

**OVERGENERALIZATION OF THE HOT PURSUIT
DOCTRINE PROVIDES ANOTHER BLOW TO THE FOURTH
AMENDMENT IN *MIDDLETOWN V. FLINCHUM*[†]**

*It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.**

I. INTRODUCTION

Unreasonable searches of the home have often been regarded as a serious infringement upon one's right to privacy.¹ The right to privacy is currently recognized by a variety of governments and has existed for hundreds of years.² Although the Constitution does not grant an express right to privacy,³ the Supreme Court has consistently acknowledged the

[†] *Middletown v. Flinchum*, 765 N.E.2d 330 (Ohio 2002).

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

1. James G. Sotos, *Despite Lack of Warrant, Arrest Was Proper: Court*, CHI. DAILY L. BULL., Oct. 20, 1994, at 6 ("The adage 'A man's home is his castle' perhaps best explains why constitutional protections against the long arm of the law are at their greatest when the police attempt to intrude on the sanctity of the home."). Stanley H. Friedelbaum, *The Quest for Privacy: State Courts and an Elusive Right*, 65 ALB. L. REV. 945 (2002) (discussing right of privacy as interpreted and applied to States).

2. David Banisar, *Privacy and Human Rights, an International Survey of Privacy Laws and Practice*, Global Internet Liberty Campaign, available at <http://www.gilc.org/privacy/survey/intro.html> (last visited Feb. 3, 2003). In discussing the origins of the right to privacy the author noted: The law of privacy can be traced as far back as 1361, when the Justices of the Peace Act in England provided for the arrest of peeping toms and eavesdroppers. In 1765, British Lord Camden, striking down a warrant to enter a house and seize papers wrote, "We can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society, for papers are often the dearest property any man can have."

Id. (quoting *Entick v. Carrington*, 1558-1774 All E.R. Rep. 45 (K.B. 1765)).

3. See generally Adam Hickey, *Between Two Spheres: Comparing State and Federal Approaches to the Right to Privacy and Prohibitions Against Sodomy*, 111 YALE L.J. 993 (2002) (discussing relationship between homosexuals' right to privacy and sodomy laws); Tracie B. Loring, *An Analysis of the Informational Privacy Protection Afforded by the European Union and the United States*, 37 TEX. INT'L L.J. 421 (2002) (comparing European information privacy laws to those of the United States).

rights of personal privacy and zones of privacy.⁴ Affording extra protection to the home seems to show that our right to privacy is at its peak behind closed doors.⁵

Unfortunately, the list of exceptions to the warrant requirement is large⁶ and continuously growing.⁷ These exceptions will undoubtedly infringe upon our right to privacy and further erode Fourth Amendment protections.⁸ Some scholars feel that liberal interpretations of such exceptions will eventually eliminate the objectives behind the Fourth Amendment.⁹ For example, increasing the number of exceptions to the

4. See, e.g., *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). Justice Blackmun acknowledged: The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas of zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment . . . ; in the Fourth and Fifth Amendments . . . in the penumbras of the Bill of Rights . . . ; in the Ninth Amendment . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

Id. (citations omitted), quoted in Alain A. Levasseur, *Legitimacy of Judges*, 50 AM. J. COMP. L. 43, 81 (2002) (discussing theoretical approaches to the legitimacy of the judicial branch).

5. See, e.g., *United States v. U.S. Dist. Ct. E.D. Mich.*, 407 U.S. 297, 313 (1972) (stating “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”), cited with approval in *Payton*, 445 U.S. at 585-86.

6. See Jeffrey Haningan Kuras et al., *Warrantless Searches and Seizures*, 90 GEO. L.J. 1130 (2002) (providing a list of recognized exceptions to the warrant requirement).

7. Sherri Schuck, *Letting the End Justify the Means: The Continuing Dissolution of the Fourth Amendment's Requirement for Search Warrants*, 40 WASHBURN L.J. 350 (2001) (discussing expansion of the exception by allowing courts to continue to determine exigent circumstances with a variety of factors); Darrel C. Waugh, Note, *Constitutional Law-Developing Guidelines in Fourth Amendment “Clothing Cases” After United States v. Butler*, 16 W. NEW ENG. L.REV. 289, 292 (1994) (providing background of the large amount of exceptions to the warrant rule).

8. See generally Kuras, *supra* note 6. The author explained how the warrant requirement can be avoided with the following exceptions:

There are, however, many exceptions to the probable cause and warrant requirements, including investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, consent searches, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.

Id. Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1 (1991) (discussing the Supreme Court's willingness to disregard settled doctrine while expanding exceptions to the Fourth Amendment).

9. Emily Sovell, Note, *State v. Hanson: Has the Exigent Circumstances Exception to the Warrant Requirement Swallowed the Rule?*, 45 S.D. L. REV. 163 (2000) (criticizing the South Dakota Supreme Court's determination relative to exigent circumstances in *State v. Hanson*). See generally John Barnoski, Note, *Fourth Amendment – Knock-and-Announce Rule – Common Law “Knock and Announce” Principle forms Part of Reasonableness Inquiry Under Fourth Amendment Wilson v. Arkansas*, 6 SETON HALL CONST. L.J. 1231 (1996) (arguing recent decisions concerning the Fourth Amendment have been ambiguous and have failed to adequately protect our Fourth

warrant rule provides a greater chance for police error, bias, and abuse, thus escalating unreasonable searches and invasions of privacy.¹⁰ Requiring members of the judicial branch to determine probable cause reduces the chance of unreasonable searches because a neutral individual is less likely to suffer from partiality.¹¹ Therefore, to protect our right to privacy the Supreme Court has found that exceptions to the warrant requirement are carefully constructed and few in number.¹²

The Ohio Supreme Court held that hot pursuit of a suspect qualifies as an exigent circumstance regardless of the underlying offense.¹³ Unfortunately, this holding increases the number of exceptions to the

Amendment rights); Phyllis Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991) (arguing lack of coherent guidelines have widdled away the Fourth Amendment); Adina Schwartz, *Homes as Folding Umbrellas: Two Recent Supreme Court Decisions on "Knock and Announce,"* 25 AM. J. CRIM. L. 545 (1998) (arguing recent attempts by the Supreme Court to define the home have resulted in considerable erosion of Fourth Amendment protections); *but see* Crystal Cunningham, *Domestic Violence: I Don't Need to Have Bruises to Feel Pain, A Worthy Exception to the Warrant Requirement*, 28 PAC. L.J. 731 (1997) (arguing exigent circumstance should be created to deal with domestic violence); *cf.* Steven W. Skinner, Note, *Search and Seizure – Warrants - Police Officers Acting Pursuant to an Arrest Warrant May Pursue a Fleeing 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, 26 SETON HALL L. REV. 1736 (1996) (arguing hot pursuit doctrine is needed to prevent the hampering of police duties).

10. See Robert J. Driscoll, *Unannounced Police Entries and Destruction of Evidence after Wilson v. Arkansas*, 29 COLUM. J.L. & SOC. PROBS. 1 (1995) (discussing rash of police raids after no knock rule). See also Matthew Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149 (1993) (discussing civil and criminal remedies available for police misconduct).

11. Johnson v. United States, 333 U.S. 10, 13-14 (1948). In discussing the rationale behind their decision the Court noted:

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

Id.

12. Katz v. United States, 389 U.S. 347, 357 (1967) (“[S]earches outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . subject only to a few specifically established and well-delineated exceptions.”) (footnote omitted). *But see* Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1 (1991) (discussing the Supreme Court’s willingness to disregard settled doctrine while expanding exceptions to the Fourth Amendment); Silas Wasserstrom, *The Court’s Turn toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989) (interpreting Supreme Court decisions in the Warren and Burger eras to have severely limited the power of the Fourth Amendment).

13. *Id.*

warrant rule without any corresponding justification.¹⁴ This Note will explore the Ohio Supreme Court's reasoning and discuss potential problems created by failing to establish a buffer zone for interpretations of exigent circumstances to the constitutional warrant requirement.¹⁵ Part II will discuss the history of the warrant requirement and its application to the states.¹⁶ Part III will present the facts and relevant procedural history¹⁷ of *Middletown v. Flinchum*.¹⁸ The Note will conclude by analyzing the court's reasoning and exploring the possible consequences of its holding.¹⁹

II. BACKGROUND

A. *The History of the Warrant Requirement*

When interpreting²⁰ Fourth Amendment protections²¹ courts have

14. *Middletown v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002). When officers are in hot pursuit of a suspect who flees into a residence, officers may enter that residence regardless of the underlying offense. *Id.*

15. See Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1292 (1998) (arguing the court's purpose is to act as a constitutional buffer, giving effect to the fundamental right of the governed in the face of the at times arbitrary powers of the legislature); Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 524 (1988) (stating "the Constitution, which may not be changed in the ordinary process, was intended to be a buffer against the injustices caused by the swayed passions of the majority").

16. See *infra* notes 20-84 and accompanying text.

17. See *infra* notes 85-128 and accompanying text.

18. *Flinchum*, 765 N.E.2d at 331.

19. See *infra* notes 129-237 and accompanying text.

20. See Josephine R. Potuto, *A Practitioner's Primer to the Fourth Amendment*, 70 NEB. L. REV. 412 (1991) (summarizing Fourth Amendment law); Scott Lewis, *An Historical Review of the Fourth Amendment*, 60 AUG WIS. B. BULL. 15 (1987) (discussing history and relevant case law of Fourth Amendment); Thomas Y. Davies, *The Fictional Character of Law-and Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002) (providing a historical approach counter to that taken by the Supreme Court in *Atwater v. Lago Vista*).

21. U.S. CONST. amend. IV. The amendment states:

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.

Id. For a basic analysis of Search and Seizure law see *Understanding Search and Seizure Law*, available at <http://www.nolo.com/lawcenter/ency/article.cfm/objectID/DED24689-ADA8-4785-887A0B4A19A694DE> (last visited September 23, 2002) (providing a general summary of all Fourth Amendment law). See also Stacy E. Roberts, Note, *Bond and Beyond: A Shift in the Understanding of What Constitutes a Fourth Amendment Search*, 22 U. TOL. L. REV. 457 (2002) (discussing how the Supreme Court has approached the concept of what is a search). Christopher Slobogin, *The*

often relied on the state of common law during the framing of the Constitution.²² In the early 1700s colonists were subjected to countless searches based on little or even no suspicion.²³ Some believe these unreasonable searches were a contributing factor in the American Revolution.²⁴ Thus, it seems the framers were attempting to prevent unreasonable intrusions²⁵ by requiring probable cause,²⁶ particularity, and an oath prior to the issuance of a warrant.²⁷

World Without a Fourth Amendment, 39 UCLA L. REV. 1 (1991) (presenting the question of how to regulate searches and seizures if the Fourth Amendment did not exist).

22. *Steagald v. United States*, 451 U.S. 204, 217-20 n.1 (1981) (discussing the power of constables at common law, but concluding “[t]he common law rules governing searches and arrests evolved in a society far simpler than ours is today . . . it would . . . be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper”); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (recognizing that “[i]n evaluating the . . . [Fourth Amendment], we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing”). *Contra Payton v. New York*, 445 U.S. 573, 591 n.33 (1980) (discussing Fourth Amendment’s prohibition against unreasonable searches and seizures should be interpreted by today’s norms).

23. See generally Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483 (1995) (discussing the historical abuses framers sought to prevent with the Fourth Amendment); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) (arguing framers did not intend for a constitutional standard to regulate warrantless officers because they never perceived the warrantless officer as having the power to pose a significant threat to the security of person or house); Tracey Maclin, *Another Grave Threat to Liberty*, 24 N.L.J. 12 (2001) (stating “[i]n 1706, for example, colonial officials used such warrants to search every home in New Hampshire”).

24. Todd Witten, Note, *Wilson v. Arkansas: Thirty Years After Ker the Supreme Court Addresses the Knock and Announce Issue*, 29 AKRON L. REV. 447,447 (1996) (stating some scholars have argued the revolution was related to England’s lack of respect for the Colonists personal privacy) (citing WAYNE LAFAVE, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.1(a) (2d ed. 1987) (providing a summary of Fourth Amendment law)).

25. See, e.g., *Payton*, 445 U.S. at 583-84. The first draft of the Fourth Amendment included a clause limiting the issuance of warrants, however the final copy included a second clause. *Id.* The first protected the citizens from unreasonable searches and seizures and the second clause required warrants to be particular and supported by probable cause. *Id.* Thus, the framers wanted protections from unreasonable searches and seizures, and wanted to prevent government abuse in the form of general warrants. *Id.* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989) (arguing intent of framers was to protect against the unlimited and arbitrary exercise of power by the government), reprinted in 16 PACE L. REV. 97 (1996); cf. Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 10-13 (2000) (discussing the drafting history of the Fourth Amendment).

26. *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (stating “probable cause is a fluid concept turning on the assessment of probabilities in particular factual contexts not readily, or even usefully, reduced to a neat set of legal rules”). Thus, it seems that each factual situation must be analyzed by whether the officer or magistrate was objectively reasonable in believing probable cause existed. *See Id.*

27. U.S. CONST. amend. IV. See also Clancy, *supra* note 23, at 489-90 (discussing the reasons for the creation of the Fourth Amendment).

The home has been afforded greater protection under the Fourth Amendment because it is the setting for the most intimate activities.²⁸ The significance of personal privacy in the home was recognized in early Seventeenth Century England.²⁹ An English court forced the King's men to announce their purpose and presence prior to entry.³⁰ This historical framework implies that the creation of the Fourth Amendment was an attempt to safeguard our right to privacy in the home.³¹

B. *Balancing Test*

One must concede that when the threat to society outweighs³² the right to privacy, the warrant requirement may cause more harm than good.³³ For instance, society has a strong interest in fighting the war on drugs and, without certain exceptions to the warrant rule, police are

28. *Oliver v. United States*, 466 U.S. 170, 178-79 (1984) (stating sanctity of home has been embedded in our traditions since the origins of the Republic because it is the setting for the most intimate activities). Alan W. Blackman, Comment, *Warrantless Home Searches: The Road to Calabretta*, 22 J. JUV. L. 64 (2002) (summarizing Fourth Amendment law on intrusions in the home).

