parents of even a markedly mature minor in order to avoid the risk of prosecution under section 304(2) by the minor's parents.

In *Bellotti II,* four members of the Court, who joined the opinion of the Court in *Matheson,*[107] struck down the Massachusetts parental consent and notice statute because it left a minor without a means to have an independent determination made as to her maturity.[108] The Utah statute also fails to provide for a decision-maker to verify the maturity of a minor. The discretion is supposedly in the hands of the physician but in fact his hands are tied by the threat of prosecution under section 304(2).

The Utah statute will not burden the abortion decision of those minors in homes where parents will abide by their daughter's wishes without interference, but in homes where parents hold deeply religious and moral views, a minor's choice may be taken away from her.[109] The Court's view that parents will act in the best interest of their children is optimistic, yet optimism should not cloud the fact that many minors' decisions to have an abortion will be overridden by a parental veto if the parents are notified.

Mark Douglas Goranson

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107. The four members of the Court were Justices Powell, Burger, Stewart and Rehnquist.

108. Bellotti v. Baird, 443 U.S. 622, 651 (1979).

109. *See id.* at 647. "[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those at home, are particularly vulnerable to their parents' efforts to obstruct [abortion]." *Id.*

CRIMINAL PROCEDURE — WHEN SEEKING TO EXECUTE AN ARREST WARRANT AT THE HOME OF A THIRD PARTY NOT NAMED IN THE WARRANT, THE FOURTH AMENDMENT REQUIRES A SEARCH WARRANT TO BE OBTAINED ABSENT CONSENT OR EXIGENT CIRCUMSTANCES. — *Steagald v. United States* (U.S. Sup. Ct. 1981).

On appeal for conviction of possession of cocaine and of conspiracy to possess cocaine with intent to distribute,[1] Gary Keith Steagald made several arguments,[2] including the contention that the trial court erred in denying his motion to suppress evidence seized in plain view as a result of a warrantless search of his residence during an attempt by agents of the Drug Enforcement Administration (DEA) and local police to execute an arrest warrant for Ricky Lyons,[3] who did not live at that location but was suspected of staying there.[4] In challenging the admissibility of the evidence seized during the search[5] the defendant contended that the fourth amendment[6] required a

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1. Steagald v. United States, 101 S. Ct. 1642, 1645 (1981). (defendant convicted under 21 U.S.C. §§ 841(a)(1), 846 (1976)).

2. United States v. Gaultney, 606 F.2d 540 (5th Cir. 1979), *rev'd sub nom.* Steagald v. United States, 101 S. Ct. 1642 (1981). Gaultney and Steagald were co-defendants; their cases were joined at trial court and on appeal to the fifth circuit. *See id.* Only Steagald appealed to the Supreme Court.

Defendant Steagald argued that the trial court erred in refusing to require the Government to provide his defense expert witness with a primary reference sample—a sample of the drug in question whose quality and purity are known—enabling the expert to examine that evidence. *Id.* at 545. This refusal, defendant argued, amounted to a denial of due process of law by precluding defendant from analyzing the suspected evidence through an independent laboratory. *Id.*

Another argument raised by the defendant was that the evidence produced at trial was insufficient to prove the required knowledge and intent necessary to sustain his conviction under the statute. *Id.* at 546. Defendant also contended that the trial court committed reversible error by failing to dismiss the indictment on grounds of double jeopardy based upon prosecutorial overreaching. *Id.* at 547. Finally, the defendant argued that the trial court committed reversible error in a supplemental charge to the jury by refusing to re-instruct on specific intent and reasonable doubt. *Id.*

3. *Id.* at 545. The arrest warrant was over six months old. 101 S. Ct. at 1644.

4. 606 F.2d at 543. An informant had notified agents that Lyons and another fugitive would be at Steagald's residence for 24 hours. *Id.* Prior information of this informant had resulted in seven drug-related arrests. *Id.* at 542 n.2.

5. *Id.* at 542.

6. This 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.

U.S. CONST. amend. IV.

search warrant to be issued before his home could be searched for Lyons.[7] The Fifth Circuit Court of Appeals affirmed the district court's denial of defendant's motion to suppress the evidence thereby affirming the defendant's conviction.[8] The United States Supreme Court *held*, reversed and remanded. When seeking to execute an arrest warrant at the home of a third party not named in the warrant, the fourth amendment requires a search warrant to be obtained absent consent or exigent circumstances. *Steagald v. United States*, 101 S. Ct. 1642 (1981).

