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*Brown to Payton to Harris: A Fourth Amendment Double Play by the Supreme Court*

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BROWN TO PAYTON TO HARRIS: A FOURTH AMENDMENT DOUBLE
PLAY BY THE SUPREME COURT

I. INTRODUCTION

On January 11, 1984, Thelma Staton was murdered in New York City. Police officers immediately began an investigation, and over the course of several days gradually developed probable cause to arrest Bernard Harris for the murder. There is no question that police officers could have arrested Harris had they encountered him in public. However, if the police wished to enter Harris’ residence without his consent to make the arrest, they were required by law to first obtain an arrest warrant from a neutral judge.

The police officers decided to arrest Harris in his home, but did not want to obtain the necessary warrant. Time was not an issue: the arresting officers were not in hot pursuit of a fleeing suspect; they were instead arresting a suspect in his home for a five-day-old murder. Nor could the officers have reasonably

2. See id. at 15-17 (reciting pertinent facts from lower court decisions). This note focuses on Bernard Harris’ murder conviction case as it was litigated in four different courts on five separate occasions. The trial court case is unreported; the other cases are: People v. Harris, 507 N.Y.S.2d 823 (N.Y. App. Div. 1986) [hereinafter Harris I] (affirming trial court conviction); People v. Harris, 532 N.E.2d 1229 (N.Y. 1988) [hereinafter Harris II] (reversing Appellate Division); New York v. Harris, 495 U.S. 14 (1990) [hereinafter Harris III] (reversing Court of Appeals); People v. Harris, 570 N.E.2d 1051 (N.Y. 1991) [hereinafter Harris IV] (reinstating previous Court of Appeals decision on state constitutional grounds).
5. Harris II, 532 N.E.2d at 1230.
feared that their warrant request would be denied, as the showing of probable cause was very strong. The problem was New York's unique right-to-counsel rules. If the police officers wished to interrogate Harris without an attorney present, their chances of doing so would be much greater if they did not obtain an arrest warrant.

In New York, a criminal suspect's right to counsel attaches at the moment accusatory papers seeking an arrest warrant are filed. Once this happens, the suspect is guaranteed one meeting with an attorney. Even if the suspect wishes to speak to police without the benefit of counsel, any statements made by the suspect are inadmissible until after the suspect has met with and been fully apprised of his rights by an attorney. On the other hand, if accusatory papers seeking a warrant are not filed, the right of counsel does not attach until the suspect is formally indicted. Until the indictment is issued, police officers need only advise the suspect of his or her *Miranda* rights. The right to counsel then attaches only upon request after the indictment has been issued.

Therefore, even though the United States Supreme Court had interpreted the Fourth Amendment to require warrants for in-home arrests, the standard procedure in New York City in 1984 was to violate the law by making such arrests without first obtaining warrants. Accordingly, police officers bypassed the courthouse on their way to Bernard Harris' apartment. At the apartment, officers stationed themselves at the door and at the window by the fire escape, drew their weapons, and banged on both the door and window until Harris came to the door. Once inside, the arresting officers recited the *Miranda* warnings, and Harris calmly confessed to the murder while sipping a glass of wine. The officers handcuffed Harris and drove him to the police station, where he was advised of his *Miranda* rights a second time. He then repeated the confession and signed a statement to that effect.

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6. See Harris I, 507 N.Y.S.2d at 824 (Asch, J., concurring) (detailing the unquestioned existence of probable cause to believe that Harris had murdered Thelma Staton).
7. See Lewis R. Katz and Jay Shapiro, New York Suppression Manual § 21.06 n.3 (1991) [hereinafter NYSM] (citing People v. Lane, 478 N.E.2d 1305 (N.Y. 1985)).
8. See id. at n.5 (citing People v. Smith, 465 N.E.2d 336 (N.Y. 1984)).
11. See NYSM, supra note 7, § 21.06 n.11 (citing N.Y. CODE CRIM PROC. § 1.20).
13. See id. at 16 (reciting the pertinent facts from the lower court decisions). Actually,
When Harris was tried for murder, the in-home confession was suppressed. The trial court found that police acted illegally by making a forcible non-emergency entry into the home without a warrant in direct violation of Payton v. New York. The court admitted the second confession into evidence, finding that the second confession was sufficiently removed from the illegal arrest so that the two events were unrelated. At trial, Harris was convicted of murder, and he appealed.

The deceptively simple case of People v. Harris provoked dramatic disagreement among twenty-one reviewing judges sitting on three different courts. All courts let stand (with varying degrees of enthusiasm) the trial court's decision to suppress the first confession as the direct result of an illegal arrest. The courts sharply split, however, over the appropriate treatment of the second confession. The New York Supreme Court (Appellate Division) affirmed the admission of the second statement in a 2-2-1 plurality. The New York Court of Appeals reversed, holding 4-1-2 that the second statement was legally indistinguishable from the first and must be suppressed. The United States Supreme Court in turn reversed, holding 5-4 the second confession admissible in spite of an earlier Payton violation because it was obtained outside the home and because the arrest was supported by probable cause. Finally, on remand from the U.S. Supreme Court, the New York Court of Appeals again suppressed the second confession (again

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Harris gave a third statement at the station house. At the prosecutor's request, Harris made a videotaped confession, which was done after he had already requested that he be allowed to consult with an attorney. For reasons unrelated to the subject of this note, that statement was excluded from use at trial and its suppression was not challenged on appeal. Id.

15. Id.
18. Harris II, 532 N.E.2d at 1231; see also infra notes 127-30 and accompanying text for a discussion of the trial court decision.
19. See Harris III, 495 U.S. 14, 16 (1990) (noting that the state court did not challenge the ruling to suppress the first confession); Harris II, 532 N.E.2d at 1235 (noting that Brown v. Illinois, 422 U.S. 590 (1975) requires that confessions resulting from illegal arrests be suppressed); Harris I, 507 N.Y.S.2d at 823-825 (stating that two justices would not have suppressed the first confession because they believed there was no unlawful entry where the defendant voluntarily admitted the police officers into his apartment ).
voting 4-1-2), citing the special need to protect the warrant requirement in light of New York's unique right-to-counsel rules.\(^2\)

It perhaps is not surprising that a Fourth Amendment case contemplating suppression of a reliable murder confession would result in eleven separate appellate opinions. Controversial topics such as the home arrest warrant requirement and the proper operation of the exclusionary rule often have been decided and applied by closely divided courts.\(^2\) The *Harris* decisions, however, go far beyond a good-faith disagreement over difficult Fourth Amendment issues. They reflect a judicial willingness to covertly abandon well-established doctrines such as the warrant requirement and the exclusionary rule in a manner that substitutes ideology and "analytical sleight of hand"\(^2\) for stare decisis and honest debate.

This note analyzes the damage done by the *Harris* decisions to Fourth Amendment protections against unreasonable searches and seizures. Part II reviews the importance of the warrant requirement, and examines the need to deter warrantless entries such as the one which occurred in *Harris*. Part III explains the use of the exclusionary rule to deter constitutional violations, emphasizing how the attenuation doctrine balances Fourth Amendment protections against society's interest in convicting dangerous criminals. Part IV examines all of the *Harris* opinions in detail, and demonstrates that important Fourth Amendment doctrines were damaged by the problematic *Harris III* decision. Finally, Part V approvingly cites two examples of courts looking to state constitutions to maintain Fourth Amendment protections in the wake of *Harris*.

II. THE ILLEGALITY OF HARRIS’ ARREST

Police acted illegally when they arrested Harris because they entered his residence with neither a warrant nor with Harris’ con-
sent. As a preliminary matter, it is important to understand exactly why this conduct is considered illegal and why it should be deterred.

A. The History of the Warrant Requirement

It has been suggested that the lack of a meaningful warrant requirement in colonial America was directly responsible for the American Revolution and the founding of this country. The colonists were subjected to limitless intrusions into their privacy through the much-hated British device known as the Writ of Assistance. A Writ of Assistance allowed customs officials to break down any door and search any place for evidence of customs violations. The officials were not required to have particularized suspicions about any person or place before searching, nor were they required to justify their actions to any authority after the search. The Writ of Assistance effectively gave the government the power to conduct warrantless searches and seizures.