29. Jennifer M. Goddard, Note, *The Destruction of Evidence Exception to the Knock and Announce Rule: A Call for Protection of Fourth Amendment Rights*, 75 B.U. L. REV. 449, 453-61 (1995) (providing a historical analysis of the knock and announce rule).

30. See *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603). In discussing the sheriff's authority to execute a civil writ of attachment the court stated that "[i]n all cases where the King is party, the sheriff may break the house, either to arrest or do other execution of the King's process, if he cannot otherwise enter. But he ought first to signify the cause of his coming, and make request to open the doors." *Id.* See also Goddard, *supra* note 29, at 453. One author noted:

[T]he rule of announcement was so firmly entrenched in England by the latter part of the eighteenth century, that the proposal by a noted jurist of no-knock powers for the police was seen as a radical innovation In the years immediately before 1791, then, search without announcement was not countenanced, despite repeated attempts to broaden search powers to include it.

Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 144 (1970). See also Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 912 n.68 (2002) (providing a history of the Fourth Amendment).

31. *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984). The court has stated that "[a] principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest." *Id.*

32. See Kevin Lantz, *Search and Seizure: "The Princess and the 'Rock,'" Minnesota Declines to Extend "Plain View" to "Plain Feel,"* State v. Dickerson, 18 U. DAYTON L. REV. 539 (1993) (discussing Supreme Court's use of the balancing test in Fourth Amendment cases).

33. See Amitai Etzioni, *The Right to Privacy vs. the Common Good*, USA TODAY MAG., September 2000, available at http://www.findarticles.com/cf_dls/m1272/2664_129/65230204/p1/article.jhtml (8/29/2002) (providing an analysis of the balancing test imposed on the Fourth Amendment).

subdued by their inability to secure evidence needed for a conviction.³⁴ Thus, our interest in public safety seemingly outweighs limited infractions on the individual right to privacy.³⁵ Recognizing the framers could not have contemplated such issues, the Court has implemented a balancing test between society's interest, exercised through the government, and the affected individual's interest in privacy.³⁶ When attempting to decipher the governmental interest, the Court focuses on the underlying crime because the applicable punishment impliedly shows society's value on preventing the crime in question.³⁷

C. The Warrant Requirement

The Fourth Amendment protects citizens from unreasonable government searches and seizures.³⁸ In *Katz v. United States*,³⁹ the

34. Donald B. Allegro, Note, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant is an Idea Whose Time has Come*, 64 NOTRE DAME L. REV. 552, 553 (1989) (arguing "[in] light of the recent upsurge in narcotics and gang associated violence in many communities, it is appreciably more difficult for police serving narcotics search warrants to simultaneously seize admissible evidence and to ensure reasonable safety for themselves and others").

35. See Douglas Holden Wigdor, *What's in a Word? A Comparative Analysis of Article I, §12 of the New York State Constitution and the Fourth Amendment to the United States Constitution as Interpreted by the New York Court of Appeals and the United States Supreme Court*, 14 Touro L. REV. 757 (1998) (discussing how conservative approaches to the Fourth Amendment prevent numerous felony convictions); George F. Will, *Not Too Strict To Apply Justice*, WASH. POST June 17, 2001, at B7 (discussing use of thermo imaging devices as impermissible searches).

36. *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). The Court created a balancing test to help deal with the rising crime problem. *Id.* This test recognizes the interest the government has in fighting crime, and attempts to preserve citizens' privacy rights as provided by common law. *Id.* The Court noted:

In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Id. (citations omitted). Russell W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737 (1992) (providing a step by step analysis for assessing Fourth Amendment Cases).

37. See *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (holding the nature of the underlying offense should be considered when determining whether exigent circumstances exist); *cf.* *Payton v. New York*, 445 U.S. 573, 602 (1980) (limiting holding to felonies). See also Jonathan T. Skrmetti, *The Keys to the Castle: A New Standard for Warrantless Home Searches in United States v. Knights*, 25 HARV. J.L. & PUB. POL'Y 1201 (2001) (discussing the balancing test put forth by the Supreme Court).

38. U.S. CONST. amend. IV. "The right to be secure in their persons, houses papers, and effects, against unreasonable searches and seizures . . ." *Id.* Thomas K. Clancy, *What Constitutes*

Supreme Court determined that, absent exigent circumstances,⁴⁰ all warrantless searches of the home are *per se* unreasonable.⁴¹ The Court reasoned that the warrant requirement serves to minimize the danger of needless intrusions.⁴² This rationale is based on the long held principle that physical entry into the home is the chief evil against which the Fourth Amendment is directed.⁴³ The warrant provides restraint by forcing a police officer to present his estimate of probable cause to a judge or magistrate, and thus become bound by the precise limits imposed by the court exercised through the warrant.⁴⁴

an "Arrest" Within the Meaning of the Fourth Amendment?, 48 VILL. L. REV. 129 (2003) (providing various definitions of the term arrest as used in Fourth Amendment search and seizure cases). Evidence obtained in violation of one's Fourth Amendment rights is excluded from trial. Miles Clark, *The Exclusionary Rule*, 90 GEO. L.J. 1264 (2002) (providing an in depth review of the exclusionary rule). Roberto Iraola, *New Detection Technologies and the Fourth Amendment*, 47 S.D. L. REV. 8 (2002) (discussing the application of the Fourth Amendment in today's society).

39. 389 U.S. 347 (1967).

40. 28 OH. JUR. *Criminal Law* § 2147 (3d ed. 2001). Ohio has defined exigent circumstances excusing warrantless home entry to include: hot pursuit, immediate threat to arresting officers or the public, and immediate action needed to prevent destruction of evidence or escape. *Id.* See Dale Joseph Gilsinger, Annotation, *When is Warrantless Entry of House or Other Building Justified Under "Hot Pursuit" Doctrine*, A.L.R. (5th 2002), for a summary of other state approaches to the hot pursuit doctrine. See also John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433 (1999) (focusing on the application of the emergency doctrine as an exigent circumstance); James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are they Serious or is this Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413 (1993) (discussing drastic departure from the language used in the *Katz* case).

41. *Katz v. United States*, 389 U.S. 347, 357 (1967). The Court stated:

'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' *United States v. Jeffers*, 342 U.S. 48, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.

Id.

42. *Payton*, 445 U.S. at 586 n.24. In discussing the purpose of the Fourth Amendment the Court noted:

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

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

43. *United States v. U.S. Dist. Ct. E.D. Mich.*, 407 U.S. 297, 313 (1972), *cited with approval in Payton*, 445 U.S. at 585-86.

44. *Katz*, 389 U.S. at 356. The Court found the agents' search unreasonable because:

They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed,

The necessity of the warrant was demonstrated in *Payton v. New York*.⁴⁵ In *Payton*, the Court struck down New York statutes authorizing police to make warrantless home entries in the course of routine felony arrests.⁴⁶ Acknowledging the privacy interest a person has in his home, the Court rejected the argument that an arrest in a public place was indistinguishable from an arrest in the home.⁴⁷

In addition to a warrant, the Supreme Court requires law enforcement to knock and announce their presence prior to entering the home in order to satisfy the reasonable search requirement.⁴⁸ Later, the Court held this requirement was a fundamental part of the Fourth Amendment and is applicable to states through the Due Process Clause.⁴⁹ However, an exception has been recognized when police have reasonable suspicion to believe that adhering to the rule in a particular situation will be dangerous or will inhibit an effective investigation by

to notify the authorizing magistrate in detail of all that had been seized.

Id.

45. *Payton*, 445 U.S. at 587. The Court distinguished between seizure of objects in public and plain view and those in the home. *Id.* See also Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299 (2002) (discussing Posner's pragmatic application of social science to the *Payton* case). See Matthew Bell, *Warrantless Home Arrests and Police Liability Under Utah Law*, 2002 B.Y.U. L. REV. 1131 (2002) (discussing potential liability for officers who rely on a Utah statute which misleads officers into believing they have the authority to make warrantless home arrests).

46. *Payton*, 445 U.S. at 577 n.6. The relevant portion of the New York law stated:

A peace officer may, without a warrant, arrest a person . . . When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it . . . [T]he officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

Id. (citations omitted).

47. *Id.* at 587. The Court reasoned that seizure in a public place is different because there is no expectation of privacy, however, individuals do have such expectation in their homes. *Id.*

48. See *Ker v. California*, 374 U.S. 23, 40-44 (1963) (holding when evidence indicates occupants were in the process of committing a felony of possession of marijuana, arrest of occupants without warrants was valid and evidence seized was admissible); *Miller v. United States*, 357 U.S. 301, 313-14 (1958) (holding evidence seized by officers was inadmissible when, prior to stating purpose and authority, they forced their way into defendant's home by breaking the chain lock); Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 COLUM. L. REV. 685, 687 (1993) (providing a common law history of the knock and announce requirement and a history of relevant Supreme Court analysis).

49. *Wilson v. Arkansas*, 514 U.S. 927, 930 (1995). This decision was based primarily on the longstanding history of the knock and announce rule in common law and its use in England. *Id.* at 931-37. While establishing this principle was apart of the Fourth Amendment's reasonable requirement, the Court noted that law enforcement interests may play a part in establishing the reasonableness of an unannounced entry. *Id.* at 935-37. Thus, strict adherence to the knock and announce rule is subject to the needs of society and law enforcement. *Id.* This interpretative process was left to the lower courts. *Id.* at 936. For a further analysis of this case see Barnoski, *supra* note 9.

stimulating the destruction of evidence.⁵⁰

D. Application of the Warrant Requirement to States

The Fourth Amendment to the United States Constitution⁵¹ has been extended to the states through the Due Process Clause⁵² of the Fourteenth Amendment.⁵³ The Due Process Clause affords all citizens those fundamental rights that are basic to a free society.⁵⁴ *Malloy v. Hogan*⁵⁵ determined that fundamental rights are to be considered under the standards of federal law and not superseded by a less stringent state standard.⁵⁶ Thus, states are free to provide additional protection to the

50. *Richards v. Wisconsin*, 520 U.S. 385 (1997). In reviewing the Wisconsin Supreme Court's blanket exception to the knock and announce rule in drug cases the Court stated:

Thus, the fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

Id. at 394. The decision rested on the basis that the exception could easily be extended and was not necessary in all cases. *Id.*

51. U.S. CONST. amend. IV.

52. U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law

Id.

53. *Wolf v. Colorado*, 338 U.S. 25, 27-29 (1949). The Court attempted to explain the concept of Due Process:

Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights, which the courts must enforce because they are basic to our free society It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits of the essentials of fundamental rights.

Id. at 27.

54. *Id.* (holding the security of one's privacy against arbitrary invasion by the police is basic to a free society, and is therefore enforceable against the states through Due Process).

55. *Malloy v. Hogan*, 378 U.S. 1 (1964).

56. *Id.* at 10-11.

[T]he prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. In the coerced confession cases, involving the policies of the privilege itself, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal. The Court thus has rejected the notion that the Fourteenth Amendment applies to the States

fundamental rights recognized in amendments to the U.S. Constitution,⁵⁷ but this level of protection can never fall below federal interpretations.⁵⁸

E. Exigent Circumstances

In *Kirk v. Louisiana*⁵⁹ the Supreme Court made it clear that warrantless home intrusions are justified when a police officer has probable cause⁶⁰ and exigent circumstances are present. Exigent circumstances refer to those situations which require immediate intervention, thus excusing the government from following procedural requirements.⁶¹ The Court has long held that the hot pursuit doctrine satisfies the exigent circumstance exception.⁶²

Hot pursuit has been defined as an immediate pursuit from the location of a crime⁶³ involving some element of chase.⁶⁴ The length of the pursuit does not effect the determination of hot pursuit.⁶⁵

only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'

Id. (citation omitted).

57. See generally Justice Charles W. Johnson, *Survey of Washington Search and Seizure Law: 1998 Update*, 22 SEATTLE U. L. REV. 337 (1998) (surveying current case law in Washington dealing with search and seizure); Lantz, *supra* note 32; Note, *Search and Seizure*, 14 TOURO L. REV. 1167 (1998) (discussing how New York courts interpret constitutional language when the federal and state statutes are similar); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: the New York State Court of Appeals' Quest for Principled Decision Making*, 62 BROOK. L. REV. 1 (1996) (discussing the difference between state and federal constitutional approaches to search and seizure); Wigdor, *supra* note 34.

58. *Malloy*, 378 U.S. at 10-11. For a general discussion concerning various applications of Due Process, see YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 32-33 (10th ed. 2002).

59. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (overturning a Louisiana Court of Appeals decision that justified warrantless entry without establishing exigent circumstances).

60. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The Supreme Court has determined that probable cause to arrest depends "upon whether, at the moment the arrest was made . . . the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Id.* See also *State v. Flinchum*, No. CA99-11-193, 2000 WL 1843199, at *4 (Ohio Ct. App. 12th Dist. Dec. 8, 2000) (unpublished).

61. See BLACK'S LAW DICTIONARY 98 (Pocket ed. 1996), defining exigent circumstances as "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside." *Id.*

62. See *Steagald v. United States*, 451 U.S. 204, 218 (1981). The Court overruled the Fifth Circuit's finding that an arrest warrant was enough to enter and search a third party's house, absent any showing of exigent circumstances. *Id.* at 222-23.

63. *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984).

