspect's description in motel room, and after vigorous knocking, opened an apparently unsecured door).

175. *See* United States v. Clayton, 210 F.3d 841, 842, 844 (8th Cir. 2000) (man who answered door indicated that suspect was present, opened door revealing suspect asleep on the couch); Parra v. Chino, Nos. 96-55218, 96-55271, 1998 WL 88256 (9th Cir. Mar. 2, 1998) (Parra's wife answered door, told police her husband would come to the door in a moment and then closed and apparently locked the screen door; fearing an escape attempt, officers forcibly entered and searched the residence for Parra); United States v. Miles, 82 F. Supp. 2d 1201, 1204–09 (D. Kan. 1999) (after initial denials, girlfriend eventually told police that the suspect was in the apartment; entry upheld under three different alternative theories: (1) a valid *Payton* entry; (2) exigent circumstances; and (3) consent), *aff'd*, No. 00-3230, 2001 WL 815379 (10th Cir. Jul. 19, 2001) (based on consent only); State v. Ramsey, 864 S.W.2d 320, 329–30 (Mo. 1993) (mother indicated defendant was home and then opened door further so defendant could be seen); Noel v. Commonwealth, No. 1730-99-2, 2000 WL 781322, at *1 (Va. Ct. App. June 20, 2000) (unpublished disposition) (after man who answered the door indicated that he would get the suspect, police officer entered residence).

In United States v. Boyd, 180 F. 3d 967 (8th Cir. 1999), the defendant argued that the trial court erred by concluding that police had reason to believe he was a resident at the home where he was arrested. In *Boyd*, officers knocked on the door, identified themselves to the suspect's girlfriend, Troupe, told her that they possessed an arrest warrant for her boyfriend, Boyd, and asked where he was. *Id.* at 973. Troupe responded that Boyd was up in his room and police went upstairs to arrest the suspect. *Id.* at 973, 978. The court contended that Troupe's response to the officers ("He's up in his room") made it "reasonable for the marshals to believe they had Troupe's consent to enter the home." *Id.* at 978. Even if Troupe's comment did not amount to consent to enter, it certainly seems

laws of time and space lead to a near-certain belief that the suspect is present.[177]

Less compelling, yet still persuasive, are cases where police or a third party see the suspect at or near[178] the residence some time prior to the entry,[179] even if the identification is less than certain.[180] In fact, courts

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to be a strong piece of evidence that he was present. Yet, oddly, the court does not cite the comment as support for the *Payton* rule, although the court details other proof of presence in the opinion. *Id.*

176. United States v. Stinson, 857 F. Supp. 1026, 1027 (D. Conn. 1994) (woman who answered door "looked over her shoulder, turned toward the back of the apartment, and then turned back to face" police, when asked for suspect's location).

177. At the other end of the spectrum would be cases where the police enter immediately after seeing the defendant leave his home, thus eradicating any belief that the suspect is still present. As of yet, there have been no reported cases upholding an entry on those facts. *Cf.* People v. White, 183 Cal. App. 3d 1199, 1209 (1986) (stating that where rape victim told police that her assailant, White, departed from scene of crime by car a short time earlier, and no car fitting description was in vicinity of residence, "any belief White could be found in his house was more in the nature of wild speculation. . . . far below the standard of a 'reasonable belief.'"). *But see* United States v. Edmonds, 52 F.3d 1236, 1248 (3d Cir. 1995) (concluding that fact that suspect had last been seen departing his residence did not exclude possibility that he was present, when police returned the next morning, because "normally, a person who is currently living at an apartment returns there at some point to spend the night").

178. U.S. v. Morgan, No. 92-5068, 1992 WL 203950 (4th Cir. Aug. 24, 1992) (per curiam) (officer saw suspect running towards his home; interior lights were on and then off; suspect's car was parked in the rear of the house).

179. *See Boyd*, 180 F.3d at 978 (confidential informant told police that suspect was at girlfriend's residence); United States v. Smith, 131 F.3d 1392, 1396 (10th Cir. 1997) (police entered house 15 minutes after spotting suspect at the door of the garage); United States v. Spencer, 684 F.2d 220, 221–23 (2d Cir. 1982) (police arrived at defendant's home thirty-five minutes after being told by defendant's girlfriend that he was home); People v. Wader, 854 P.2d 80, 90–91 (Cal. 1993) (substantial evidence supported trial court's determination that officer had reasonable cause to believe defendant was inside because "the arresting officer personally observed defendant at the residence in the early morning hours before the arrest at dawn"); People v. Dyke, 224 Cal. App. 3d 648, 659 (1990) (motel manager with picture of suspect phoned police to say she spotted the suspect); *see also* Bratton v. Toboz, 764 F. Supp. 965, 968–72 (M.D. Pa. 1991) (confidential informant informed police that the someone resembling the suspect—he was 99% sure—was at the residence approximately two-and-a-half hours prior to police entry); Wisconsin v. Blanco, No. 98-3153-CR, 98-3535-CR, 2000 WL 623024 (Wis. Ct. App. May 16, 2000) (one occupant saw suspect outside of building smoking cigarette; another resident saw suspect near the apartment just before police arrived, and police saw suspect's aborted attempt to climb out of bathroom window).

In *United States v. Gay*, 240 F.3d 1222, 1225, 1227 (10th Cir. 2001), the court held that *Payton* was satisfied where a confidential informant told police that the suspect was home, after which the police heard a "loud thud" in the residence. However, the basis for the CI's knowledge is not clear from the opinion. *Id.* at 1225, 1227–28.

180. *See* Anderson v. Campbell, No. 95-6459, 1996 WL 731244, at *3 (10th Cir. Dec. 20, 1996) (suspect's father, who possessed the same basic features as his son, was seen through window); Bailey v. Kenney, 791 F. Supp. 1511, 1519–20 (D. Kan. 1992) (officers entitled to qualified immunity in § 1983 action where police incorrectly entered residence of man with the same name as a fugitive, because bondsman saw *someone* enter residence, even though a neighbor did not

have specifically held that a later determination that the identification was erroneous does not weaken its contribution to the reasonable belief that the suspect was present.[181] Finally, contact with a suspect at a location by phone has also been held to support the belief that the suspect would be present at the time of entry.[182]

2. *Noise, Light, and Cars*

Absent an indicator as clear as contact (visual or otherwise) with the suspect, courts look to other indicia of a suspect's presence. The two most commonly utilized factors are noise or light emanating from the suspect's residence,[183] especially if the presence of the noise or light represents a change from earlier circumstances.[184]

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positively identify a photo of the fugitive as his neighbor); *see also* Smith v. Tolley, 960 F. Supp. 977, 988–89 (E.D. Va. 1997) (three individuals, though not the suspect, observed in suspect's residence, and suspect's husband emerged from the residence to confront the police); Wilson v. Northcutt, No. 1:90-CV-928JTC, 1991 WL 495710, at *4 (N.D. Ga. Nov. 25, 1991) (entry valid where officers saw person in house, who would not come to the door, who resembled description of suspect in warrant, but for hair color, and neighbors verified description of person present in home prior to officer's entry). *But see* Watts v. Sacramento, 256 F.3d 886, 890 (9th Cir. 2001) (holding that trial court erred in granting summary judgment on *Payton* claims because it could not be said "as a matter of law that it was reasonable" for police to believe that the man who answered the door was the suspect), *reversing* Watts v. Sacramento, 65 F. Supp. 2d 1111, 1116 (E.D. Cal. 1999).

181. *See* State v. Green, 723 A.2d 1012 (N.J. Super. Ct. App. Div. 1999) (no constitutional violation where police spotted someone matching the suspect's description on the street in front of the suspect's residence and pursued him into the residence by kicking down doors, even though the belief of the suspect's identity turned out to be incorrect).

182. *See, e.g.*, United States v. Risse, 83 F.3d 212, 217 (8th Cir. 1996) (police phoned prior to entry); Russell v. Kitsap County Sheriff's Dep't, No. 2413151-5-II, 2000 WL 380543, at *2 (Wash. Ct. App. Apr. 14, 2000) (suspect called the police department minutes before the police arrived and a neighbor had advised police that no one had left the house all day).

183. *See* United States v. Route, 104 F.3d 59, 63 (5th Cir. 1997) (television heard on premises); *Tolley*, 960 F. Supp. at 988 (interior lights "illuminated the house"); United States v. Morehead, 959 F.2d 1489, 1496 (10th Cir. 1992) (lights observed illuminating both a building and a camper on the premises); *Anderson*, 1996 WL 731244, at *3 (lights on at home); Hardaway v. Georgia, 372 S.E.2d 845, 846 (Ga. Ct. App. 1988) (moving light and noises); State v. Northover, 991 P.2d 380, 381, 384 (Idaho Ct. App. 1999) (basement light on); State v. Workman, 476 S.E.2d 301, 311 (N.C. 1996) (lights were on inside trailer and noises were heard inside); State v. Asbury, 493 S.E.2d 349, 351–52 (S.C. 1997) (light on in residence and kitchen window open); *Russell*, 2000 WL 380543, at *5 (a light was on in the residence). *But see* Lyles v. City of Barling, 181 F.3d 914, 917–18 (8th Cir. 1999) (dispute in facts regarding whether light or sound emanated from the residence sufficient to withstand summary judgment on qualified immunity defense in § 1983 action); *Asbury*, 493 S.E.2d at 354–55 & 354 n.2 (Toal, J., dissenting) (noting that police sighting of light on in residence was called into question on cross-examination).

184. *See, e.g.*, United States v. Meindl, 83 F. Supp. 2d 1207, 1210, 1213 (D. Kan. 1999) (in contrast to previous day, outdoor security lights activated, television operating in living room, and

Second, courts often cite the presence of a vehicle at the residence to support the belief that the suspect is present. There are three types of vehicle cases. First, there are cases where a car is specifically linked to the suspect or the police have been informed that the presence of the vehicle means that the suspect will be present.[185] Second, there are cases where the vehicle is not linked to the suspect, but the court still finds the presence of a vehicle to carry some weight in terms of indicating presence.[186] Third, there are cases where the vehicles present have been linked to known friends or associates of the suspect. In this third group of cases, the presence of the vehicle supports the conclusion that a friend is visiting the resident, which in turn supports the theory that the suspect is present.[187]

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electric meter on house moving at accelerated pace); U.S. v. Morgan, No. 92-5068, 1992 WL 203950 (4th Cir. Aug. 24, 1992) (interior lights were on and then off).

185. *See* United States v. Boyd, 180 F. 3d 967, 978 (8th Cir. 1999) (hood of girlfriend's car still warm, and car matching description of car driven by suspect parked outside of the girlfriend's residence); United States v. Edmonds, 52 F.3d 1236, 1248 (3d Cir. 1995) (black Ford Mustang connected to suspect seen parked outside of residence); United States v. Magluta, 44 F.3d 1530, 1537–38 (11th Cir. 1995) (despite dispute in evidence, presence of vehicle allegedly connected to fugitive contributed to reasonableness of conclusion that he was at home); *Morgan*, 1992 WL 203950, at *1 (suspect's car was parked in the rear of the house); United States v. Litteral, 910 F.2d 547, 553–54 (9th Cir. 1990) (informant told agents that if suspect's car was there, he would be present); United States v. De Parias, 805 F.2d 1447, 1457 (11th Cir. 1986) (apartment manager told agents that suspects were at home if a certain car was parked outside of the premises); United States v. Beck, 729 F.2d 1329, 1331 (11th Cir. 1984) (suspect's car parked nearby his apartment); United States v. Hagman, Nos. 00-40050-01/02-DES, 2000 WL 1476578, at *1–3 (D. Kan. Sept. 19, 2000) (a bail bondsman that staked out the motel room for three days and was told by a motel employee that the suspect drove a gold Pontiac and that if the car was there, then the suspect was there); United States v. Segarra, No. 5:91-CR-53 (WWE), 1991 WL 434803, at *3 (D. Conn. Dec. 27, 1991) (defendant's vehicle parked in the vicinity of the apartment complex); Archer v. Commonwealth, 492 S.E.2d 826, 829–31 (Va. Ct. App. 1997) (police received anonymous tip stating that a wanted man who drove a light green Geo Storm was at a named hotel; when police located the car in front of a motel room, they knocked on the door vigorously, opening the unsecured door, revealing presence of suspect). *But see Lyles*, 181 F.3d at 917–18 (presence of vehicle, which was warm to the touch indicating it had recently been driven, not dispositive where neighbor told police that another vehicle had recently departed the residence); Harasim v. Kuchar, 702 F. Supp. 178, 182 (N.D. Ill. 1988) (summary judgment in favor of police officer denied where police did not verify the presence of either of two vehicles connected to the defendant).

186. *See Bervaldi*, 226 F.3d at 1258, 1267 (two trucks and boat trailer parked at residence); *Route*, 104 F.3d at 63 (unidentified vehicle remained in driveway as co-resident suspect apprehended as he attempted to depart by car); *Tolley*, 960 F. Supp. at 988 (two cars parked near the suspect's home, "one in the driveway and one in the street"); United States v. Morehead, 959 F.2d 1489, 1496 (10th Cir. 1992) (multiple vehicles present); *Russell*, 2000 WL 380543, at *2, *5 (four vehicles were parked outside of the residence; and a neighbor had advised the police that no one had left the house all day).

187. *See Magluta*, 44 F.3d at 1538 ("The presence of a visitor at a residence supports the reasonable conclusion that the resident is at home.").

3. *Time of Day and the Suspect's Schedule*

Courts also have given great weight to the time of day the police seek entry. Early morning[188] or late evening[189] police entry weighs in favor of finding that it was reasonable to believe the suspect was at home, although it is arguable whether the time of day, without more, should suffice to permit entry.[190] The time of day factor is often viewed in conjunction with information about the suspect's schedule.[191] Therefore, the fact that the suspect is not known to be working could affect how police act at a particular time of day. Thus, in one case, the Tenth Circuit

188. *See Edmonds*, 52 F.3d at 1248 (police arrived at 6:45 a.m. and monitored apartment until 9:40); *Beck*, 729 F.2d at 1331–32 (7:30 a.m.); United States v. Terry, 702 F.2d 299, 319 (2d Cir. 1983) (8:45 a.m. on a Sunday morning); United States v. Lovelock, No. 96 CR. 440 (HB), 1997 WL 4574, at *1–2 (S.D.N.Y. 1997) (7:00 to 8:00 a.m. and door was found open), *aff'd* 170 F.3d 339 (2d Cir. 1999) (not addressing presence prong of *Payton*); United States v. Stinson, 857 F. Supp. 1026, 1031–32 (D. Conn. 1994) (approximately 7:00 a.m.); Commonwealth v. DiBenedetto, 693 N.E.2d 1007, 1010 (Mass. 1998) (5:00 to 6:00 a.m.); People v. Ocasio, 430 N.Y.S.2d 971, 975 (N.Y. Crim. Ct., 1980) (noting that "the police entered at 6:30 a.m., a time when it would be expected the suspect was sleeping"); *Asbury*, 493 S.E.2d at 350 (just after daybreak). *But see* Blake v. Peterson, No. 94 C 6561, 1995 WL 360702, at *10 (N.D. Ill. 1995) (concluding, where court had already held that the police did not have reason to believe that the suspect resided at the residence to be entered, entry at 6:15 a.m. not justified under *Payton*, where vehicle associated with suspect not present and surveillance not performed at residence); *Harasim*, 702 F. Supp. at 182 (denying summary judgment in favor of police officer in civil rights action where only fact adduced in support of reason to believe that suspect was present was officer's testimony of "belief that persons are always home at 7:00 a.m."); State v. Miller, 777 A.2d 348, 364 (N.J. Super. Ct. App. Div. 2001) (after holding that police did not have reasonable belief as to residence, also holding that police entry to serve parole arrest warrant at 7:10 a.m. was impermissible because the officers did not "offer any basis for a reasonable belief, beyond the early hour, that defendant was present within").

In *United States v. Miles*, 82 F. Supp. 2d 1201 (D. Kan. 1999), the court noted the time of entry in its findings of facts, *id.* at 1204, and cited case law referring to the time of day factor in its legal discussion, *id.* at 1207, but did not explicitly rely on the time of entry, 9 a.m., in its legal analysis. *See id.* at 1208.

189. *Tolley*, 960 F. Supp. at 988 (Monday at 10:30 p.m.); Anderson v. Campbell, No. 95-6459, 1996 WL 731244, at *3 (10th Cir. 1996) (8:45 p.m. on a cold, snowy evening); State v. Northover, 991 P.2d 380, 384 (Idaho Ct. App. 1999) (8 p.m.); State v. Workman, 476 S.E. 2d 301, 311 (N.C. 1996) (11:30 p.m. on a Sunday night).

190. Valdez v. McPheters, 172 F.3d 1220, 1230 (10th Cir. 1999) (Ebel, J., concurring in part and dissenting in part) (noting that the "time of day" circuit court cases cited by the majority all "had other indicia of presence besides the time of day at which they conducted their search").

191. *See Magluta*, 44 F.3d at 1535 ("[O]fficers may presume that a person is at home at certain times of the day—a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule.").

(over a vigorous dissent[192]) upheld a midday entry where the suspect purportedly was unemployed and liked to stay out late drinking.[193]

4. The Phantom Suspect

Courts have been willing to overlook the absence of a direct sighting of a suspect by police or neighbors under the theory that a fugitive would likely be laying low to avoid detection and apprehension.[194] At first

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192. *See Valdez*, 172 F.3d at 1230 n.2 (Ebel, J., concurring in part and dissenting in part) (expressing disagreement with majority's portrayal of the level of certainty in the officer's declaration regarding the suspect's lifestyle). Judge Ebel's dissent in *Valdez* remains one of the most thoughtful judicial considerations of *Payton*, in large part because of Ebel's willingness to question the factual conclusions asserted by the prosecution and the majority.