To the people who founded this country, such unchecked governmental power was unacceptable. Colonist James Otis delivered a speech in 1761 to his fellow citizens in which he decried the Writ of Assistance as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book." According to Otis, limitless government power to search and seize placed "the liberty of every man in the hands of every petty officer." John Adams, the second President of the United States, later recalled the atmosphere at Otis' speech, stating, "[T]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

Whatever the role played by the Writ of Assistance in the American Revolution, there can be no doubt that memories of ar-

26. Id. at 17.
27. See, e.g., Boyd v. United States, 116 U.S. 616, 625 (1886) (quoting memoirs of John Adams concerning the role of warrantless intrusions in the founding of the Nation).
29. Boyd, 116 U.S. at 625 (quoting Otis as recounted by James Adams) (internal quotation, footnote and citation omitted).
30. Id.
31. Id.
bitrary government conduct were considered by the framers of the Fourth Amendment. The Fourth Amendment eliminated the general warrant feature of the Writ of Assistance by requiring that all warrants be supported by probable cause and limited in scope. Just as important, the Fourth Amendment declared the right to be free from "unreasonable searches and seizures". Courts have long interpreted the reasonableness clause to require that probable cause be determined by an impartial judge or magistrate before the search or seizure takes place.

B. The Importance of the Warrant Requirement

When the New York City police officers decided to go directly to Bernard Harris' apartment without first seeking a warrant, they abandoned several important safeguards contemplated by the framers of the Fourth Amendment. Most obviously, they unilaterally usurped the judicial branch's authority to determine probable cause, in direct contradiction of the concept of separation of powers. In Harris' case, the determination of probable cause was not

32. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (refusing to apply Fourth Amendment to an extraterritorial arrest, but acknowledging that the amendment was intended to protect citizens against arbitrary government conduct).

33. The Fourth Amendment provides that:

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

U.S. CONST. amend. IV.

34. Id.

35. Id.

36. See, e.g., Johnson v. United States, 333 U.S. 10, 13-14 (1948) (holding that the likely existence of probable cause to search a hotel room for narcotics did not justify police failure to first seek from a neutral judicial officer a warrant to search); United States v. Duchi, 906 F.2d 1278, 1282 (8th Cir. 1990) (holding that it is the function of a neutral judicial officer, not a police officer, to draw the reasonable inference necessary to support searching a home); State v. Schur, 538 P.2d 689, 692 (Kan. 1975) (holding that a warrantless search could not be supported by a police officer's observation that marijuana was being smoked inside the house because such an entry must be predicated on a warrant issued by a neutral magistrate).

37. See OASS, supra note 28, at 76-77 (listing separation of powers as one of the primary rationales for the warrant requirement). Virtually all power granted in this country by the people to a branch of government is checked and balanced by power granted to a different branch of government. This delicate system of checks and balances is upset when one branch usurps power for itself, as when police officers exclude the judicial branch from probable cause determinations.
made, as required, by a “neutral and detached magistrate,” but instead “by [police officers] engaged in the often competitive enterprise of ferreting out crime.” Courts have consistently stated that the dual requirements of probable cause and particularity in a warrant are of little use if these determinations are made by the very people seeking and executing the warrants. The U.S. Supreme Court echoed James Otis’ warning about placing “the liberty of every man in the hands of every petty officer” when it held that a warrantless search of a hotel room for narcotics, although supported by probable cause, was illegal. To hold otherwise, the Court reasoned, “would reduce the [Fourth] Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.”

Most importantly, the warrant requirement recognizes that unreasonable searches and seizures must be prevented because their effects cannot be undone. An innocent person who has been wrongfully arrested does not simply forget about the incident once released from custody. Innocent family members forced to lie face-down on the floor in handcuffs while police search through their most personal possessions are not consoled when the erring police department apologizes and offers to pay for the broken front door. Even if police officers are disciplined for such actions (and they rarely are), or even if the innocent citizens can seek money damages through the courts (and they are rarely successful), the damage caused by an unreasonable search and seizure is not cured.

39. Id.
40. See, e.g., United States v. Lefkowitz, 285 U.S. 453, 464 (1932) (“the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests”); McKnight v. United States, 183 F.2d 977, 978 (D.C. Cir. 1950) (suppressing evidence seized because police officers deliberately failed to arrest defendant on the street in order to arrest him in his home for the real purpose of searching the premises); Harding v. Florida, 301 So. 2d 513, 514 (Fla. Dist. Ct. App. 1974) (holding that evidence of marijuana must be suppressed because marijuana was seized when police officers entered defendant’s home, looking for drugs, but on the pretext of arresting another man with a traffic warrant), cert. denied, 314 So. 2d 151 (Fla. 1975).
41. Boyd v. United States, 116 U.S. 616, 625 (1886) (internal quotation, footnote and citation omitted).
42. Johnson, 333 U.S. at 14.
43. See, e.g., United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (commenting that where police officers have wrongfully arrested a person, “no decision that he should go free can come quickly enough to erase the invasion of his privacy that already will have occurred”).
by an after-the-fact remedy. A casual reading of the text of the Fourth Amendment indicates that the framers were not content to merely outlaw unreasonable searches and seizures. They were determined to prevent such conduct by giving effect to the warrant requirement. This emphasis on prevention has been the underpinning of judicial declarations that warrantless searches are "per se unreasonable." When the arresting officers in Harris abandoned the warrant procedure, they abandoned one of the fundamental distinctions between the new United States and the old system of colonial oppression.

C. Exceptions to the Warrant Requirement

The Fourth Amendment was intended to protect citizens from arbitrary government conduct, but it was not intended to hamper police in the execution of their legitimate law enforcement duties. To achieve these dual goals, courts have long recognized exceptions to the warrant requirement where exigent circumstances preclude police from seeking a warrant before a search or seizure, or where an individual consents to the search or seizure.

The Supreme Court currently recognizes three situations where exigent circumstances justify a warrantless search or seizure: imminent escape of the suspect, imminent destruction of evidence, and imminent danger of harm to another person. Officers need not have absolute proof of exigent circumstances before acting without a warrant. The law only requires that police officers use common sense and act reasonably. Recognizing that exigent circumstances

44. See infra notes 75-80 and accompanying text for a discussion of the inadequacy of civil remedies and internal disciplinary proceedings in response to unreasonable searches and seizures.

45. Katz v. United States, 389 U.S. 347, 357 (1967). Katz held that police acted illegally when they eavesdropped on defendant's conversations in a phone booth without first seeking a warrant, even though the activity was amply supported by probable cause and was limited in scope. Id. at 359. See also California v. Acevedo, 111 S.Ct. 1982, 1991 (1991) (quoting same language from Katz).

46. See, e.g., Payton v. New York, 445 U.S. 573, 583 (1980) (acknowledging that exigent circumstances are relevant when considering the legality of a warrantless arrest). Payton is discussed in detail infra at notes 56-70 and accompanying text.

47. The trial court suppressed the first confession, holding that Harris did not voluntarily consent to police entry into his apartment, and this conclusion was not disturbed on appeal. Harris IV, 570 N.E.2d 1051, 1052 n.1 (N.Y. 1991).


49. See, e.g., Anderson v. Creighton, 483 U.S. 635, 641 (1987) (stating that the reasonableness of an officer's belief in the existence of exigent circumstances is the standard by which to judge his or her actions).
also demand that police officers make split-second decisions, sometimes in life-threatening situations, courts are understandably reluctant to second-guess the good faith assessments of exigent circumstances made by these officers.50

However, no exigent circumstances existed in the warrantless arrest of Harris.51 Officers did not arrive at Harris' apartment in hot pursuit in the hours immediately following the killing. Instead, they had been working for several days to identify a suspect and develop probable cause.52 There was no reason for the arresting officers to believe that Harris knew he was under suspicion or that he might flee. Nor was there any suggestion that Harris was attempting to destroy evidence or that he posed an immediate threat to others.