64. See *Johnson v. United States*, 333 U.S. 10, 16 n.7 (1948) ("However, we find no element of hot pursuit in the arrest of one who was not in flight . . ."), cited with approval in *United States v. Santana*, 427 U.S. 38, 43 n.3 (1976).

65. 5 AM. JUR. 2D *Arrest* § 123 (2000).

F. Supreme Court Applications of Exigent Circumstances

1. *United States v. Santana*

The Supreme Court confronted the issue of warrantless home entry and hot pursuit in *United States v. Santana*.⁶⁶ After a drug sting, police learned that Santana had possession of one hundred ten dollars in marked bills.⁶⁷ Santana fled into her home after seeing police pull up to her house.⁶⁸ Officers quickly apprehended Santana causing her to drop two bundles of cocaine.⁶⁹ The Court determined the hot pursuit doctrine applied,⁷⁰ and thus the failure to obtain a warrant did not prevent the

66. 427 U.S. 38, 39-44 (1976). See Jack E. Call, *The Constitutionality of Warrantless Doorway Arrests*, 19 MISS. C. L. REV. 333, 333-34 (1999) (discussing the Supreme Court cases dealing with the entry way and Fourth Amendment analysis).

67. *Santana*, 427 U.S. at 39. On August 16, 1974, Michael Gilletti, an undercover officer with the Philadelphia Narcotics Squad arranged a heroin "buy" with Patricia McCafferty. *Id.* McCafferty told the undercover officer it would cost \$115 and that they would obtain the heroin from Momma Santana. *Id.* "Gilletti notified his superiors of the impending transaction, recorded the serial numbers of \$110 (Sic) in marked bills, and went to meet McCafferty at a prearranged location." *Id.* McCafferty got into the undercover officer's car and directed him to a home known as the Santanas' residence. *Id.* at 39-40. McCafferty went in and returned with the heroin, the officer then showed his badge and asked who had the money. *Id.* at 40. McCafferty stated that Momma Santana had the money. *Id.*

68. *Santana*, 427 U.S. at 40. They saw Santana standing in the doorway of her home with a brown paper bag in her hand. *Id.* "They pulled up to within 15 feet of Santana and got out of their van, shouting 'police,' and displaying their identification. As the officers approached, Santana retreated into the vestibule of her house." *Id.* For a discussion of how the Fourth Amendment has been applied to the home, see Garnet M. Goins, Comment, *Constitutional Law-Broadening the Scope of Qualified Immunity to Public Officials from §1983 Liability for Conducting Warrantless Entry into Individual's Home*, Joyce v. Town of Tewksbury, 32 SUFFOLK U. L. REV. 803, 812 (1999) (arguing the threshold of the home is the proper place to draw the line between a public place and a private home).

69. *Santana*, 427 U.S. at 40.

70. *Id.* at 42. The Court noted that while the porch is private, cases analyzing the Fourth Amendment focus on one's expectation of privacy. *Id.*

While it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L.Ed.2d 576 (1967). She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. *Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in *Watson*. The only remaining question is whether her act of retreating into her house could thwart an otherwise proper arrest. We hold that it could not.

admission of evidence found on Santana.⁷¹ The Court noted that, because of the possibility of destruction of evidence,⁷² the need to act quickly in this case is even more apparent than in *Warden v. Hayden*.⁷³

Justice White concurred in the holding, but felt the absence of force justified the entry of the home and not hot pursuit.⁷⁴ Justice Stevens and Justice Stewart separately concurred in the holding, and focused primarily on the risk of evidence destruction.⁷⁵ Justices Marshall and Brennan dissented on the basis that the hot pursuit was created by the officers and thus should not validate the entry.⁷⁶

2. *Welsh v. Wisconsin*

In *Welsh*, the defendant left his car on the side of a road after swerving out of control.⁷⁷ After consulting a witness who informed

Id. at 42. See *Katz*, 389 U.S. at 351 (stating that “[w]hat a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection”).

71. *Santana*, 427 U.S. at 43. “The fact that the pursuit here ended almost as soon as it began did not render it any the less a “hot pursuit” sufficient to justify the warrantless entry . . . [o]nce Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence.” *Id.* See Richard J. Schaen, Note, *Pretextual Arrests: The Ninth Circuit Invades the Home in United States v. Hudson*, 66 U. CIN. L. REV. 1045 (1998). The author noted that in this case officers did not have enough evidence to obtain a search warrant for the suspect, so they obtained an arrest warrant which resulted from an undercover cop selling a small amount of methamphetamine to the suspect. *Id.* at 1045. The officers knocked and announced with the warrant but did not wait for an answer, rather they quickly entered and found the evidence they were looking for. *Id.* at 1046. The author viewed this as a pretextual arrest, which true purpose was to serve as a search warrant. *Id.* at 1047.

72. *Santana*, 427 U.S. at 42-43.

73. *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967) (holding that where police are notified that an armed robber wearing light cap and dark jacket has entered house and clothing matching description is found in washing machine in house by officer without warrant before he knows a weapon has been found in another part of the house, even though clothing was “mere evidence” and had “evidential value only,” it is subject to seizure and admissible in the prosecution of the robber).

74. *Id.* at 43 (White, J., concurring). “It is not disputed here that the officers had probable cause to arrest Santana and to believe that she was in the house. In these circumstances, a warrant was not required to enter the house to make the arrest, *at least where entry by force was not required.*” *Id.* (emphasis added).

75. *Id.* at 44-45. (Stevens, J., Stewart, J., concurring). After placing McCafferty under arrest the police had enough information to obtain a warrant for Santana. *Id.* at 44. Therefore “their failure to obtain a warrant . . . was both (a) a justifiable police decision, and (b) even if not justifiable, harmless. The decision was justified by the significant risk that the marked money would no longer be in Santana’s possession if the police waited until a warrant could be obtained.” *Id.*

76. *Id.* at 45-49 (Marshall, J., Brennan, J., dissenting). Justice Marshall conceded that exigent circumstances were present due to the close proximity of the arrest to the Santana home. *Id.* at 47-48. However, this factor was in police control as they could have driven to a more remote location. *Id.* at 48.

77. *Welsh v. Wisconsin*, 466 U.S. 740, 742 (1984). A passerby noticed a car swerve out of

officers that the driver appeared intoxicated, the police obtained defendant's address from the vehicle's registration.⁷⁸ Without a warrant, the police gained entry and found the defendant lying naked on a bed.⁷⁹ In determining the entry was improper, the Court recognized that the nature of the underlying offense⁸⁰ was an important factor in determining whether exigent circumstances were present.⁸¹ The Court rejected the imminent destruction of evidence argument and concluded that even if exigent circumstances were present, the traffic offense under Wisconsin law was a non-criminal civil forfeiture offense.⁸²

The Court concluded that entry into the home to arrest a person for a civil traffic offense was clearly prohibited by the Fourth Amendment because the State's classification of the crime indicates a low interest in arrest.⁸³ Furthermore, they noted that it would be difficult to conceive of a warrantless home arrest that would be reasonable under the Fourth Amendment when the underlying offense is relatively minor.⁸⁴

control and eventually run off the road. *Id.* The witness pulled up behind the car to prevent it from leaving. *Id.* An additional passerby showed up and was instructed to call the police; however, the defendant left the scene before police arrived. *Id.*

78. *Id.* The officer checked the motor vehicle registration to determine the defendant's address. *Id.* The officer noted that the address was close to the scene and thus easily within walking distance. *Id.*

79. *Id.* at 743. Police arrived at the defendant's home around 9 p.m. and gained entry after defendant's stepdaughter answered the door. *Id.* The issue of whether there was consent to enter was never determined by the trial court because they found exigent circumstances. *Id.* at 473 n.1. The issue was remanded, but the Wisconsin Supreme Court found exigent circumstances and the issue became moot. *Id.* Since no determination was made, the Supreme Court assumed no consent had been given for purposes of their decision. *Id.*

80. See William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations- Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. KAN. L. REV. 439 (1990) (discussing application of the *Welsh* decision).

81. *Welsh*, 466 U.S. at 753. (holding that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made").

82. *Id.* at 754. In response to the state's exigency exception the court replied:

Even assuming, however, that the underlying facts would support a finding of this exigent circumstance, mere similarity to other cases involving the imminent destruction of evidence is not sufficient. The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant.

Id.

83. See *id.* at 754. The Court reasoned that since the State of Wisconsin has classified D.U.I as a civil non-criminal offense, the State's interest in arresting the defendant is low. *Id.* Thus, the fact that evidence may be destroyed during the time it took to get a warrant is not enough to obtain an exigent circumstance. *Id.*

84. *Id.* at 753. The Court listed several cases reaching differing decisions and noted that they

III. STATEMENT OF FACTS

A. Facts

On the morning of April 23, 1999, officers John Newlin and Wayne Birch observed a maroon car driven by Thomas E. Flinchum stopped at a traffic signal in Middletown, Ohio.⁸⁵ As the light changed Flinchum spun his tires,⁸⁶ causing the car to “fishtail” as it made a right turn.⁸⁷ Officer Burch attempted to follow Flinchum but was unable to locate Flinchum’s vehicle.⁸⁸

A few moments later the officers saw Flinchum in another intersection and again attempted to pursue the vehicle.⁸⁹ As the officers closed in, Flinchum came to a near halt and turned his vehicle sharply down an alley.⁹⁰ The officers, unable to make the sharp turn, were forced to drive around the block.⁹¹ Upon circling the block, the officers saw Flinchum standing near his car.⁹² The officers stopped their cruiser to speak with Flinchum.⁹³ Upon seeing the officers, Flinchum ran towards the rear of his house while the officers yelled “Stop” and “Police.”⁹⁴ Officer Birch jumped through bushes and ran toward the rear of the house.⁹⁵ During this pursuit officer Birch heard the slamming of a screen door.⁹⁶ Birch, after observing Flinchum through a window, entered the rear of the residence without permission and placed Flinchum under arrest.⁹⁷

did not approve of any one situation. *Id.* at 752-53. Recent Case, *Criminal Procedure-Fourth Amendment-Search and Seizure-Tenth Circuit Applies Reasonable Suspicion Standard to Stops for Minor Traffic Infractions*- United States v. Callarman, 116 HARV. L. REV. 697 (2002) (arguing the Tenth Circuit failed to consider the seriousness of the suspected offense).

85. State v. Flinchum, No. CA99-11-193, 2000 WL 1843199, at *1 (Ohio Ct. App. 12th Dist. Dec. 18, 2000) (unpublished).

86. *Id.*

87. *Id.*

88. *Id.*

89. State v. Flinchum, 765 N.E.2d 330, 334 (Ohio 2002) (Pfeifer, J., dissenting). The dissent noted that upon viewing Flinchum’s acts the officers never activated their overhead lights. *Id.*

90. *Flinchum*, 2000 WL 1843199, at *1.

91. *Id.*

92. *Id.*

93. *Id.*; Liz Sidoti, *Police Chased Man into His Home*, CINCINNATI ENQUIRER, Dec. 20, 2001, available at http://www.enquirer.com/editions/2001/12/20/loc_police_chased_man.html (providing interviews with the key players in the *Flinchum* case).

94. *Flinchum*, 2000 WL 1843199, at *1.

95. *Id.*

96. *Id.*

97. *Id.*; Justice Paul E. Pfeifer, Weekly Column, *Hot Pursuit and Warrantless Entry* (May 15, 2002), available at http://www.sconet.state.oh.us/Communications_Office/Justice_Pfeifer/

B. Procedural History

1. Trial Court

Flinchum was charged with reckless driving, driving under the influence (DUI), and resisting arrest.⁹⁸ His attorney filed a motion to suppress the evidence based on the officers' warrantless entry.⁹⁹ The trial court found there was no need for a warrant because the officers were in hot pursuit of Flinchum at the time of the intrusion.¹⁰⁰ Flinchum was acquitted of resisting arrest, but was convicted for DUI and reckless operation.¹⁰¹

2. The Ohio Twelfth District Court of Appeals

Flinchum appealed the trial court's denial of the suppression motion.¹⁰² The appellate court recognized the limitations imposed by the *Welsh* Court,¹⁰³ but felt the case turned on whether or not jail time could be imposed for the offense¹⁰⁴ rather than its classification as a felony or misdemeanor.¹⁰⁵ The court recognized that reckless operation does not

2002/jp051502.asp [hereinafter *Weekly Column*]. The officer observed Flinchum through a kitchen window, standing about five feet from the door. *Id.*

98. *Flinchum*, 2000 WL 1843199, at *1.

99. *Id.*

100. *Id.*

101. *Id.* The court granted the acquittal for resisting arrest pursuant to defendant's Criminal Rule 29 motion. *Id.* However, defendant received ninety days in jail and a suspended license for three years for the D.U.I and reckless driving charges. *Id.*

102. *Id.* at * 2. Another issue on appeal was whether the trial court erred in conducting a bench trial absent a jury waiver. *Id.* at *5. The court relied on Ohio Criminal Rule 23(A) to find failure to demand a jury in a petty offense case in effect waives one's right to a jury trial. *Id.* at *5-6.

103. See *Welsh v. Wisconsin*, 466 U.S. 740 (1984), construed in *Flinchum*, 2000 WL 1843199, at *2-4. The *Welsh* Court hesitated in determining whether exigent circumstances are present when the underlying offense for which there is probable cause to arrest is relatively minor. *Id.* at *2.

104. See *State v. Dobbins*, No. 94APC02-276, 1994 WL 521187, at *3 (Ohio App. 10th Dist. Sept. 22, 1994), cited with approval in *Flinchum*, 2000 WL 1843199, at *3. The *Flinchum* appellate court refused to define all of Ohio's misdemeanors as "minor offenses" to which the exigent circumstance exception would not apply, and further stated the determining factor is not classification but rather whether the offense is one that is punishable by jail. *Flinchum*, 2000 WL 1843199, at *3.