The *Steagald* case reflects the Court's continued concern for heavily weighing an individual's privacy expectations in his home against the practical inconveniences to the police in searching an individual's home.[9] Due to a conflict between the circuits over the need for a search warrant when searching for an individual in a third party's home,[10] the Supreme Court deter-

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7. United States v. Gaultney, 606 F.2d at 545. Steagald based his argument on *Payton v. New York*, 445 U.S. 573 (1980), which held that absent consent or exigent circumstances the fourth amendment requires an arrest warrant to be obtained prior to entry into a person's home in order to arrest him. United States v. Gaultney, 606 F.2d at 545 (citing Payton v. New York, 445 U.S. at 573-74).

8. United States v. Gaultney, 606 F.2d at 548. The court of appeals stated the situation in *Payton* was inapposite to *Steagald* because *Payton* involved a warrantless arrest. *Id.* at 545.

The lower federal courts in *Steagald* based their holding on the fifth circuit decision of *United States v. Cravero*, 545 F.2d 406 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). Therein, the court held that an officer who had a valid arrest warrant and who reasonably believed that the named party was "within the premises belonging to a third party," did not have to obtain a search warrant to arrest the subject within the premises. United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). In *Cravero*, officers armed with arrest warrants followed suspects to another's house and upon being denied entrance by a woman at the door, officers forced their way into the house and seized evidence resulting in convictions of persons not subjects of the arrest warrants. 545 F.2d at 412-13.

9. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980) (requiring arrest warrant, absent consent or exigent circumstances, to enter suspect's home), Stanford v. Texas, 379 U.S. 476 (1965) (requiring items to be seized to be named with particularity rather than leaving it up to police discretion), Johnson v. United States, 330 U.S. 10 (1948) (requiring a search warrant to balance individual's privacy interest with the legitimate concern for crime).

10. Steagald v. United States, 101 S. Ct. at 1645 n.3. The third, fourth and ninth circuits prohibit searches such as the one conducted in *Steagald*. *See* Government of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); Wallace v. King, 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 2045 (1981). United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978).

The sixth and tenth circuits allow searches such as the one upheld by the fifth circuit in *Steagald*. *See* United States v. Harper, 550 F.2d 610 (10th Cir. 1977), *cert. denied*, 434 U.S. 837 (1977), United States v. McKinney, 379 F.2d 259 (6th Cir. 1967). The second circuit, in dictum, conforms with the fifth circuit. *Cf.* United States v. Manley, 632 F.2d 978 (2d Cir. 1980) (upholding a warrantless search under the authority of an arrest warrant executed at another's home thereby convicting occupant of possession of narcotics). The Court of Appeals for the District of Columbia indicates it would require a search warrant in such cases. *See* United States v. Ford, 553 F.2d 145, 159, n.45 (D.C. Cir. 1977). The issue has been left unanswered by two other Courts of Appeal. *See* United States v. Adams, 621 F.2d 41, 44 n.7 (1st Cir. 1980); Rice v. Wolf, 513 F.2d 1280, 1291-92 n.7 (8th Cir. 1975), *rev'd on other grounds sub nom.* Stone

mined it was necessary to resolve the issue in *Steagald*.[11]

A related issue was recently dealt with in the landmark decision of *Payton v. New York*[12] which addressed the fourth amendment protections concerning the requirement that an arrest warrant be issued in order to arrest an individual in his home.[13] Consequently, the *Steagald* Court relied heavily on the precedence set by the *Payton* decision.[14] Assuming that *Payton* accurately describes the law under the fourth amendment and the rights of the subject sought to be arrested,[15] then the logic of the *Steagald* decision is inescapable. In *Payton*, in the absence of exigent circumstances or consent, the Court required an arrest warrant prior to entering the home of the subject sought.[16] This requirement is based upon the need to interject a judicial official to determine whether probable cause exists to justify an intrusion by the government into the home of a private citizen.[17] It logically follows, therefore, that an individual not the subject of an arrest warrant is entitled to at least the same neutral judicial determination prior to a government intrusion into his home.[18] The third party homeowner is not even suspected of a crime.

Prior to addressing the merits of this case, the *Steagald* Court summarily disposed of the Government's contention that the petitioner lacked a

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v. Powell, 428 U.S. 465 (1976).