D. Payton and the Preservation of the Warrant Requirement for Arrests in the Home

In 1976, the Supreme Court seemingly created another exception to the warrant requirement. In United States v. Watson,53 the Court held that arrests made in public do not require prior authorization through the warrant process as long as probable cause exists.54 By removing all public arrests from prior judicial review, the Court arguably created an inference that arrests were somehow different from other types of searches and seizures. The Court expressly left open the question of whether arrests in the home might also fall under the so-called "arrest exception" to the warrant requirement.55 Four years later, however, the Court drew a line at the door of a person's home. In Payton v. New York,56 the Court held that in the absence of consent or exigent circumstances, police

50. See, e.g., id. (stating that the reasonableness of a police officer's assessment of exigent circumstances must be judged considering the degree of danger involved); United States v. Perdomo, 800 F.2d 916, 919 (1985) (stating that a police officer's reasonable belief that exigent circumstances existed must be judged taking into consideration the officer's lack of delay in making a warrantless entry); People v. Cocchiza, 221 N.Y.S.2d 856, 862 (1961) (finding that where the defendant could have used his gun or disposed of his narcotics, the police officers were entitled to a good-faith assessment of exigent circumstances).


54. Id. at 423.

55. Id. at 418 n.6.

must have a warrant before entering a home to make an arrest. 57

\textit{Payton} involved two cases, one of which was factually similar to \textit{Harris}. In the main case, officers investigated a murder over the course of two days and developed probable cause to arrest Theodore Payton for the crime. 58 Without obtaining a warrant, six officers went to Payton's apartment and, when there was no answer, broke down the door. 59 Although Payton was not inside, the police officers seized a .30-caliber shell casing that was used at Payton's trial. 60 In the companion case decided by the Court in the \textit{Payton} decision, police officers developed probable cause to arrest Obie Riddick for armed robbery. 61 When the officers arrived at Riddick's apartment without a warrant, Riddick's young son opened the door. 62 Officers saw Riddick sitting inside the apartment and entered to make the arrest. 63 Before allowing Riddick to get dressed, the officers searched a chest of drawers and discovered weapons and narcotics. 64

The state courts held in both cases that the evidence was admissible because the state statute permitted warrantless entries into the home to arrest. 65 The state courts drew a distinction between a warrantless entry to search and a warrantless entry to arrest, concluding that the latter did not constitute as severe an invasion of privacy as the former. According to these courts, a warrantless entry to search was more invasive because a search could range throughout the entire house, allowing police to rummage through all sorts of personal effects without any limitation in scope imposed by the Fourth Amendment warrant requirement. A warrantless entry to arrest was much less intrusive because police officers would be limited to searching those areas large enough to hold a person, and would have to terminate the search when the person was found. Therefore, according to the state courts, a warrantless entry to arrest did not violate Fourth Amendment reason-

57. Id. at 602-03.
58. Id. at 576.
59. Id.
60. Id. at 576-77.
61. See id. at 578 (noting that defendant Riddick had been identified by the victims of the armed robbery, implying the existence of probable cause).
62. Id.
63. Id.
64. Id.
65. Id. at 579.
The U.S. Supreme Court, in suppressing the evidence seized in both cases, rejected the distinction between a warrantless entry to make an arrest and a warrantless entry to search. The Court first took notice that an arrest is a seizure of the person and is thus regulated by the Fourth Amendment proscription against unreasonable searches and seizures. The Court then noted that home arrests required even more constitutional scrutiny:

To be arrested in the home involves not only the invasion attendant in all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present.

The Court thus returned to the familiar historical concepts of security in the home and person in reaching its Payton holding. Where Watson suggested that arrests and searches required entirely different Fourth Amendment analyses, Payton re-emphasized that both types of invasion are subject to the reasonableness command of the Fourth Amendment. After Payton, there could be no doubt about the legality of a warrantless entry to make an arrest. The Court stated that “[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”

E. The Two Crimes Committed in Harris

The police in Harris were investigating a serious crime and were obliged to arrest the perpetrator. The law gave the police officers all the options they needed to accomplish this duty. The showing of probable cause to arrest Harris was strong, and there is little doubt that a warrant would have been issued quickly and

66. Id. at 579-81.
67. Id. at 585-86.
68. Id.
69. Id. at 588-89 (quoting United States v. Reed, 572 F.2d 412, 423 (2d Cir. 1978), cert. denied sub nom. Goldsmith v. United States, 439 U.S. 913 (1978)).
70. Id. at 590.
easily had the officers sought one.\textsuperscript{71} If they were worried that Harris might flee from his apartment, they certainly could have put the apartment under surveillance while a warrant was obtained. If Harris tried to escape or if some other exigent circumstance arose, they could have arrested him on the spot, with or without a warrant.\textsuperscript{72} Nothing in the law would have prevented police officers from arresting Harris quickly and safely under such circumstances.

But instead, the police broke the law. They knew that filing the accusatory papers requesting a warrant would give Harris a greater right to counsel than he would otherwise enjoy, and they did not wish to be so encumbered in their investigation.\textsuperscript{73} The arresting officers, therefore, ignored the Fourth Amendment and the command of \textit{Payton}. They entered Harris’ apartment without his consent and without a warrant to make an arrest. In so doing, a message was sent, not only to Bernard Harris (who, admittedly, does not generate much sympathy), but also to society. The message was that the New York Police Department did not see a problem with traditions underlying the British Writ of Assistance and unchecked governmental power to search and seize. The police officers were unconcerned that they were conducting, without prior review, the most invasive type of search and seizure possible: entry into a private home for the purpose of depriving a person of his liberty. They were not bothered by the fact that unreasonable searches and seizures cannot be remedied, and that citizens are secure only when unreasonable invasions are prevented. Ordinary citizens are not permitted to pick and choose which laws to follow and which may be ignored, but that is precisely what the arresting officers did here. Although the \textit{Harris} trial properly focused on the crimes committed by Bernard Harris, the crimes committed by the police required attention as well. Some of the courts reviewing

\textsuperscript{71} In the days following the murder, the victim’s daughter told the investigating officers that Harris had kidnapped and raped her mother, eventually releasing her several days before the murder. The victim’s co-workers said that the victim told them the same story, and an entry in her diary recorded the incident. The victim’s boyfriend told police officers that the victim complained about the kidnapping and rape, but would not reveal her assailant’s name for fear of putting her boyfriend in danger. Harris \textit{I}, 507 N.Y.S.2d 823, 824 (N.Y. App. Div. 1986) (Asch, J., concurring).

\textsuperscript{72} See supra notes 46-50 and accompanying text for discussion of exceptions to the warrant requirement.

\textsuperscript{73} See \textit{Harris I}, 507 N.Y.S.2d at 827 (Rosenberger, J., dissenting) (suggesting that the desire to evade New York’s unique right-to-counsel rules was the true motivation behind police disregard of the warrant requirement).


Harris were prepared to deal with both sets of crimes, but others were not.  

III. CONFRONTING FOURTH AMENDMENT VIOLATIONS

When the police abandon the mechanism for preventing Fourth Amendment violations, courts have few after-the-fact remedies available to redress the violation. Civil sanctions are usually unavailable or inadequate to remedy constitutional violations such as those committed by the police in Harris. Actions for trespass are usually limited to compensatory damages, such as reimbursement for property damaged during an unlawful search. Punitive damages are available only if the plaintiff can show actual malice on the part of the government. Because the potential for monetary recovery is so limited, most citizens subjected to an unlawful search or seizure do not bother to bring a civil action, and few attorneys are interested in taking such cases on a contingency basis.

In addition to civil actions, there is also the possibility of prosecuting the offending police officers, either formally through the criminal justice system or less formally through police department disciplinary proceedings. At least one Supreme Court justice, however, does not have much faith in this remedy: "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates [such as police officers] for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates

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74. See infra notes 19-23 and accompanying text.
76. See Leslie E. John, Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort, 74 CAL. L. REV. 2033, 2055 (1986) (distinguishing between the bases on which punitive and compensatory damages may be claimed).
77. See, e.g., Mapp v. Ohio, 367 U.S. 643, 651-52 (1961) (noting the inadequacy of civil actions to remedy unreasonable searches and seizures); see also Potter Stewart, Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 COLUM. L. REV. 1365, 1387-88 (1983) (explaining that while damage actions for Fourth Amendment violations may provide some compensation to victims, they are not sufficient on their own and have several problems including the lack of competent legal counsel to pursue such civil remedies).
78. See Report to the Attorney General, Office of Legal Policy, The Search and Seizure Exclusionary Rule, Truth in Criminal Justice, 22 U. MICH. J.L. REF. 573, 579 (1989) (highlighting internal disciplinary measures as one of the administrative tools which can be employed to redress Fourth Amendment violations).
have ordered.”79 Internal departmental proceedings are similarly
not likely or helpful. Indeed, the arresting officers in Harris would
not have been subject to internal discipline because they followed
standard departmental procedure when they went to Harris’ home
without a warrant.80

A. The Exclusionary Rule

The exclusionary rule is the primary sanction currently used to
enforce the reasonableness mandate of the Fourth Amendment.81
Under this doctrine, evidence seized as the result of a constitutional
violation is excluded from use at a criminal trial.