105. *Flinchum*, 2000 WL 1843199, at *3. The court relied on *State v. Rouse*, 53 Ohio App. 3d 48, 51 (Ohio Ct. App. 10th Dist. 1988) and *State v. Marlow*, No. 17400, 1996 WL 84627, at *4 (Ohio Ct. App. 9th Dist. Feb. 28, 1996) (unpublished), to hold that *Welsh* did not determine that a warrantless intrusion into a home was unjustified when the offense involved was a non-criminal civil forfeiture offense, not punishable by imprisonment, and where the arrest was not commenced in a public place. *Flinchum*, 2000 WL 1843199, at *3-4.

satisfy their interpretation of the *Welsh* standard.¹⁰⁶ However, the court felt the officer had probable cause to believe Flinchum was committing¹⁰⁷ the crime of resisting arrest,¹⁰⁸ a jailable offense.¹⁰⁹ The court believed hot pursuit was present because Flinchum failed to obey the officers' orders.¹¹⁰

Upon finding the officer was in hot pursuit¹¹¹ of a person suspected of a jailable offense, the court held that the police were permitted to follow the individual into his home to complete the lawful arrest.¹¹² The appellate court subsequently petitioned the Ohio Supreme Court to decide whether the Fourth Amendment allows a warrantless entry into a home if police are in pursuit of a person they suspect has committed a misdemeanor.¹¹³

3. The Supreme Court of Ohio

Recognizing the lack of uniformity among Ohio courts,¹¹⁴ the Ohio

106. *Id.* at *4. The court cited Middletown, Ohio Codified Ordinance § 434.02, which defines reckless operation as a minor misdemeanor punishable by a fine not greater than \$100, and to which no jail time may be imposed. See MIDDLETOWN, OHIO, CODIFIED ORDINANCE § 408.01(d).

107. *Flinchum*, 2000 WL 1843199, at *4. The court felt Flinchum's actions of fleeing upon the officers' arrival and disobeying their commands to stop gave the officers probable cause to believe Flinchum was resisting arrest. *Id.*

108. OHIO REV. CODE ANN. § 2921.33.1(B) (Anderson 2000) (stating that "[n]o person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop").

109. OHIO REV. CODE ANN. § 2929.21(B)(1) (Anderson 2000). The crime of first-degree misdemeanor is punishable for up to six months in jail. *Id.*

110. *Flinchum*, 2000 WL 1843199, at *4. The court agreed with the trial court findings that the police were in hot pursuit. *Id.*

111. *Id.* The court relied on *Santana* to conclude hot pursuit had taken place. "Where police have probable cause to arrest an individual in a public place and are in "hot pursuit" of that individual in the public place, the individual cannot defeat an otherwise lawful arrest by retreating into his home or some other private place." *Id.* (quoting *United States v. Santana*, 427 U.S. 38, 42-43 (1976)).

112. *Flinchum*, 2000 WL 1843199, at *4. The court stated: "Officer Birch had probable cause to believe appellant had committed a jailable offense, and the officer was in hot pursuit of appellant. Under such circumstances, police may be permitted to follow the individual into his home to complete the lawful arrest begun in public." *Id.*

113. See *Weekly Column*, *supra* note 97.

114. See the following cases which permit the exigent circumstance exception to apply to misdemeanor cases: *State v. Marlow*, No. 17400, 1996 WL 84627, at *4 (Ohio Ct. App. 9th Dist. Feb. 28, 1996) (interpreting *Welsh* as turning on imprisonment and not a felony); *State v. Raszick*, No. 93TRC11110, 1994 WL 728339 (Ohio Ct. App. 5th Dist. Dec. 29, 1994), *appeal denied in*, 649 N.E.2d 278 (1995) (interpreting *Santana* as allowing entry when officers are in hot pursuit of a suspect who committed a misdemeanor in a public area); *State v. Rouse*, 557 N.E.2d 1227, 1229-30 (Ohio Ct. App. 10th Dist. 1988) (officer's entry into suspect's home was proper, when suspect smelled of alcohol, slurred speech, refused to present his license and fled into his home). But see the following cases refusing to allow exigent circumstances to apply in misdemeanor cases: *State v.*

Supreme Court granted a motion to certify a conflict and requested the parties to brief the issue.¹¹⁵ The court recognized the need for a warrant prior to entering the home,¹¹⁶ but felt *Santana*¹¹⁷ and other jurisdictional treatment¹¹⁸ compelled them to extend the hot pursuit doctrine to misdemeanors.¹¹⁹ The court feared that adoption of such a rule would lead to the illusion that fleeing an officer is justified where the accused has only committed a misdemeanor.¹²⁰ As a result, the court held that when an officer is in hot pursuit of a suspect who attempts to defeat the arrest by fleeing into his home, officers have the power to enter the home regardless of the underlying offense.¹²¹

Justice Pfeifer disagreed with the majority and felt *Santana* was

Davis, 726 N.E.2d 1092 (Ohio Ct. App. 6th Dist. 1999) (emphasizing the distinction between a felony and minor offenses and holding warrantless entry into a home to prevent destruction of evidence from an underage drinking party was invalid); *State v. Scott*, 733 N.E.2d 653, 656-57 (Ohio Ct. App. 6th Dist. 1999) (holding that when underage persons were allegedly consuming alcohol, no violence was involved and no persons were armed, risk of escape was not present, and since resulting charges against defendant of contributing to delinquency of minor did not require proof that juveniles had certain alcohol content, the need to preserve evidence was not an exigent circumstance); *Cleveland v. Shields*, 663 N.E.2d 726, 728 (Ohio Ct. App. 8th Dist. 1995) (holding police officers' continuous chase of suspected felon fell within hot pursuit exception, permitting officers to make warrantless entry into home to make arrest); *State v. Banks*, No. C-980774, 1999 WL 632924, at *2 (Ohio Ct. App. 1st Dist. Aug. 20, 1999) (holding officers' entry into a third party's apartment to search for a suspect was unlawful especially considering the State's failure to provide the underlying offense); *State v. Trammel*, No. 17196, 1999 WL 22884, at *8 (Ohio Ct. App. 2d Dist. Jan. 22, 1999) (finding exigent circumstances were not present when officers entered suspect's business property to give him a citation for disorderly conduct).

115. *State v. Flinchum*, 743 N.E.2d 402 (Ohio 2001) (unpublished table decision).

116. *State v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2003). The case noted that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* (quoting *United States v. U.S. Dist. Ct. for the E.D. of Mich.*, 407 U.S. 297, 313 (1972)).

117. *Id.* "Although *Santana* deals with the issue of warrantless home arrests in the context of a felony suspect, we see no reason to differentiate appellant's offense and give him a free pass merely because he was not charged with a more serious crime." *Id.*

118. *Id.* The court relied on *State v. Penas*, 263 N.W.2d 835, syllabus (Neb. 1978) (holding that when a citizen has knowingly placed himself in a public place, and valid police action is commenced in that public place, the citizen cannot thwart police action by fleeing into a private place), and *State v. Paul*, 548 N.W.2d 260, 268 (Minn. 1996) (holding a police officer in hot pursuit of a person suspected of the serious offense of driving under the influence of alcohol may make a warrantless entry into the suspect's home in order to effectuate an arrest).

119. *Flinchum*, 765 N.E.2d at 332 (holding "when officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor").

120. *Id.* The court rejected *Flinchum*'s argument that officers were prevented from entering his home because probable cause and exigent circumstances were absent and because the underlying offense was merely a misdemeanor. *Id.*

121. *Id.*

distinguishable from the case subjudice.¹²² In *Santana*, the court was faced with the possible destruction of evidence and commission of a felony, neither of which was present in Flinchum's case.¹²³ Therefore, Justice Pfeifer felt the *Welsh* opinion was controlling.¹²⁴ Under *Welsh*, the government has the difficult task of rebutting a presumption of unreasonableness in the finding of exigent circumstances.¹²⁵ Justice Pfeifer noted that the officers did not turn on their flashing lights or sirens, and Flinchum was already running towards his house prior to any remarks by the police.¹²⁶

Justice Pfeifer concluded by comparing the potential gains and losses from the decision.¹²⁷ He determined the only benefit of the majority decision was that Ohio police may enter the homes of misdemeanants, but in addition to giving up a right that has been guarded for over two hundred years, he noted the court has placed homeowners and police in dangerous situations.¹²⁸

122. *Weekly Column*, *supra* note 97. In his dissent, Justice Pfeifer noted:

[T]he police in *Santana* were faced with "a realistic expectation that any delay would result in destruction of evidence." They were also dealing with a felony. The Supreme Court was willing to limit Fourth Amendment protections in a case where a serious crime was committed and where evidence of that crime was liable to be compromised. [In *Flinchum*], we are asked to weaken the Fourth Amendment in exchange for an arrest on a minor traffic offense where there was no threat of the destruction of evidence. We are dealing in this case with a fundamental part of a fundamental right- the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."

Flinchum, 765 N.E.2d at 333 (Pfeifer, J., dissenting) (citations omitted).

123. *Id.*

124. *Id.* Justice Pfeifer concluded:

The *Welsh* court recognized exceptions for exigent circumstances, but emphasized that "exceptions to the warrant requirement are 'few in number and carefully delineated' . . . and that police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." In *Welsh* the court was quick to point out that the exception carved out by *Santana* concerns "hot pursuit of a fleeing felon."

Id. (citations omitted).

125. See *Payton v. New York*, 445 U.S. 573, 586 (1980), *cited with approval in Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

126. *Flinchum*, 765 N.E.2d at 334 (Pfeifer, J., dissenting). Justice Pfeifer concluded the chase was more of a "luke warm amble" than a hot pursuit. *Id.*

127. *Id.*

128. *Id.*

IV. ANALYSIS

A. *The Rationale Behind Flinchum*

1. The Severity of Punishment Identifies the Societal Interest

The Ohio Supreme Court relied heavily on the idea that there is no reason to distinguish between crimes of varying severity.¹²⁹ However, the level of punishment associated with a crime reflects society's interest in preventing such crimes.¹³⁰ Presumably, if society has a strong interest in preventing a crime they will pressure the state legislature to increase the penalty.¹³¹ When determining exceptions to the Fourth Amendment, courts must balance the government interest, as represented by society, against the private individual's right to privacy.¹³² By finding no reason to differentiate between the severity of crimes, the Ohio Supreme Court has extinguished the balancing test, resulting in the right to privacy being permanently outweighed in the realm of hot pursuit.¹³³

129. *Flinchum*, 765 N.E.2d at 332. "Although *Santana* deals with the issue of warrantless home arrests in the context of a felony suspect, we see no reason to . . . give [appellant] a free pass merely because he was not charged with a more severe crime." *Id.* Dawn Marie Johnson, *The AEDPA and the IIRLA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 478-79 (2001) (providing a history of the misdemeanor-felony distinction). Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239 (2001) (explaining application of the felony-misdemeanor distinction to strip search law).

130. *Flinchum*, 765 N.E.2d at 333 (Pfeifer, J., dissenting). The Court in *Santana* was dealing with a felony. *Id.* "The Supreme Court was willing to limit Fourth Amendment protections in a case where a serious crime was committed and where evidence of that crime was liable to be compromised. Here, we are asked to weaken the Fourth Amendment in exchange for an arrest on a minor traffic offense where there was not threat of the destruction of evidence." *Id.* See also William A. Schroeder, *Warrantless Misdemeanor Arrests and The Fourth Amendment*, 58 MO. L. REV. 771, 802-04, 812 (1993) (discussing the distinction between felonies and misdemeanors).

131. See Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1369 (2002) ("Elizabeth Rapaport argues that domestic homicides result in more lenient treatment for defendants than predatory crimes because modern American society assigns less moral outrage to wife-killing."); Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 CAL. L. REV. 257, 288 (2002) (describing the three strikes laws as too harsh in comparison to the actual crime done to society); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06B(3), at 481 (2d ed. 1995) (stating felony murder rule "reflects society's judgment that the commission of a felony resulting in death is more serious-and, therefore, deserves greater punishment than the commission of a felony not resulting in death"); Richard Brooks Holcomb, Note, *Predicate Offenses for First Degree Felony Murder in Virginia*, 57 WASH. & LEE L. REV. 561, 568 n.39 (2000) (discussing Virginia's felony murder rule).

132. *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999) (comparing the government's interest in law enforcement against the individual's right to privacy).

133. *Flinchum*, 765 N.E.2d at 332. The court relied solely on the fact that *Flinchum* ran from

The U.S. Supreme Court in *Welsh* recognized there is a distinction to be found in the severity of crimes, and accordingly held that a court should be hesitant in finding exigent circumstances when the underlying crime is relatively minor.¹³⁴ The Court stated that even if the circumstances had lent themselves to finding the necessity of immediate state action, Wisconsin chose to classify a DUI as a civil non-criminal offense for which no imprisonment is possible.¹³⁵ Thus, if Wisconsin had provided a greater penalty for DUI, the chance of finding an exigent circumstance would have increased.¹³⁶ The Court emphasized this idea by stating that this classification is the best indicator of the State's interest in preventing this crime.¹³⁷ By finding an exigency present

police and provided no other basis for their decision. *Id.* See also Melissa Fernandez, *The Fourth Amendment: Administrability Defeats Reasonableness in the Application of Arrest Law*, 54 FLA. L. REV. 827 (2002) (discussing misdemeanor arrests); Schroeder, *supra* note 78 (discussing application of the *Welsh* decision); Raymond Hayes, *Balancing Victims' Rights and Probative Value with the Fourth Amendment Right to Security in the Exclusion of Unlawfully Seized Evidence*, N.Y.L. SCH. J. HUM. RTS. 271 (2002) (presenting a balancing test that includes the victim's rights). See also Kuras, *supra* note 6, at 1140 (providing balancing test that is measured by the degree of intrusion versus states need to ensure public safety).