193. *See id.* at 1226–27 (holding that midday entry was valid where officer asserted knowledge that suspect was unemployed and liked to stay out late drinking).

> Although there is no indication in the record that the officers had reason to know whether appellant would be at his home when they went there to execute the arrest warrant, we find it a reasonable anticipation on the officers' part to believe that a person would be at his place of abode, especially at 8:30 in the morning for a man not known to be working.

United States v. Woods, 560 F.2d 660, 665 (5th Cir. 1977) (pre-*Payton* case). *But see* People v. Jacobs, 729 P.2d 757, 759–62 (Cal. 1987) (in case decided under state law, although police knew that the defendant did not have a day job, without more evidence of presence, it was not reasonable to enter his residence at 3:20 p.m.).

194. *See* United States v. Edmonds, 52 F.3d 1236, 1248 (3d Cir. 1995) (concluding that belief that suspect was present "not dispelled by the fact that someone probably involved in a drug operation did not appear when the agents announced themselves at his door"); *Magluta*, 44 F.3d at 1535 ("[O]fficers may take into consideration the possibility that the resident may be aware that police are attempting to ascertain whether or not the resident is at home . . . ."); United States v. Beck, 729 F.2d 1329, 1331–32 (11th Cir. 1984) (determining that lack of response to knock and announcement did not prove that no one was at home "since it was reasonable to expect a fugitive to hide or flee if possible"); United States v. Meindl, 83 F. Supp. 2d 1207, 1213 (D. Kan. 1999) (stating that police could reasonably believe defendant was concealing himself when he did not respond to the knock on the door, especially in light of their experience serving a different arrest warrant on the suspect two weeks earlier); Bailey v. Kenney, 791 F. Supp. 1511, 1520 (D. Kan. 1992) ("[T]he failure of the person within the house to respond to the knocks at the door, accompanied by the announcement that they were police officers, could reasonably be interpreted as an attempt to evade apprehension."); United States v. Segarra, No. 5:91-CR-53 (WWE), 1991 WL 434803, at *3 (D. Conn. Dec. 27, 1991) ("It was reasonable for the officers to conclude that the Defendant failed to respond to their knocks because he was hiding or fleeing."); State v. Beal, 994 P.2d 669, 673 (Kan. Ct. App. 1999) (noting that suspect was a fugitive with a "history of eluding officers"); *see also* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 6.1(a), at 230 (3d ed. 1996) ("[I]f the defendant's quarters are dark and no sounds or movements can be detected within and no one answers the door, the other facts and circumstances (e.g. nature of the crime, crime recently committed, defendant's car parked nearby) may nonetheless support the inference that the defendant is concealing himself therein.").

blush this seems to create a Catch-22[195] for those seeking to avoid detection by the police—if they are seen by police, then *Payton* is automatically satisfied and police may enter the residence, yet if they evade detection, police may presume that they are in hiding and exhibiting behavior consistent with a criminal suspect. To be fair, though, courts do not typically treat the absence of the suspect as an indicator of presence[196]—they simply refuse to treat a lack of sighting as a powerful *Payton* defense.[197]

More to the point, deference to the police on direct suspect observation probably arises from the refusal of the courts to impose *any* affirmative investigative duty on police in the otherwise lawful execution of arrest warrants.[198] This deference seems to be a reflection of

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195. The use of this phrase should not be taken to suggest that it is necessarily improper to force a criminal fugitive suspect into a "Catch-22."

196. *But see* United States v. Hagman, Nos. 00-40050-01/02-DES, 2000 WL 1476578, at *3 (D. Kan. Sept. 19, 2000) ("[T]he defendant did not respond to the officers knocking and announcing their presence. A suspect who does not answer the door when officers knock or announce their presence may also support a reasonable belief the suspect is present.") (citing *Valdez*, 172 F.3d at 1226). Of course, there is an enormous difference between holding that a reasonable belief that the suspect is present may still be warranted even if the suspect does not answer the door, and concluding that the fact that the suspect did not answer the door *supports* the reasonable belief as to presence. The *Hagman* court blurs this distinction.

197. *See Magluta*, 44 F.3d at 1538:

> [T]he officers were entitled to consider that Magluta was a fugitive from justice, wanted on a 24 count drug trafficking indictment, who might have been concealing his presence. This could explain why the marshals never saw Magluta during their observation, and why he might not have been spotted previously. Hence, the lack of direct evidence that Magluta had been seen that day does not eviscerate the marshals' reasonable conclusion that he was home.

There are rare situations where an absence of evidence has probative value. A leading Second Circuit *Payton* case, *United States v. Terry*, 702 F.2d 299 (2d Cir. 1983), provides an interesting related example. In *Terry*, police sought to enter a suspect's residence at 8:45 a.m. on a Sunday morning. *Id.* at 319. Outside of the residence, a 12-year old boy wearing a shirt with the name "Terry" on it told police that his parents lived in the apartment and "did *not* indicate that his father was *not* at home." *Id.* (emphasis added). The court accepted the boy's silence as support for the proposition that the father was home. *Id.; see also* United States v. Miles, 82 F. Supp. 2d 1201, 1207 (D. Kan. 1999) (citing *Terry*, 702 F.2d at 319, for the proposition that "officers may consider an absence of evidence the suspect is elsewhere").

198. *See Valdez*, 172 F.3d at 1226 ("Direct surveillance or the actual viewing of the suspect on the premises is not required."); *id.* at 1226 n.2 ("While surveillance certainly may bolster a *Payton* entry, the cases fail to reveal any requirement of substantial prior surveillance of a residence prior to entry."); *see also Terry*, 702 F.2d at 319 ("We have rejected the contention that the police must first conduct a thorough investigation to obtain evidence of an arrestee's actual presence before entering his residence." (citing United States v. Manley, 632 F.2d 978, 984 (2d Cir.1980)).

the judiciary's long-standing institutional concerns regarding second-guessing police work.[199]

D. Dubious Payton *Cases*

In cases where multiple factors indicate the suspect's presence, the theoretical weakness of the typical *Payton* approach is not evident. The fallibility of this method manifests itself when police possess scant evidence of a suspect's presence, or even information suggesting that the suspect is not at home.[200] For example, in *United States v. May*,[201] police investigating a murder that took place on a Saturday afternoon learned that the suspect spent Saturday night at his residence.[202] An arrest warrant was issued on the following Monday and, without any other information, police entered the suspect's residence on Tuesday morning.[203] In holding the entry valid under the Fourth Amendment, the court stated:

> Thomas slept somewhere on Sunday and Monday. The police reasonably could suppose that the somewhere was the address on the affidavit and that Thomas would still be inside at 11:20 a.m.

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199. For example, in the context of investigatory stops, the Supreme Court has warned:

> A court . . . should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. . . . A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable."

United States v. Sharpe, 470 U.S. 675, 686–87 (1985) (quoting Cady v. Dombrowski, 413 U.S. 433, 447 (1973)). Anthony Amsterdam captured the essence of judicial deference to police action over twenty-five years ago, when he explained:

> What [a Fourth Amendment reasonableness standard] means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.

Amsterdam, *supra* note 154, at 394.

200. It could be argued, however, that the following cases do not reflect an intrinsic weakness in the *Payton* methodology, but rather that the courts simply failed to properly weigh the indicia of presence. Another possibility is that these cases were decided correctly and that the *Payton* standard is simply extremely lenient towards police behavior and is satisfied with little evidence of presence. Neither perspective weakens this Article's critique that these opinions lack sufficient factual bases.

201. 68 F.3d 515 (D.C. Cir. 1995).

202. *Id.* at 516.

203. *Id.*

> when they arrived. The police could not be certain of this but certainty is not required. . . . Thomas must have felt safe at his dwelling, having returned there after committing a murder in broad daylight. . . . and the logical place one would expect to find Thomas on that Tuesday morning was at his home.[204]

The D.C. Circuit's application of *Payton* to *May*'s facts eviscerates the *Payton* rule. First, the fact that Thomas slept at his home on the night of the murder—*prior* to the issuance of a warrant for his arrest—does not lead to the conclusion that he slept there on subsequent nights. Second, even if such an assumption is warranted, it is questionable whether 11:20 a.m. is early enough to support the presumption that May would still be on the premises.[205] Perhaps the *May* court's true reasoning can be found in its statement: "Given the gravity of his crime, the police would have been remiss if they had not attempted to apprehend him as quickly as possible. And the logical place one would expect to find Thomas on that Tuesday morning was at his home."[206] This is akin to a rebuttable presumption that dangerous felons can be found at home.[207] The question remains, however, of whether this presumption is warranted, and if so, whether courts should be forced to explicitly state this as the governing rule, as opposed to shrouding their actions in *Payton*'s "reason to believe" balancing test.

An approach similar to *May* was utilized by the Massachusetts Supreme Court in *Commonwealth v. DiBenedetto*,[208] where an informant notified the police that he had seen DiBenedetto in his residence four days earlier. The *DiBenedetto* court reasoned that "[t]here was no reason to believe that DiBenedetto had left,"[209] and held that the early morning

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204. *Id.* (citations omitted).

205. *See supra* notes 188–93 and accompanying text for a discussion of the presumptions regarding the time of day a person might logically be found at home.

206. *May*, 68 F.3d at 516.

207. LAFAVE, *supra* note 194, § 6.1(a), at 225–26:

> Sometimes when the objection is raised that the police entered the defendant's premises without probable cause to believe he was then there, the court will respond in a way which makes it less than clear whether the probable cause requirement is being accepted or rejected, as by saying that "rudimentary police procedure dictates that a suspect's residence be eliminated as a possible hiding place before a search is conducted elsewhere."

(quoting People v. Sprovieri, 95 Ill.App.2d 10, 238 N.E.2d 115 (1968)).

208. 693 N.E.2d 1007 (Mass. 1998).

209. *Id.* at 1010.

timing of the police entry[210] and the fact that the door was ajar not only easily satisfied the reason to believe test, but probable cause as well.[211] Note that the court did not state that police investigation had failed to turn up information suggesting that the suspect had departed, just that no information rebutted this belief. In a sense, the *DiBenedetto* court implicitly put the burden on the suspect to produce evidence that it was unreasonable for the police to believe he was present.

Even evidence rebutting the belief that the suspect is present has failed to persuade courts that the police did not possess reason to believe the suspect was present. In *Minnesota v. Williams*,[212] the hotel desk clerk informed police that the suspect had *not* stayed in his room the night before the search,[213] and that he had been locked out of his room for failure to pay his bill.[214] Despite this powerful evidence that the suspect would not be in the room, the Minnesota Court of Appeals held that police entry into the hotel room was proper under *Payton*.[215] The *Williams* court provided no reasoning for its conclusion, simply stating:

> The arrest warrant justified the limited entry into room 226 to determine possible locations where the arrestee could conceal himself. The police officers were not required to rely on the hotel manager who told them that Hayes/Lebeau was not in his room. A valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence 'when there is reason to believe the suspect is within.' The officers acted reasonably in seeking

210. Although the opinion states that warrant execution occurred "between 5 A.M. and 6 P.M," *id.*, the description of the entry as "early morning" strongly suggests that the "P.M." is a typographical error.

211. *Id.* at 1010; *see also* United States v. Junkman, 160 F.3d 1191, 1192–93 (8th Cir. 1998) (police entered male suspect's purported hotel room, allegedly rented by someone else on his behalf, when in response to their knock and announce a female occupant yelled "cops" and officers heard a commotion within the room).

212. 409 N.W.2d 553 (Minn. Ct. App. 1987).

213. *Id.* at 554–55.

214. *Id.*

215. The fruits of the search, however, were suppressed on the grounds that police exceeded the bounds of a reasonable search for the suspect. *See id.* at 556 ("The trial court did not clearly err in ruling that police officers lacked justification for conducting an exploratory search of the hotel room when armed with a valid arrest warrant. . . . [T]hey had no authority to search the room, even ostensibly to verify identification of the fugitive or to determine if the fugitive had an airline ticket and was preparing to flee the state.").

admission into Hayes/Lebeau's room to determine if he was present.[216]

Unpublished opinions have applied *Payton* in a similarly lax manner.[217] A series of federal district court cases in New York is instructive. In *United States v. Hughes*,[218] the court concluded that because the suspect was originally arrested in the apartment—nearly six months earlier—there was "sound reason to believe she could be found there again."[219] Likewise, the court in *Magedson v. Fina*[220] held that there was "uncontroverted evidence" that the suspect "was on the premises at the time of the search,"[221] because the suspect provided the address to police at an earlier time.[222] Finally, in *United States v. Pichardo*,[223] the court elevated *Payton* deference to its highest level by simply skipping the presence prong of the *Payton* rule altogether.[224] Although the opinion describes in detail how police formed probable cause (the court's term) to believe that the suspect named in the warrant, Carmen Rosario, resided at the residence to be entered,[225] there is no

216. *Id.* at 555 (citations omitted). The use of the dual name "Hayes/Lebeau" arises out of the fact that police possessed an arrest warrant for Richard Charles Hayes, but "[t]he deputies were informed that Hayes was staying at the hotel under the name of John Lebeau." *Id.* at 554. Parenthetically, it should be noted that the police were in the wrong room and that they sought to use the contraband discovered against Williams, not Hayes/Lebeau.

217. *See, e.g.*, United States v. Grubb, No. 95-5103, 1996 WL 200326, at *1, *4 (10th Cir. 1996) (entry into living quarters located on the second floor of a business held proper under *Payton* where the business owner stated: "Well, I think he is at work. He drives our truck and it's not there, but I am not sure. He may be asleep.").

218. No. 88 CR. 257 (CSH), 1989 WL 1308 (S.D.N.Y. Jan. 5, 1989).

219. *Id.* at *3.

220. No. 91-CV-213, 1993 WL 113489 (N.D.N.Y. Apr. 12, 1993) (granting summary judgment on § 1983 claim).

221. *Id.* at *11.

222. *Id.* at *10.

223. No. 92 CR. 354 (RPP), 1992 WL 249964 (S.D.N.Y. Sept. 22, 1992).

224. *Id.* at *3; *see also* Anderson v. United States, 107 F.Supp.2d 191, 196–97 (E.D.N.Y. 2000) (holding that *Payton* was satisfied without analyzing the presence prong); Sharp v. McWilliams, No. Civ. A.3:98-CV-1454L, 1999 WL 814546, at *3 (N.D. Tex. Oct. 8, 1999) (discussing and applying *Payton* standard without reference to facts satisfying the presence prong); State v. Pederson, No. 19450-7-III, 2001 WL 1187159, at *2 (Wash. Ct. App. Oct. 9, 2001) (holding that the fact that the residence belonged to the suspect, "supported a reasonable inference that they would find her there," even though a roommate stated that he did not see the suspect on the premises).

225. *Pichardo*, 1992 WL 249964, at *1.

mention of a police determination that Rosario was present at the time of attempted entry.[226]

It is hard to imagine *Payton* embodying less than in the previous three opinions,[227] but two other notably lenient opinions bear mentioning. *United States v. Wickizer*[228] represented the Sixth Circuit's first attempt at applying *Payton*. In *Wickizer*, the court upheld police entry into a cabin without any discussion of *Payton*'s presence prong.[229] The only evidence adduced prior to police entry was a tip that the suspect "was staying at a cabin with another man and woman."[230] Perhaps the background facts of *Wickizer* motivated the court's decision—particularly that the suspect had recently escaped from jail and police had been told that he was armed and that he had said that he would not be taken alive.[231] Still, those facts, compelling as they might have been, do not explain why the court neglected to discuss *Payton*'s presence requirement.

More recently, a Kansas Court of Appeals opinion tried valiantly to lower the *Payton* bar. In *State v. Beal*,[232] the court held that police properly entered a detached garage on Beal's property when executing a warrant for his arrest.[233] The garage, a heavy metal structure with no windows and only a small "swivel-type" peephole, was locked.[234] Police had been told while searching the main residence alternatively that Beal was "out of town" and "over at Jimmy's."[235]

The *Beal* court concluded that *Payton* was satisfied and that police were justified in opening the garage door with a battering ram and utilizing a police dog to sniff out the suspect because "some of the

226. The *Pichardo* court mentioned the time of entry—approximately 8:00 a.m.—but only as background. *Id.*

227. At least one district judge in New York has applied *Payton* with more bite. *See* United States v. Martinez, No. S2 92 Cr. 839 (SWK), 1993 WL 322768, at *4–6 (S.D.N.Y. Aug. 19, 1993) (case discussed, *infra*, note 261).

228. 633 F.2d 900 (6th Cir. 1980).

229. *Id.* at 901–02.

230. *Id.* at 901.

231. *Id.*

232. 994 P.2d 669 (Kan. Ct. App. 2000).

233. *Id.* at 673. After a police dog indicated the presence of drugs in a cabinet, police withdrew and obtained a search warrant. *Id.* at 671.

234. *Id.* at 671, 673.