Historically, there were two policy justifications for the
exclusionary rule. First, the doctrine was used to prevent the courts
from approving and perpetuating illegal conduct by officials in
other branches of the government. Under this view, the public’s
confidence in the integrity of the judicial branch would be under-
mined if courts allowed constitutionally tainted evidence into the
courtroom.82

The second justification for the exclusionary rule was deter-
rence of illegal police activity. The rule assumed that police offi-
cers are ultimately interested in securing convictions of criminals
and are thus deterred from violating the Constitution if they know
that evidence obtained illegally will not help secure a convic-
tion.83

In 1984, the United States Supreme Court took a dramatically
different view of the “judicial integrity” justification for the
exclusionary rule. In United States v. Leon,84 the Court held that
evidence was admissible where it was seized by police officers
acting in good faith reliance on a warrant later found to be inval-

79. Wolf v. Colorado, 338 U.S. 25, 42 (1949) (Murphy, J., dissenting), overruled in
part by Mapp, 367 U.S. 643.
81. See Weeks v. United States, 232 U.S. 383, 398 (1914) (adopting exclusionary rule
for federal courts); Mapp, 367 U.S. at 660 (applying exclusionary rule to the states
through the Fourteenth Amendment due process clause).
82. See Weeks, 232 U.S. at 392 (suggesting that the importance of the judicial
branch’s role in securing Fourth Amendment rights implies that the public’s faith in the
judiciary is undermined when courts fail to prevent public officials from tampering with
these rights).
83. See Brown v. Illinois, 422 U.S. 590, 599-600 (1975) (citing deterrence as a pri-
mary function of the exclusionary rule). Brown is discussed in detail infra at notes 96-124
and accompanying text.
The Court noted that the exclusion of such evidence would not deter officers from violating constitutional provisions because they are doing as much as can be expected when acting in good faith reliance on a warrant. As for judicial integrity, the Court reasoned that public respect for the courts was endangered not by use of constitutionally tainted evidence (as suggested in Weeks), but rather by exclusion of “inherently trustworthy” evidence. Therefore, the Court limited application of the exclusionary rule to those situations where it clearly would deter future illegal police behavior.

Leon not only manifested the current Supreme Court majority’s dislike of the exclusionary rule, but also its reluctance to openly and honestly overrule earlier decisions giving birth to the rule. By purportedly leaving the exclusionary rule undisturbed in cases where the rule would serve a clear deterrent purpose, the Court could plausibly claim that it was merely balancing the societal costs and benefits of the rule. The succeeding sections of this note, however, suggest a different, more insidious agenda by the Court. In Harris, the Court confronted an admittedly confusing aspect of the exclusionary rule — its proper application to a confession given in the wake of an illegal arrest. When the Court was finished, the exclusionary rule was removed from meaningful application to a situation where the police misconduct was egregious and the deterrent effect of the rule was clear.

B. Deterring Illegal Arrests: the Exclusionary Rule and the Attenuation Doctrine

Because both unreasonable searches and seizures violate the Fourth Amendment, the exclusionary rule should be used to deter either type of constitutional violation. In practice, however, the exclusionary rule is not applied equally. Following an illegal search the operation of the exclusionary rule is quite simple. All evidence obtained during the illegal search is banned from use at trial.

85. Id. at 922.
86. Id. at 918.
87. See supra note 82 and accompanying text.
88. Leon, 468 U.S. at 907.
89. Id. at 926 (“suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause”).
The rule does not apply as neatly, though, to illegal arrests. An illegally arrested person is not "excluded" from trial. Rather, the court retains jurisdiction no matter how unreasonable the arrest.\footnote{See Frisbie v. Collins, 342 U.S. 519, 522 (1952) (rejecting appellant's due process argument because he understood the charges against him and received a fair trial, stating that "there is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will"); see also United States v. Alvarez-Machain, 112 S. Ct. 2188, 2192 (1992) (concluding that even though the abduction of a foreign defendant into U.S. police custody may be shocking, the defendant is nonetheless answerable for his offense in court). The disparate application of the exclusionary rule to illegal searches and arrests is probably best explained by the exclusionary rule's cost to society. Society's interest in convicting a dangerous criminal does not evaporate simply because the defendant was subjected to an illegal search or seizure. If illegally seized tangible evidence is suppressed, the possibility remains that other untainted evidence can be used to secure a conviction. On the other hand, obviously, a conviction is not possible where an illegal arrest deprives the court of jurisdiction over the defendant. OASS, supra note 28, at 35-36.} Similarly, a person may not use an illegal arrest as the basis for overturning a conviction.\footnote{See Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (reaffirming the rule established by Frisbie v. Collins, 342 U.S. 519 (1952) that a conviction is not invalid despite an illegal arrest or detention).}

Therefore, the exclusionary rule seeks to deter illegal arrests by excluding evidence seized as the result of an illegal arrest. In Payton, for example, the weapons and narcotics discovered during the illegal arrest of Obie Riddick were suppressed.\footnote{See supra notes 56-70 and accompanying text for a discussion of Payton.} It was fairly easy to conclude that these items of tangible evidence were seized as the result of the illegal arrest.

In Harris, however, police seized no tangible evidence as the result of the illegal arrest. The only evidence they "seized" was Harris' confessions, and it was not clear if the confessions were obtained as the result of the illegal arrest. Indeed, the workings of the human mind are too complex to ascertain whether a suspect gives a confession as the result of an illegal arrest, in spite of an illegal arrest, or without regard to an illegal arrest.\footnote{See Brown v. Illinois, 422 U.S. 590, 603 (1975) (stating the impossibility of objectively determining whether a confession is the product of free will or the result of exploitation by a law enforcement officer).} The cause and effect relationship between the arrest and the confessions in Harris was further clouded by the administration of Miranda warnings in Harris' apartment. Any coercive atmosphere created by an illegal arrest was arguably lessened by informing Harris that he had the right to remain silent and the right to speak with an attorney.

\footnote{91. See Frisbie v. Collins, 342 U.S. 519, 522 (1952) (rejecting appellant's due process argument because he understood the charges against him and received a fair trial, stating that "there is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will"); see also United States v. Alvarez-Machain, 112 S. Ct. 2188, 2192 (1992) (concluding that even though the abduction of a foreign defendant into U.S. police custody may be shocking, the defendant is nonetheless answerable for his offense in court). The disparate application of the exclusionary rule to illegal searches and arrests is probably best explained by the exclusionary rule's cost to society. Society's interest in convicting a dangerous criminal does not evaporate simply because the defendant was subjected to an illegal search or seizure. If illegally seized tangible evidence is suppressed, the possibility remains that other untainted evidence can be used to secure a conviction. On the other hand, obviously, a conviction is not possible where an illegal arrest deprives the court of jurisdiction over the defendant. OASS, supra note 28, at 35-36.

92. See Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (reaffirming the rule established by Frisbie v. Collins, 342 U.S. 519 (1952) that a conviction is not invalid despite an illegal arrest or detention).

93. See supra notes 56-70 and accompanying text for a discussion of Payton.

94. See Brown v. Illinois, 422 U.S. 590, 603 (1975) (stating the impossibility of objectively determining whether a confession is the product of free will or the result of exploitation by a law enforcement officer).}
before questioning. In fact, the record indicates that the atmosphere in the apartment was anything but coercive. Harris invited the officers in, poured himself a glass of wine, and confessed to the police officers. Application of the exclusionary rule to Harris' confessions was thus not nearly as straightforward as application of the rule to tangible evidence discovered in the course of an illegal search or following an illegal arrest.

The Supreme Court clarified the function of the exclusionary rule in the arrest/confession context in *Wong Sun v. United States* and *Brown v. Illinois*. In *Wong Sun*, the defendant was illegally arrested, but after arraignment was released on his own recognizance. Several days later, the defendant voluntarily returned to the police station and made an inculpatory statement. The Court admitted this confession into evidence, finding it so attenuated from the illegal arrest that its suppression would not deter future illegal arrests. In contrast, the defendant in *Brown* gave an inculpatory statement while still in police custody only a few hours after the illegal arrest. The Court suppressed the statement in *Brown* because it was too closely related to the underlying illegality of the arrest.