134. *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984). The Supreme Court stated that "exceptions to the warrant requirements are 'few in number and carefully delineated' and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Id.* (citations omitted). The Court then cited *Santana* in which the parenthetical stated "hot pursuit of a fleeing felon." *Id.* at 750. Therefore, there may be an argument over whether *Santana* is limited to hot pursuit of felons.

135. *Id.* (stating "[o]ur hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrests is relatively minor"). It is puzzling how a court can say hot pursuit, an exigency, constitutes a *per se* exception to the warrant requirement. William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013 (1994) (presenting the arguments focusing on a literal interpretation of the Fourth Amendment). See *supra* notes 77-84 and accompanying text.

136. See Jonathan L. Hafetz, "A Man's Home is His Castle?": *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175 (2002) (explaining the development of search and seizure law in regard to the home from 1870 through 1920). In *United States v. Santana*, the Court allowed entry because Mrs. Santana was carrying drugs, and upon viewing police, was likely to destroy evidence of a potential felony drug crime. *Santana*, 427 U.S. at 43 (stating "[o]nce Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence"). Such examples seem rare when viewed in the arena of misdemeanors.

137. *Welsh*, 466 U.S. at 754 (commenting that Wisconsin had chosen to classify DUI as a non-criminal, civil forfeiture case and this classification was the best indicator of a State's interest in preventing a crime). The Supreme Court has stated that there must be a compelling necessity for immediate action to prevent the potential harm that a delay in obtaining a warrant could present, however such compelling necessities are unlikely in misdemeanor cases. *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967). See also Robert S. Leming, *Teaching About the Fourth Amendment's Protection Against Unreasonable Searches and Seizures*, available at http://www.ed.gov/databases/ERIC_Digests/ed363526.html (last updated May 1993) (providing an analysis of

during all hot pursuits regardless of the offense, the Ohio Supreme Court rejects the societal interest as well as some of the basic protections provided by the U.S. Supreme Court.¹³⁸

The Ohio Twelfth District Court of Appeals properly differentiated *Welsh* on the basis of whether the underlying offense is a jailable or non-jailable offense.¹³⁹ It should be noted that the U.S. Supreme Court rejected the jailable/non-jailable distinction in the context of warrantless misdemeanor arrests¹⁴⁰ in *Atwater v. City of Lago Vista*.¹⁴¹ The Court was concerned that the jailable distinction rests on factors not readily apparent, such as whether the suspect has previously been convicted or

Supreme Court decisions concerning unreasonable searches and seizures). In *Warden*, the court allowed police to enter a home after they had probable cause to believe that an armed robber had entered a home, thus the potential for imminent harm was great. *Warden*, 387 U.S. at 298 (recognizing the right of police to make a warrantless entry when they have probable cause to believe an armed robber had entered a house a few minutes before).

138. See *Welsh*, 466 U.S. at 753. The Court specifically held:

[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see *Payton*, application of the exigent- circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

Id.

139. *State v. Flinchum*, No. CA99-11-193, 2000 WL 1843199, at *3 (Ohio Ct. App. 12th Dist. Dec. 18, 2000) (unpublished). The court determined that,

consistent with *Welsh*, the operative analysis for determining whether the underlying offense is a “minor” one for purposes of an officer’s warrantless entry into a home is not whether the offense is a felony or a misdemeanor; the determinative factor is whether the offense is one that is punishable by jail or imprisonment.

Id. But see Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1337-38 (2002) (the author argues that the amount of protection afforded will decrease rather than increase with the seriousness of the crime, but one would assume that we need the greatest protection when the punishment is greatest).

140. *Atwater v. City of Lago Vista*, 532 U.S. 318, 348-49 (2001). The Court felt it would be too difficult to apply such a distinction when the officer was attempting to make an arrest. *Id.* See Patrick S. Yatchak, Note, *Breaching the Peace: The Trivialization of the Fourth Amendment Reasonableness Standard in the Wake of Atwater v. City of Lago Vista*, 25 HAMLINE L. REV. 329 (2002) (providing various crimes for which an individual can be arrested and taken to jail, including eating a ham sandwich on the subway in violation of a county ordinance in New York).

141. *Atwater*, 532 U.S. at 318. Texas law made it a misdemeanor violation for not wearing a seat belt, which allowed warrantless arrest for anyone in violation. *Id.* at 323. An officer pulled *Atwater* over for violating the law and “verbally berated her, handcuffed her, placed her in his squad car, and drove her to the local police station, where she was made to remove her shoes, jewelry, and eyeglasses, and empty her pockets.” *Id.* at 324. Her mug shot was taken and she was placed in a cell for almost an hour. *Id.* She pleaded no contest to the seatbelt misdemeanors and paid a \$50 fine. *Id.* The Court stated that “the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.” *Id.* at 346-47.

the amount of marijuana in a bag.¹⁴² However, asking whether the officer had a reasonable belief that the suspect had committed a jailable offense would easily counter such arguments.¹⁴³ Furthermore, *Atwater* dealt with a warrantless arrest in a public place, which does not require as much protection as warrantless home intrusions.¹⁴⁴

2. Jurisdictional Support

The Ohio Supreme Court relied on two cases, *Minnesota v. Paul* and *Nebraska v. Penas*, in upholding the warrantless entry.¹⁴⁵ In *Minnesota v. Paul*, a police officer was in an auto parts store when the defendant put his arm around the officer and began to talk to him.¹⁴⁶ The officer smelled alcohol on the defendant but never questioned him. The officer then saw the defendant climb into a truck.¹⁴⁷ Deciding to follow him, the officer observed defendant roll through a stop sign and fishtail into a turn.¹⁴⁸ At this point the officer activated the overhead lights and pursued defendant for several miles on the highway and eventually to defendant's residence.¹⁴⁹ The officer knocked on the front door and spoke with the defendant's wife who insisted her husband was

142. *Atwater*, 532 U.S. at 348-49. The Court felt it was impractical for an officer to determine if it was the suspect's first arrest. *Id.* at 348. They also felt that it was impossible to determine if the amount of marijuana in a bag was an ounce or less than an ounce. *Id.* at 348-49. Thus, the standard would be too difficult to apply and require a case by case application. *Id.*

143. Interview with J. Dean Carro, Professor of Law at the University of Akron School of Law in Akron, Ohio (February, 4, 2003) (discussing the potential application of the jailable standard in relation to *Atwater*, 532 U.S. 318 (2001)). It seems a court could easily apply this standard to determine if the amount of marijuana in a bag could reasonably be viewed as a jailable offense. *Id.* I would also advocate that it is unreasonable for an officer to assume an individual had committed a previous offense, absent actual knowledge. *Id.*

144. *See Atwater*, 532 U.S. at 323-27. Also, *Atwater* involved a vehicle to which the Court has been unwilling to extend an amount of privacy equal to that of a home. *California v. Carney*, 471 U.S. 386, 391 (1985) (“[L]ess rigorous warrant requirements govern because the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office.”); The Court has generally found that “law enforcement officials [are granted] greater latitude in exercising their duties in public places.” *Florida v. White*, 526 U.S. 559, 565 (1999). The Court also found that a suspect is not in custody for mere questioning on a public street because a motorist is in view of the public thus decreasing any chance of police misconduct. *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984). Because we have a greater interest in privacy in the home, a court should be more willing to accept this argument as it outweighs the associated uncertainty.

145. *State v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002). “Similar conclusions have already been reached in other jurisdictions,” in *Nebraska* and *Minnesota*. *Id.*

146. *State v. Paul*, 548 N.W.2d 260, 262 (Minn. 1996).

147. *Id.* The officer walked across the street to a gas station, after four or five minutes he saw the defendant walk out of the auto parts store and climb into his pickup truck. *Id.*

148. *Id.*

149. *Id.* at 262-63.

not home.¹⁵⁰ However, the officer entered the home and eventually found the defendant emerging from the basement.¹⁵¹

In *Paul*, the court distinguished *Welsh* primarily on the ground that driving under the influence was a criminal offense rather than a civil forfeiture offense; however, in *Flinchum* the *Welsh* holding was completely ignored.¹⁵² Therefore, *Paul* does not support the proposition that hot pursuit is justified regardless of the underlying offense.¹⁵³

In *Nebraska v. Penas* an officer who witnessed a van veer into oncoming traffic and make a U-turn decided to follow the vehicle.¹⁵⁴ After reaching the defendant's home the officer ordered the defendant to stop; however, the defendant proceeded into the house.¹⁵⁵ The officer followed, but decided to radio for backup out of concern for his safety.¹⁵⁶ Another officer arrived and they entered the home to arrest the defendant.¹⁵⁷ The court relied upon *Santana* in upholding the arrest; however, this case was decided six years before the *Welsh* opinion.¹⁵⁸ In

150. *Id.* at 263. Upon reaching the house the defendant ran out of his truck towards the garage. *Id.* The officer reached the door but it was locked. After asking for the door to be opened the officer went around to the front of the house. *Id.* Defendant's wife answered the front door and stated the defendant was not home. *Id.* The officer asked the wife to look inside the house to make sure he was not home. *Id.* Compare *Paul*, 548 N.W.2d at 263 (knocking on the door and asking, "Sir, come on out, answer the door, come out and talk to me") with *State v. Flinchum*, 765 N.E.2d 330, 331 (2002) (stating "[w]ithout appellant's permission, Officer Birch entered the home and arrested him"); *State v. Stuber*, No. 1-02-20, 2002 WL 31618993, at *1 (Ohio Ct. App. 3d Dist. Nov. 21, 2002) (forcing open a locked door).

151. *Paul*, 548 N.W.2d at 263. The officer looked in the kitchen and garage but was unable to find the defendant. *Id.* The officer began to question defendant's wife when the defendant emerged from the basement. *Id.*

152. *Id.* at 266. The court differentiated *Welsh* on three grounds: "(1) the officer was in hot pursuit; (2) there was a need to preserve evidence of the defendant's blood alcohol level; and (3) the ordinance or statute under which the defendant was arrested provided for criminal penalties and not merely noncriminal civil forfeitures." *Id.* *Flinchum*, 765 N.E.2d at 330 (failing to cite the *Welsh* opinion). It should be noted that the first two grounds appear completely illusory as the *Welsh* Court stated that "a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984). The Court further stated that "[e]ven assuming, however, that the underlying facts would support a finding of . . . [hot pursuit], mere similarity to other cases involving the imminent destruction of evidence is not sufficient . . . [because] [t]he State of Wisconsin has chosen to classify . . . [D.U.I.] . . . as a noncriminal, civil forfeiture offense for which no imprisonment is possible." *Id.*

153. *Flinchum*, 765 N.E.2d at 332. The court clearly evidenced they found no distinction between felonies and misdemeanors by saying: "[W]e see no reason to differentiate appellant's offense and give him a free pass merely because he was not charged with a more serious crime." *Id.*

154. *State v. Penas*, 263 N.W.2d 835, 836 (Neb. 1978).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 837.

fact, after deciding this case Nebraska courts have interpreted *Welsh* as turning on whether the underlying crime is punishable by jail.¹⁵⁹ Clearly, the cases cited by the Ohio Supreme Court do not support the contention that the underlying offense is irrelevant in determining an exigency.¹⁶⁰

It seems the majority of jurisdictions have interpreted *Welsh* as prohibiting warrantless home intrusions when the offense is a non-jailable.¹⁶¹ Relatively few courts have been willing to follow *Flinchum* and hold that hot pursuit alone creates an exigency to enter the home regardless of the underlying offense.¹⁶²

B. Balancing Test: Governmental Interest

1. Bright Line Rules

The Supreme Court of Ohio has created a bright line rule that allows officers to enter a home during the hot pursuit of any offense.¹⁶³

159. *State v. Beeken*, 585 N.W.2d 865 (Neb. Ct. App. 1998); *State v. Gerstner*, No. A-91-1256, 1993 WL 44493, at *6 (Neb. Ct. App. Feb. 23, 1993) (finding that the Supreme Court of Nebraska requires a serious offense to the finding of an exigency) (quoting *State v. West*, 388 N.W.2d 823, 830 (Neb. 1986)).

160. *State v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002) (opining “we see no reason to differentiate appellant’s offense and give him a free pass merely because he was not charged with a more serious crime”).

161. *Dyer v. State*, 680 So.2d 612, 613 (Fla. Dist. Ct. App. 1996) (distinguishing on whether jail is possible); *Goines v. James*, 433 S.E.2d 572, 578 (W.Va. 1993) (focusing on whether the underlying offense is punishable by jail); *State v. Legg*, 633 N.W.2d 763, 773 (Iowa 2001) (distinguishing *Welsh* on the basis that Wisconsin had classified DUI as a civil non-forfeiture offense for which no jail was possible); *State v. Blake*, 468 N.E.2d 548, 552 (Ind. Ct. App. 1984) (adopting Justice White’s dissent in *Welsh* and focusing on the severity of the underlying offense); *Hamrick v. State*, 401 S.E.2d 25, 26-27 (Ga. Ct. App. 1990) (finding that when officers pursued a yellow motorcycle and then later found it leaning against a house, they could not enter the residence even though they were in hot pursuit because there was no danger of destruction of evidence, and the suspect had only committed a misdemeanor); *State v. Mikkelson*, 647 N.W.2d 421, 424-25 (Wisc. Ct. App. 2002) (finding no exigent circumstances present when officers were in hot pursuit of a suspect for obstructing an officer which is a misdemeanor); *Waugh v. State*, 51 S.W.3d 714, 718 n.3 (Texas Ct. App. 2001) (distinguishing on basis of whether jail is possible).

162. *People v. Lloyd*, 265 Cal. Rptr. 422, 425 (Cal. Ct. App. 1989) (holding it does not matter whether the underlying offense is a misdemeanor or a felony); *State v. Ramirez*, 814 P.2d 1131, 1134-35 (Utah Ct. App. 1991) (finding hot pursuit is enough to create an exigency and it does not matter what is the underlying offense).