235. *Id.* at 671.

officers knew Beal had used the detached garage as an office"[236] and he "was a fugitive [with] a history of eluding officers."[237] The court also observed that the police had previously searched the office pursuant to a search warrant.[238] No evidence supported the belief that Beal was on the premises at the time the police arrived.[239]

There are several ways of analyzing the cases above. First, one might argue that the courts that dropped *Payton*'s presence prong simply erred as a matter of law. Those opinions should have been reversed and the courts should have been required to re-apply the *Payton* test with both the residence and presence prongs intact. Or, in the alternative, it is possible that the above cases adopted, sub silentio, a presumption that proof of residence supports proof of current presence—to such an extent that analysis of presence is unnecessary. The question then would be whether this assumption is empirically sound. Does residence prove presence? And if so, why did *Payton* separate the two elements? More likely, the courts that dropped the *Payton* presence prong simply did in the open what most courts have routinely done behind the guise of balancing factors: failed to determine whether police had an empirically sound basis for believing that the suspect would be at home.

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236. *Id.* at 673.

237. *Id.*

238. *Id.* The court neither fully elaborates on the circumstances of the prior search, nor explains how the information from that search supported the *Payton* entry at issue. *See id.*

239. Another case where the court declined to mention *Payton*'s presence prong was *Clayton v. City of Kingston*, 44 F. Supp. 2d 177 (N.D.N.Y. 1999). In this case, Taisha Clayton brought a 42 U.S.C. § 1983 action against police, the department and the city, based upon events surrounding the execution of an arrest warrant at Clayton's residence for Yves Francois, whom the police believed was staying with another man, Omar Finch, at Clayton's apartment. *Id.* at 177–78. Clayton argued that a search warrant was required, pursuant to *Steagald*, because she was not named in the arrest warrant. *Id.* at 180. The court granted the officers' motion for summary judgment based upon qualified immunity. *Id.* at 182. In response to Clayton's argument, the court naturally focused on the residence issue to determine whether *Payton* or *Steagald* governed. However, once Judge McAvoy determined that there was sufficient proof that Francois was residing or "staying" at the apartment to invoke *Payton*, *id.* at 182, there is no discussion of the proof adduced of Francois's presence at the time of entry. (Though in the "background" section of the opinion, there is an indication that Francois had been seen outside of the residence at an earlier point in the day—but the time between sighting and entry is not specified.) It is quite possible that the court did not address this issue because Clayton did not raise it or the facts suggesting Francois's presence at the time of entry were indisputable. Nevertheless, as the *Clayton* court itself observed, *Payton* is explicitly a two-prong test. *See id.* at 181 (quoting United States v. Lovelock, 170 F.3d 339, 343 (2d Cir. 1999) (quoting United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995))). So, while one cannot say that the court erred by failing to consider the second prong (because it might not have been at issue), mention of the presence issue would have been prudent.

E. Payton *Comes Alive!*

As the foregoing suggests, it is extremely rare for courts to hold that the *Payton* standard has not been met.[240] With a few notable exceptions, courts usually hold that the police have reason to believe that a suspect was present if the police possessed no information in their favor or if the state waived its right to argue this point.[241] For example, in *State v. Loftin*,[242] the South Carolina Supreme Court held that police violated *Payton* by entering a residence to execute an arrest warrant because, during the course of a one and a half-hour stakeout, there was no sign of the suspect or his previously identified blue van and no answer at the residence.[243] In fact, one officer even testified that "no one appeared to

240. *See* 3 LAFAVE, *supra* note 194, at 226 ("The actual exclusion of evidence on the ground that the police lacked probable cause to believe that the defendant was present in his own home at the time of entry has occurred but rarely."). Due to the court's cursory discussion, it is not clear whether *United States v. Diaz-Garcia*, 808 F. Supp. 784, 787 (S.D. Fla. 1992), should be included in this Part as a lax *Payton* case. In *Diaz-Garcia*, the court specifically discredited the wife's testimony that she told the police at the door that the her husband, the subject of a warrant, was present and that he was on his way out to surrender. *Id.* Instead, the court explicitly adopted the government's version of the facts, namely that when police knocked on the door and asked if the woman's husband was present, she said no and refused police entry to search. *Id.*

Yet, the facts set forth in the *Diaz-Garcia* opinion contain an interesting inconsistency—one officer testified that the defendant "could be seen from outside the door," *id.*, while the opinion also states that "officers proceeded one or two steps into the doorway, and observed the defendant . . . ." *Id.* at 786. The court should have reconciled the two versions of the facts, lest it be suggested that a *Payton* police residential entry can be validated by information gained after police enter the residence.

241. *See, e.g.*, Hoppe v. O'Rourke, No. 98-CV-3548, 2000 WL 748106, at *1 (E.D.N.Y. June 8, 2000) (denying defense motion for summary judgment in 42 U.S.C. § 1983 action where defendant police officer testified in deposition that he did not believe that the suspect was present when he and his partner entered the plaintiff's home to execute an arrest warrant); State v. Lofton, No. C8-01-195, 2001 WL 1035033, at *2 (Minn. Ct. App. Sept. 11, 2001) (state neither filed brief on appeal nor argued before the district court that suspect resided at location entered); *cf.* United States v. Curzi, 867 F.2d 36, 39 n.3 (1st Cir. 1989) (district court found and government conceded that police did not have "probable cause" to believe that resident for whom outstanding arrest warrant existed was present at the time of entry).

242. 275 S.E.2d 575 (S.C. 1981).

243. *Id.* at 576. In *State v. Peacher*, 280 S.E. 2d 559, 579 (W. Va. 1981), the court engaged in *Payton*-type analysis (*Peacher* is not a *Payton* case, since the police did not possess an arrest warrant when they first entered the residence, *see id.* at 579) and held that police did not have reason to believe the suspect was present when they first entered his residence. The court noted that the police returned to the suspect's trailer precisely because the trail had gone cold, *id.* at 579, and concluded that the police officer's decision to allow himself to be pushed, unarmed, through a small window in search of a suspect in a recent brutal murder, belied the police's assertion that they thought the suspect was present. *Id.* at 579–80. The police in *Peacher* attempted to justify their entry based on exigent circumstances. *Id.* at 579. Though the court held that the police improperly entered the residence, the court upheld the admission of the evidence under the "independent source

be home."[244] In *Loftin*, police seem to have primarily sought to justify their entry based upon the property manager's consent[245]—there is no mention that the state put forward facts regarding the suspect's presence to justify police entry.[246]

In *People v. Jacobs*,[247] police sought to arrest John Albert Jacobs at his residence at approximately 3:20 p.m. and were greeted by his eleven-year old daughter at the door.[248] There was conflicting testimony regarding whether the daughter consented to the subsequent police entry that led to the discovery of stolen merchandise.[249] It was undisputed, however, that the defendant's vehicles were nowhere in sight,[250] there was no suggestion that the defendant had seen the police approaching and was attempting to hide,[251] and the defendant's daughter told police that he would be back in an hour.[252] At the heart of the police argument was the asserted belief that Jacobs would be present because they knew that Jacobs did not have a day job.[253] However, the court concluded that although the police officer's "testimony supports an inference that defendant could be home at 3:20 p.m., when the officers attempted to serve the warrant, it does not, without more, support a finding that the

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rule." *See id.* at 580.("In this case all of the independent evidence upon which a finding of probable cause could have been based was discovered prior to the illegal entry and none of it was discovered as a result of police illegality.").

244. *Loftin*, 275 S.E.2d at 576.

245. This is all mere conjecture as the opinion's discussion on this point is rather cursory. *Id.* at 576–77.

246. *Id.* at 576.

247. 729 P.2d 757 (Cal. 1987). *Jacobs* is technically not a *Payton* case, since it was decided under § 844 of the California Penal Code, which provides:

> To make an arrest . . . a peace officer may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

Id. at 760 (citing CAL. PENAL CODE § 844). Nevertheless, *Jacobs* is included here because it applies a similar standard to the *Payton* rule, and represents one of the few cases in which police entering a residence in reliance upon an arrest warrant were deemed to have acted improperly. The decision to include Jacobs here is quite debatable, especially because the *Jacobs* court seems to equate the statutory standards found in § 844 with probable cause. *Id.* at 761.

248. *Id.* at 759.

249. *Id.* at 759–760.

250. *Id.* at 761.

251. *Id.*

252. *Id.*

253. *Id.* at 760–61. In fact, Jacobs was suspected of stealing from his night job. *Id.* at 759.

officers had reasonable grounds to believe defendant was in fact home."[254]

Even less evidence was proffered in *State v. Roepka*,[255] where the state conceded (and the court agreed) that police had no reason to believe that the suspect, Ruzicka, was within the trailer house occupied by Roepka.[256] If the state's concession were not enough, the opinion is devoid of any indication that the suspect was present; to the contrary, the suspect was not spotted during surveillance and Roepka denied Ruzicka's presence.[257] As in *Loftin*, the more forceful argument made on appeal centered on the issue of Roepka's consent to the police entry,[258] so the case was remanded to the lower court to make findings on that score.[259] One gets the sense reading *Roepka* that the lower court simply misapplied the *Payton* rule, and on appeal, the state, exhibiting excellent judgment, decided to let the matter go.

In *Loftin*, *Jacobs*, and *Roepka*, police armed with arrest warrants but lacking *any* evidence of the suspects' presence[260] could not enter the suspects' residence. If these cases suggest that *Payton* has limits, they only establish that *Payton* does not create a per se rule allowing entry under all circumstances.[261] None of these three published opinions

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254. *Id.* at 761. A recent New Jersey case is also on point. In *State v. Miller*, 777 A.2d 348, 364 (N.J. Super. Ct. App. Div. 2001), the court first held that police did not have reasonable belief as to *Payton*'s residence prong and then also held that the police entry to serve parole arrest warrant at 7:10 a.m. was impermissible because the officers did not "offer any basis for a reasonable belief, beyond the early hour, that defendant was present within."

255. 347 N.W.2d 857 (Neb. 1984).

256. *Id.* at 858–59 (remanding for determination of whether resident consented to police entry).

257. *Id.* at 858; *see also* United States v. Aldred, No. 00-200-KI, 2000 WL 1310655, at *3 (D. Or. Sept. 14, 2000) (granting suppression of evidence where suspect had been ordered to vacate the shed in which he was residing approximately three weeks before police entry, and nothing in the record indicated the suspect's presence), *rev'd on other grounds*, No. 00-30311, 2001 WL 1108919 (9th Cir. Sept. 19, 2001).

258. *Roepka*, 347 N.W.2d at 858.

259. *See id.*

260. Although *People v. Cabral*, 560 N.Y.S.2d 71 (N.Y. Super. Ct. 1990), is a "residence," not a "presence," case, it bears mentioning. In *Cabral*, the court held that officers improperly entered a residence where their sole basis for entry was the subject's address on court papers from six months earlier, especially since the current resident, who was present at 8:30 a.m., had a telephone bill from, and key for, the apartment. *Id.* at 74.

261. A few unpublished opinions have applied *Payton* with more bite. *See* United States v. Kratzer, No. 00-10020-01-JTM, 2000 WL 882434, at *3 (D. Kan. June 5, 2000) (no reasonable basis for police entry where no one answered the door, all of the doors but the one inside the garage that lead to the house were unlocked, no lights were on in the home, no sounds came from within the house and the only vehicle on the premises was an old Chevy truck located in the detached shed,

provide a strong demonstration of judicial vigilance in the exercise of the *Payton* standard.[262]

F. A Less Critical Note on the Limits Imposed by Payton

The foregoing discussion amply illustrates the deference courts extend to police in the interpretation and application of *Payton*'s presence prong. This should not be taken to suggest that judicial deference on the right to enter a residence under *Payton* insulates the police from all potential Fourth Amendment liability regarding their activities at the residence.[263] The Supreme Court has observed that "the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion."[264] This

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and one detective testified that suspect would probably be driving a small Ford sedan), *aff'd*, No. 00-3203, 2001 WL 589883 (10th Cir. June 1, 2001); Speaks v. City of Philadelphia, Civ. A. No. 96-3428, 1996 WL 741996, at *5 (E.D. Pa. Dec. 19, 1996) (finding genuine issue of material fact existed as to police officers' reasonable belief that suspect was present in home on date of entry, where only information proffered by defendants was that police possessed information that the suspect hung out or stayed in the residence at issue); State v. Lantzer, No. 62616, 1992 WL 74234, at *1 (Ohio Ct. App Apr. 9, 1992) (per curiam) (upholding trial court's suppression of evidence, where officers entered residence at night to execute an arrest warrant for a misdemeanor offense, after officers, with a 15-man SWAT team, had performed surveillance on house for one and one-half hours, and had observed no activity which could make them reasonably believe the suspect was in the house).

In *United States v. Martinez*, Nos. S2 92 Cr. 839 (SWK), 1993 WL 322768, at *4–6 (S.D.N.Y. Aug. 19, 1993), the court held that Marshals did not have reason to believe that the suspect was present even though: (1) they arrived at 5:30 a.m. and sought entry at 7:30 a.m. (monitoring the apartment in the interim); (2) noise from a radio or television emanated from the apartment; and (3) the superintendent identified the suspect's photograph and stated that he usually left later in the day. *Id.* at *4. The court was unconvinced, noting that over the two-hour period of direct surveillance, the Marshals heard no footsteps, nothing being moved, no talking, and no doors opening or closing. *Id.* at *6. Most important, the Marshals had previously been informed that the suspect was splitting between the apartment and his wife's residence, a fact that the court believed raised the burden of proof for entry. *Id.* at *5.

262. It appears that judicial vigilance is more likely at the summary judgment stage of a *Payton* civil action. *See, e.g.*, Lyles v. City of Barling, 181 F.3d 914, 917–18 (8th Cir. 1999) (dispute in facts regarding whether light or sound emanated from the residence sufficient to withstand summary judgment on qualified immunity defense in § 1983 action).

263. *See* Carl Horn, *For the Criminal Practitioner: Review of Fourth Circuit Opinions in Criminal Cases Decided in Calendar Year 1992*, 50 WASH. & LEE L. REV. 119, 177 (1993):

> A valid arrest warrant carries with it the authority to enter the home of the person to be arrested, assuming there is reason to believe the person may be inside. Once validly inside the house, other principles relative to search and seizure may apply, including particularly searches incident to arrest and the plain view doctrine.

(citation omitted).

264. Wilson v. Layne, 526 U.S. 603, 611 (1999).

clearly means that police may still violate the Fourth Amendment if their actions go beyond what is necessary to locate and arrest a suspect, especially if the suspect surrenders at the door.[265] Depending on the facts, though, police overreaching may be most accurately characterized as a violation of *Maryland v. Buie*,[266] which authorizes limited protective sweeps incident to arrest, rather than as a *Payton* violation. Although the outcome may be the same under *Buie* or *Payton*, there is a danger that imprecise reasoning may make it difficult for subsequent courts to understand the applicability and boundaries of each doctrine.

Consider, for example, *State v. Risinger*,[267] in which three police officers sought to arrest a suspect at home. The full facts from the opinion are provided here, because the timing of events is important:

> Two officers, Hutson and Siegler, appeared at the front door, and Officer King went to the rear of the apartment to secure its back door. The two officers knocked at the front door, and appellee opened it. After the officers identified themselves and told appellee that he was wanted by the El Dorado Police Department, appellee invited the officers into the foyer of the apartment and explained to them that police departments sometimes get him and his cousin mixed up. Because the foyer area was small, the two officers and the appellee stepped into the living room area to further discuss and effect the appellee's arrest. In addition, the appellee had

265. *See, e.g.*, United States v. Albrektsen, 151 F.3d 951, 954–55 (9th Cir. 1998) (holding that police violated arrestee's Fourth Amendment rights where they entered hotel room after suspect volunteered at the threshold of the room); State v. Kubit, 627 N.W. 2d 914, 919–24 (Iowa 2001) (same); *see also e.g.*, People v. LeBlanc, 70 Cal. Rptr. 2d 195, 200–01 (Cal. Ct. App. 1997) (determining that police executing arrest warrant at hotel room violated the Fourth Amendment where, after spotting contraband in plain view, they searched the rest of the hotel room without a search warrant); State v. Estep, 753 N.E.2d 22, 26–28 (Ind. Ct. App. 2001) (holding that, although police properly entered residence under *Payton*, they did not have justification to sweep the entire residence). *But see* State v. Coma, 981 P.2d 754, 759 (Idaho Ct. App. 1999) (concluding that detective did not unlawfully enter residence when suspect who answered door twice refused to comply with requests to turn around and place his hands behind his back and Detective entered residence one and a half feet past the door—just far enough to handcuff suspect); Archer v. Commonwealth, 492 S.E.2d 826, 831 (Va. Ct. App. 1997) (holding that police properly searched motel room for weapons even though suspect was already in custody); *Albrektsen*, 151 F.3d at 954 n.5 (suggesting that police would have been warranted in entering hotel room if suspect had retreated from the threshold).

266. 494 U.S. 325, 337 (1990) (holding that "[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene").

267. 762 S.W.2d 787 (Ark. 1989).