Most modern commentators agree that a search warrant is needed in situations such as *Steagald*. *See, e.g.*, 2 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 374 (1978); Groot, *Arrests in Private Dwellings*, 67 Va. L. Rev. 275 (1981); Tanzer, *Searching for the Person to be Seized*, 35 Ohio St. L.J. 56 (1975); Comment, *Arresting a Suspect in a Third Party's Home: What is Reasonable?*, 72 J. Crim. L. 292 (1981); Note, *The Neglected Fourth Amendment Problem in Arrests Entries*, 23 Stan. L. Rev. 995 (1971). *But see* Mascolo, *Arrest Warrants and Search Warrants: The Seizure of a Suspect in the Home of a Third Party*, 54 Conn. B.J. 299 (1980).

11. 101 S. Ct. at 1645.

12. 445 U.S. 573 (1980). Payton was a suspect in the murder of a gas station manager two days prior to the search of Payton's home. *Id.* at 576. The police had sufficient evidence to establish probable cause that Payton had committed the murder and proceeded to his apartment with intent to arrest him. *Id.* Without an arrest or search warrant, the officers forced entry into Payton's apartment after their knocking at the door went unanswered. *Id.* This entry lead to the discovery of incriminating evidence found in plain view, which then lead the police to obtain a search warrant, ultimately resulting in Payton's conviction. *Id.* at 607.

13. *Id.* at 573.

14. *See* Steagald v. United States, 101 S. Ct. at 1648-49.

15. *See generally* Comment, *A Suggested Method of Fourth Amendment Analysis After Payton v. New York*, 14 Creighton L. Rev. 907 (1981); Comment, *Criminal Law: Searches and Seizures in the Home*, 4 Am. J. Trial Adv. 447 (1980); Comment, *Payton v. New York: The Supreme Court Reverses the Common Law Warrantless Arrest Requirements*, 58 Den. L. J. 197 (1980); 71 J. Crim. L. 518 (1980); Comment, *Threshold of the Fourth Amendment*, 26 Loyola L. Rev. 730 (1980). *But see* Payton v. New York, 445 U.S. at 603-04. (White, J., and Rehnquist, J., dissenting).

16. 445 U.S. 573 (1980).

17. *Id.* at 586 n.24.

18. *See* Payton v. New York, 445 U.S. at 588-89; *see also* note 10 *supra*.

sufficient expectation of privacy to sustain his fourth amendment claim.[19] The Court refused to consider this contention because the Government had failed to raise it earlier in its opposition to the Court's granting certiorari.[20]

Central to the Court's concern was the fact that the search conducted lacked both the owner's consent and exigent circumstances.[21] The Court immediately reiterated its position that absent such conditions an "entry into a home to conduct a search or make an arrest is unreasonable" according to fourth amendment standards unless a warrant is first obtained.[22] Here, the police had a warrant to arrest Lyons but Steagald's privacy interest in his home was not the subject of the judicial determination authorizing that warrant;[23] accordingly, the issue raised by the petitioner was "whether an arrest warrant—as opposed to a search warrant—[was] adequate to protect the Fourth Amendment interests of persons not named in the warrant."[24]

The privacy expectations of the individual in his home have long been a focus of the Supreme Court when interpreting the parameters of the fourth amendment.[25] Indeed, "physical entry of the home is the chief evil against

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19. 101 S. Ct. at 1646-47 n.5.

20. The Government claimed it was unable to raise the issue prior to this appeal to the Supreme Court because the lower court proceedings in *Steagald* were prior to the Court's abrogation of the automatic standing rule in fourth amendment challenges. *Id.* at 1646 n.5. In *Salvucci v. United States*, 448 U.S. 83 (1980), the Court held that the automatic standing rule, which permits a challenge to a search when one is faced with prosecution resulting from evidence of that search, is limited to persons who had a reasonable expectation of privacy in the area or object of the search. *Id.* at 93. The defendants in *Salvucci* were convicted of mail fraud, by evidence seized at the apartment of another. *Id.* at 85. The *Steagald* Court pointed out that *Salvucci* was decided prior to certiorari being sought in *Steagald* and rather than oppose certiorari on the expectation of privacy issue, the Government made concessions acknowledging Steagald's expectation of privacy. 101 S. Ct. at 1646-47 n.5.

21. 101 S. Ct. at 1644. The exigent circumstances permitting foreclosure of the search warrant requirement have been painstakenly articulated in *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (warrantless search for suspect at his home wherein incriminating evidence seized following a hold-up held to be exigent circumstance). The offense involved must be one of violence. *Id.* at 392. The suspect involved, must be reasonably believed armed, and, there must be a clear showing of probable cause, as opposed to a mere minimum, to believe the suspect committed the offense. *Id.* at 392-93. Further required is a "strong reason to believe that the suspect is in the premises to be entered." *Id.* Also, there must be a likelihood that an escape would result if the suspect is not immediately apprehended. *Id.* Finally there should be a peaceful entry, if possible. *Id.* Absent consent, such criteria preserve the fourth amendment protections of the individual without imposing an unreasonable burden on the police. *See, e.g.*, note 91 *infra*.