163. *Flinchum*, 765 N.E.2d at 332. By creating a bright line rule for hot pursuit, the court has sanctioned entrance to the home for any crime, regardless of the nature of the offense, weakening the already strained warrant requirement. *Id.* at 334 (Pfeifer, J., dissenting). Jennifer Ison Cooke, *Discretionary Warrantless Searches and Seizures and the Fourth Amendment: A Need for Clearer Guidelines*, 53 S.C. L. REV. 641 (2002) (discussing contradictions in Supreme Court cases dealing with warrantless arrests). Rachael M. Dockery, Note, *Atwater v. City of Lago Vista A Simple*,

The United States Supreme Court has shown a preference for bright line rules in some situations, primarily because they clarify the duties of law enforcement and allow easier application of decisions.¹⁶⁴ However, the Court has been hesitant in applying such rules when the costs exceed these potential benefits.¹⁶⁵

In *Richards v. Wisconsin*, the Court conceded that felony drug investigations frequently involve violent circumstances and the risk of evidence destruction.¹⁶⁶ In rejecting a bright line rule allowing no-knock entries in felony drug arrests, the Court focused on two factors.¹⁶⁷ First, this bright line rule is based on an overgeneralization, that is while some drug investigations pose great danger, others vary considerably as to the degree of harm associated.¹⁶⁸ Second, the exceptions for one category can easily be applied and expanded to other categories.¹⁶⁹

As we consider the bright line rule given by the Ohio Supreme Court we see that a great overgeneralization has occurred.¹⁷⁰ The court has decided that all fleeing misdemeanants are of such a danger that Ohio police may forcefully enter homes.¹⁷¹ If the Supreme Court was

Bright-Line Holding Results in Future Fourth Amendment Confusion, 55 ARK. L. REV. 577 (2002) (discussing the *Atwater v. City of Lago Vista* case and detailing the problems with the bright line holding and how it compares to the balancing test).

164. *California v. Acevedo*, 500 U.S. 565, 576-79 (1991) (finding the old *Chadwick-Sanders* rule too confusing for police to apply); *New York v. Belton*, 453 U.S. 454 (1981) (“A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

165. *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997) (rejecting Wisconsin’s *per se* rule for no knock entries during routine felony arrests because not all felony arrests will have the possibility of destruction of evidence or impair the safety of officers).

166. *Richards*, 520 U.S. at 392 (recognizing that the knock-and-announce requirement could give way “under circumstances presenting a threat of physical violence,” or “where police officers have reason to believe that evidence would likely be destroyed if advance notice were given”) (quoting *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995)).

167. *Richards*, 520 U.S. at 392 (creating exceptions to the knock-and-announce rule based on the culture surrounding a general category of criminal behavior presents at least two serious concerns). See Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL’Y REV. 53 (2003) (arguing that police should study crime patterns in order to learn what creates crime and focus on the elimination of such problems).

168. *Richards*, 520 U.S. at 393 (“First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree.”).

169. *Id.* at 393-94 (stating that “[a] second difficulty with permitting a criminal-category exception to the knock-and announce requirement is that the reasons for creating an exception in one category can, relatively easily, be applied to others”).

170. *State v. Flinchum*, 765 N.E.2d 330, 334 (Ohio 2002) (Pfeifer, J., dissenting) (arguing the only thing gained by this ruling is allowing the police to enter the households of tire spinners).

171. *Id.* at 332 (holding warrants are not required for fleeing suspect regardless of whether the

unwilling to assume that all felony drug arrests are surrounded by dangerous circumstances, then it seems implausible to assume, as *Flinchum* does, that all fleeing misdemeanants require extreme precautions.¹⁷² The second concern is that at some point the exceptions to the warrant requirement will extinguish its existence.¹⁷³ It is important to note that the Court in *Richards* was unwilling to extend the law to allow no-knock entries when police already have a warrant,¹⁷⁴ where as the holding in *Flinchum* creates a bright line rule for officers who do not have a warrant.¹⁷⁵ As the dissent in *Flinchum* suggests, the benefit received by such a bright line rule is minor when compared to the possible consequences.¹⁷⁶

2. Swifter Law Enforcement

It seems the major benefit of the ruling is that officers save valuable time often spent attempting to obtain a warrant.¹⁷⁷ However, this benefit

offense being committed was a misdemeanor).

172. See *supra* notes 166-167 and accompanying text.

173. Brady, *supra* note 25, at 21 (discussing the consequences of the warrant exceptions). Consequences of laws such as the one created in *Flinchum* include: exceptions to the warrant rule become the rule, increases in arrests due to less procedural grounds for a warrant, and broad police authority coupled with operational stresses in the court system removes the buffer between the government and individuals which undermines the intent of the framers. *Id.*; Bookspan, *supra* note 9 (arguing lack of coherent guidelines has rendered the Fourth Amendment useless); Charles W. Chotvac, *The Fourth Amendment Warrant Requirement: Constitutional Protection or Legal Fiction? Noted Exceptions Recognized by the Tenth Circuit*, 79 DENV. U. L. REV. 331 (2002) (addressing the large number of current exceptions to the warrant rule as decided in the U.S. Tenth Circuit Court of Appeals); Garcia, *supra* note 48, at 687 (arguing against blanket or particularity approaches and proposing a reasonable alternative approach that resolves contradictory public policy goals of effective law enforcement and protection of individualized liberty).

174. *Richards*, 520 U.S. at 388. Police in *Richards* had already obtained a warrant, thus a neutral detached magistrate had already made a decision. *Id.* However, this was still not enough protection from unreasonable searches to allow this bright line rule. See *Id.* at 395-96.

175. *Flinchum*, 765 N.E.2d at 332.

176. *Id.* at 334 (Pfeifer, J., dissenting). Ohio police are now able to enter the homes of “tire spinners.” *Id.*

177. *Id.* at 332 (holding “when officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor”). See Christine A. Haberle, Note, *Search and Seizure—Stop and Frisk—Evidence Seized Incident to an Arrest that is Based Upon a Police Officer’s Computer Record that Failed to Indicate that the Arrest Warrant had been Quashed, due to an Error Committed by Court Personnel, is Within the Scope of the Good Faith Exception to the Exclusionary Rule* *Arizona v. Evans*, 26 SETON HALL L. REV. 866 (1996) (arguing for liberal interpretations of Fourth Amendment exceptions. Specifically, strict application of exclusionary rule is improper because it will set the guilty free and it provides no impermissible burden on citizens rights). See Los Angeles Police Department Board of Inquiry into the Rampart Area Corruption Incident, Public Report 67 (2000) [hereinafter *Rampart Incident*] (finding L.A. anti-gang officers routinely entered homes without a warrant because they believed

is limited when we consider that officers have the right to wait outside and secure the premises until a warrant is issued.¹⁷⁸ Thus, the suspect is unlikely to escape.¹⁷⁹ Also, this argument ignores the fact that warrants can be obtained much faster with cell phones, fax machines, and various other means. Therefore, the time argument should be less persuasive today than it may have been one hundred years ago.¹⁸⁰

Perhaps the timing concern reflects the idea that evidence may be destroyed while an officer is awaiting a warrant, but the officer must know evidence exists to create an exigency.¹⁸¹ Furthermore, the *Richards* Court was unwilling to presume that felony drug arrests will always be coupled with the chance that evidence will be destroyed. This should preclude any argument that destruction of evidence in non-jailable offenses is of great concern.¹⁸²

getting a warrant takes too long), *cited in* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1129, 1249 n.60 (2002).

178. *United States v. Grummel*, 542 F.2d 789, 791 (9th Cir. 1976) (holding it was proper to secure the premises to prevent destruction of evidence until a warrant could be obtained); *Segura v. United States*, 468 U.S. 796, 798 (1984) (allowing officers to secure the premises from the inside or the outside).

179. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (arguing recent historical approach of deciding whether a search is reasonable departs from the Warren and Burger decisions which relied on the general aims of the Fourth Amendment). *See* Rampart Incident *supra* note 177.

180. John Michael Harlow, Note, *California v. Acevedo: The Ominous March of a Loyal Foot Soldier*, 52 LA. L. REV. 1205, 1242-43 (1992). Harlow argues that:

Many police departments can phone in warrant requests, and developing communications technology will only quicken the warrant process. Warrants can even be issued within one hour. Furthermore, those individuals who value their time more than their privacy interest in a container may waive the warrant requirement and consent to an immediate search. Of course, for those who do not consent, the police will be required to spend some time to satisfy the warrant requirement. But, the police cannot say that their time is too valuable to recognize a citizen's constitutional right to a magistrate's approval of the search.

Id.

181. *Hamrick v. State*, 401 S.E.2d 25, 27 (Ga. Ct. App. 1990) (refusing to find exigent circumstances because the officer could not have known that driver of a motorcycle was drunk so the fact that it was later discovered cannot be a part of the assessment of whether exigent circumstances were present).

182. *Richards v. Wisconsin*, 520 U.S. 385, 393 (1997). The Court stated that not every felony drug arrest will present the threat of destruction of evidence. *Id.*

For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and thus will be unlikely to threaten officers or destroy evidence. Or the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy quickly. In those situations, the asserted governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interest

Id. Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283 (1988) *reprinted in* 16 PACE

3. Prevents Incentives to Flee

Another benefit of the bright line rule is that it removes the incentive to flee from officers; however, the incentive is the possibility of escape, not the additional time spent in the home while a warrant is procured.¹⁸³

A Minnesota court argued that applying *Welsh* too strictly would lead to the following problem: a DUI is generally a misdemeanor, thus if a suspect knows he is protected in his home until a warrant is obtained he will likely attempt to flee.¹⁸⁴ During this time, a crafty suspect could drink alcohol rendering the results of any Breathalyzer unreliable.¹⁸⁵ Certainly, we do not want to provide incentive to engage in high speed chases.¹⁸⁶ However, this argument does not justify extending hot pursuit to all crimes, but rather only to offenses punishable by jail. Thus, there

L. REV. 37 (1997). The author described the three types of procedures used by federal courts to determine whether destruction of evidence satisfies the exigency requirement:

(1) the “examine-avoid” approach, exemplified by courts that critically evaluate the police officer’s assertion that an emergency exists and also require that officers avoid warrantless action when possible; (2) the “uncritical” approach, illustrated by courts that accept at face value the police officer’s assertion that an emergency exists and do not affirmatively require that police avoid warrantless action although possible; and (3) the “examine-only” approach employed by courts that critically evaluate the police officer’s assertion that an emergency exists, but do not require that officers avoid the need for warrantless action although possible.

Id. at 43.

183. See *infra* notes 203-10 and accompanying text.

184. *State v. Paul*, 548 N.W.2d 260, 268 (Minn. 1996). In explaining the possible consequences of a per se rule preventing hot pursuit of misdemeanors the court stated:

The Fourth Amendment simply cannot be stretched nor can public safety be ensured by a bright-line felony rule which would encourage drunk drivers to elude the police by racing through the streets to the sanctuary of their homes in order to “freeze” a hot pursuit or to otherwise evade a lawful arrest.

Id.

185. *Id.* at 267. The court noted that

Had Officer Gunderson not immediately entered Paul’s home, Paul’s blood alcohol level might have dissipated while a warrant was being obtained, or Paul might have drunk more alcohol, making a chemical test unreliable.

Id. (citing *State v. Storvick*, 428 N.W.2d 55, 58 (Minn. 1988), where the “defendant informed arresting officers that ‘I drank after I got home’ in an attempt to thwart the state’s attempt to collect evidence against him”).

186. *Paul*, 548 N.W.2d at 268. The court further reasoned:

Adopting a bright- line rule based on the legislature’s classification of conduct as a misdemeanor would also sweep away any possibility that warrantless home arrests would be justified for those misdemeanors in which the underlying conduct is serious, or when the underlying offense is minor, but subsequent activity by the perpetrator during his flight from the police elevates the situation to a serious one.

Id.

seems to be little support for *Flinchum*'s broad holding.¹⁸⁷

C. *Balancing Test: Privacy Interest*

The home has long been afforded greater protection as it is the place for the most intimate details of our lives.¹⁸⁸ The home is our only refuge from the outside world. It is our safe haven and the center of our privacy interests.¹⁸⁹ Accordingly, this has been recognized at various times by the Supreme Court.¹⁹⁰

However, when courts allow warrantless home intrusions the chances of our privacy being invaded are greater.¹⁹¹ This results from circumventing the neutral magistrate, who serves to prevent unreasonable intrusions on our privacy.¹⁹² It is clear that increasing the

187. *State v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002) (holding hot pursuit will justify a warrantless entry regardless of the underlying offense). See *supra* notes 129-44 and accompanying text discussing how the Ohio Supreme Court should have considered the severity of punishment in determining exigent circumstances.

188. See *supra* notes 1-5 and accompanying text. See also Rich Jefferson, *Federal Judge Delivers Major Opinion Supporting Sanctity of Family Home*, Home School Legal Defense Association, available at <http://www.hslda.org/docs/nes/hslda/199701080.asp> (Jan. 8, 1997) (discussing improper searches with regard to reports of child abuse).

189. Hafetz, *supra* note 136 (providing a review of the court's treatment of the home during the 18th and 19th century, and how the concept of "a man's home is his castle" has provided an unmanageable standard for the courts). Privacy is a widely held right throughout the world. See 79 C.J.S. *Searches and Seizures* § 32 (2002) (defining the home with regard to the constitutional protections offered).

190. William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1 (2002) (discussing the Supreme Court's conservative approach to interpretations of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 482-86 (1965) (discussing the various ways in which privacy is incorporated into our Constitution).