> apparently asked to put on his shoes, which were located in the living room. Officer King was on the patio immediately outside the sliding door of the living room, so when the officers entered the room, they were able to allow King to enter. Apparently from his position outside the patio door, Officer King observed an ash tray containing a hemostat holding a cigarette. After entering the living room, King went over to the hemostat and cigarette on top of a coffee table, and at that time, he saw a glass tray with a straw and razorblade protruding from under a couch. When he pulled the tray all the way out, King saw that it had white powder residue, which was confirmed to be cocaine. On the same tray, King also found a "bunch of marijuana" and cigarette papers that were used to roll marijuana. One of the other officers subsequently discovered a curio box, which, when opened, was found to contain three valium pills.[268]

The Arkansas Supreme Court held that King was properly on the premises under *Payton* and that the objects in plain view, including the drug tray that had been pulled out from under the couch, were admissible.[269] The court held, however, that the plain view doctrine did not apply to the matter inside the pillbox, and that opening the box exceeded the proper bounds of a search incident to arrest.[270]

Risinger's argument that he did not invite King into his home was ultimately unavailing, yet in refuting the argument, the Arkansas Supreme Court displayed some interesting reasoning. The court stated that "King was only at the back door to ensure the appellee could not escape. King's role in securing *and entering* the back door was a reasonable one, which was designed to ensure appellee's arrest."[271] Obviously, securing the rear entrance was reasonable. The proper legal basis for sustaining Officer King's *entry*, though, is less clear, especially because when King entered the residence the suspect seemed to be fully cooperating.[272] Though an argument could have been made that safe arrest procedure required that all of the officers be permitted to enter even if the suspect was cooperating, the court did not explicitly endorse this view. Perhaps the fact that Officer King saw suspicious non-

268. *Id.* at 788.

269. *Id.* at 789.

270. *Id.*

271. *Id.* (emphasis added).

272. *Id.*

contraband from outside motivated the court's stance. Yet the court did not endorse the position that a sighting of non-contraband authorized entry.

If the suspect had surrendered at the front door and Hutson and Siegler called out to King that the suspect was in custody, it is doubtful whether there would have been a legal basis for Officer King to then enter the house (absent a viable fear of violent confederates lurking about). The *Risinger* court's decision does not answer exactly why the actual facts compelled a different outcome, though certainly it intuitively makes sense that once the other officers entered the residence to complete the arrest process, King could also enter. Perhaps there is a waiver or consent concept at work here—that a suspect must elect to be arrested at the threshold—once he retreats into the residence (even if he is not attempting to evade arrest) a blanket waiver of privacy interests is triggered, at least for the rooms in which the suspect is standing.[273]

G. Payton *in Sum*

Examining *Payton*'s progeny leads to two conclusions. First, the *Payton* "reason to believe" rule is a remarkably relaxed standard that is almost always satisfied. With rare exceptions, courts hold that police possessed reason to believe that a suspect was present at the time of entry. Second, police entering residences pursuant to *Payton*, and courts reviewing law enforcement action, employ a wide range of untested assumptions about suspect and citizen behavior. The speculative nature of these assumptions decreases the level of Fourth Amendment protection afforded to an individual in his or her home.

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273. It is also worth mentioning the recent Supreme Court opinion in *Illinois v. McArthur*, 531 U.S. 326 (2001). There the Court held that a police officer who had probable cause to believe that illegal drugs were in McArthur's residence did not violate the Fourth Amendment by refusing to allow McArthur to reenter his residence without a police escort while the police waited for a search warrant. *Id.* at 331–37. The Court reasoned, in part, that where the suspect re-entered for his own convenience, the reasonableness of the greater restriction—to bar McArthur from reentering at all, implied the reasonableness of the lesser restriction—to permit "reentry conditioned on observation." *Id.* at 335. *McArthur* is not completely analogous to *Risinger* because the greater power to arrest does not necessarily encompass the lesser power to enter the residence if the suspect is found at the door and can be arrested immediately. Still, *McArthur* suggests that where it is the suspect's choice to reenter his residence, it is not unreasonable for police to accompany him. *Id.* But this does not resolve the question of whether all of the police present may do so.

III. THE PROBABLE CAUSE COMPARISON: FUTILE EFFORTS AT TRADITIONAL LEGAL REASONING

A. *Why Discuss Probable Cause?*

Although courts typically apply *Payton* in a mechanical fashion, rare attempts have been made to place *Payton* within a broader Fourth Amendment context by comparing "reason to believe" to a better known criminal procedure standard—"probable cause."[274] However, efforts to illuminate the *Payton* standard by comparing it to probable cause are fruitless and highlight the weakness of traditional legal reasoning in this context.

B. *Reason To Believe and Probable Cause: Two Possibilities*

Two possibilities exist when comparing reason to believe with probable cause. First, the two terms may be synonymous.[275] This would explain Justice Stevens's decision not to elaborate upon reason to believe in *Payton*[276] and why numerous commentators[277] have used

274. The Supreme Court has stated that probable cause to search exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." Ornelas v. United States, 517 U.S. 690, 696 (1996). At times, the parties attempt to make the perceived distinction between probable cause and reason to believe the center of the debate. *See* United States v. Magluta, 44 F.3d 1530, 1534 (11th Cir. 1995).

275. The Model Code of Pre-Arraignment Procedure provides support for this view, although it employs the terms "reasonable cause" and "reasonable cause to believe." *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.1 note (American Law Institute 1975) ("The term reasonable cause is the usual statutory equivalent of the Fourth Amendment's 'probable cause' standard."); *id.* § 120.6 ("If a law enforcement officer has reasonable cause to believe that a person whom he is authorized to arrest is present on any private premises, he may, upon identifying himself as such an officer, demand that he be admitted to such premises for the purpose of making an arrest."); *id.* § 120.6 cmt. n.5 (citing RESTATEMENT (SECOND) OF TORTS, § 206 (1965)).

276. A perceptive California appellate court opinion also noted that the *Payton* dissent used "reasonable grounds to believe" interchangeably with probable cause. *See* White v. California, 228 Cal. Rptr. 672, 677 n.2 (Cal. App. 1986); *see also* Payton v. New York, 445 U.S. 573, 616 n.13 (1980) (White, J., dissenting).

277. *See, e.g.*, Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1679 (1998); Mascolo, *supra* note 150, at 346–47; James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639, 673 (1985); Thomas D. Colbridge, *Search Incident to Arrest: Another Look*, 68 FBI L. ENFORCEMENT BULL. 27, *available at* 1999 WL 14948080 (May 1, 1999); Edward M. Hendrie, *Warrantless Entries to Arrest: Constitutional Considerations*, 67 FBI L. ENFORCEMENT BULL. 25, *available at* 1998 WL 15028962 (Sept. 1, 1998); Verde, *supra* note 151, at 193.

reason to believe and probable cause interchangeably.[278] Second—and the most common post-*Payton* judicial interpretation—is that reason to believe requires less proof than probable cause.[279] This view respects the *Payton* court's choice of a unique formulation, "reason to believe," in an opinion replete with references to probable cause.[280] As one federal district court succinctly put it, "when the Court wishes to use the term 'probable cause,' it knows how to do so."[281]

C. *The* Terry v. Ohio *Analogy*

Most courts have held that *Payton* reason to believe requires less proof than probable cause. Thus, an analogy can be drawn between a *Payton* entry and a *Terry*[282] stop based upon reasonable suspicion that

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278. This might also account for why cases decided under the *Payton* standard seem so similar to probable cause cases. *See infra* Part III.C.

279. United States v. Route, 104 F.3d 59, 62 (N.D. Tex. 1997) ("All but one of the other circuits that have considered the question are in accord, relying upon the 'reasonable belief' standard as opposed to a 'probable cause' standard.") (footnote omitted); *see also* Valdez v. McPheters, 172 F.3d 1220, 1224–25 (10th Cir. 1999) (adopting reason to believe test and collecting cases); United States v. Miles, 82 F. Supp. 2d 1201, 1204 (D. Kan. 1999) (collecting cases); United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995) (holding that district court erred by applying a probable cause standard to *Payton*'s residence prong because "the proper inquiry is whether there is a *reasonable belief* that the suspect resides at the place to be entered . . . and whether the officers have reason to believe that the suspect is present."). Finally, in *Valdez*, 172 F.3d at 1227 n.5, the court stated that "although not articulated as such, the dissent seemingly applies a standard much closer to 'probable cause' than 'reasonable belief.' While probable cause itself is a relatively low threshold of proof, it is a higher standard than 'reasonable belief,' which is, as everyone agrees, the appropriate standard."

280. *See* United States v. Magluta, 44 F.3d 1530, 1534 (11th Cir. 1995) ("The strongest support for a lesser burden than probable cause remains the text of *Payton*, and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of 'reason to believe' over that of 'probable cause.'").

281. Smith v. Tolley, 960 F. Supp. 977, 986 (E.D. Va. 1997); *see also* LAFAVE, *supra* note 194, § 6.1(a), at 227–28 (suggesting that the Supreme Court may have intended to send a message of flexibility to lower courts, so they would not "adopt a hard-nosed 'probable cause to believe the suspect is at home' test," though opining that "on balance it seems preferable to insist upon probable cause").

Nevertheless, it would seem odd for the Supreme Court to create a new, less stringent standard without a more fully developed discussion than is present in *Payton*. *Cf. White*, 228 Cal. Rptr. at 678 (noting that the California Supreme Court "has been very careful to announce when it was deviating from the traditional 'probable cause' standard" such as in the case of investigatory stops).

282. The Supreme Court has held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *See* Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). For comments on the debate over whether *Terry* and its progeny reflect a proper interpretation of Fourth Amendment law, see Terry v. Ohio *30 Years Later: A Symposium on*

criminal activity is afoot,[283] as opposed to probable cause to believe that a crime has been committed.[284] A comparison between *Terry v. Ohio*[285] and *Payton*, however, requires overlooking several objections. First, the Supreme Court has strongly contended that probable cause and reasonable suspicion cannot easily be defined.[286] Second, scholars have

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the Fourth Amendment, Law Enforcement and Police-Citizen Encounters, 72 ST. JOHN'S L. REV. 721 (1998).

283. *But see* Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 926 (1998) ("Notwithstanding the fact that *Terry* is widely known today as . . . establishing a reasonable suspicion standard, one can find nothing in Chief Warren's opinion to support the claim that he thought that was the standard the Court was adopting."); *id.* at 951–52 (explaining that the "reasonable suspicion" standard emerged in Supreme Court cases decided between 1968 and 1979).

284. At least one court has stated that the *Terry* standard is distinguishable from the *Payton* standard, with the simple assertion that, "[t]hese are two different legal standards." United States v. Gay, 240 F.3d 1222, 1227 (10th Cir. 2001) (citing United States v. Clayton, 210 F.3d 841, 844 n.3 (8th Cir. 2000)); *see also* Fleissner, *supra* note 155, at 779 (characterizing the *Payton* standard, as applied in discussing *Magluta*, 44 F.3d 1530, as "akin to the 'reasonable suspicion' standard in investigatory stops"). Additionally, commentators have noted that the Supreme Court explicitly relied upon comparisons between a protective sweep of a residence pursuant to *Maryland v. Buie*, 494 U.S. 325 (1990) (which usually follows a *Payton* entry), and the limited searches of people that flow from *Terry* and its progeny. *See* Mark A. Cuthbertson, Comment, Maryland v. Buie*: The Supreme Court's Protective Sweep Doctrine Runs Rings Around the Arrestee*, 56 ALB. L. REV. 159, 163–65 (1992); Adam F. Trupp, Note, Maryland v. Buie*: Extending the Protective Search Warrant Exception into the Home*, 17 J. CONTEMP. L. 193, 197–98 (1991).

285. 392 U.S. 1 (1968).

286. Ornelas v. United States, 517 U.S. 690, 695–96 (1996):

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not "finely-tuned standards," comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.

(internal citations and some quotation marks omitted); *see also* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 3.2 (1996) ("Notwithstanding the frequency with which police, lawyers and judges must decide whether a given set of facts amounts to probable cause, it remains 'an exceedingly difficult concept to objectify.'") (quoting Joseph G. Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317 (1971)); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 102 (1999) (noting that "the courts have affirmatively resisted clearly defining the contours" of reasonable suspicion); Slobogin, *supra* note 154, at 1082 ("[Probable cause] is the standard with which we are most familiar—except we don't really know what it means."); Stuntz, *supra* note 170, at 1215

argued that measures such as probable cause cannot be fixed.[287] Third, different types of facts contribute to the likelihood that criminal behavior has occurred, than the likelihood that someone is present at a residence.[288]

("[R]easonable suspicion has never received a solid definition. (Perhaps it can't.)"); *see also* Meares & Harcourt, *supra* note 8, at 781:

> Despite the Court's reluctance to discuss the level of certainty probabilistically, there is evidence that decisionmakers assess the level of evidence that justifies different police actions in implicit probabilistic terms. For example, in one study, 96 out of 166 federal judges surveyed indicated a belief that the reasonable suspicion standard requires 40% certainty or less that evidence of crime would be found by an officer after a stop. In the same study, 25% of the judges indicated that 50% certainty was necessary for reasonable suspicion, while another 19% indicated that 60% certainty or more was necessary. This empirical evidence makes it quite clear that Fourth Amendment jurisprudence leaves open just how much liberty should be circumscribed.

(citing C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327 tbl. 3 (1982)) (footnotes omitted).

We must take the Court's vociferous disclaimers about the quantifiability of reasonable suspicion and probable cause with a grain of salt because, in the *Terry* context, both the Supreme Court and the lower courts have built an entire area of Fourth Amendment law upon the idea that courts and police can adequately distinguish probable cause and reasonable suspicion. *See* Saltzburg, *supra* note 283, at 954:

> Probable cause is a judgment call based upon the totality of the circumstances, and even though there is most always some probability of criminal activity, however small, associated with events, courts have been able to make probable cause a meaningful term. This does not mean that all judges agree in all cases. But there is a substantial body of agreement on when probable cause does or does not exist in many familiar circumstances. This is also true of reasonable suspicion.

(footnote omitted).

287. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, FIRST PRINCIPLES 19 (1997) ("[P]robable cause cannot be a *fixed* standard. It would make little sense to insist on the same amount of probability regardless of the imminence of the harm, the intrusiveness of the search . . . ."); POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 85, § 28.1, at 748 (suggesting that gravity of the crime being investigated, or the social loss involved, justifies a lesser showing of probable cause). Posner's view has been adopted by the Seventh Circuit in the context of exigent circumstances. *See* Llaguno v. Mingey, 763 F.2d 1560, 1564–67 (7th Cir. 1985) (plurality opinion) (en banc); *see also* Mason v Godinez, 47 F.3d 852, 856 (7th Cir. 1995) ("[T]he amount of information the police are required to gather before establishing probable cause for arrest is in inverse proportion to the gravity of the crime and the threat of its imminent repetition.").

288. *See* LAFAVE, *supra* note 286, § 3.1(b), at 7:

> The fact that there are grounds amounting to probable cause to make an arrest does not mean that a search warrant could lawfully issue upon that same information. Nor can it be said that probable cause for a search warrant would necessarily justify an arrest. Each requires a showing of probabilities as to somewhat different facts and circumstances—a point which is seldom made explicit in the appellate cases.

Allen & Rosenberg, *supra*, note 154 at 1160:

Nevertheless, the Supreme Court and the commentators have not wavered on one basic proposition: reasonable suspicion requires less proof than probable cause.[289] So, if we assume that the *Terry* and *Payton* standards are equivalent in some sense, one conclusion must follow: *Payton* cases should have less proof of presence than cases where *probable cause* was applied to the presence of a suspect.[290] But the probable cause comparison quickly falls apart, because cases from the

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"Probable cause" is not a thing; it is a probability measure, a burden of persuasion in other words. The relevant "things" in the picture are what must be established to the level of probable cause, such as that there is a murderer in the house and who is dangerous in some fashion.

See also LAFAVE, *supra* note 286, § 3.1(b), at 6:

It is generally assumed by the Supreme Court and the lower courts that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search. For this reason, discussions by courts of the probable cause requirement often refer to and rely upon prior decisions without regard to whether these earlier cases were concerned with the grounds to arrest or the grounds to search.

(footnotes omitted).

289. *See* Alabama v. White, 496 U.S. 325, 330 (1990):

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

United States v. Sokolow, 490 U.S. 1, 7 (1989) (noting that "the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause"); Raymond, *supra* note 286, at 102 ("Reasonable suspicion has not been quantified, but it can be approximated. It is less than probable cause, which has been described as a 'fair probability.'") (footnotes omitted); *see also* William J. Stuntz, Terry *and Substantive Law*, 72 ST. JOHN'S L. REV. 1362, 1362 (1998) (opining that a "good approximation" of reasonable suspicion "might be something like a one-in-five or one-in-four chance"). *See generally* LAFAVE, *supra* note 194, § 9.4 (exploring the permissible grounds for a *Terry* stop, which is "not the probable cause needed for arrest but rather some lesser standard").

The Court has also emphasized that reasonable suspicion "requires a showing considerably less than preponderance of the evidence." Illinois v. Wardlow, 528 U.S. 119, 123 (2000); *Sokolow*, 490 U.S. at 7 (same).

290. Even here we have to ignore the Supreme Court's admonition "that because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multi-faceted, one determination will seldom be useful precedent for another." *Ornelas*, 517 U.S. at 698 (quoting Illinois v. Gates. 462 U.S. 212, 238 n.11 (1983)) (internal quotations omitted); *see also id.* at 703 (Scalia, J. dissenting) (noting "futility of attempting to craft useful precedent from the fact-intensive review demanded by determinations of probable cause and reasonable suspicion"). *But see id.* at 698 (observing that there are exceptions where factual situations are close enough to warrant the use of analogy in Fourth Amendment decisionmaking). It is not clear how courts are supposed to resolve these issues, when the Court explains on the one hand that "the legal rules for probable cause and reasonable suspicion acquire content only through application," *id.* at 697, while simultaneously warning courts against trying to use one case as precedent for another.

last thirty years[291]—both before[292] and after *Payton* was decided[293]—reveal that, in this context, it is difficult to discern the meaning of probable cause.