*Wong Sun* and *Brown* provided workable rules that balanced the need to deter Fourth Amendment violations with the legitimate needs of law enforcement. *Wong Sun* rejected the notion that all evidence, including confessions seized in the wake of an illegal arrest must be suppressed; instead, the Court focused on whether police tried to exploit the illegal arrest in order to obtain the confession. The reasoning is sound: if police make an illegal arrest with the purpose of obtaining a confession, subsequent suppression of that confession would remove the incentive police had for making the illegal arrest in the first place. Application of the exclusionary rule would likely deter the illegal arrest. On the other

96. Id.
98. 422 U.S. 590 (1975).
100. Id. at 475-76.
101. Id. at 491.
103. Id. at 604-05.
105. See *Brown*, 422 U.S. at 599 (construing *Wong Sun v. United States*, 371 U.S. 471 (1963)). See also supra note 83 and accompanying text.
hand, if there is no apparent relationship between the illegal arrest and the confession, then it can be safely assumed that the illegal arrest was inadvertent or that police made the illegal arrest for reasons other than obtaining a confession. In such a case, the exclusionary rule probably would not accomplish its deterrent purpose. If the goal of police in making the illegal arrest was not to secure the confession, then suppressing the confession would be unlikely to change police behavior in the future.

Wong Sun was clearly the latter type of case. Whatever reasons police had for illegally arresting the defendant, they could not have predicted that the defendant would voluntarily return several days after his release from custody to confess. The illegal arrest still required deterrence, but suppressing the fortuitous confession was unlikely to deter. In other words, the confession was sufficiently attenuated from the initial illegality that the confession was admissible.

The Wong Sun attenuation rule functioned well until 1966, when the Supreme Court decided the landmark case of Miranda v. Arizona. In Miranda, the Court held that police may not interrogate a citizen before first advising the citizen of his or her Fifth Amendment right against self-incrimination and right to counsel. Compliance with Miranda obviously lessened the coercive atmosphere surrounding police interrogation, but this phenomenon had an unintended effect on the attenuation doctrine. Lower courts began to rely solely on Miranda when reviewing the admissibility of confessions, and some ceased to conduct the attenuation analysis mandated by Wong Sun where the confession was obtained in the wake of an illegal arrest.

One such case was Brown v. Illinois. In that case the defendant, Richard Brown, confessed to a murder after having been illegally arrested. Brown and Wong Sun were at opposite ends of the attenuation spectrum: Chicago police admitted at trial that they arrested Brown without a warrant solely because they wanted to

106. Cf. United States v. Ceccolini, 435 U.S. 268, 279-80 (1978) (finding that the application of the exclusionary rule would not serve its deterrent purpose when a long lapse of time occurs between the officer’s illegal search for evidence and the testimony of a witness at the trial of the defendant).
107. Wong Sun, 371 U.S. at 491.
109. Id. at 479.
110. 422 U.S. 590 (1975).
question him in connection with a murder. Brown made his confession while still in unlawful police custody. There could be no doubt that police exploited the illegal arrest with the goal of obtaining a confession. The Illinois courts all acknowledged the illegality of Brown’s arrest, but they uniformly refused to suppress the confession because there was no evidence that it was coerced. Instead, the record showed that police administered Miranda warnings three times before Brown gave his full confession. Finding compliance with Miranda dispositive to the admissibility of Brown’s confession, the state courts did not conduct a Fourth Amendment attenuation analysis in order to determine whether the exclusionary rule would have served to deter the illegal arrest.

A unanimous U.S. Supreme Court reversed the Illinois courts and held that the administration of Miranda warnings did not dispose of the Fourth Amendment issues. The Court made it clear that although Miranda warnings protected Fifth Amendment interests, the warnings did nothing to deter the illegal arrest that brought Brown into custody in the first place. Deterrence of the illegal arrest, according to the Court, was accomplished through application of the attenuation doctrine.

Brown clarified the attenuation analysis by identifying three factors for courts to consider when evaluating the relationship between an illegal arrest and a subsequent confession: “[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct . . . .” Applying these three factors, the Court quickly concluded that Brown’s confession was not sufficiently attenuated from the illegal arrest. Brown’s statements came only two hours after the illegal arrest, “and there was no intervening event of significance whatsoever.” The Court also found that the manner in which police conducted the arrest gave “the appearance of having been calculated to cause

111. Id. at 605.
112. Id. at 595-96.
113. Id. at 596-97.
114. Id. at 594-95.
115. Id. at 597.
116. Id. at 601-02.
117. Id.
118. Id. at 603-04 (citation omitted).
119. Id. at 604.
surprise, fright, and confusion." Accordingly, the Court suppressed Brown's confession and reversed his conviction.

Wong Sun and Brown made powerful statements about Fourth Amendment jurisprudence. On one hand, the Court recognized that illegal arrests are not always deterred by suppression of subsequent confessions. The Court thus established rules for determining when the relationship between the arrest and the confession warranted application of the exclusionary rule. On the other hand, the Court unmistakably manifested its determination to enforce the Fourth Amendment, even to the point of unanimously suppressing a reliable murder confession, where suppression was likely to deter illegal police conduct.

There was, however, disagreement on the Brown court that is of critical importance. In an innocent-sounding concurrence, Justice Powell made it clear that he agreed only with the Court's conclusion that Miranda warnings do not per se protect Fourth Amendment interests in the arrest/confession context. When considering a new test to replace the old rules, Powell proposed classifying Fourth Amendment violations according to seriousness. Brown would be at the high end of this hierarchy because in that case, police made an arrest without probable cause. At the low end of the hierarchy would be mere "'technical' violations of Fourth Amendment rights", such as where police search or seize in good-faith reliance on a warrant later found to be invalid. According to Powell, only the former type of violation justified suppression of the evidence in order to deter police conduct. In Powell's view, therefore, the "flagrancy" prong of the majority's three-part test was the determinative factor in an attenuation analysis.

Justice Powell did not say in Brown where he ranked a warrantless in-home arrest on his scorecard of Fourth Amendment

120. Id. at 605.
121. Id.
122. Id. at 607 (Powell, J., concurring).
123. Id. at 611-12.
124. Id. at 612. For "technical" violations, Justice Powell would not require more than proof that effective Miranda warnings were given and that the ensuing statement was voluntary in the Fifth Amendment sense. Absent aggravating circumstances, [Justice Powell] would consider a statement given at the station house after one has been advised of Miranda rights to be sufficiently removed from the immediate circumstances of the illegal arrest to justify its admission at trial.

Id.
violations. Five years later, however, he joined with the *Payton* majority in declaring this type of activity unlawful,\textsuperscript{125} so presumably he would have considered a *Payton* violation serious enough to warrant some attention in an attenuation analysis. The current members of the U.S. Supreme Court, however, had different ideas.