191. See *supra* notes 6-12 and accompanying text. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL L. REV. 1087 (2002) (providing an analysis of historical approaches to discussing privacy and arguing for a pragmatic approach to determining privacy). The right to privacy can be infringed upon in other domains. Amitai Etzioni, *The Right to Privacy vs. the Common Good*, U.S.A. TODAY MAGAZINE Sept. 2000, available at <http://www.gwu.edu/~ccps/etzioni/B338.html> (last visited Feb. 9, 2003) (discussing drug testing as a violation of the right to privacy from philosophical approaches); Jessica Reaves, *Does a Sex Offender Have a Right to Privacy?*, available at http://www.cnn.com/2000/US/04/20/megan4_20.a.tm/index.html (last visited April 20, 2000) (discussing how certain State laws dealing with the reporting of sex offenders may infringe on the offenders' right to privacy).

192. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). In discussing the rationale behind their decision the Court noted:

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

Id.

number of exceptions to the warrant rule will affect our right to privacy in our homes.¹⁹³ The *Flinchum* holding leaves open the possibility that an officer may break down the door of any home if he or she is in hot pursuit and reasonably believes the suspect is inside.¹⁹⁴

When we analyze the Ohio Supreme Court's approach we see that a limited increase in benefits occurs, but the overly broad holding disproportionately increases potential consequences, as well.¹⁹⁵ Therefore it cannot be said that the government interest outweighs the right to privacy, regardless of the underlying offense.¹⁹⁶

D. Consequences of *Flinchum*

1. Erosion of Fourth Amendment Principles of Reasonableness

The *Flinchum* decision grants another exception to the knock-and-announce rule.¹⁹⁷ The knock-and-announce rule ensures that a search

193. *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (stating that "a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest").

194. See *supra* notes 114-21 and accompanying text discussing the Ohio Supreme Court's reasoning in *State v. Flinchum*.

195. See the Ohio Supreme Court's reasoning at *supra* notes 114-21 and accompanying text. See Charles Hellman, Note, *Secure in Their Houses? Fourth Amendment Rights at Public Housing Projects*, 40 N.Y. L. SCH. L. REV. 189 (1995). The author discussed the great amount of violence in Chicago Public Housing, which prompted "Operation Clean Sweep." *Id.* at 189-90. This operation allowed officers to enter each building in an effort to curb the violence and tensions, regardless of whether permission was given or if the resident was home. *Id.* at 190. In August 1995, "Operation Clean Sweep" was banned as it was found to violate the Fourth Amendment. *Id.* at 190-91.

196. See *supra* notes 163-87 and accompanying text discussing potential benefits from the rule announced in *Flinchum*. The proposed benefits from applying the hot pursuit doctrine to all crimes regardless of the underlying offense seem to be illusory and disproportionately increases the consequences without increasing the benefits. *Id.*

197. OHIO REV. CODE ANN. § 2935.12 (Anderson 2003) provides:

When making an arrest or executing an arrest warrant or summons in lieu of an arrest warrant, or when executing a search warrant, the peace officer, law enforcement officer, or other authorized individual making the arrest or executing the arrest or summons may break down an outer or inner door or window of a dwelling house or other building, if after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance

Id. Bryan Murray, Note, *After United States v. Vaneaton, Does Payton v. New York Prevent Police From Making Warrantless Routine Arrests Inside the Home?*, 26 GOLDEN GATE U. L. REV. 135, 135-36 (1996). "[T]he Ninth Circuit held that police did not violate the Fourth Amendment . . . by making a warrantless arrest of a suspect who answered his door in response to their knock." *Id.* at 135. "In so holding, the Ninth Circuit ignored the firm line drawn in *Payton* by allowing a warrantless entry into a dwelling so long as police use no coercion and announce the arrest before

will be reasonable; however, *Flinchum* fails to provide any assurance of reasonableness.¹⁹⁸ The Ohio Supreme Court attempted to minimize its decision in the opinion's closing sentence, which claims that officers do not have unbridled authority to disregard the Fourth Amendment.¹⁹⁹

Unfortunately, applications of *Flinchum* show otherwise. For example, in *State v. Stuber*, police officers approached Stuber in his driveway and stated they had a bench warrant for a minor traffic offense.²⁰⁰ Stuber then entered his residence and locked the doors but officers forced the door open and arrested him.²⁰¹ The Ohio appellate court relied on *Flinchum* in upholding the officer's actions, thus showing officers have the power to disregard the warrant requirement anytime

stepping inside." *Id.* at 136

198. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). In reviewing the Wisconsin Supreme Court's blanket exception to the knock and announce rule in drug cases, the Court stated that in "each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement." *Id.* See also Randall S. Bethune, Note, *The Exclusionary Rule and the Knock-and-Announce Violation: Unreasonable Remedy for an Otherwise Reasonable Search Warrant Execution*, 22 *WHITIER L. REV.* 879 (2001). The author recognized the importance of the requirement by stating:

It is a long-standing principle in society and in law that a man's home is his domain, providing both security and sanctity. Our law honors that notion by prohibiting government officials from entering one's home without a warrant approved by a magistrate. Even when government officials possess a valid search or arrest warrant, the law underscores the importance of the right to privacy in the home by requiring government officials to knock and announce their presence and purpose.

Id. at 879. Mark Josephson, *Fourth Amendment: Must Police Knock and Announce Themselves Before Kicking in the Door of a House?*, 86 *J. CRIM. L. & CRIMINOLOGY* 1229, 1235-38 (1996) (discussing how the framers were in general agreement that the knock-and-announce requirement was an important part of their English heritage).

199. *State v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002) (stating that "[i]n so holding, we do not give law enforcement unbridled authority to enter a suspect's residence at whim or with blatant disregard for the constraints of the Fourth Amendment, but rather limited to situations present in today's case"). Goddard, *supra* note 29, at 462 (finding that "early common-law exceptions involved either imminent bodily danger to the officers or the suspect's knowledge of an officer's presence and purpose," therefore "early American courts . . . narrowly construed the type of exigent circumstances that would constitute exceptions to the knock and announce rule"), *cited in* Maclin, *supra* note 30, at 914 n.76 (discussing the history of the Fourth Amendment and recent Supreme Court cases dealing with history).

200. *State v. Stuber*, No. 1-02-20, 2002 WL 31618993, at *1 (Ohio Ct. App. 3d Dist. Nov. 21, 2002).

201. *Id.* Lisa Ruddy, Note & Comment, *From Seat Belts to Handcuffs: May Police Arrest for Minor Traffic Violations?*, 10 *AM. U.J. GENDER SOC. POL'Y & L.* 479 (2002). "[T]wenty-eight states permit a police officer to place otherwise law-abiding citizens under full custodial arrest." *Id.* at 479. See Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 *IND. L.J.* 419 (2002) (discussing the *Atwater v. Lago Vista* case and its relation to arrests for minor offenses).

their authority is ignored.²⁰²

2. Police Misconduct

The Ohio Supreme Court's reasoning assumes that innocent people do not run from the police. This ignores the severe racial problems associated with law enforcement²⁰³ and the great deal of fear associated with arrest.²⁰⁴ Certainly race problems are not foreign to Ohio. For example, Cincinnati erupted in protests after the shooting of Timothy Thomas in April 2001.²⁰⁵ Thomas was being pursued for several misdemeanor violations and was shot unarmed.²⁰⁶ Furthermore, it is

202. *Stuber*, 2002 WL 31618993, at *3. The court declined to determine whether the officer's entry was reasonable under O.R.C. 2935.12(A), which requires officers to knock-and-announce prior to forcing their way into a home. *Id.* at *2.

203. Lewis Katz, *Anti-Terrorism Laws: Too Much of a Good Thing*, available at <http://jurist.law.pitt.edu/forum/forumnew39.htm> (last visited November 24, 2001) (discussing the Fourth Amendment in the wake of September 11, 2001); William J. Stuntz, *Local Policing after the Terror*, 111 YALE L.J. 2137, 2179 (2002). Even those who regard racial or ethnic profiling as occasionally tolerable must agree that it is a very bad thing. *Id.* It depends on the balance of the benefits to law enforcement from using race as a proxy and the harm to the group affected by the profiling. *Id.* Consequently, police are likely to take race and ethnicity into account even when doing so is socially harmful. *Id.* One is left with a world in which a lot of profiling is both socially destructive and impossible to prevent. *Id.* Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693 (1998) (discussing use of minor traffic violations as a pretext for otherwise invalid searches and seizures). See also Matthew S. Crider, Note, *Criminal Procedure—Searches and Seizures—Police Officers Must Meet “Reasonable Officer” Standard to Withstand Pretext Claim*, 36 S. TEX. L. REV. 629 (1995) (discussing the modified objective or the reasonable officer approach with respect to pretext cases).

204. Schroeder, *supra* note 130, at 798-801. Discussing the great fear associated with arrest: A custodial arrest is an especially “awesome and frightening” experience. The arrestee is abruptly constrained and usually searched, even if the arrest is for a minor offense. He is then forcibly taken to an unfamiliar place, booked, fingerprinted, photographed, searched more extensively, and held in jail, possibly under unsanitary and unsafe conditions, until, and unless, he can obtain his release. The arrestee may suffer emotional distress and public humiliation, and may lose contact with family and friends. He may lose time from work and will probably be required to retain an attorney and spend money on bail. If the detention is at all prolonged, he may lose his job or suffer other adverse consequences. If a person charged with a misdemeanor is subjected to a custodial arrest, that arrest is likely to be the major consequence suffered by that person.

Id.

205. Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: from Elian to the Internment* 70 FORDHAM L. REV. 2257, 2257 (2002) (claiming “the shooting sparked protests in Cincinnati’s African-American community, as protesters alleged that the officers used excessive force because of Thomas’s race”) (citing Francis X. Clines, *In Aftershock of Unrest, Cincinnati Seeks Answers*, N.Y. TIMES, Apr. 23, 2001, at A11 (suggesting protests partly sparked by concerns that the Thomas shooting was the latest in a long line of excessive force cases)).

206. Taslitz, *supra* note 205 (noting that Thomas was the fourth black male killed since 1995 and that no white suspects had been shot during the same period).

very common to experience fear when one is being arrested. In fact, a black social worker cited for speeding is now petrified every time she sees a police car in her rearview mirror.²⁰⁷ She stated, “[i]n that one brief encounter, her entire sense of herself— her job, the fact that she is a mother and an educated, law-abiding person working on a master’s degree—was stripped away.”²⁰⁸ A forty-one year old black male who was consistently pulled over by police put it best: “[t]hey have the power and they can do whatever they want to do to you for that period of time You’re never beyond this, because of the color of your skin.”²⁰⁹ The fear associated with arrest is not limited to blacks, but rather is generally experienced by all minorities.²¹⁰

It is no secret that our society deals with police corruption and abuse on a daily basis.²¹¹ In 1931, a National Commission found extensive evidence of police lawlessness, including unnecessary violence.²¹² In 1961, the U.S. Commission on Civil Rights found that police brutality is a serious and continuing problem.²¹³ Most recently

207. *Id.* at 2260. Suzanne Leone, *Massachusetts Addresses Racial Profiling Head On: The Efficiency of Chapter 228 of the Acts and Resolves of 2000*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 335 (2002) (discussing how the Massachusetts Legislature is dealing with racial profiling). Alberto B. Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation’s Roads*, 90 KY. L.J. 75 (2002) (discussing recent Presidential concern over racial profiling and Congressional pressures to solve this problem).

208. Taslitz, *supra* note 205, at 2260 (citing KENNETH MEEKS, DRIVING WHILE BLACK: HIGHWAYS, SHOPPING MALLS, TAXICABS, SIDEWALKS: HOW TO FIGHT BACK IF YOU ARE A VICTIM OF RACIAL PROFILING 3-20, 63-157 (2000)). Statistics taken from major Ohio cities including Toledo, Akron, Cleveland, and Columbus, have shown that blacks are twice as likely to be ticketed than whites. David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 266-67 (1999).

209. Taslitz, *supra* note 205, at 2260 (citing Harris, *supra* note 208, at 272-73 quoting interview by David Harris with Michael in Toledo, Ohio (Oct. 1, 1998)). See Devon W. Carbado, *(E)rasing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (providing an in depth look at race and its relation to the Fourth Amendment).

210. See Theodore W. Maya, Comment, *To Serve and Protect or to Betray and Neglect? The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611 (2002) (explaining the problems experienced by immigrants in Los Angeles, California).

211. Hess, *supra* note 10, at 150 (finding that while a certain level of abuse exists, the public is hesitant to picture the abused as victims). See also Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593 (2002) (providing an alternative to traditional methods of police operation).

212. NATIONAL COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 153-56 (1931), reprinted in THE THIRD DEGREE: MASS VIOLENCE IN AMERICA (Zechariah Chafee, Jr. et al. eds., 1969). See Harold A. McDougall, *For Critical Race Practitioners: RACE, RACISM AND AMERICAN LAW (4th Ed.)* By Derrick A. Bell, Jr., 46 HOW. L.J. 1 (2002) (summarizing the arguments in the civil rights case book RACE, RACISM, AND AMERICAN LAW).

213. U.S. COMM’N ON CIVIL RIGHTS, 1961 COMMISSION ON CIVIL RIGHTS REPORT, BOOK V. JUSTICE 26 (1961). See Richard S. Frase, *What Were They Thinking? Fourth Amendment*

the U.S. General Accounting Office noted that various sources have recommended independent federal monitors to prevent police corruption.²¹⁴ As we have seen, the rule announced in *Flinchum* allows police to circumvent various Fourth Amendment protections.²¹⁵ Additionally, increases in police power are likely to escalate the number of Section 1983 lawsuits filed against law enforcement.²¹⁶

3. Danger to Third Parties

In *Flinchum*, the officers were not sure what residence Flinchum entered until they viewed him standing in the kitchen. The officers could not have known whether the house belonged to Flinchum or to a

Unreasonableness in Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329 (2002) (arguing that broad arrest power creates the potential for police abuse because of the large amount of traffic laws).