*1. Pre-*Payton *Cases*

Courts in the pre-*Payton* era alternated between the terms "probable cause" and "reason to believe," often within the same opinion, without adequate discussion or distinction.[294] An example can be found in *State v. Jordan*,[295] in which the court relied on eighteen state and federal court decisions that purportedly "held that a police officer may enter a private premises to execute a valid arrest warrant as long as the officer *reasonably believes* that the subject of the arrest warrant is on the

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291. The treatment of police entries as a matter of constitutional concern is of relatively recent vintage. *See* John C. Siegesmund III, Note, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 STAN. L. REV. 995, 995 n.7 (1971) ("Only two federal cases have dealt with such entries in terms of fourth amendment doctrine. Other courts . . . approved arrest entries on the basis of either statutory or common law.").

292. Prior to *Payton* and *Steagald*, courts split on the proper standards for residential arrest entries. As one district judge explained:

> Prior to April, 1980, the Circuits agreed that an arrest warrant alone was not constitutionally sufficient to justify the entry into a third party's dwelling in search of the subject of that warrant. Something more was needed; the most lenient of Circuit courts required only that the government officials holding the arrest warrant also have a reasonable belief that the person named in the warrant is located on the premises. One Circuit required exigent circumstances in addition to the arrest warrant. Another Circuit required both that the entering officers have probable cause to believe that the subject of the warrant is present, and exigent circumstances.

Adelona v. Webster, 654 F. Supp. 968, 973–74 (S.D.N.Y. 1987) (footnotes and citations omitted); *see also* Fisher v. Volz, 496 F.2d 333, 340 (3d Cir. 1974) ("[T]hose circuits which have considered the question have uniformly held that such entry is constitutional only when the police have probable cause to believe that the suspect is within.").

293. One source of probable cause cases could be police entries to locate a suspect in a third-party's residence pursuant to a search warrant. *See* Steagald v. United States, 451 U.S. 204, 205–06 (1981) (holding that Fourth Amendment required police to obtain a search warrant to enter a third party's residence to arrest a non-resident suspect); Fed. R. Crim. P. 41(b)(4) ("A warrant may be issued under this rule to search for and seize any . . . person for whose arrest there is probable cause, or who is unlawfully restrained."). However, for several reasons beyond the scope of this Article, there is a dearth of search warrant case law applying probable cause to the presence of a suspect named in an arrest warrant.

294. *See* United States v. Arboleda, 633 F.2d 985, 994–95 (1980) (Oakes, J., dissenting) (observing that many of the home arrest cases "seem to equate 'reasonable belief' with 'probable cause,' while allowing the officers to make the judgment without consulting a magistrate").

295. 605 P.2d 646 (Or. 1980).

premises."[296] Yet a review of the opinions cited in *Jordan* indicates that six of the cases failed to state any clear standard on this precise issue,[297] one case primarily used probable cause,[298] two cases seem to have used both a probable cause *and* reason to believe standard in some combination,[299] and one opinion is too perplexing to pin down.[300] Finally, *Jordan* itself adopted a probable cause standard while citing three "reason to believe" opinions.[301]

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296. *Id.* at 649 (emphasis added) (citing United States v. Woods, 560 F.2d 660, 665–66 (5th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978); United States v. Harper, 550 F.2d 610, 613–14 (10th Cir. 1977), *cert. denied*, 434 U.S. 837 (1977); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), *on pet. for rehearing*, 545 F.2d 420 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); United States v. James, 528 F.2d 999, 1016–17 (5th Cir. 1976), *cert. denied*, 429 U.S. 959 (1976); Rice v. Wolff, 513 F.2d 1280, 1291–92 (8th Cir. 1975), *rev'd. on other grounds sub nom.* Stone v. Powell, 428 U.S. 465 (1976); United States v. Jones, 475 F.2d 723, 729 (5th Cir. 1973); Rodriguez v. Jones, 473 F.2d 599, 605–06 (5th Cir. 1973), *cert. denied*, 412 U.S. 953 (1973); United States v. Brown, 467 F.2d 419, 423–24 (D.C. Cir. 1972); United States v. McKinney, 379 F.2d 259, 262–63 (6th Cir. 1967); United States v. Alexander, 346 F.2d 561 (6th Cir. 1965), *cert. denied*, 382 U.S. 993 (1966); People v. Stibal, 372 N.E.2d 931 (Ill. Ct. App. 1978); State v. Platten, 594 P.2d 201 (Kan. 1979); Nestor v. State, 221 A.2d 364, 368 (Md. 1966); Cook v. State, 371 A.2d 433 (Md. Ct. Spec. App. 1977); State v. Jemison, 236 N.E.2d 538 (Ohio 1968); State v. Clark, 319 N.E.2d 605 (Ohio Ct. App. 1974); Commonwealth v. Terebieniec, 408 A.2d 1120 (Pa. Super Ct. 1979); State v. McNeal, 251 S.E.2d 484 (W.Va. App.1978)).

297. *See Jones*, 475 F.2d at 729; *Platten*, 594 P.2d at 205; *Nestor*, 221 A.2d at 368; *Jemison*, 236 N.E.2d at 541–42; *Clark*, 319 N.E.2d at 609–10; *McNeal*, 251 S.E.2d at 488–89 (discussing presence in context of exigent circumstances without stating specific standard).

298. *See Terebieniec*, 408 A.2d at 1125–27 (clearly framing test in terms of probable cause, yet explaining that the evidence "would reasonably support a belief that" the suspect was at home at the time of entry).

299. *See Wolff*, 513 F.2d at 1292 (holding that Fourth Amendment requires "*reasonable or probable cause* to believe that the suspect is within") (emphasis added); *Brown*, 467 F.2d at 423–25 (stating test in terms of reasonable belief, then concluding that there was probable cause to believe the suspect was on the premises).

300. *See Stibal*, 372 N.E.2d at 933–34. The *Stibal* court first states the rule in terms of reasonable belief, notes that some jurisdictions require probable cause, then concludes enigmatically that there was compliance with "this latter standard" because the police could reasonably believe that the defendant was present. *Id.*

301. State v. Jordan, 605 P.2d 646, 651 (Or. 1980) (citing United States v. Cravero, 545 F.2d 406, *on pet. for rehearing*, 545 F.2d 420 (5th Cir. 1976); United States v. Brown, 467 F.2d 419, 423–24 (D.C. Cir. 1972); United States v. McKinney, 379 F.2d 259, 262–63 (6th Cir. 1967)). A dissenting judge in a recent Oregon Court of Appeals opinion made the same observation. *See* State v. Jones, 995 P.2d 571, 575–76 (Or. Ct. App. 2000) (Linder, J., dissenting). Some opinions on this topic are simply mystifying when closely scrutinized. For example, in *State v. Harris*, 272 S.E.2d 719, 720 (Ga. 1980), *vacated sub nom. Harris v. Georgia*, 452 U.S. 901 (1981), the Georgia Supreme Court chastises the Court of Appeals for using a probable cause test rather than a "reasonable belief" standard. Then the court indicates that reasonable belief encompasses the same standard of reasonableness as probable cause. *Id.* One might wonder how a court could err by invoking the wrong standard, if it is equivalent to the proper standard.

Second, little proof was required to satisfy even those courts that applied a probable cause test as to the suspect's presence in the pre-*Payton* era,[302] with rare exceptions.[303] For example, in *Fisher v. Volz*,[304] the Third Circuit declined to hold that police lacked probable cause as a matter of law to enter a third-party's residence,[305] even though the only evidence linking the residence to the suspect was the fact that police had traced a phone number *possibly* connected to a bank robber to her building.[306] The *Volz* court contended that the evidence was as least as strong as in two circuit court opinions where probable cause existed.[307] Yet the form of probable cause applied in those two cases, *Brown* and

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302. *See, e.g.*, United States v. Williams, 385 F. Supp. 1400 (E.D. Mich. 1974) (holding that probable cause existed to believe that suspects in Seattle, Washington bank robbery would be found at residence in Detroit, because the suspects had bought plane tickets to Detroit, and a call from the suspects' hotel room in Oregon was traced to the Detroit residence). This state of affairs led to the claim that under the pre-*Payton/Steagald* regime the cases "allow[ed] the intrusion when the police officers do not have probable cause to believe the suspect is at home at the time, and . . . *even when the police have reason to think that the suspect is not at home.*" Daniel A. Rotenberg & Lois B. Tanzer, *Searching for the Person To Be Seized*, 35 OHIO ST. L.J. 56, 67 (1974) (emphasis added). *But see* LAFAVE, *supra* note 194, § 6.1(a), at 225 (stating that "while it may be fairly said that the cases cited in support of this statement do not justify such a conclusion, it must be conceded that it is not possible to produce any substantial body of authority to the contrary") (footnote omitted).

303. *See* Vasquez v. Snow, 616 F.2d 217, 219–20 (5th Cir. 1980) (holding that police did not have probable cause to believe that suspect would be at residence where he had been seen earlier because the evidence showed that the "peripatetic" suspect was constantly changing his hideout, and police searched four residences in one day searching for the suspect). Note that *Vasquez*, a May 1980 decision, technically was decided after *Payton*, which was decided in April 1980. It has been placed here as a pre-*Payton* decision, because it makes no reference to *Payton*, and was likely written and submitted for publication before *Payton* was handed down by the Supreme Court.

304. 496 F.2d 333 (3d Cir. 1974).

305. *Id.* at 343. The court did not express its own opinion on this matter. It only said that the proof was not insufficient as a matter of law. *See id.*

306. *Id.* at 343. In perhaps the most astonishing fact presented in the opinion, one detective testified a trial that in twenty-four years on the police force he had entered thousands of apartments without *ever* obtaining a search warrant. *Id.* at 337.

307. *Id.* at 343 (citing United States v. Brown, 467 F.2d 419, 420–24 (D.C. Cir. 1972) and United States v. McKinney, 379 F.2d 259, 260–61, 263–64 (6th Cir. 1967)). It is not even clear whether *McKinney* is a "probable cause" case, since it applied a reasonable belief test. *See McKinney*, 379 F.2d at 263:

> An arrest warrant is validly issued only when a magistrate is convinced that there is probable cause to believe that the named party has committed an offense. This determination, together with the inherent mobility of the suspect, would justify a search for the suspect provided the authorities reasonably believe he could be found on the premises searched.

However, *Fisher* suggested that the *McKinney* court "apparently considered 'reasonable belief' to be synonymous with 'probable cause,'" *see Fisher*, 496 F.2d at 340, and it relied upon a "probable cause" Supreme Court case. *Id.* (citing *McKinney*, 379 F.2d 259 (citing McCray v. Illinois, 386 U.S. 300 (1967))) (pinpoint cites not provided in original).

McKinney, seems indistinct from the *Payton* standard. In *McKinney*,[308] the court upheld the search on two pieces of proof: a month old statement by witnesses that the suspect had spent some time in the apartment to be entered;[309] and an anonymous, undisclosed tip that the fugitive was there.[310] The reasoning in *Brown* further illustrates the lack of bite in this version of probable cause. In *Brown*, the D.C. Circuit reversed the district court's grant of a motion to suppress,[311] holding that the police had probable cause to enter the apartment of a suspect's girlfriend.[312] The court relied on the following facts: (1) the 5:30 a.m. entry time;[313] (2) that two unidentified men[314] seemingly[315] entered her apartment the night before;[316] and (3) that a resident clearly stalled police when they arrived, while failing to dispute the suspect's presence.[317]

2. *Post*-Payton *Cases*

It appears that only one published federal appellate court opinion has explicitly applied a probable cause standard to a *Payton* case. In *United States v. Harper*,[318] the Ninth Circuit carefully reviewed the facts that supported the finding that "probable cause" existed for police to believe that the suspect resided at his family's residence.[319] Yet even as Judge

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308. Under current Supreme Court doctrine, McKinney's Fourth Amendment claim would be doomed, as there was no indication that he had an expectation of privacy in the residence that was searched. *See* Minnesota v. Carter, 525 U.S. 83, 86–87 (1998). McKinney merely paid the homeowner to harbor the fugitive. *See McKinney*, 379 F.2d at 260–61.

309. *McKinney*, 379 F.2d at 260.

310. *Id.* at 260–61. The information was not disclosed either a pretrial hearing on the motion to suppress or the trial, but the appeals court held that it could consider the evidence. *See McKinney*, 379 F.2d at 264.

311. *Brown*, 467 F.2d at 420.

312. *See id.* at 423–24.

313. *See id.* at 422. A simultaneous raid was executed at another address. *Id.*

314. *Id.* at 421 (described by police as "one a tall Negro and the other a very short Negro").

315. "Seemingly" because all police saw on that rainy, misty evening was two men enter building with their own key and a light in "in the vicinity" of the girlfriend's apartment then come on. In fact, "both Officers concluded that they 'had no reason to believe that that was the particular subject [Brown] we were interested in' at the time the tall and short men entered the apartment building," until the light came on near the girlfriend's apartment. *Id.*

316. *Id.* (between 11:00 and 11:30 p.m.).

317. *Id.* at 422. The court also noted that the suspect was involved in a narcotics operation and was wanted for murder. *Id.* at 424.

318. 928 F.2d 894 (9th Cir. 1990).

319. *Id.* at 896–97.

Kozinski chided the police for not obtaining a search warrant,[320] he ignored *Payton*'s presence prong.[321] *Harper* contains no discussion regarding whether the police had reason to believe that the suspect was present at the time of entry.[322] Similarly, in *Fontenot v. Cormier*,[323] the Fifth Circuit stated, arguably in dicta,[324] that the police had probable cause to believe that a suspect would be at a certain person's residence "since that was where he resided."[325] Thus, in one leap, the Fifth Circuit equated probable cause as to residence with probable cause as to presence.[326]

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320. *Id.* at 895.

> There's a simple way for the police to avoid many complex search and seizure problems: Get a search warrant. Had they obtained a search warrant in this case—as they could well have—there would have been no motion to suppress, no hearing, no objection at trial and no thorny issues for us to resolve on appeal. But they didn't. So once again we consume a few pages of the Federal Reporter analyzing the circumstances under which the police may enter a home without a search warrant.

Id.

321. Even as the issue was being framed, the presence prong had disappeared. *See id.* at 896 ("[Defendants] concede that the warrant was issued on probable cause and that, under *Payton v. New York* . . . an arrest warrant normally carries with it the limited authority to enter the home of the person named in the warrant."). Later in the opinion, as the court addressed the scope of the search, it is implied that probable cause existed that the suspect was present. *See id.* at 897 ("Defendants' challenge to the scope of the search also fails. Once the police 'possess[ed] an arrest warrant and probable cause to believe [David] was in his home, the officers were entitled to search anywhere in the house in which [he] might be found.'") (quoting Maryland v. Buie, 494 U.S. 325 (1990)). Nevertheless, the *Harper* court does not address the suspect's presence as a requirement of *Payton*, nor does it discuss what evidence supported this implied conclusion.

322. *Id.* at 896–97. To be fair, it was noted that "the police saw cars belonging to known associates of David's parked at the Harper family home." *Id.* at 896. But it is not clear from the opinion when these cars were parked at the residence, nor is there any indication that the cars indicated presence at the time of entry.

323. 56 F.3d 669 (5th Cir. 1995).

324. The court held that the homeowner's Fourth Amendment rights were violated because police did not possess a warrant and did not contend that exigent circumstances were present. *See id.* at 675.

325. *Id.*

326. Several cases from the Seventh Circuit have been omitted from this discussion, although they do address probable cause in the context of home entries and would likely support the arguments advanced herein. *See, e.g.*, Mason v Godinez, 47 F.3d 852, 855–56 (7th Cir. 1995); Reardon v. Wroan, 811 F.2d 1025, 1028–29 (7th Cir. 1987); Llaguno v. Mingey, 763 F.2d 1560, 1564–67 (7th Cir. 1985) (en banc). Nevertheless, in these cases, the Seventh Circuit has explicitly endorsed the view that, in the context of exigent circumstances, increased exigency warrants less probable cause in home entries. *See* Anne Bowen Poulin, *The Fourth Amendment: Elusive Standards; Elusive Review*, 67 CHI.-KENT L. REV. 127, 131 (1991) ("[T]he plurality [in *Llaguno*] employed a flexible definition of probable cause, requiring a greater quantity of information to search when the crime is less serious and a lesser quantity when the crime is more serious."). The

State courts have fared no better. When the Massachusetts Supreme Judicial Court was faced with the question of whether the Massachusetts Constitution requires a greater level of protection than *Payton*, the court avoided resolving the question by holding that the evidence satisfied probable cause as well as *Payton*. In *Commonwealth v. DiBenedetto*,[327] the court held that the early morning timing of the police entry and the fact that the door was ajar satisfied probable cause, even though the most recent sighting of the suspect at his residence was four days prior to the police entry.[328]

In fact, it appears that only one post-*Payton* circuit court has held that the police did not establish probable cause to believe that a suspect was present.[329] In *United States v. Jones*,[330] the court applied a "reasonable or probable cause" test when police sought to arrest Earl Jones in his brother's girlfriend's house.[331] A confidential informant notified police that the suspect might be present there,[332] but indicated neither why he possessed this belief, nor the length of time Jones had been at the residence.[333] The government argued that the two brothers had associated with each other two years earlier; a male voice responded to the initial knock on the door by the police; the police saw a male look outside of the residence while the police knocked; and the occupants delayed in opening the door after being told the police had a "warrant."[334] Although the Sixth Circuit believed that, under the facts on which the government relied, Jones's presence "was not impossible,"[335] the court held that the

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explicit adoption of a "sliding scale," *id.* at 128, version of probable cause inversely tied to exigency makes these cases less helpful for analogizing to *Payton* cases.