\section*{IV. *Brown* to *Payton* to *Harris*: A Double Play on the Warrant Requirement and Exclusionary Rule}

\subsection*{A. *Harris* in the New York Courts}

1. The Trial Court

Thirteen judges considered the case of *People v. Harris* before it finally reached the U.S. Supreme Court.\textsuperscript{126} The state trial court found that the routine in-home warrantless arrest violated the Fourth Amendment. As the trial judge noted in the record, "No more clear violation of *Payton* [sic], in my view, could be established."\textsuperscript{127} Accordingly, the trial court suppressed Harris' first confession as the direct result of the illegal arrest, and the issue was not raised on appeal.\textsuperscript{128} The trial court then conducted a *Brown* attenuation analysis on the second confession, and concluded that the confession was sufficiently attenuated from the illegal arrest to be admissible at trial.\textsuperscript{129} The court did not comment on the flagrancy of the police misconduct, but did conclude that the passage of one hour between the arrest and second confession satisfied the "temporal proximity" prong of the attenuation test. The court also reasoned that readministration of *Miranda* warnings constituted a sufficiently intervening circumstance to remove the taint of the illegal arrest.\textsuperscript{130}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{125} *Payton v. New York*, 445 U.S. 573 (1980). The *Payton* majority consisted of Justices Powell, Stevens, Brennan, Stewart, Marshall, and Blackmun (with Blackmun also writing a separate concurring opinion). Chief Justice Burger and Justices White and Rehnquist dissented in *Payton*. Id.
\item \textsuperscript{126} In addition to the trial court judge, the case was reviewed by five justices in the Appellate Division and seven judges on the Court of Appeals. See supra notes 20-21 and accompanying text.
\item \textsuperscript{128} *Harris III*, 495 U.S. 14, 15 (1990).
\item \textsuperscript{129} *Harris I*, 507 N.Y.S.2d at 824-25 (Asch, J., concurring).
\item \textsuperscript{130} Id.
\end{itemize}
\end{footnotesize}
2. The Appellate Division (Harris I)

The trial court decision, though affirmed by the Appellate Division, divided the five Appellate Division justices into three camps and drew fire from all. Two justices (Sandler and Wallach) wrote a concurring opinion in which they accepted, with some reservation, the trial court's finding that police entered Harris' apartment without consent. Therefore, these justices refused to disturb the conclusion that Harris' arrest constituted a Payton violation which required suppression of the first confession. These justices also affirmed the decision to admit the second confession made at the police station, but they did not accept the trial court's reasoning. In the view of Justices Sandler and Wallach, the Brown attenuation analysis was "relevant" but "not ... clearly determinative." Borrowing a page from Justice Powell's Brown concurrence, they concluded that a Payton violation ranked rather low in the pecking order of Fourth Amendment violations. According to Justices Sandler and Wallach, because the arrest of Harris was supported by probable cause, police could have legally arrested him without a warrant just about anywhere except his home. Thus, the warrantless entry into Harris' home to make the arrest was presumably a technical violation, and application of the attenuation doctrine was inappropriate.

Justices Asch and Kassal also affirmed the conviction, but took a wholly different approach in a separate concurring opinion. These justices would have reversed the trial court's finding of fact on the issue of consent, and thus would have found as a preliminary matter that there was no Payton violation. Without a Payton violation, the arrest would be legal and there would be no Fourth Amendment question as to the subsequent confessions. Justices Asch and Kassal also found a Brown attenuation analysis inappropriate. In their view, Brown only stood for the proposition that Miranda compliance was not dispositive of Fourth Amendment considerations. In Harris' case, "any 'taint' resulting from an
illegal arrest was removed by the lapse of time between the statements and re-reading of the Miranda warnings." They also distinguished Brown on the facts: the Brown arrest was illegal because it lacked probable cause, while the Harris arrest was illegal because it was made without a warrant. Although the relevance of these observations was not given, these justices concluded that the second confession was admissible.140

Finally, Justice Rosenberger wrote a dissenting opinion that accepted the trial court's finding on the Payton violation and strongly urged suppression of the second confession.141 According to Justice Rosenberger, Brown was "instructive ... and ... determinative" of the case.142 Although the dissenting opinion did little more than quote extensively from Brown, it did identify the flagrancy of the police conduct by raising the issue of the unique interplay between the warrant requirement and New York's special right-to-counsel rules.143

3. The Court of Appeals (Harris II)

Harris' case generated three more opinions upon reaching New York's highest court. Although the five-justice majority was split on the precise reasoning, the Court of Appeals voted 5-2144 to reverse the Appellate Division and suppress the second confession.145 Writing for the court, Judge Simons found the case to be rather straightforward. The majority acknowledged that Wong Sun and Brown had already dealt with the admissibility of confessions following illegal arrests, and the court simply applied the Brown three-part test.146 First, there was an even closer temporal relationship between the arrest and confession in Harris than there was in Brown: only one hour had passed between Harris' illegal arrest and his confession, while in Brown there was a two hour gap.147 If two hours was not sufficient attenuation in Brown, then one hour could not be in Harris.148

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139. Id.
140. Id.
141. Id. at 825 (Rosenberger, J., dissenting).
142. Id. at 826.
143. Id. at 827.
145. Id. at 1235.
146. Id. at 1231-32.
147. Id. at 1232.
148. Id. at 1232-33.
The court also found that the second prong of the attenuation analysis was not satisfied. The only legally significant event that occurred between Harris’ illegal arrest and his subsequent confession at the station house was the reading of his *Miranda* rights. The majority noted that *Brown* clearly stated that the administration of *Miranda* warnings did not dispose of the Fourth Amendment issue. The court acknowledged that *Brown* dealt with a single confession following an illegal arrest, while this case involved two confessions. However, the court concluded that the difference was irrelevant: “Having just given a statement in his apartment which inculpated him in the crime, defendant had already committed himself and there was little incentive to withhold a repetition of it.”

Finally, the court considered the flagrancy of the police conduct. Harris’ confession clearly failed this prong of the test. The court drew “a reasonable inference” from the record that the New York Police Department routinely violated the warrant requirement in order to avoid restrictions on questioning criminal suspects. In the view of the court, this case was thus appropriate for application of the exclusionary rule in order to deter Fourth Amendment violations. And in response to those judges and justices who suggested that the *Payton* violation was not as serious as an arrest without probable cause, the court concluded with its own view on hierarchies of violations:

Finally it should be noted that as a matter of policy, deterring *Payton* violations by suppressing confessions causally related to them is no less important than deterring investigative detentions or street arrests made on less than probable cause. All are entitled to the same level of scrutiny and evidence obtained as a result of such misconduct.

149. *Id.* at 1233.
150. *Id.*
151. *Id.* (quoting United States v. Johnson, 626 F.2d 753, 759 (9th Cir. 1980), aff’d, 457 U.S. 537 (1982)). Johnson, the case quoted by the majority here in *Harris II*, was especially revealing: in an almost identical two-confession case, the *Johnson* court suppressed the second confession with little analysis simply because the first confession had already been suppressed on Fourth Amendment grounds. Because the defendant in *Johnson* had already “let the cat out of the bag” during the first confession, the court treated the second confession as identical to the first for purposes of attenuation. If the first confession must be suppressed on Fourth Amendment grounds, so must the second. *Johnson*, 626 F.2d at 759.
152. *Harris II*, 532 N.E.2d at 1233.
must be suppressed unless the taint of the illegality has
become sufficiently attenuated.\textsuperscript{153}

Concurring separately, Judge Titone rejected the proposition
that a \textit{Payton} violation was as serious as other illegal arrests, and
he was therefore not as willing as the majority to proceed with an
attenuation analysis following a \textit{Payton} violation.\textsuperscript{154} However, he
also acknowledged that a \textit{Brown}-type analysis was required by
New York common law interpreting the state constitution, and for
this reason he concurred in the result.\textsuperscript{155}

Chief Judge Wachtler and Judge Bellacosa dissented, finding it
abhorrent to public policy to suppress a confession that the defen-
dant was apparently most willing to provide.\textsuperscript{156} The dissenters
argued that the familiar \textit{Brown} attenuation factors were not disposi-
tive, but were merely guideposts to aid in determining whether a
confession was given as the product of an illegal arrest.\textsuperscript{157} Con-
vinced that the evidence of voluntariness in Harris’ confession was
sufficient to remove any taint of the \textit{Payton} violation, these judges
would have ruled the confessions admissible.\textsuperscript{158}

4. Analysis of the State Court Decisions

Given the clear Fourth Amendment standards articulated by
\textit{Payton} and \textit{Brown}, it is somewhat difficult to understand why
thirteen state judges sitting on three courts generated seven differ-
ent opinions about the case of Bernard Harris. The courts were
confronted with an arbitrary abuse of police power in the worst
traditions of the colonial Writ of Assistance. To claim that the
existence of probable cause in \textit{Harris} made the \textit{Payton} violation
less severe is nonsense. Police illegally entered the place most
zealously protected by the Fourth Amendment in order to effect the
most intrusive seizure regulated by the Fourth Amendment, and
they did so without the prior review from the neutral judicial
branch. It would be bad enough if laziness or uncertainty about the
chances of obtaining a warrant motivated police to evade the war-
rant requirement, but the motives here were even worse: by casual-
ly disregarding the Fourth Amendment, police would not have to

\begin{itemize}
  \item \textsuperscript{153} \textit{Id.} at 1235.
  \item \textsuperscript{154} \textit{Id.} at 1235-36 (Titone, J., concurring).
  \item \textsuperscript{155} \textit{Id.} at 1235.
  \item \textsuperscript{156} \textit{Id.} at 1236 (Wachtler, C.J., dissenting).
  \item \textsuperscript{157} \textit{Id.} at 1236.
  \item \textsuperscript{158} \textit{Id.}
\end{itemize}
put up with some of the more confining features of the Sixth Amendment. The people sworn to uphold the law were willing to break the law so they could avoid offering a suspected lawbreaker all the protection guaranteed by the law. Even for judges who indulge in classifying the "seriousness" of Fourth Amendment violations before applying an attenuation analysis, there simply does not seem to be any room for argument on the need to deter the type of illegality associated with the Harris arrest.