22. *Id.* at 1647. *See* Payton v. New York, 445 U.S. 573 (1980); Johnson v. United States, 333 U.S. 10 (1948).

23. 101 S. Ct. at 1647-48.

24. *Id.*

25. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980); Salvucci v. United States, 448 U.S. 83 (1980); McDonald v. United States, 335 U.S. 451 (1948) (evidence of illegal lottery seized following warrantless search inadmissable); Johnson v. United States, 333 U.S. 10 (1948) (seizure of opium upon search of hotel room when odor of burning opium smelled in hallway held inadmissable). *Cf.* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (the police were en-

which the wording of the Fourth Amendment is directed."[26] The Court's emphasis on the privacy interests of the individual was most recently addressed in *Payton* in which the Court suppressed evidence based on a warrantless search.[27] The crucial point of intrusion is when the entrance of the individual's residence is crossed.[28] The individual's privacy interest is protected in a variety of situations.[29] The *Payton* Court prohibited crossing the entrance without a warrant, absent consent or exigent circumstances.[30] The *Payton* Court readily recognized the privacy interests of the individual in his home when he is sought by the police.[31] The *Steagald* Court accordingly extended the privacy expectations contained in the fourth amendment protections to an individual whose home is searched for someone else.[32]

The purpose of a warrant is to provide an unbiased determination by the judicial branch of whether probable cause exists "to make an arrest or conduct a search."[33] Even though the arrest warrant is the subject of judicial determination, the interest to be protected is distinct from that of a search warrant.[34] The search warrant is designed to protect against unreasonable intrusions into an individual's privacy in his home and thus requires a showing that the object of the search is in a specified place and that it may be legally seized.[35] The arrest warrant, by contrast, is based upon a judicial determination that probable cause exists that the subject named has committed a crime, and hence, the warrant serves to guard against an unreasonable seizure of the person.[36] Accordingly, the focus of judicial determination upon application for an arrest warrant does not include the privacy interests of a third party in his home nor the homeowner's fourth amendment guarantees against unreasonable searches.[37]

The search warrant requirement serves three functions: it allows for a

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joined from warrantless searches of more than 300 homes looking for two murder suspects). The *Lankford* decision expressly recognized the individual's expectation of privacy in his home and the necessary balance required of government interests in combating crime. *Id.* at 201.

26. United States v. United States Dist. Ct., 407 U.S. 297, 313 (1971) (warrantless electronic surveillance in the name of national security held violative of the fourth amendment).

27. 445 U.S. at 603.

28. *Id.* at 589.

29. *Id. See also* note 6 *supra.*

30. *Id.* at 590.

31. *Id.* at 588-89.

32. Steagald v. United States, 101 S. Ct. 1642 (1981), *cf.* Payton v. New York, 445 U.S. 573 (1980) (subject of warrantless search has privacy expectation in his home).

33. Steagald v. United States, 101 S. Ct. at 1647. This requirement concedes the likelihood that an " 'officer engaged in the often competitive enterprise of ferreting out crime,' " may lack the objectivity to balance the evidence against the private individual's interests. *Id.* at 1648 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

34. 101 S. Ct. at 1648.

35. *Id.*

36. *Id.*

37. *See* text accompanying notes 35-36 *supra.*

neutral and detached third person to weigh the facts in determining whether probable cause exists to issue the warrant;[38] it aids in avoiding police abuse of fourth amendment guarantees;[39] and it ensures that the privacy interests of the individual will be balanced against the government interests in crime prevention.[40] The *Steagald* Court has properly sought to establish the fourth amendment limitations on police abuses[41] by specifically elevating the privacy interests of individuals above the inconveniences to police except when consent or exigent circumstances are found to exist.[42]

The split of opinion within the federal circuits[43] in delineating the search warrant requirement was based upon a decision by some courts that an officer's reasonable belief that the subject of the arrest warrant is within the home of a third party justifies a warrantless search of the premises for the subject.[44] However, the advocates of this more liberal view[45] undervalue the privacy expectations of the third party.

The fifth circuit in *Steagald*[46] based its opinion on its prior ruling in *United States v. Cravero.*[47] In *Cravero,* the search was made subsequent to

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38. *See* W. LAFAVE, *supra* note 10, at 384-85.