327. 693 N.E.2d 1007 (Mass. 1998).

328. *Id.* at 1010; *see also* Doby v. Decrescenzo, No. CIV. A. 94-3991, 1996 WL 510095, at *5, *34 (E.D. Pa. Sept. 9, 1996) (holding that, though suspect answered door, police had probable cause to believe she "was there because the apartment was hers"); Commonwealth v. Rivera, 710 N.E.2d 950, 950–53 (Mass. 1999) (finding that probable cause existed where the suspect eventually opened the door in response to the police).

329. See *supra* note 303 for a discussion of *Vasquez v. Snow*, 616 F.2d 217, 219–20 (5th Cir. 1980), which was decided just after *Payton*, but has been grouped with the pre-*Payton* cases for special reasons.

330. 641 F.2d 425 (6th Cir. 1981) (third-party residence case decided after *Payton* but before *Steagald* imposed a search warrant requirement for such entries).

331. *See id.* at 428 & n.3.

332. *Id.* at 427.

333. *Id.*

334. *Id.* at 428.

335. *Id.* at 429.

facts failed to "suggest that it was probable or likely."[336] Most significantly, the court was willing to probe into the value of each piece of evidence to test it against the conclusion that the suspect and not his brother could be found at the residence.[337]

D. The Futility of the Probable Cause Comparison

In the last thirty years—both before and after *Payton* was decided in 1980—courts have occasionally dispensed with the "reason to believe" standard and elected to apply a probable cause test to the presence of a criminal suspect at a particular residence. Yet, a close review of these decisions reveals that the term "probable cause" in this context has little discernable meaning. Courts routinely have been satisfied with meager evidence of a suspect's presence and some courts seem to use the terms "probable cause" and "reasonable belief" interchangeably. This approach is in stark contrast to the *Terry*-stop realm, where, despite Supreme Court disclaimers on the quantifiability of reasonable suspicion and probable cause, courts and commentators seem to make an effort to distinguish the meanings of these terms.

In sum, in the home-arrest arena, it is futile to compare probable cause of a suspect's presence with reason to believe a suspect is present to derive the meaning of the *Payton* standard. Conventional legal reasoning fails us in this situation. Although *Payton*'s "reason to believe" seems like it should require less proof than probable cause, the cases relying on probable cause are at least as lenient as the *Payton* cases.[338] The dilemma calls for a non-formalistic response that eschews crude analogies to superficially similar case law. The next Part discusses one possible solution.

IV. EMPIRICAL PRAGMATISM AND *PAYTON*

Part II of this Article demonstrated that *Payton* case law is rather stable and consistent. Reason to believe a suspect is home has been interpreted to be a low threshold, nearly always satisfied by evidence proffered by the state. Part III examined how efforts at traditional

336. *Id.*

337. *Id.* at 428–29.

338. Of course, the answer could be that the *Payton*/probable cause comparison fails because the two standards are equivalent and extraordinarily low.

judicial reasoning involving comparisons of "reason to believe" and "probable cause" fail to illuminate disputes over the application of *Payton*, because "probable cause" in this context is also a low standard that is nearly always satisfied. In the absence of any legislative or constitutional action—an unlikely prospect—some rationale must be advanced for looking outside of *Payton*'s progeny to decide *Payton* cases. Part IV will argue that pragmatism provides this philosophical rationale, by encouraging or empowering judges to look beyond cases to the realities of home arrests.[339] The outcome may be the same—a holding that police entry was justified—but the process would be decidedly different. Using this approach, decisions would be based on facts regarding home entries rather than rote application of *Payton* case law and unquestioned assumptions about suspect conduct.

This Part begins with a simple proposal for a study of home arrests executed by the United States Marshals Service. This study would generate the empirical knowledge necessary as a foundation for applying pragmatism to resolve *Payton* cases. This Article will then argue that, even accepting the validity of the critiques of pragmatism described in Part I, empirical pragmatism can be of great use in the *Payton* context.

339. One scholar has argued that the Supreme Court's fourth amendment jurisprudence (though not *Payton* specifically) is already pragmatic.

> The Supreme Court's contemporary fourth amendment decisions reveal legal pragmatism at work. . . . Recognizing the pragmatist pedigree for these opinions offers fresh explanations for the Justices' interpretive behavior. From the perspective of traditional doctrinal analysis, these opinions can appear to be nothing more than examples of the exercise of raw judicial power. They now can be understood as the application of instrumental and contextual ideas about law and its uses that are the product of one of the most influential legal theories operating in this country in this century.

Cloud, *supra* note 23, at 301. Cloud's observations do not conflict with this Article's thesis for several reasons. First, this Article solely focuses on application of *Payton* at the sub-Supreme Court level. Whether or not *Payton* itself was pragmatic does not affect analysis regarding *Payton*'s subsequent lower court implementation. An opinion setting forth a legal rule could conceivably be pragmatic, without its progeny deserving the same moniker. Second, Cloud implies that he does not consider *Payton* to be pragmatic, as he uses the term, since he cites *Payton* as an example of a decision that expresses a preference for a rule over ad hoc balancing. *See id.* at 275 & n.334. Third, even if *Payton* and its progeny could be termed pragmatic, it does not reflect the type of pragmatism advocated herein, in that *Payton*'s progeny is thoroughly non-empirical.

A. *A Preliminary Proposal: A Study of Home Arrests by the United States Marshals Service*

1. *What the United States Marshals Service Should Study*

An empirical study of home arrests could form the foundation for rejuvenated application of *Payton*. The United States Marshals Service (The Marshals Service or USMS) is the ideal law enforcement partner for a study of home arrests. The Marshals Service, a bureau within the Department of Justice,[340] accounts for a majority of all federal fugitive arrests,[341] and arrests more fugitives and executes more arrest warrants than all of the other federal law enforcement agencies combined.[342] According to the Marshals Service, in the last four years, the USMS has arrested over 120,000 federal, state, and local fugitives.[343] During the first seven months of the year 2000, the Marshals Service arrested over 15,000 federal fugitives.[344] Moreover, the Marshals Service often teams up with agents from other federal,[345] state, and local law enforcement departments as part of permanent and short-term fugitive apprehension

340. *See* 28 U.S.C. § 561(a) (1999). For general background information on the United States Marshals Service, the Department of Justice Website, at http://www.usdoj.gov/marshals/reading-room/files.html (last visited Apr. 30, 2002), has links to several USMS public affairs documents that can be downloaded, including: *United States Marshals Service Past and Present*, USMS Pub. 3 (Rev. Apr. 1997); *United States Marshals Service Investigative Services Fact Sheet*, USMS Pub. No. 24 (Feb. 3, 1997); *United States Marshals Service Fact Sheet*, USMS Pub. No. 21 (Feb. 3, 1997); and *United States Marshals Service Facts and Figures at a Glance* (Fiscal Year 1996).

341. There is some conflict on the exact percentage. *Compare United States Marshals Service Investigative Services Fact Sheet*, USMS Pub. No. 21 (Feb. 3, 1997) (stating number at 75%), *with* U.S. Marshals Service website <http://www.usdoj.gov/marshals/factsheets/general.html> (last visited Apr. 30, 2002) (55% last year).

342. *See United States Marshals Service Investigative Services Fact Sheet*, USMS Pub. No. 21 (Feb. 3, 1997); House Subcomm. on Crime of the Comm. of the Judiciary, 106th Congress, Serial No. 105, at 10 (July 13, 2000) (prepared statement of John W. Marshall, Director, United States Marshals Service) [hereinafter Marshall Statement], *available at* 2000 WL 23831434.

343. Marshall Statement, *supra* note 342, at 10.

344. *Id.*

345. *See* House Subcomm. on Crime of the Comm. of the Judiciary, 106th Congress, Serial No. 105, at 27 (prepared statement of Robert J. Finan II, Assistant Director, United States Marshals Service) [hereinafter Finan Statement] ("Since 1989, the Marshals Service has entered into Memoranda of Understanding . . . with 10 federal law enforcement agencies giving [the USMS] administrative and/or apprehension responsibilities for those agencies' fugitives."), *available at* 2000 WL 23831435.

task forces.[346] These task forces utilize synergy between the Marshals Service and local law enforcement agents—with the Marshals offering resources, personnel, and fugitive apprehension expertise and local law enforcement contributing special knowledge of local conditions and law enforcement issues.[347] Hence, the Marshals Service's unique fugitive-apprehension role gives it a vested interest in determining the safest[348] and most reliable methods for apprehending fugitives while preserving evidence for trial and avoiding the suppression of improperly obtained evidence.

Finally, on the administrative side, the Marshals Service's preexisting use of database technology would make it easy to maintain and analyze arrest information. The Marshals Service has an in-house division, the Analytical Support Unit, which is dedicated to data analysis.[349] In fact, the Analytic Support Unit has already done two substantial research projects—a study geared towards identifying the common characteristics of fugitives,[350] and a study of the threats made upon federal judges since 1980.[351] Accordingly, it would not be difficult for the USMS to track and analyze arrest data.

The preliminary proposal for study is rather simple.[352] In Section II, we learned that courts typically look to several recurring factors when determining whether there is reason to believe that a suspect is present. These factors primarily include: (1) police or third-party sighting of, or contact with, the suspect at the residence some time prior to the attempted entry; (2) light or noise emanating from the residence; (3) the presence of vehicles, connected or unconnected to the suspect, at the

346. Currently, the USMS participates in approximately 130 task forces nationwide, of which it leads sixty. *See* Marshall Statement, *supra* note 342, at 10; Finan Statement, *supra* note 345, at 29.

347. *See generally* DOJ Office of Legal Counsel, *Authority of FBI Agents, Serving as Special Deputy United States Marshals, To Pursue Non-Federal Fugitives* (Feb. 21, 1995), *available at* 1995 WL 944018 (describing history of state and federal intergovernmental fugitive task forces).

348. The Marshals Service has emphasized the dangers presented by fugitives, who are "[b]y definition . . . mobile and opportunistic, preying on innocent citizens." Finan Statement, *supra* note 345, at 26.

349. *Id.* at 7–8.

350. *Id.* at 26–27.

351. *Judging Threats: How Analysis Helps U.S. Marshals Service Gauge Harm to Judicial Officials*, *in* THE THIRD BRANCH, Vol. 30, No.7 (July 1998), *available at* http://www.uscourts.gov/ttb/aug98ttb/judging.html (last visited Apr. 30, 2002).

352. This Part is intended to simply sketch out what empirical study might uncover—not to provide the formal parameters of the study.

residence; and (4) the time of day the police seek entry in combination with any known information regarding the suspect's schedule.[353]

Obviously, this list is not exhaustive, and these factors could be further refined. For example the exact amount of time between initial police or informant contact with the suspect and the *Payton* entry might be important. It would not be surprising to learn that the nature of the offense for which the fugitive is wanted may also play a role in determining whether she is present at the time entry is sought. But in one form or another, the list above contains most of the commonly used indicators of suspect presence. The study would analyze how reliable each factor is as an indicator of presence, with the goal of creating a comprehensive account of the weight of each presence factor, individually and in concert.[354] James R. Acker explained the validity of this form of data analysis in the area of *Terry* stops:

> When common factors recur across cases, the possibility arises that policy decisions can be made about their place in a probable cause or reasonable suspicion equation. Variables that are not case-specific, idiosyncratic, or otherwise resistant to classification do not have to be left for processing by individual officers as if they were.[355]

Acker thus suggests an alternative to the Supreme Court's "preference for case-by-case rather than doctrinal development of factors affecting probable cause and reasonable suspicion."[356] In Acker's view "it is quite likely that some aspects of a probable cause or reasonable suspicion decision will be sufficiently predictable, and generalizable across cases, that they need not be left to the quick judgment of the officer at the

353. *See supra* Part II.C.

354. Accordingly, this Article's thesis runs contrary to the assertion that "[w]hat specific evidence equates to any burden of persuasion cannot be said in advance of any aspect of the human condition." Allen & Rosenberg, *supra* note 154, at 1160. If one generates enough "local knowledge," *id.* at 1160–61, about suspect presence, it can be determined in advance whether certain facts meet the burden of establishing "reason to believe," if we assume that reason to believe is a measure of probabilities. This may not be true in all cases involving probable cause and its relatives—but it is possible in the *Payton* realm.

355. James R. Acker, *Social Sciences and the Criminal Law: The Fourth Amendment, Probable Cause, and Reasonable Suspicion*, 23 CRIM. L. BULL. 49, 52–53 (1987); *see also* Meares & Harcourt, *supra* note 8, at 793 (calling for the Supreme Court to engage in a "very public and forthright discussion of the requisite probability of certainty required to justify a police stop or an arrest based on empirical data").

356. Acker, *supra* note 355, at 78.

scene."[357] Acker's observation can easily be extended to the *Payton* realm, where the courts so often rely on the same set of recurring factors to establish suspect presence, and rarely are idiosyncratic facts at the heart of the decision making process.

Categorizing home arrests based upon a small list of recurring factors might seem rather tame as social science—but in the *Payton* context it would be revolutionary. It would mean that prior to every police entry, the police would have a statistically sound basis for determining whether there is reason to believe that the resident is home. Courts could thus honestly evaluate police action instead of engaging in formalist reasoning that nearly always ends up with *Payton* satisfied.

In addition, such a study might begin to gather information on *Payton* arrests, with an eye towards evaluating more broadly the efficacy of the rule. For example, one might track how often a suspect's cohabitant's privacy is also intruded upon or whether certain types of residences are entered more frequently than others (e.g., motels versus single-family homes). Thus, we would start to get a sense of how the burdens associated with *Payton* entries are shouldered in practice.

2. *How Would Courts Treat the USMS Study or Other Research Regarding Home Arrests?*

If the USMS study of home arrests is successful, trial courts will have to decide the procedures for considering this research.[358] John Monahan and Laurens Walker developed the leading framework for how courts should address social science information in a trilogy of law review articles published in the 1980s.[359] These articles built upon and refined

357. *Id.* at 59.

358. Appellate courts will, in turn, have to determine the level of deference to be accorded to the study and whether it should be treated as precedent in subsequent cases. *See* David L. Faigman, *Appellate Review of Scientific Evidence Under* Daubert *and* Joiner, 48 HASTINGS L. J. 969, 976–79 (1997) (arguing in favor of *de novo* appellate review of scientific evidence that transcends a particular dispute).

359. *See generally* Monahan & Walker, *Social Authority*, *supra* note 112; Walker & Monahan, *Social Frameworks*, *supra* note 120; Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988) [hereinafter Walker & Monahan, *Social Facts*]; *see also* John Monahan & Laurens Walker, *Judicial Use of Social Science* Research, 15 LAW & HUM. BEHAV. 571 (1991) (summarizing authors' arguments on how courts should handle social science research); 2 MCCORMICK ON EVIDENCE § 331 (John W. Strong et al. eds., 5th ed. 1999) (noting that "the Federal Rules of Evidence make no effort to regulate" judicial notice of legislative facts, but citing Monahan & Walker's *Social Authority* as an effort to rationalize this endeavor).

the traditional categories of facts first elaborated by the legendary professor and administrative law treatise author Kenneth Culp Davis. Davis divided facts into two categories in the context of administrative law: (1) "adjudicative facts," which pertain to the case at bar;[360] and (2) "legislative facts," which are facts involved in deciding questions of law or policy.[361] As Monahan and Walker reconceptualized Davis's distinction between different classes of facts, they applied distinctive terminology, by referring to adjudicative facts as social facts,[362] and legislative facts as social authority.[363] By using the concept of "social authority," as opposed to the term "legislative facts," Monahan and Walker focus our attention on the similarities between legal authority and the uses of social science research that transcend particular cases.[364] This has implications that will be discussed below.

Monahan and Walker build upon this heuristic concept by making the vital observation that certain social science research used by courts does not easily fall into the legislative (social authority) or adjudicative fact (social fact) categories.[365] They point to an emerging use for empirical data, which they term social frameworks,[366] and define as "the use of general conclusions from social science research in determining factual issues in a specific case."[367] As examples of social frameworks, Monahan and Walker use social research regarding eyewitness identification, predictions of future dangerousness of convicted felons,

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360. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

361. *Id.* at 424; *see also* Monahan & Walker, *Social Authority*, *supra* note 112, at 482–83 (citing Davis, *supra* note 360, at 402.

362. *See* John Monahan & Laurens Walker, *Empirical Questions Without Empirical Answers*, 1991 WIS. L. REV. 569, 570 [hereinafter Monahan & Walker, *Empirical Questions*]; Walker & Monahan, *Social Facts*, *supra* note 359, at 11 & n.26.

363. *See* Monahan & Walker, *Empirical* Questions, *supra* note 362, at 571; Monahan & Walker, *Social Authority*, *supra* note 112, at 488–95 (proposing that social science research used to create legal rules should be deemed "social authority" and treated akin to legal precedent); Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011, 1023 tbl. 2 (1990) (charting Monahan and Walker approach); Walker & Monahan, *Social Facts*, *supra* note 359, at 881.

364. Saks, *supra* note 363, at 1018–19; *see also* Monahan & Walker, *Social Frameworks*, *supra* note 120, at 585 (explaining that under heuristic concept of social authority, "courts would treat social science research, when used to create a rule of law, as a source of authority rather than as a type of fact").