Furthermore, there can be no doubt that suppression of the confessions would deter this type of police behavior in the future. Officers bypassed the warrant requirement solely because they hoped to elicit a confession by questioning Harris before he had a chance to speak with an attorney. Even without applying the Brown attenuation factors, simple common sense dictates that police would have no incentive to bypass the warrant requirement in the future if any confessions they obtained were excluded from use at trial. Formal analysis of the case under Brown does not change the conclusion. As the Court of Appeals majority found, the confessions were obtained close in time to the illegal arrest, there were no legally significant circumstances during that short intervening time, and the flagrancy of the police misconduct was manifest.

Some of the judges who considered Harris' arrest and confession argued that the Brown analysis was inapplicable because repeated Miranda warnings purged the atmosphere of any coercion. But Brown itself unequivocally stated that Miranda warnings did not automatically resolve the Fourth Amendment issues. Other judges took a closely related position: Harris obviously had intended to confess before the police even arrived at his apartment, and his confession was in no way caused by the illegal arrest. This argument is flawed in two ways. First of all, notwithstanding Harris' calm demeanor as he sipped wine and confessed, the record is far from clear on Harris' predisposition to confess. He did not answer the door when police first knocked, but only after police covered both exits and persisted in banging on his doors and windows. Police claimed Harris voluntarily admitted them into his apartment, but it is hard to imagine slamming a door in the face of police officers with drawn weapons when more

161. Harris II, 532 N.E.2d at 1236 (Wachtler, C.J., dissenting); Harris I, 507 N.Y.S.2d at 824 (Sandler, J., concurring).
officers with drawn weapons are at the window. Additionally, if Harris was so determined to confess, he could have kept right on confessing after he saw an attorney and after his case went to trial. Certainly, then, the later confessions would be so far attenuated from the illegal arrest as to be admissible.

More importantly, Harris' predisposition to confess is not the issue. Brown's analysis of Miranda warnings established that the only thing proven by a willingness to confess would be that the confession was not coerced within the meaning of the Fifth Amendment. However, a willingness to confess would have absolutely no bearing on the Fourth Amendment issues of whether the illegal arrest was serious enough to require deterrence, and whether suppression would deter.

B. The U.S. Supreme Court Opinion (Harris III)

The issues were more focused when Harris reached the U.S. Supreme Court. On appeal from the state high court, the prosecution no longer challenged the finding of a Payton violation or the decision to suppress the first confession. The sole issue before the Supreme Court was whether the second confession should also be suppressed. Given the state's concession that the arrest was illegal and that suppression of the first confession was an appropriate deterrent, it seems that the status of the second confession could have been settled with a review of the Brown attenuation analysis performed by the New York Court of Appeals.

The Court, however, approached the issue differently. Chief Justice Rehnquist (then Justice Rehnquist) was one of the justices who thought that Brown was used in too many confession cases. In Brown, he joined in Justice Powell's concurrence and advocated that application of the attenuation doctrine be limited to cases presenting "serious" Fourth Amendment violations. Furthermore, it is clear that the Chief Justice did not view "mere" Payton violations as serious enough to qualify for review under Brown. In his dissent in Payton, he refused to acknowledge any Fourth Amendment problems with warrantless in-home arrests. In Har-

162. Brown, 422 U.S. at 600-01.
he was presented a chance to review *Brown* and *Payton* in a fact pattern that at least superficially suggested a defendant who was eager to confess.

The *Brown* dictum and the *Payton* dissent became the law when *Harris* reached the Supreme Court. Writing for a seven-justice majority, Justice White, another *Payton* dissenter, reversed the state court’s suppression of Harris’ second statement and held that *Payton* was applicable only to evidence seized while police were actually in the home.\(^{166}\) The Court noted that Harris was subject to arrest anywhere outside of his home since there was probable cause.\(^{167}\) Therefore, according to the Court, the arrest became legal for Fourth Amendment purposes the moment Harris left the apartment with the police:

The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated.\(^{168}\)

At least three things were problematic with the Court’s startling new view of *Payton*. First of all, the statement that *Payton* merely protects the home totally ignored one of the most oft-quoted phrases in Fourth Amendment jurisprudence: “[T]he Fourth Amendment protects people — and not simply ‘areas’ — against unreasonable searches and seizures . . . .”\(^{169}\) Second, the majority refused to acknowledge that unreasonable searches and seizures are regulated by the Fourth Amendment. To limit *Payton* only to the illegal entry into the home, and to ignore the constitutional implications of the subsequent illegal arrest, is to disregard the clear language of *Payton*: “[T]he warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable.”\(^{170}\) Finally, the Court’s suggestion that it enforced *Payton* by suppressing the first confession, while allowing the second to be admitted, is sophistry: police obviously would not feel hindered from repeating the illegal *Harris* arrest in the future if they knew that at least one of the confessions would be admissible. The *Harris* fact pat-

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167. *Id.* at 21.
168. *Id.* at 20.
tern would provide the blueprint for future police conduct: officers
could obtain the in-home confession while the defendant was still
surprised and disoriented by the illegal entry. Later, they could tell
the defendant they had all the evidence they needed, but just
wished to confirm a few details, and thereby elicit the admissible
confession.

The Court also rejected the suggestion that suppression of the
second confession would provide meaningful deterrence against the
illegal arrest.\footnote{171}{Harris’III, 495 U.S. at 20.} The Court’s explanation of this conclusion, when
considered along with the lower court findings of police miscon-
duct, defies logic:

Given that the police have probable cause to arrest a sus-
p ect in Harris’ position, they need not violate Payton in
order to interrogate the suspect. It is doubtful therefore that
the desire to secure a statement from a criminal suspect
would motivate the police to violate Payton. As a result,
suppressing a station house statement obtained after a
Payton violation will have little effect on the officers’
actions, one way or another.\footnote{172}{Id. at 20-21.}

The Court’s assertion that police probably would not violate Payton
is simply preposterous given that police in the case before them
did indeed violate Payton. The Court’s assertion is even more
amazing because the violation did not result from the actions of
rogue police officers. Instead, the New York Police Department
had institutionalized such illegal behavior into its standard operat-
ing procedure.\footnote{173}{Id. at 25 (Marshall, J., dissenting).} In the face of these compelling facts, the Court
actually suggested that because police had legal means at their
disposal for questioning or even arresting Harris, suppressing evi-
dence obtained during “legal” questioning would not deter police
from making illegal arrests. One might as well argue that jail terms
would not deter wealthy shoplifters because they had the means to
purchase the stolen goods lawfully.

Turning its attention to Brown, the Court limited the attenua-
tion doctrine in several ways. Invoking the familiar hierarchy of
Fourth Amendment violations from the Brown concurrence, the
majority implicitly limited Brown to arrests unsupported by proba-
b le cause.\footnote{174}{See id. at 19 (distinguishing Brown because the underlying illegality in Brown was}

\footnotesize{171.} Harris’III, 495 U.S. at 20.
\footnotesize{172.} Id. at 20-21.
\footnotesize{173.} Id. at 25 (Marshall, J., dissenting).
\footnotesize{174.} See id. at 19 (distinguishing Brown because the underlying illegality in Brown was
of the lower courts thus became the law of the land: a "mere" purposeful violation of the warrant requirement was not worth deterring.