39. *Id.* Absent this judicial interjection, the potential for police abuse is evidenced by an examination of recent cases. *See* note 10 *supra.* Indeed, the fourth circuit was faced with just such abusive police conduct where a multitude of searches were based upon anonymous telephone tips and were accomplished under the presumed authority of valid arrest warrants in lieu of search warrants. Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). Similarly, in *Wallace v. King,* 626 F.2d 1157 (4th Cir. 1980), *cert. denied,* 101 S. Ct. 2045 (1981), the searches were conducted without search warrants in an attempt to execute an arrest warrant at the home of a third party. 626 F.2d at 1158-59. The arrest warrant resulted from the refusal of the subject of the warrant "to obey a court order in a domestic relations matter involving" child custody and the searches were prompted by telephone calls from the subject's estranged husband. *Id.* at 1159. The requirement of a search warrant aids in reducing this police abuse of fourth amendment freedoms.

A neutral judicial determination must be sought to protect the privacy interests of a third party prior to government intrusion in such a situation regardless of the reasonableness of the officer's belief that the subject of the arrest warrant is on the premises. *See id.* at 1161.

40. *See* W. LAFAVE, *supra* note 10, at 384-85.

41. It is questionable whether adequate civil remedies exist in either motions to suppress unlawfully seized evidence or damage suits for fourth amendment infringements. Steagald v. United States, 101 S. Ct. at 1649. The *Steagald* Court recognized the inadequacy of these remedies and pointed out that previously the Court has found " '[t]he [Fourth] Amendment is designed to prevent, not simply to redress, unlawful police action.' " *Id.* (quoting Chimel v. California, 395 U.S. 752, 766 n.12 (1969)).

42. 101 S. Ct. at 1652-53.

43. *See* note 10 *supra.*

44. *See, e.g.,* United States v. Harper, 550 F.2d 610 (10th Cir.), *cert. denied,* 434 U.S. 837 (1977); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967). *See also* note 10 *supra.*

45. *See, e.g.,* 101 S. Ct. at 1653 (Rehnquist, J., dissenting).

46. United States v. Gaultney, 606 F.2d 540 (1979) *rev'd sub nom.* Steagald v. United States, 101 S. Ct. 1642 (1981).

47. 606 F.2d at 544 (citing United States v. Cravero, 545 F.2d at 421).

entry and execution of arrest warrants for subjects within the residence of a third party.[48] Upon hearing a scuffling noise in an adjacent room, the officers forced an entry which resulted in the discovery of cocaine and related paraphernalia in plain view.[49] The *Cravero* court authorized this search under the protective sweep doctrine which provides that an "officer can search a suspect's person for weapons and evidence that could be destroyed, as well as the immediate area where the arrestee could grab a weapon, [but] the policeman cannot routinely search other rooms absent some exception to the search warrant requirement."[50] The *Cravero* court paid little attention to the privacy interests of the individual.[51] The fifth circuit failed to recognize the long-standing emphasis the Supreme Court has placed upon privacy expectations of individuals.

Another federal court to hold an arrest warrant sufficient to permit the search of a third party's home was the tenth circuit,[52] where the court reasoned that the judicial determination resulting in the arrest warrant does not require consideration of the place of arrest.[53] This court similarly lost sight of the privacy interests of the individual which are not examined when determining whether there is probable cause for the arrest warrant since the third party is not suspected of a criminal offense at that time.[54]

The remaining federal circuit to rely on the reasonable belief standard is the Sixth Circuit Court of Appeals.[55] In *United States v. McKinney*,[56] the search of a third party's premises was based upon the authority presumed to exist in law enforcement officials when a valid arrest warrant had been issued.[57] The *McKinney* court found the existence of the arrest warrant to be a type of exigent circumstance.[58] The court based this conclusion upon

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48. 545 F.2d at 413.

49. *Id.*

50. 545 F.2d at 417-18 (citing Chimel v. California, 395 U.S. 752, 763 (1965)). The *Cravero* court found this exception to include situations threatening the officers' safety suggested by the scuffling sounds and the possibility that yet another subject of a warrant sought by them was therein. 545 F.2d at 417-18.

51. *See* 545 F.2d at 418.

52. United States v. Harper, 550 F.2d 610 (10th Cir.), *cert. denied*, 434 U.S. 837 (1977) (search of third party home resulting in seizure of heroin under authority of arrest warrant admitted into evidence).