365. Walker & Monahan, *Social Frameworks*, *supra* note 120, at 563–67.

366. *Id.* at 559, 563–70.

367. *Id.* at 570.

battered woman syndrome, and behavioral traits of abused children.[368] What makes all of these uses of social science similar is that in all four situations general conclusions from social science are used to make case-specific findings. In their casebook, the authors use suspect profiles, including drug courier profiles, as further examples of the use of general social science to determine facts regarding the likelihood of criminal behavior.[369]

Monahan and Walker's social framework concept captures what a study of home arrests might enable courts to do in the *Payton* context. General information regarding suspect conduct and home arrests could be used to determine whether the police had reason to believe a suspect was present in a particular case. It should be noted, however, that the *Payton* situation is somewhat different from a typical social framework usage, because the determination of whether police have reason to believe a suspect was present (like a determination of probable cause or reasonable suspicion under *Terry*[370]) is arguably a mixed question of law and fact reviewed de novo, not a finding of fact reviewed for clear error.[371] Still, because it is a legal conclusion that rests so heavily on its subsidiary factual underpinnings,[372] it is sensible to use the social framework approach.[373]

Once we agree that *Payton* home arrest information, whether from the proposed USMS study or other sources, should be treated as a social framework, several conclusions follow according to Monahan and Walker. First, judges ruling on *Payton* cases should feel empowered to

368. *Id.* at 563–67; *see also* Monahan & Walker, *Empirical Questions*, *supra* note 362, at 589–91 (using empirical data regarding eyewitness identification and behavioral traits of sexually abused children as two examples of social frameworks).

369. MONAHAN & WALKER, SOCIAL SCIENCE IN LAW, *supra* note 73, at 395–422.

370. *See* Ornelas v. United States, 517 U.S. 690, 696–97 (1996).

371. *Compare* United States v. Route, 104 F.3d 59, 62–63 (5th Cir. 1997) (reviewing district court's *Payton* reason to believe finding for clear error) *with* United States v. Magluta, 44 F.3d 1530, 1536–37 (11th Cir. 1995) (holding that *Payton* reason to believe determinations, like determinations of probable cause, should be reviewed *de novo*).

372. *See Ornelas*, 517 U.S. at 695–96.

373. In their casebook, Monahan and Walker examine various criminal profiles routinely used by police, such as drug courier profiles to establish reasonable suspicion to support an investigatory search or probable cause to search, under the rubric of "Contexts for Determining Present Facts." *See* MONAHAN & WALKER, SOCIAL SCIENCE IN LAW, *supra* note 73, at 395–412. Although their conclusions and reasoning seem correct, it might be prudent to note that the final determination on probable cause or reasonable suspicion is a legal conclusion (or a mixed question of law and fact), not a pure finding of fact. *See Ornelas*, 517 U.S. at 695–96.

use every tool at their disposal to gain information about home arrests,[374] within the boundaries of ethical judicial conduct.[375] Although Brandeis briefs from the parties would undoubtedly be useful—judges should not be limited to the parties' submissions.[376] Second, it is arguably reasonable to treat any study of home arrests as legal precedent, subject to modification if new data emerges.[377]

B. Data Failure, the Ignorance Hypothesis, and Dilettantism Are Not Risks in the Payton *Context*

As discussed above, whenever one seeks to utilize scientific information in adjudication, three formidable barriers arise: the limits of the data, the limits of the judges interpreting the data, and the limits of the professors providing the data.[378] Although these serious concerns arise when complex social science or scientific data is involved, they would not be problems in the *Payton* context. The event being studied—the presence of a suspect—is rather uncomplicated. No one could argue that once the USMS data is collected and studied that there would be an intrinsic problem with understanding the object of study, home arrests.

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374. Saks, *supra* note 363, at 1028 (noting numerous tools at courts' disposal to find and evaluate social science "in a manner analogous to finding and evaluating law"); *see also* Monahan & Walker, *Social Authority*, *supra* note 112, at 495–98 (proposing that courts receive social authority by way of Brandeis briefs and through independent judicial investigation, just as courts can do independent legal research); Walker & Monahan, *Social Frameworks*, *supra* note 120, at 588–89 (arguing that social frameworks should be obtained and evaluated as a court would locate legal authority).

375. *See generally* George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291 (1998).

376. *See* Walker & Monahan, *Social Frameworks*, *supra* note 120, at 588–89.

377. *See* Meares & Harcourt, *supra* note 8, at 748 (explaining and approving of Monahan and Walker's theory, under which social science is treated as law when it is used to address more general issues) (citing Monahan & Walker, *Social Authority*, *supra* note 112, at 491); Monahan & Walker, *Social Authority*, *supra* note 112, at 514–15 (arguing that lower courts' conclusions regarding empirical research should be reviewed *de novo* and that lower courts should defer to appellate court judgments regarding scientific authority unless the lower court is presented with new research not available to the higher court); Saks, *supra* note 363, at 1029 & n.60 (explaining that general theory behind social frameworks would be reviewed *de novo*, as would legal doctrine). *See also* Laurens Walker & John Monahan, *Scientific Authority: The Breast Implant Litigation and Beyond*, 86 VA. L. REV. 801, 822–23 (2000) (noting that the Fifth Circuit had, in effect, granted precedential effect to a scientific conclusion that existing studies failed to prove a causal link between the drug Benedictin and birth defects) (discussing Brock v. Merrell Dow Pharmaceuticals, Inc., 874 F.2d 307 (5th Cir. 1989), *modified* 884 F.2d 166 (5th Cir. 1989)).

378. *See supra* Part I.C.

Moreover, the study of home arrests does not require the mastery of arcane scientific data or an entire scientific or academic discipline. Judges should have no difficulty interpreting indicators of when a person is at home.[379] In fact, they have already been doing so, though without a factual basis, and judges seem rather comfortable with the concepts that arise in *Payton* cases. Finally, the use of the proposed USMS study would render law professors' involvement at the data collection stage unnecessary. This somewhat circumvents the institutional barriers against empirical legal research,[380] although academic oversight of the study might be well advised. For the same reasons that judges will be able to understand how these factors play out, professors should be able to understand the data. Hence, judicial incompetence and professorial dilettantism are not at issue.

Fortunately, the proposed study of home arrests does not raise questions regarding causation, which often trouble courts that address scientific matters.[381] This is because in the *Payton* context, we are not attempting to prove causation. The presence of a vehicle, light, or noise at a residence may indicate or correlate to presence, but it does not cause the suspect to be present. This distinction between correlation and causation is immensely important.[382] One can readily contrast this with complex legal, social, or scientific questions where judges and legislators must determine, to the best of their ability, whether the proposed action will result in desirable or undesirable outcomes. In such situations, causation is immensely important, because if one does not

379. To the extent that judges still might struggle with concepts of probability, there are many valuable resources for federal judges who endeavor to understand scientific and statistical methodology. *See* David H. Kaye & David A. Freedman, *Statistical Proof, in* 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE 155 (2002) (revised version of David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83 (Federal Judicial Center ed., 2d ed. 2000)); *Scientific Method: The Logic of Drawing Inferences from Empirical Evidence, in* MODERN SCIENTIFIC EVIDENCE 119, *supra*; Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563, 1580–84, 1599–1604 (2000) (discussing probabilistic reasoning and statistical analysis).

380. *See supra notes* 104–109 and accompanying text.

381. Erica Beecher-Monas, *A Ray of Light for Judges Blinded by Science: Triers of Science and Intellectual Due Process*, 33 GA. L. REV. 1047, 1093–1109 (1999) (discussing difficulties courts face with reconciling scientific understandings of causation, especially in the context of epidemiological or toxicological studies, with legal standards of proof).

382. *See* M. Elizabeth Karns, *Statistical Misperceptions*, 47 FED. LAW. 19 (June 2000) (emphatically explaining that correlation does not prove causation); *see also* MODERN SCIENTIFIC EVIDENCE, *supra* note 379, §§ 4.4.2–4.3.1 (discussing distinction between establishing correlation and establishing causation).

believe that the challenged action causes a result, then one may dispense with normative question of whether the result is desirable.

Of course there are several practical problems with the proposed USMS study that would have to be addressed. First, one might argue that the Marshals Service would be biased, because it has a greater interest in law enforcement objectives than in ensuring the privacy interests of criminal suspects. Second, the Marshals Service may be unmotivated to conduct the proposed study. After all, as this Article demonstrates, law enforcement agencies fare very well in *Payton* cases. So one might ask why the USMS or the Department of Justice would be interested in a study that might lead to the more frequent suppression of evidence or an increase in the payment of damages in civil suits. Third, even those in favor of empirical studies might question whether studying when suspects are at home is an inquiry of great import. One might argue that the more pressing inquiry would be the effect on law enforcement that would be wrought by stringent *Payton* application. To such critics, more would be gained by measuring the probable effect of adjusting the *Payton* rule on evidence suppression and conviction rates.

These are valid concerns, but they do not counsel in favor of abandoning a study of *Payton* home entries. The last point can be dispensed with first. The existence of other substantial subjects for study does not obviate the need to study home arrests. First, home privacy is a substantial interest. It makes sense to determine what type of information police typically possess before they invade the home. Additionally, this Article's suggestion that police action in this realm is worth studying does not imply in any way that it would not be valuable to study the potential effects that setting the *Payton* standard at various levels would have on suppression and conviction rates. These issues may also be worth studying. It seems to make more sense, however, first to get a lay of the land and to obtain a solid sense of existing police practices, before we move on to more complex causal questions regarding the potential future effects of changing the *Payton* rule or applying it with more vigor.

Second, as with any empirical work, the potential for bias exists. This suggests only that decisionmakers should not rely uncritically on social science research, not that such research is of no use whatsoever.[383]

Finally, the question of USMS motivation to engage in the proposed study is more difficult, but there are potential responses. First, putting

383. *See supra* notes 99–110 and accompanying text.

the *Payton* issue to the side, the Marshals Service might gain valuable insights regarding suspect conduct from the proposed study. This information could make fugitive apprehension a less dangerous endeavor if police are able to identify the types of locations and scenarios where fugitives are least likely to offer violent resistance to arrest.[384] Moreover, one would assume that the Marshals Service wants to do all that it can to avoid unwarranted entries into private residences. Although fugitive apprehension is its top priority, there is something to be gained by the USMS here. Even if law enforcement officers eventually prevail in *Payton* cases, there are costs and burdens associated with litigating these issues. A decrease in home entries also means a decrease in thorny suppression issues and civil claims by innocent residents and homeowners. In addition, it must be noted that the envisioned study is exceedingly modest in scope. The study's cost in resources likely would be negligible. One last, more idealistic point is worth mentioning. At its core, Posner's pragmatism calls for reconceptualizing the roles played by various players in the legal system. As judges and professors are asked to transcend their current functions, law enforcement agencies may also be asked to take on more innovative and less reactive roles. Participating in the proposed study is one way that the USMS can be infused with this pragmatic spirit.

C. *Can Banality Be Overcome in the* Payton *Context?*

If we accept that data failure, the ignorance hypothesis, and professorial dilettantism are not problems in the *Payton* context, the remaining hurdle is the dreaded charge of banality. We begin with Posner's own concession (or explanation) that pragmatism, as a method of inquiry, and not a substantive theory, cannot "resolve any moral or legal disagreement."[385] We add this to the powerful critics of pragmatism, led by Dworkin, who persuasively argue that empirical study cannot assist judges in determining how to balance competing visions of public good.[386] Thus, one might ask, what can pragmatism offer in the *Payton* context—or indeed in any context?

384. Such a study might also uncover interesting information regarding race, class, and policing.

385. POSNER, PROBLEMATICS, *supra* note 2, at xii; *see also* Tamanaha, *supra* note 131.

386. *See supra* notes 126–141 and accompanying text.

1. The Value of Empirical Inquiry in Light of the Dworkinian Critique

Even if pragmatic empirical inquiry cannot resolve debates over fundamental values, it can help legal decisionmakers in a variety of ways. First, as pragmatism's detractors concede, empirical inquiry and experimentation can be helpful when the political community agrees upon the ends or normative goals that it wishes to pursue, but it is undecided as to the optimal method to achieve those ends.[387] This can be contrasted with a scenario where the ends themselves are the subject of intense debate.[388] As Dworkin explains:

> Of course, in some circumstances, pointing out that a doctrine will have surprising consequences—that a welfare program designed to help a particular group will actually harm that group, for example—is obviously immensely helpful. But these circumstances are rare: most often the controversy is not about what means will in

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387. Dworkin, *Arduous Virtue*, *supra* note 139, at 1265–66.

388. Dworkin explains:

> We must distinguish two situations in which a political community might find itself. In the first, it has a pretty good idea of what goals it wants to pursue through its constitutional and other laws—a good sense, we might say, of where it wants to end up. It wants to keep inflation down and nevertheless have sustained growth, for example. It wants a lively political discourse, a lower crime rate, and less racial tension. It would know when it has achieved these goals, but it is now uncertain how to pursue them. It might indeed be helpful, in some such cases, to tell such a community not to try to solve its problems by first constructing grand economic or moral principles and then proceeding in their light, but, instead, to be experimental—to try one thing after another, just to see what works.
>
> In the second situation, however, the community's problem is not that it doesn't know which means are best calculated to reach identified ends. Rather, it doesn't know what goals it *should* pursue, what principles it *should* respect. It wants to be a fair society, a just society, but it doesn't know whether that means increased liberty for people to make intimate sexual decisions for themselves, for example, or whether it means giving preferences in hiring and education to minorities. Its difficulty is not that it doesn't have the factual basis to be able to predict the consequences of granting increased sexual liberty or of adopting affirmative action programs. Or, at least, that is not its only problem. Its deeper problem lies in not knowing whether these consequences would be, overall, improvements or further defects in the justice and fairness of its structures. In these circumstances it's evident, isn't it, that the pragmatist's earnest advice—his practical, empirical, counsel of caution and theoretical abstinence—is worthless.
>
> When we are in the second situation, we can't avoid general principles by asking ourselves whether any particular step "works." We can't do that because no one can have any opinion about what working *is* until he has endorsed, however tentatively, a general principle that identifies a step as a step forward rather than a step backward. Whether increased sexual liberty or affirmative action makes a society more just cannot be decided without deciding what denials of liberty or distinctions of treatment are unjust and why.

Id.

> fact achieve an agreed end, but about what end should be agreed upon—about how high efficiency should rank, for example, against social or distributive goals or the protection of rights or goals of integrity.[389]

So, in a sense, at the heart of the conflict between pragmatists and their critics is an empirical disagreement regarding the types of disputes most often faced by society.[390] Dworkin and his allies think that it is rare that the ends or goals are agreed upon.[391] Instead, they think that legal disputes usually involve some claim about which ends should prevail. In contrast, pragmatists are more likely to believe that enough consensus exists on ends to justify experimentation on means.[392] So even if we accept Dworkin's criticism, room remains for situations where empirical study may be of use, such as when the goals are uncontroversial, but there is a dispute over which method for achieving the ends will be most effective.[393]

Second, empirical inquiry may be useful for revealing situations where doctrine or legal categories obscure a complete understanding of the underlying legal problem. As Steven Smith (a critic of pragmatism) observes, a pragmatist might argue that excessive abstraction and overuse of conceptual categories comes with the "costs of overlooking potentially significant features of experience."[394] Therefore, the process of compartmentalizing legal controversies into existing categories of legal doctrine carries with it some risk of losing touch with important features of the underlying issue.

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389. Dworkin, *Reply*, *supra* note 102, at 433.

390. *See* Warner, *supra* note 17, at 552 n.81 (noting that the "extent of unresolvable disagreement is, of course an empirical issue" but arguing that our daily lives demonstrate that consensus is often lacking on "virtually every substantive aspect of public policy" and that "[t]he intellectual history of the last three centuries is in part the history of the breakdown of any consensus about what justifies a moral or political judgment").

391. *See A Case Too Far*, *supra* note 30, at 8 ("There is no general consensus about society's economic and social goals, as [Posner] seems to assume, but frequent and bitter disagreement about them. What is a matter of simple pragmatism to Judge Posner, or any judge may well seem outrageous to others.").

392. *See* POSNER, PROBLEMATICS, *supra* note 2, at 262 ("Pragmatism will not tell us what is best; but, provided there is a fair degree of value consensus among the judges, as I think there is, it can help judges seek the best results unhampered by philosophical doubts.").

393. *Cf.* Shreve, *supra* note 39, at 66 (explaining that pragmatism can help to clarify and mediate the debate among other substantive theories "without becoming one more competing theory").

394. *See* Smith, *supra* note 3, at 432–33. According to Smith, "[s]uch a view seems to inform the pragmatists' frequent condemnation of "abstraction" or "abstract theory." *Id.* at 433.

However, the use of pragmatism as an antidote for excessive abstraction has its own difficulties. As Smith explains, while excessive abstraction can be a problem, it is hard to see how pragmatism can help us figure out exactly *when* theory becomes too abstract.[395] The only honest answer to Smith's observation is that one who asserts that theory has gone awry must be willing to invoke some other normative basis for asserting that theory has failed. If pragmatism cannot provide a normative goal for lawmakers, then it is equally incapable of determining when we are in a crisis. As Gene Shreve explains:

> Pragmatism . . . is designed around the process of finding and solving problems. But what are the problems? How, when and why do we define them? Pragmatism is often thought to eschew moral (substantive) values, but it must have a moral base somewhere to escape relativism. That is, pragmatism can neither call something a problem nor value one solution to it over another without substantive reference points. Hence the dilemma. If pragmatism is substantive, does it contradict itself? If pragmatism lacks substantive reference, is it not hopelessly relativistic?[396]

Third, and most important for the *Payton* context, pragmatic empirical study can force courts to explicitly identify the normative bases of their decisions, thus helping to create what Tracey Meares and Bernard Harcourt aptly call "transparent adjudication."[397] As Deborah Jones Merritt explains "[f]acts cannot replace constitutional theories, nor . . .