The Court also found a novel way to limit Brown even further. At one point, the Court suggested that Brown should only be used where the cause-effect relationship was clearly established between the underlying illegality and the seized evidence. It is difficult to imagine anyone seriously reading Brown in such a fashion. Brown represented the means for determining the relationship between a Fourth Amendment violation and the subsequent seizure of evidence. The Harris III majority, however, had its own means for determining the cause-effect relationship in a confession case. A confession will not be considered the result of an illegal arrest if, by the time the confession is obtained, the suspect's custody has become lawful. The Court stated that "Harris was not unlawfully in custody when he was removed to the station house, given Miranda warnings, and allowed to talk." The Court thus returned to the pre-Brown doctrine that Miranda warnings cure all Fourth Amendment concerns, a proposition that was explicitly rejected by a 9-0 vote in Brown.

Four incredulous justices, led by Justice Marshall, dissented in Harris III, accusing the majority of "analytical sleight-of-hand, resting on errors in logic, misreadings of our cases, and an apparent blindness to the incentives the Court's ruling creates for knowing and intentional violations by the police."

Echoing the opinion of the New York Court of Appeals, the dissent found that Brown required suppression of both of Harris' confessions: little time had transpired between the illegal arrest and the confessions, there were no legally significant intervening circumstances, and the flagrancy of police misconduct was extreme. Justice Marshall stressed that the disagreement with the majority did not stem from a disagreement over how the Brown factors should be applied to this case: "Instead, the court

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175. See id. (stating that the Brown attenuation analysis is appropriate only where "the challenged evidence is in some sense the product of illegal governmental activity.").
176. Id. at 18.
177. Id.
178. Id. at 25-26 (Marshall, J., dissenting).
179. Id. at 24-26.
FOURTH AMENDMENT DOUBLE PLAY

redrafts our cases in the service of conclusions they straightforwardly and explicitly reject."\textsuperscript{180} The dissent continued with a point-by-point rejection of the new views of \textit{Payton} and \textit{Brown}, and concluded with the following criticism of the majority’s approach to \textit{Harris}:

The majority’s assertion, as though the proposition were axiomatic, that the effects [of an illegal arrest] \textit{must} end when the violation ends is both undefended and indefensible. The Court’s saying it may make it law, but it does not make it true.\textsuperscript{181}

V. DUSTING OFF THE STATE CONSTITUTION: PREVENTING UNREASONABLE SEARCHES AND SEIZURES AFTER \textit{HARRIS}

Little remains of \textit{Payton} and \textit{Brown} after the U.S. Supreme Court’s decision in \textit{Harris III}. While warrantless in-home arrests are still technically illegal, the Court now offers no mechanism for deterring \textit{Payton} violations in cases such as \textit{Harris}. And by implicitly limiting the \textit{Brown} attenuation analysis only to situations involving arrests without probable cause resulting in confessions obtained without \textit{Miranda} warnings, the Court has relegated \textit{Brown} to an extremely limited number of easy cases. In close cases, involving an illegal arrest that happens to be supported by probable cause, where a confession is obtained after proper \textit{Miranda} warnings, the guiding influences of \textit{Brown}’s three-prong test no longer operate.

In fairness to the Court, it must be acknowledged that the Fourth Amendment survived its first 189 years without \textit{Payton}, and that \textit{Payton} itself was decided by a six justice majority over a vigorous and compelling dissent. It would be unwise for the Court to overrule \textit{Payton}: that a judicial officer must determine the sufficiency of probable cause before the government may enter a place as private as the home in order to forcibly remove the occupant to a police station seems unremarkable (at least in America). But at least if the Court had overruled \textit{Payton}, there could be open and honest debate about the necessity of arrest warrants for in-home arrests which are supported by probable cause.

Instead, the Court covertly tampered with the fringes of

\textsuperscript{180} \textit{Id.} at 26.
\textsuperscript{181} \textit{Id.} at 28-29.
Payton, and almost completely disemboweled Brown in the process. This is especially tragic because Brown in no way represented Fourth Amendment activism by a closely divided court. Brown was a 9-0 decision that responsibly and realistically assessed both the benefits and costs of the exclusionary rule. Brown gave lower courts a much-needed method to distinguish among the differing goals of the Fourth and Fifth Amendments when they intersected in a criminal confession case.

More disturbing is the Court’s apparent indifference to flagrant police misconduct. Even Justice Powell’s Brown concurrence wholeheartedly adopted the attenuation analysis where it could be shown that police acted egregiously. Similarly, the Leon Court tempered its limitations on the exclusionary rule with a professed willingness to employ the rule where deterrence of police misconduct was the likely result. In Harris III, the Court went to incredible lengths to justify its refusal to deter the institutionalized disregard for constitutional rights by the police department of the nation’s largest city. One wonders if members of the current majority were being honest in the Brown concurrence and in Leon, or if in reality the Court has become totally hostile toward the Fourth Amendment.

At least two states that have reflected on the continued vitality of the Fourth Amendment in the wake of Harris III have invoked state constitutional law to fill in the gaps.

A. The New York Court of Appeals and Harris IV

On remand from the U.S. Supreme Court, the New York Court of Appeals once again suppressed Harris’ second statement, this time on state constitutional grounds. However, the Court of Appeals stressed that its decision rested on New York’s unique right-to-counsel rules:

In New York . . . , police are prohibited from questioning a suspect after an arrest pursuant to a warrant unless counsel is present. They have every reason to violate Payton, therefore, because doing so enables them to circumvent the accused’s indelible right to counsel . . . . It is this interplay between the right to counsel rules established by New York law and the State’s search and seizure provisions which

provides a compelling reason for deviating from the Supreme Court’s determination in this case.\textsuperscript{183}

The state court majority drew the wrath of the dissenting justices for “rest[ing] its result on a significantly expanded State right to counsel concept, injected into this case for the first time after all appeals have been exhausted . . . .”\textsuperscript{184} Whatever the merits of that objection, the Court of Appeals need not have justified its disagreement with the U.S. Supreme Court on right-to-counsel grounds. The New York Constitution, in wording identical to the Fourth Amendment to the U.S. Constitution, guarantees citizens freedom against unreasonable searches and seizures.\textsuperscript{185} The Court of Appeals could have simply construed its state constitution to guarantee greater rights to citizens than given by the U.S. Supreme Court under the federal provisions.

B. Connecticut’s Better Approach

The Appellate Court of Connecticut has also come to recognize the protective gaps left by \textit{Harris III}. Accordingly, it has wasted no time in distinguishing its interpretation of its own state constitution from the U.S. Supreme Court’s interpretation of the federal constitution.

In \textit{State v. Geisler},\textsuperscript{186} a now familiar fact pattern emerged. Police developed probable cause to arrest the defendant for drunk driving, but failed to obtain a warrant before entering his home to make the arrest.\textsuperscript{187} After police transported the defendant to the station and administered \textit{Miranda} warnings, he made an inculpatory statement and produced readings on an intoximeter.\textsuperscript{188} The trial court allowed all evidence to be introduced at trial,\textsuperscript{189} notwithstanding the \textit{Payton} violation. The appellate court reversed and ordered a new trial, and the state supreme court refused to hear the

\textsuperscript{183} \textit{Id.} at 1055.
\textsuperscript{184} \textit{Id.} at 1056 (Bellacosa, J., dissenting).
\textsuperscript{185} \textit{N.Y. Const.} art. I, \S 12.
\textsuperscript{188} \textit{Id.} at 1292.
prosecution's appeal. However, in the wake of *Harris III*, the U.S. Supreme Court vacated *Geisler* and remanded the case back to the state court for reconsideration.

On remand, the Connecticut appellate court rejected the reasoning of the *Harris III* majority as to the seriousness of the *Payton* violation and the deterrent effects of *Brown*:

By requiring that only evidence acquired inside a home following a *Payton* violation be suppressed, the *per se* rule in *Harris [III]* does not grant to Connecticut citizens the scope of the exclusion that we believe is necessary to deter police from entering a home without a warrant. This deterrence cannot be achieved if the evidence acquired immediately thereafter outside a home cannot be suppressed under any circumstances, unless it resulted from illegal government activity.

The Fourth Amendment begins its third century on shaky ground. *Harris III* demonstrates the U.S. Supreme Court's dislike of many Fourth Amendment doctrines and its unwillingness to openly admit its feelings. Perhaps the pendulum will swing the other way in time, and perhaps protections against unreasonable searches and seizures will enjoy new vitality at the federal level. In the meantime, state courts must be vigilant toward further erosion of the Fourth Amendment and must be willing to step in with protective safeguards where necessary.

ALAN C. YARCUSKO

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