53. *Id.* at 613. The court relied on the federal rule of criminal procedure which states that an arrest warrant "requires only judicial determination that there is probable cause to arrest a named person for a certain offense, without consideration of the place in which the arrest is to be made." *Id.* (citing FED. R. CRIM. P. 4(a) (1976)).

54. *See* United States v. Harper, 550 F.2d at 613-14. *Cf.* Lankford v. Gelston, 364 F.2d 197, 201-02 (4th Cir. 1966) (no probable cause to search multiple homes).

55. United States v. McKinney, 379 F.2d 259 (6th Cir. 1967).

56. *Id.*

57. *Id.* at 262-63 (where arrest warrant issued for suspected bankrobber, evidence of his presence within defendant's apartment was admissable in convicting lessee for aiding a fugitive).

58. *Id.* at 263.

the inherent mobility of the subject and the magistrate's determination of probable cause that the subject had committed a crime.[59] This posture impliedly acknowledged the fourth amendment limits on government intrusions through the court's reliance on exigent circumstances; however, it ignores the third party's interests in so doing. The court's stance would eliminate the privacy expectations of all third persons not named in an arrest warrant whenever the police had a reasonable belief that the subject was located on the premises of another. The Supreme Court, however, does not ignore these important privacy interests.[60]

Not every Justice in *Steagald* was in agreement that the warrantless search of a third party's home absent consent or exigent circumstances was unconstitutional.[61] In his dissent, Justice Rehnquist viewed the intrusion upon the privacy of third parties as involving "incidental infringements" that are constitutionally tolerable if arising during actions authorized by a warrant for a different purpose.[62] Justice Rehnquist based his reasoning on *Dalia v. United States*[63] where the Court held the police were not required to have a search warrant to enter a business in order to secret an eavesdropping device after obtaining a warrant authorizing the device itself.[64] Because there was probable cause to suspect that the defendant in *Dalia* was involved in a conspiracy to transport, receive and possess stolen goods in interstate commerce,[65] a warrant was issued authorizing electronic surveillance of the petitioner's telephone conversations.[66] Subsequently, the FBI covertly entered the petitioner's place of business and installed the eavesdropping device.[67] Evidence obtained through this eavesdropping was used to convict the defendant and ultimately the Supreme Court affirmed the denial of defendant's motion to suppress that evidence.[68] The facts in *Dalia* did not involve "incidental infringments" on a third party's privacy expectations.

The *Steagald* dissent failed to recognize that no third party's expectation of privacy was involved in the *Dalia* case. The incidental infringement in *Dalia* was permitted because the privacy interests of the subject of the intrusion were previously exposed to judicial scrutiny when the warrant au-

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59. *Id.*

60. *See, e.g.*, Payton v. New York, 445 U.S. at 588 n.26; United States v. United States Dist. Ct., 407 U.S. 297, 316-18 (1972); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948).

61. 101 S. Ct. at 1653 (Rehnquist, J., dissenting).

62. *Id.*

63. *Id.* (citing Dalia v. United States, 426 F. Supp. 862 (1977)).

64. 441 U.S. 247-48.

65. *Id.* at 241-42. The conspiracy statute is 18 U.S.C. § 371 (1976).

66. United States v. Dalia, 426 F. Supp. 862, 863 (1977), *aff'd*, 575 F.2d 1344 (2d Cir. 1978), *aff'd*, 441 U.S. 238 (1979).

67. 426 F. Supp. at 863.

68. United States v. Dalia, 441 U.S. at 259. Petitioner's motion was based upon an argument that a search warrant was required to authorize the placement of the device. 426 F. Supp. at 863-65.

thorizing the device was issued.[69] Indeed, "implicit in the court's order authorizing electronic surveillance is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment."[70]

Justice Rehnquist also suggested that the occupant could voluntarily point out the fugitive within his home; however, this suggestion simply reiterates the consent exception to the search warrant requirement.[71] Likewise, Rehnquist argues that additional expenses would be incurred by law enforcement agencies as a result of *Steagald*.[72] Rehnquist's dissent described the costs of police stakeouts in securing a third party premises until a search warrant could be obtained as resulting in unreasonably increased expenses in combating crime.[73] This argument of added stakeout costs, however, fails to show that any more time is involved in obtaining a search warrant than organizing a stakeout.

In *Steagald*, the Government contended that under the common law an officer's reasonable belief of the suspect's presence within a third party's home allowed for a warrantless search of that home.[74] In response, the Supreme Court stated that the application of the common law to modern problems of crime and criminal procedure does not always permit strict adherence to common law principles.[75] The Court recognized that although

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69. 426 F. Supp. at 863.