214. Jenny Rivera, *Extra! Extra! Read All About it: What a Plaintiff "Knows or Should Know" Based on Officials' Statements and Media Coverage of Police Misconduct for Notice of a § 1983 Municipal Liability Claim*, 28 FORDHAM URB. L.J. 505, 506 (2000). As investigative committees have identified and highlighted the link between police corruption and police brutality, requests for external controls have increased. Indeed, calls for independent federal monitors in cases of police brutality reflect the dissatisfaction with, and intolerance of, police misconduct and abuse, as well as the growing recognition that local police departments do not or cannot police themselves. *Id.* (citing U.S. Gen. Accounting Office, GAO Report, Law Enforcement: Information on Drug-Related Police Corruption: Report to the Honorable Charles B. Rangel, House of Representatives (1998) (noting that various sources have recommended external oversight of police departments)). See also Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 Washburn L.J. 211, 221 (2000) (discussing the rise of police perjury associated with police corruption). Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468 (1985) (providing two theoretical models to approach the Fourth Amendment analysis of police conduct in searches and seizures).

215. See *supra* notes 134-38 and accompanying text discussing the need to consider the underlying offense in determining exigent circumstances. See *supra* notes 197-202 and accompanying text discussing the knock-and-announce requirement. See *infra* note 217 and accompanying text discussing the need for a warrant before entering the home of a third party. See Skinner, *supra* note 9 (discussing how New Jersey Courts have weakened the Fourth Amendment protections by allowing officers to enter a home without knocking and announcing when they have an arrest warrant regardless of the underlying offense); Driscoll, *supra* note 10, at 2 (discussing exception to the knock-and-announce rule has created a disturbing pattern of police raids); Fernandez, *supra* note 133, at 837 (stating that "[i]n creating an 'easily administrable' rule for warrantless misdemeanor arrests, the instant Court has paved the path to police abuse by affording law enforcement officials unlimited discretion").

216. See Thorne Clark, *Protection from Protection: Section 1983 and the ADA's Implications for Devising a Race-Conscious Police Misconduct Statute*, 150 U. PA. L. REV. 1585 (2002) (discussing the life of Henry Dumas, a black author, who was slain by a mistaken N.Y. police officer). Goins, *supra* note 68 (discussing the liability of law enforcement officers when conducting warrantless home entries); See generally Hess, *supra* note 10 (discussing remedies available for police conduct); William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665 (2002) (analyzing police problems in relation to the control of law enforcement on the state and federal level).

third party.²¹⁷ Perhaps Flinchum ran into his grandfather's house. One can only imagine the terror if police kicked down the door and entered.²¹⁸ Assuming Flinchum did run into the home of a third party, the U.S. Supreme Court in *Steagald* requires police to obtain a search warrant in order to enter the premises in the absence of exigent circumstances.²¹⁹

Age can also be a factor leading to fleeing arrest. For example, imagine that your teenager consumes alcohol under the age of twenty-one.²²⁰ Upon seeing a police officer, your child, like most children, runs into the house even though the officer yells "Stop."²²¹ Upon witnessing the child enter your home the officer quickly breaks down the door and throws your fifteen-year-old down to the ground and cuffs him.²²² The officer has done nothing wrong under *Flinchum* because your child committed a crime and fled an otherwise lawful arrest.²²³

The consequences of such action are grave because it puts officers' lives in danger, citizens' lives in danger, and further erodes our Fourth Amendment rights.²²⁴ The Ohio Supreme Court failed to realize that there are often innocent people inside homes who may become injured as a door is kicked in or if shots are fired.²²⁵ In the preceding example

217. *State v. Flinchum*, 765 N.E.2d 330, 331 (Ohio 2002) ("As the pursuit continued, Officer Birch heard a rear screen door slam open on a house that was later determined to be appellant's. The officer then observed appellant standing in his kitchen five feet inside his home."). Taslitz, *supra* note 205 (providing stories of police misconduct and its effect on others).

218. See, e.g., James Bovard, *No-Knock Entries by Police Take Their Toll on Innocent*, CHRISTIAN SCIENCE MONITOR, May 24, 1994, at 18; Christopher Reed, *Drugs: Innocent People Dying in Brutal War*, CALGARY HERALD, Nov. 18, 1993, at A5; Bob Ross, *War on Drugs Takes Toll on Innocent*, USA TODAY, Jan. 11, 1993, at 1A.

219. *Steagald v. United States*, 451 U.S. 204, 222 (1981) (holding exigent circumstances are necessary to enter the home of a third party even if probable cause is present). This is distinguishable from *Flinchum* because the underlying offense is relatively minor. One should note that officers relying on statutes to enter the home without a warrant are not necessarily protected from a 1983 federal action. Bell, *supra* note 45 (discussing potential liability for officers under Utah law).

220. Underage consumption is a misdemeanor in Ohio under OHIO REV. CODE ANN. § 4301.631 (Anderson 2003).

221. Compare this example to the facts in *Flinchum*, *supra* notes 85-97 and accompanying text.

222. In *State v. Stuber*, No. 1-02-20, 2002 WL 31618993, at *2 (Ohio Ct. App. 3d Dist. Nov. 21, 2002), the appellate court refused to consider whether the officers' method of entry was reasonable as it was lawful under *Flinchum*.

223. *State v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002) (holding "when officers, having identified themselves, are in hot pursuit of a suspect who flees to a house in order to avoid arrest, the police may enter without a warrant, regardless of whether the offense for which the suspect is being arrested is a misdemeanor").

224. Driscoll, *supra* note 10, at 2.

225. *Id.* at 28. Arguing:

[T]he particularized approach limits no-knock entries only to those cases in which a need

there could have been children near the door as it came crashing in, not to mention an elderly family member witnessing this horrific event.²²⁶

In 1989, Florida police threw flash grenades into the home of a sixteen-year-old boy suspected of dealing drugs.²²⁷ Confused, the boy's father pulled out a pistol and began to fire at the incoming officers.²²⁸ In Dorchester, Massachusetts, a seventy-five-year-old retired minister died of a heart attack after a police SWAT unit mistakenly broke down the door and entered his apartment, unannounced, in a search for illegal drugs.²²⁹ Some may argue that the U.S. Supreme Court will not uphold such a blatant disregard for human rights; however, the Supreme Court in *Atwater v. Lago Vista* merely stated that the officer used poor judgment when, in front of her children, he decided to arrest, cuff, search, and take a woman to jail for a mere seatbelt violation.²³⁰

4. Problems Associated with Quick Decision Making

One of the benefits of the warrant requirement is that the inherent passage of time in obtaining a warrant allows tension to subside. Thus, police are less likely to enter the premises in a forceful, violent manner, reducing the chance of police brutality.²³¹ Even in the absence of police corruption law enforcement errors are likely to be made, and thus we should provide a buffer zone to prevent further harm.²³²

for such an entry can be demonstrated with reference to facts particular to the entry in question. By permitting no-knock entries only when there is specific evidence that destruction of evidence is otherwise likely, the particularized approach restrains law enforcement officers from making unexpected searches. Thus, this approach maximizes the virtues of the knock-and-announce principle: protection of privacy; avoidance of violence or destruction of property resulting from surprise police entries; and prevention of "arbitrary invasions by governmental officials."

Id.

226. See *supra* notes 220-22 and accompanying text.

227. Joe Hallinan, *Gestapo-like Tactics Used in Drug Raids*, DES MOINES REGISTER, Nov. 6, 1993, at 2, cited in Driscoll, *supra* note 10, at 5.

228. *Id.*

229. Toni Locy, *Confidence in Informant May Have Hastened Raid*, BOSTON GLOBE, Apr. 2, 1994, at 19, cited in Driscoll, *supra* note 10, at 5.

230. See *supra* notes 140-41 and accompanying text.

231. See Simien, *supra* note 15, at 524 (stating that "the Constitution, which may not be changed in the ordinary process, was intended to be a buffer against the injustices caused by the swayable passions of the majority").

232. Brady, *supra* note 25, at 21. The article presented some of the problems with allowing warrantless arrests of misdemeanors:

The state arrest laws, particularly those authorizing warrantless arrests, have at least three immediate consequences. First, the use of warrants for arrest becomes the exception, rather than the rule. Second, the blanket authority of police officers to conduct arrests for misdemeanors without warrants undoubtedly results in far more

In *Almeida-Sanchez v. United States*,²³³ the U.S. Supreme Court stated, “[t]he needs of law enforcement stand in constant tension with the Constitution’s protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.”²³⁴ This article is not meant to portray police officers as bigots and racists in a common pursuit to deprive Americans of civil liberties. In fact, it should be noted that the law enforcement occupation throughout the world suffers from a great deal of stress.²³⁵ Furthermore, in the wake of September 11th, Americans developed a much needed respect for law enforcement officials. It is clear, however, that decisions concerning the Fourth Amendment are better left to a neutral and detached magistrate.²³⁶ Unfortunately, *Flinchum* grants law enforcement the power to make decisions previously delegated to a neutral magistrate.²³⁷

arrests than if a “cooling off” period occurred between the alleged criminal incident and the arrest. The Fourth Amendment anticipates the benefit of that interim period— that a neutral, detached judicial officer will intervene to determine whether probable cause exists for an arrest. Third, such broad police authority coupled with operational stresses in the court systems effectively removes the buffer between the government and the individuals that the Framers intended the Fourth Amendment to provide.

Id. However, some argue that interpretations of the Fourth Amendment rulings such as *Flinchum* are needed to facilitate effective law enforcement. Skinner, *supra* note 9, at 1747 (arguing hot pursuit of the subject of a warrant is needed in order to prevent hampering of police duties); Haberle, *supra* note 177, at 895 (arguing that a strict application of the exclusionary rule will prevent effective law enforcement).

233. 413 U.S. 266 (1973).

234. *Id.* at 273. Bruce T. Moats, *Search & Seizure—The Clash Between the Fourth Amendment and Society’s Interest in Effective Law Enforcement*, 30 LAND & WATER L. REV. 253, 270 (1995) (discussing the balancing test courts must engage in when deciding Fourth Amendment issues) (quoting *Almeida-Sanchez*, 413 U.S. at 273).

235. Jennifer Brown et al., *Occupational Stress Among Senior Police Officers*, BRIT. J. PSYCHOL. 31 (Vol. 87 No. 1 1996), available at 1996 WL 10400274 (finding police officers in Britain and Germany and various other countries suffer from high levels of stress).

236. Logan, *supra* note 14, at 1292. The court’s purpose is to act as a buffer which gives effect to the rights enumerated in the Constitution. *Id.* Daniel L. Rotenberg, *On Seizures and Searches*, 28 CREIGHTON L. REV. 323 (1995) (discussing modifications for judicial and police approaches to search and seizures). See also William F. Brown & Americo R. Cinquegrana, *Warrantless Physical Searches for Foreign Intelligence Purposes: Executive Order 12,333 and the Fourth Amendment*, 35 CATH. U. L. REV. 97 (1985) (discussing foreign intelligence exceptions to the warrant rule). Corey Fleming Hirokawa, *Making the “Law of the Land” the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L.J. 295 (2000) (providing an analysis of Atlanta police academies’ practices in presenting criminal procedure requirements set by the courts).

237. See *State v. Flinchum*, 765 N.E.2d 330, 332 (Ohio 2002). It seems that prior to *Flinchum* officers would have obtained a warrant prior to entering the home.

V. CONCLUSION

It seems clear the Ohio Supreme Court's ruling in *Flinchum* was overly broad. The consequences of such a ruling can be very harsh. As discussed, the ruling gives Ohio law enforcement officers a great deal of power, and with such power comes the increased risk of abuse. Furthermore, the types of entries allowed under this holding unnecessarily endanger the lives of innocent third parties and may also cause unnecessary property damage. Additionally, *Flinchum* will likely increase the number of Section 1983 lawsuits. These lawsuits may cause a financial strain on the state government.

The benefits of *Flinchum* appear to be negligible because it is quite easy for an officer to obtain a warrant. The concept of defeating an otherwise lawful arrest thus seems misleading. The only benefit is that an officer saves the time it would have taken to get a warrant. Some benefit may be seen in allowing swift law enforcement, but this has never been a top priority. The warrant was created to prevent unreasonable government intrusions, thus fostering the right of privacy. In fact, the creation of the warrant requirement suggests this privacy interest is greater than the need for swift law enforcement action. By allowing hot pursuit to suffice as an exigent circumstance regardless of the underlying offense, the court has failed to give sufficient weight to the right of privacy.

Individuals run from police for a variety of reasons, but the court seems to assume only the guilty flee. This assumption causes an error in the balancing of the governmental interest and the individual right to privacy. In order to correct this error the court must recognize two things. First, when there is no threat of jail time the inducement to run is likely to be low, and thus when it happens it is likely due to other factors such as fear or distrust of law enforcement. Second, when a jailable offense is involved the motive to run is increased by the chance of escaping jail, not seeking temporary refuge in a home. Finally, when society decides to impose a jail sentence they have decided the act in question requires a deprivation in freedom, presumably the balancing scales tip in favor of the government when pursuing those likely to have committed such offenses. Thus, a warrant may not be required. No rational generalization exists for non-jailable offenses. Utilizing these principles creates a distinction between non-jailable and jailable offenses, which is sufficient justification for allowing hot pursuit of only the latter.

In conclusion, the gravest danger of *Flinchum* is future extensions

of the holding. It is well known that our Fourth Amendment rights have been increasingly eroded over the years. In order to prevent inaccurate interpretations of such cases it is vital that courts rule in a narrow fashion. The Ohio Supreme Court failed to take such precautions and has taken a large chunk out of our Fourth Amendment rights in a very unpersuasive two-page opinion.

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