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395. *See id.* at 433–34; TAMANAHA, *supra* note 53, at 37 (explaining that "there is no standard for determining when a given level of abstraction is excessive").

396. Shreve, *supra* note 39, at 65–66 (quoting Gene R. Shreve, *Symmetries of Access in Civil Rights Litigation: Politics, Pragmatism and Will*, 66 IND. L.J. 1, 34–35 (1990)); *see also* Warner, *supra* note 17, at 551–54 (discussing pragmatism's inevitable relativism). Shreve's description is similar to the concept of "institutional bad coherence," elucidated by Margaret Jane Radin, under which an ideologically unacceptable legal conclusion is consistent with prior legal practices. *See* Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1721 (1990); *see also* Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1047–48 (1991) (explaining how pragmatists may neglect injustices deeply imbedded into the legal landscape).

397. As Meares and Harcourt observe:

> By more transparent, we mean to describe adjudication that expressly and openly discusses the normative judgments at the core of constitutional criminal procedure. Judicial decisions that address the relevant social science and empirical data are more transparent in that they expressly articulate the grounds for factual assertions and, as a result, more clearly reflect the interpretive choices involved in criminal procedure decisionmaking.

Meares & Harcourt, *supra* note 8, at 735.

mechanically resolve questions posed by theory,"[398] but empirical inquiry "can illuminate half-hidden theories that guide decision makers."[399] Empirical pragmatism, while not a normative theory itself, can force decisionmakers to reveal the motivations for their decisions, by stripping away the guise of ill-supported factual assumptions.[400]

2. *The Value and Limits of Empirical Inquiry in the* Payton *Context*

a. *Transparent Adjudication and* Payton

To make this discussion more concrete, let us see how this effort at transparent adjudication might work in the context of home arrests under *Payton*.[401] For the moment, we will assume that the rule set forth in *Payton* is itself not open to reconsideration and that the "reason to believe" standard adequately balances the interests of residential privacy and police investigatory needs.[402] This Article has argued that *Payton*'s progeny has failed to properly capture the realities of suspect behavior. Thus, what started out as a seemingly reasonable rule governing home

398. *See* Merritt, *supra* note 51, at 1287.

399. *See id.* at 1291. Faigman opines: "[w]hen the Court's factual observations depart from reality, the rules attached to those facts become suspect." Faigman, *Normative Constitutional Fact-finding*, *supra* note 117, at 612.

400. *See* Heise, *supra* note 102, at 808–09 (explaining the regrettable power of "[a]ssertions unconnected to an empirical basis"); Meares & Harcourt, *supra* note 8, at 750–51 (criticizing the Supreme Court for treating contested empirical claims as "self-evident, common sense, or simple 'facts of life'") (discussing Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000)). Meares and Harcourt further state:

> In a world in which there really is no research available to inform the Court's commonsense judgments about human behavior, perhaps this conclusion would not be troubling. If relevant research is indeed lacking, then personal experience (to which much reference was made in oral arguments), and citations to Proverbs may be better than guessing. At least we could be confident that the Court was doing the best it could to make a difficult decision without social authority to help guide it. But what if there *is* social science research available to inform the Court's commonsense judgments? Does it still make sense to be confident about the Court's ability to make difficult decisions concerning the requisite balance between liberty and order without consulting it? Do we really believe that the unadorned commonsense judgments of the justices of the Supreme Court are adequate to determine the scope of individual rights?

Id. at 784 (footnotes omitted).

401. Meares and Harcourt demonstrate the value of transparent adjudication and empirical inquiry in the context of ongoing debates over *Miranda* warnings and *Terry* stops. *See* Meares & Harcourt, *supra* note 8, at 752–93.

402. Obviously one might argue that the *Payton* rule itself is deeply flawed.

arrests somehow failed to develop content or incorporate the realities of suspect or citizen conduct. Subsequent rote application of the rule then reinforced what was becoming a meaningless standard. The question is whether empirical study can point a way out of this dilemma. Several hypothetical home-arrest scenarios may be enlightening.

Let us assume, arguendo, that a reliable and scientifically valid study of home arrests indicates that the presence of a vehicle connected to the suspect and light emanating from a residence indicates a 95% chance that a suspect will be at home before 8 a.m. on a weekday. Police approach a suspect's residence at 6:30 a.m. on a Wednesday and see the suspect's car parked outside of his home and lights on in the residence. Most observers would intuitively respond that *Payton*'s reason to believe standard has been satisfied. To say otherwise would mean that reason to believe requires greater than 95% certainty—an implausible outcome. If we put to the side momentarily exactly why we feel that "reason to believe" cannot require greater than 95% certainty, then empiricism seems to provide a solid basis for the police action.

Now let us change the hypothetical, and assume that police attempt to arrest the suspect in the middle of the day. There is no light or noise emanating from the residence, nor any cars parked in front of the suspect's home. The home-arrest study reveals that these factors indicate less than a 2% chance that the suspect will be found inside. Once again, our intuitions line up with the study. It seems implausible to argue that the formulation "reason to believe" should be satisfied when a study shows less than a 2% chance that the suspect would be present.

Now let us take the inevitable case where intuition and the study of home arrests fail to point together towards one conclusion. Assume a case where a confidential informant reports seeing the suspect at his residence at 3 p.m. on a Saturday. The police approach the residence at 7:30 p.m. that same day. The suspect's car is not present, but several cars connected to the suspect's friends are parked in the driveway. No lights are on in the residence, but the noise of a television or stereo can be heard. The study shows that these factors taken together lead to an 18% chance that the suspect will be present. Then the question of whether *Payton* is satisfied cannot be resolved intuitively. A court must ask the next question: Does an 18% possibility that a suspect will be present satisfy *Payton*? Is 18% high enough for "reason to believe?"

This is where a form of the banality problem arises. It is not clear how further study or data would assist the court in making its determination. A devout pragmatist might say that the court could then look to the likely effects on police investigation and crime control of setting the

probability bar at one level or another. How many arrests would be thwarted? What will be the effect on the privacy interests of the suspect or the suspect's cohabitants? Perhaps further study would be warranted to address these questions. But this merely defers the inevitable judicial quandary. Eventually, the courts must step up to the plate and set the standard for home arrests. A court must be willing to explicitly hold what level of certainty is required to satisfy *Payton*. Empirical study will not answer *this* question, but it can force the court to acknowledge whether particular facts satisfy the standard without shrouding its judgment in a recitation of legal doctrine or a laundry list of factors suggesting suspect presence.

This is the value of transparent adjudication—the court will have to state flat out what suffices under *Payton*. If a court says that a 25% likelihood of suspect presence satisfies *Payton*, we can get on with the business of arguing whether we are comfortable with that standard as a matter of policy. The normative battle can be joined—which requires an honest discussion of how much we value privacy and how much latitude we wish to give police who seek to arrest suspects at home. Until the courts step up, we cannot have a proper normative debate. As Meares and Harcourt explain:

> The relevant empirical facts, we claim, are not outcome determinative. They do not compel particular resolutions, nor do they guarantee right answers. The resolution of criminal procedure cases calls for normative judgments—in particular, for a balancing of liberty and order—and is not dictated by empirical evidence. When taken together, an emphasis on the use of relevant empirical facts in the context of a pragmatic balancing approach to criminal procedure decisionmaking, we believe, holds out the greatest promise of increasing the transparency of these constitutional decisions and, therefore, potentially increasing the accountability of the Court to the public.[403]

b. The Contingent Nature of Empirically-Based Judgments

Establishing a standard under *Payton* would not be set in stone forever—it must be contingent on further empirical findings. The best example of an empirically-contingent rule in the constitutional criminal

403. Meares & Harcourt, *supra* note 8, at 744.

procedure arena is the good faith exception to the exclusionary rule created by the Supreme Court in *United States v. Leon*.[404] In *Leon*, the Court held that the exclusionary rule would not apply to evidence obtained by police in the execution of a facially valid search warrant, even if the warrant was later found to be lacking in probable cause.[405] The Court largely based its reasoning on the empirical judgment that punishing police who act in good faith would not serve any deterrent effect.[406] Justice Blackmun, in his concurrence, wrote convincingly about the necessarily contingent nature of any legal holding based on an empirical foundation, and how courts that base their legal judgments on conclusions regarding empirical matters must be willing to re-examine their holdings as new evidence comes to light.[407]

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404. 468 U.S. 897 (1984). Scholars often cite *Leon* as an opinion where the Court showed sensitivity to the empirical backdrop of the case. *See* Meares & Harcourt, *supra* note 8, at 746–48; Monahan & Walker, *Empirical* Questions, *supra* note 362, at 580–81; Walker & Monahan, *Social Frameworks*, *supra* note 120, at 562, 568. Other scholars hold a less charitable view towards *Leon*. *See, e.g.*, Tribe, *supra* note 90, at 157–58 (criticizing the Court's approach in *Leon* as a pseudo-scientific cost-benefit method that will systematically devalue the interests protected by the Fourth Amendment).

405. *Leon*, 468 U.S. at 922 ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.").

406. *Id.* at 918–21.

407. Justice Blackmun stated:

> I write separately . . . to underscore what I regard as the unavoidably provisional nature of today's decisions.
>
> As the Court's opinion in this case makes clear, the Court has narrowed the scope of the exclusionary rule because of an empirical judgment that the rule has little appreciable effect in cases where officers act in objectively reasonable reliance on search warrants. . . . Because I share the view that the exclusionary rule is not a constitutionally compelled corollary of the Fourth Amendment itself . . . I see no way to avoid making an empirical judgment of this sort, and I am satisfied that the Court has made the correct one on the information before it. Like all courts, we face institutional limitations on our ability to gather information about "legislative facts," and the exclusionary rule itself has exacerbated the shortage of hard data concerning the behavior of police officers in the absence of such a rule. . . . Nonetheless, we cannot escape the responsibility to decide the question before us, however imperfect our information may be, and I am prepared to join the Court on the information now at hand.
>
> What must be stressed, however, is that any empirical judgment about the effect of the exclusionary rule in a particular class of cases necessarily is a provisional one. By their very nature, the assumptions on which we proceed today cannot be cast in stone. To the contrary, they now will be tested in the real world of state and federal law enforcement, and this Court will attend to the results. If it should emerge from experience that, contrary to our expectations, the good-faith exception to the exclusionary rule results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken

Blackmun's observations in *Leon* would apply equally in the *Payton* realm. If further experience and empirical study began to tell a different story regarding suspect behavior, then courts would have to incorporate this understanding into *Payton* case law. This willingness to adapt reflects a strength, not a weakness, in empiricism.[408] It represents the acknowledgment that any time a legal rule is predicated upon a certain understanding of the world, the rule makers must be willing to alter the rule as a different understanding of the world emerges. So, in the *Payton* context, we apply rules based upon an understanding of suspect behavior and the subsequent effect on privacy and law enforcement efforts. If our understandings of the world change, the rules would adapt will change as well.

D. Pragmatism and Payton *in Sum*

No matter how accurate and comprehensive a study of home arrests is, facts about suspect behavior will not answer the question of what the *Payton* standard should mean. The factual inquiry, however, serves a valuable function—it forces *Payton* decisionmaking into the open, creating a process of transparent adjudication. Only by understanding the facts of home arrests can we engage in a productive normative debate over whether the *Payton* standard, as applied by the courts, satisfies our societal preferences. How often are homes entered? How successful are these entries? What are the effects on co-residents? Are different types of homes entered at different rates?[409] How often does a *Payton* entry result not in the arrest of a subject but in the seizure of contraband while police search for the suspect? How much privacy should suspects have? How much freedom do we wish to give police? Does the type of offense affect our reasoning? These are all interesting questions that can lead to a productive dialogue about the relationship between privacy in the

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here. The logic of a decision that rests on untested predictions about police conduct demands no less.

Leon, 468 U.S. at 927 (Blackmun, J., concurring) (internal citations omitted).

408. Monahan & Walker, *Empirical Questions*, *supra* note 362, at 581 ("The great advantage of judicial candor about the role of empirical assumptions and the speculative nature of their resolution, then, is that the common law is left open to change as new social authority bearing on those assumptions becomes available.").

409. Would it surprise anyone to find out that a trailer home is more likely to be stormed by police than a mansion?

home and the legitimate needs of law enforcement. Until the facts are in, though, the debate cannot be joined.

CONCLUSION

With the publication of *The Problematics of Moral and Legal Theory*, Richard Posner solidified his reputation as the leading scholarly and judicial advocate of the application of pragmatism to law. According to Posner, legal decisionmakers, including judges, should use every tool at their disposal, especially the social sciences, to render decisions that will best serve our society's needs. Judges can accomplish this goal only if they understand the factual contexts in which legal issues arise and are capable of determining the practical effects of their decisions.

Aside from the baggage that comes with appropriating a controversial philosophical term such as "pragmatism," we have seen that Posner's prescription for the U.S. legal system is both modest and radical. Posner's pragmatic prescription is modest because, for almost one hundred years, scholars from all across the ideological spectrum have urged the courts to be more cognizant of the real world, less wedded to theory or doctrine unconnected to reality, and more willing to utilize non-legal materials such as social science data in the legal decisionmaking process. Although some of these scholars have marched under the banner of pragmatism, others have called for a more empirically grounded form of legal decisionmaking without affiliating themselves with a particular philosophical school of thought.

On the other hand, Posner's pragmatic prescription is radical because the U.S. legal system has proved itself remarkably resilient against pragmatic or empirical calls to action. As this Article has shown, there are several related reasons for this resistance. First, there are questions whether social science can capture the essence of complex social phenomena at issue in most legal disputes. Second, the judiciary may be institutionally incapable of properly considering non-legal materials. Third, law professors and others in the profession have not provided the courts with the necessary social science data to supplement their decisionmaking—and many question whether lawyers are capable of providing this support. Moreover, powerful and persuasive philosophical critics—led by Ronald Dworkin—have questioned whether empirical inquiry can help courts settle the type of hotly-contested normative debates that arise in legal disputes. These critics argue that courts and other legal decisionmakers must decide on the ends that our society wishes to pursue, not merely on the most effective methods for achieving

these ends. According to these critics, pragmatism's exhortation to experiment, proceed empirically, and to try and do what works best, cannot help legal decisionmakers make the tough normative, moral, and ethical policy judgments that are required of them.

Against this daunting backdrop, the purpose of this Article has been to demonstrate, in practical terms, how empirical inquiry could help resolve an important issue in constitutional criminal procedure. For this exercise in what might be termed "applied pragmatism," we have focused on judicial review of police entries into suspects' homes to execute arrest warrants made pursuant to the authority granted by *Payton v. New York*. As this Article has endeavored to show, the *Payton* realm is a particularly rich environment to study the value of empirical pragmatism. *Payton* permits police officers armed with an arrest warrant to enter a suspect's residence when there is "reason to believe" the suspect will be present. Yet, for the last two decades, courts applying *Payton*'s reason to believe standard have constructed a legal regime under which police entries under *Payton* are rarely held to be unconstitutional, no matter what evidence is adduced that the suspect would be present. Courts have validated police entries into private residences by accepting potentially empirically unsupported assumptions regarding citizen and suspect conduct. Even worse, courts occasionally attempt to give *Payton*'s reason to believe standard meaning by comparing it to probable cause. This entails a mystifying formalist exercise, because probable cause itself has little discernable meaning in the context of home arrests.

Empirical pragmatism points a partial way out of the *Payton* quagmire. The United States Marshals Service, the pre-eminent U.S. fugitive-apprehension force, should generate sound social science evidence regarding home arrests to determine how likely it is that a suspect will be found at home in light of certain recurring evidentiary factors. Courts would then have access to this information when they review *Payton* home entries to determine whether it was reasonable for the police to have believed that the suspect would be home. Therefore, instead of engaging in unsupported judicial musing regarding how suspects behave, or meaningless comparisons of probable cause and reason to believe, judges could base their decisions on reliable data regarding home arrests and suspect conduct.

Unfortunately, social science data regarding suspect conduct cannot fully resolve the problems posed by *Payton*. Such are the limitations of empirical pragmatism—it illuminates the interests at stake and encourages a healthy process of transparent adjudication, but it cannot

resolve our normative policy debates over privacy and police action. For example, a study of home arrests may tell us that there is a 25% chance that the suspect will be at home given certain evidence, but the study cannot tell us whether we should be satisfied enough with this level of likelihood to permit law enforcement officers to enter the residence. This final inquiry requires courts and society to engage in a normative debate regarding privacy and law enforcement needs. Far from being banal or useless, however, the empirical inquiry is a necessary first step because important normative debates cannot be properly joined until we have a clear sense of the interests at stake. This is the value of Posner's pragmatism—it forces courts in the *Payton* realm (or any legal context) to explicitly question the factual bases underlying their reasoning and to acknowledge that their decisions have real world effects. To be sure, pragmatism cannot tell us what type of lives we wish to lead or what type of society we wish to build—but it can help us avoid basing our policy judgments regarding constitutional criminal procedure on empirically unsound foundations.