70. *Id.* at 866.

71. Steagald v. United States, 101 S. Ct. at 1654. Perhaps this suggestion is based upon the third party's duty to aid the police and allow him to choose between aiding the police or the fugitive. The likelihood of such a situation occurring is dubious at best. Regardless of the existence of such an option to a third person, to force him to choose between loyalty to his peers and his constitutional right of privacy, will only lead to the atrophy of that right.

72. *Id.*

73. Steagald v. United States, 101 S. Ct. at 1654. (Rehnquist, J., dissenting). Organization and preparation of stakeouts requires time just as obtaining a search warrant would require time. Assuming stakeouts require an officer's reasonable belief of the location of the suspect before such would be undertaken, wouldn't that same reasonable belief stated in a search warrant application likely survive judicial scrutiny? The time would be better spent obtaining a search warrant at the outset. In fact the search warrant limitation may reduce the costs of law enforcement by requiring verification of information before needlessly expending time and manpower on a stakeout and a fruitless, warrantless search.

Consider the amount of intelligence information the DEA may have had concerning the activities of Gary Steagald and the possibility of his trafficking large quantities of cocaine. Approximately 43 pounds of cocaine were seized at the Steagald residence. United States v. Gaultney, 606 F.2d 540, 544 n.4 (5th Cir. 1979). The prosecution further revealed that the cocaine, upon its being shipped to the United States from South America, was believed to be hidden inside table legs of furniture owned by Steagald. Brief for Respondent at 2, Steagald v. United States, 101 S. Ct. 1642 (1981). Based on the myriad of sources from which the police can obtain information, there was a strong probability that the DEA suspected defendant's alleged illegal activities and used the believed location of Lyons as an opportunity to search the defendant's premises without a search warrant.

74. 101 S. Ct. at 1650.

75. *Id.* at 1650 n.10.

common law rules may be of assistance in ascertaining the parameters of the fourth amendment, they are not to be applied so mechanically as to result in outdated law in our modern society.[76] Treatises on the common law have suggested that a constable could "break open doors" to execute an arrest warrant in the home of a third party.[77] Such commentators have relied on an English decision, *Semayne's Case*,[78] decided almost 400 years ago. However, *Semayne* is of limited value to the situation faced by *Steagald*. The facts in *Semayne* involved a sheriff's authority to serve civil process, and it was only in dictum that the court stated that one's home is not the castle of another and that it is not protection for a "person who flies to his house."[79] This statement suggests that English common law limited warrantless intrusions of the government to circumstances involving hot pursuit.[80] However, neither *Semayne* nor the limited common law commentaries address the issue of the rights of the third person. The history of the fourth amendment[81] suggests that the shortcoming of an arrest warrant, when used as authority to enter the home of a third person, is that it lacks a judicial determination to protect the privacy interests of the third party not named in the warrant.[82] The supporters of the reasonable belief standard have little support from the common law and overlook the third party's constitutional expectations of privacy.[83] There is limited applicability of the common law to mod-

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76. *Id.* at 1651. The changes between early common law circumstances and our modern society become apparent when considering the areas into which the fourth amendment is now applied. *Cf.*, Katz v. United States, 389 U.S. 347 (1967) (fourth amendment protections applied to eavesdropping devices used in obtaining evidence of unlawful transmission of wagering information across state lines).

77. Steagald v. United States, 101 S. Ct. at 1650 (citing 1 J. CHITTY, CRIMINAL LAW 57 (1816); M. FOSTER, CROWN CASES 320 (1762); 2 M. HALE, PLEAS OF THE CROWN 117 (1736)).

78. 77 Eng. Rep. 194 (1603).

79. *Id.* at 198.

80. Steagald v. United States, 101 S. Ct. at 1650. The Supreme Court has recognized "hot pursuit" as falling within exigent circumstances and thus it is an exception to the warrant requirements of the fourth amendment. *Id.* at 1651.

81. The history of the fourth amendment suggests that the Framers sought to limit searches absent a warrant. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, (1937). *See also* Payton v. United States, 445 U.S. at 611-12 (1980) (White, J., dissenting opinion). The threat sought to be dissolved by the Framers was that of general warrants and writs of assistance. N. LASSON, at 29. General warrants and writs of assistance were arbitrary powers granted freely by the King to permit arrests and searches at the King's own volition. *Id.* The complaint against both warrants was that they lacked any neutral judicial determination prior to their issuance. Stanford v. Texas, 379 U.S. 476, 481, 485 (1965) (search warrant seeking evidence of communist party membership held a nullity for failure to specifically name the things to be seized). The *Stanford* Court analogized this lack of particularity to the common law general warrants and writs of assistance. *Id.* at 485-86.

82. *See* Steagald v. United States, 101 S. Ct. at 1651-52. The *Steagald* Court concluded: "[w]e do not believe that the Framers of the Fourth Amendment would have condoned such a result." *Id.*

83. *Cf.* Steagald v. United States, 101 S. Ct. 1642 (1981) (advocates of the common law

ern circumstances wherein search and seizure issues often arise.[84] The greater mobility of suspects and the sophistication of criminal activities has been closely followed by improved police techniques. When fourth amendment protections are brought into play by techniques such as electronic surveillance, the common law seems ill-prepared to adequately address the privacy interests of the individual.

The practical problems suggested by the Government do not appear to exist to the degree that they would like the Court to believe. As the Court noted in *Steagald*,[85] several circuits require a search warrant when attempting to execute an arrest warrant at the home of a third person[86] and the record does not suggest law enforcement has been hindered as a result.[87] Also, the "hot pursuit" classification reduces the situations wherein a search warrant will be required.[88] An arrest warrant authorizes intrusion into the suspect's own residence[89] and warrantless felony arrests are not prohibited in a public place wherein probable cause exists.[90] The inconvenience is more presumed than real.[91]

The requirements of *Steagald* do not place an overly burdensome restriction on the police in these situations. The Court is cogently saying to law enforcement officials that absent exigent circumstances or the owner's consent, a warrantless intrusion into the privacy of the home of a third per-

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position elevate the inconveniences to law enforcement above the privacy interests of the individual); Payton v. New York, 445 U.S. 573 (1980) (the disadvantages to law enforcement cited in *Steagald* were argued preemptive of an individual's privacy interests to permit a warrantless entry into a home to effect an arrest of the resident therein).

84. *See* notes 26, 75 and 76 *supra*.

85. Steagald v. United States, 101 S. Ct. at 1652 n.13.

86. *See* note 10 *supra*.

87. Steagald v. United States, 101 S. Ct. at 1652 n.13.

88. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967) (immediate pursuit of armed robbery suspect into another's home where search resulted held valid based upon the exigency of the circumstances). *See also* United States v. Santana, 427 U.S. 38 (1976) (undercover narcotics buy-bust complicated by suspect fleeing into her apartment; the warrantless search qualified as exigent circumstances).

89. Payton v. New York, 430 U.S. at 602-03.

90. United States v. Watson, 423 U.S. 411 (1976) (probable cause derived through information from reliable informant permitted warrantless arrest in restaurant for felony possession of stolen mail).

91. *See, e.g.*, Gaultney v. United States, 606 F.2d at 542-43. The DEA had received information that a fugitive could be found at a specific telephone number. *Id.* Despite verifying the existence of the arrest warrant, two days elapsed before an attempt was made to execute the arrest warrant. *Id.* The raid was planned from the federal courthouse in Atlanta where magistrates were available. Steagald v. United States, 101 S. Ct. at 1652. If a magistrate was not available a search warrant was obtainable by telephone. *Id.* Under Federal Rules of Criminal Procedure 41(c)(2) (1979) it is stated: "[i]f the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means." FED. R. CRIM. P. 41(c)(2) (1979).

son is prohibited by the fourth amendment.[92] In other words, if the police officer has the time to seek a search warrant, he must do so because "[w]hatever practical problems remain . . . cannot outweigh the constitutional interests at stake."[93]

The Supreme Court has dogmatically acknowledged the privacy interests of the individual when juxtaposed against the governmental interests in combating crime, absent consent or exigent circumstances. Such was the emphasis in *Payton*[94] and *Steagald* logically extends that protection to include homes of persons not named in an arrest warrant.[95] The purpose of the warrant requirement is to interject a neutral and impartial third party to determine whether probable cause exists.[96] An arrest warrant does not address the privacy interests of third parties in that the judicial determination of probable cause sufficient to authorize an arrest warrant is focusing on the subject suspected of a crime.[97] A man's home is still his castle and it still holds true in the Court's reasoning that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[98]

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92. 101 S. Ct. at 1649.
93. *Id.* at 1653.
94. 430 U.S. 573 (1980).
95. 101 S. Ct. 1642 (1981).
96. *Id.* at 1647.
97. *See* text accompanying notes 34-37 *supra*.
98. United States v. United States Dist. Ct., 407 U.S. 297, 313 (1971).