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Absent Exigent Circumstances, Warrantless Felony Arrest Effected in Suspect's Home Violates Fourth Amendment Guarantees (United States v. Reed)

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ABSENT EXIGENT CIRCUMSTANCES, WARRANTLESS FELONY ARREST EFFECTED IN SUSPECT'S HOME VIOLATES FOURTH AMENDMENT GUARANTEES

United States v. Reed

The fourth amendment guarantees to citizens the right to be free from unreasonable searches and seizures of their persons and property.[1] It is well settled that searches are unreasonable *per se* when conducted without a warrant in the absence of exigent circumstances.[2] In contrast, the Supreme Court has held that a warrantless arrest in a public place does not violate the fourth amendment[3] when based on probable cause.[4] Whether the same rule applies to

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[1] The fourth amendment provides:

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

U.S. CONST. amend. IV. The fourth amendment prohibition against unreasonable search and seizure provides the standard for the courts to evaluate law enforcement practices. *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976) (warrantless arrests effected in public places reasonable); Gerstein v. Pugh, 420 U.S. 103 (1975) (detainment unreasonable absent judicial determination as to probable cause); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (warrantless search not unreasonable if evidence seized in plain view); Katz v. United States, 389 U.S. 347 (1967) (warrantless wiretapping of phone booth unreasonable); Warden v. Hayden, 387 U.S. 294 (1967) (warrantless entry and search not unreasonable when in hot pursuit).

[2] *See, e.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338, 358 (1977); United States v. United States Dist. Court, 407 U.S. 297, 315-16 (1972); Katz v. United States, 389 U.S. 347, 357 (1967); Stoner v. California, 376 U.S. 483, 486-87 (1964); Chapman v. United States, 365 U.S. 610, 613-15 (1961); Jones v. United States, 357 U.S. 493, 497-99 (1958). In Trupiano v. United States, 334 U.S. 699, 703-06 (1948), the Supreme Court established the categorical rule that the fourth amendment is violated when the police conduct a warrantless search although a warrant could have been obtained. In United States v. Rabinowitz, 339 U.S. 56 (1950), however, the Court overruled *Trupiano*, stating that the reasonableness of official conduct under the fourth amendment should be evaluated on a case-by-case basis. *Id.* at 66. Nineteen years later, in Chimel v. California, 395 U.S. 752 (1969), the Court articulated the search incident to arrest doctrine, *see* note 36 *infra*, and expressly overruled the *Rabinowitz* principle. 395 U.S. at 768. The *Chimel* Court stated that "although '[t]he recurring questions of the reasonableness of searches' depend upon the facts and circumstances—the total atmosphere of the case,' those facts and circumstances must be viewed in the light of established Fourth Amendment principles." *Id.* at 765 (quoting United States v. Rabinowitz, 339 U.S. at 63, 66 (citation omitted)).

[3] United States v. Watson, 423 U.S. 411 (1976). In *Watson*, the Court reaffirmed the common law rule permitting warrantless felony arrests where the officer either witnessed the offense or had reasonable grounds for believing that an offense had been committed. *See* Carroll v. United States, 267 U.S. 132, 156-57 (1925); Kurtz v. Moffitt, 115 U.S. 487, 504 (1885); E. FISHER, LAWS OF ARREST § 57 (1967). *See generally* C. BERRY, ARREST, SEARCH AND SEIZURE § 14(a) (1973); Comment, Watson *and* Ramey: *The Balance of Interest In Non-Exigent Felony Arrests*, 13 SAN DIEGO L. REV. 838, 844-46 (1976).

[4] Under the fourth amendment, arrests made with or without a warrant must be based

arrests effected in the home, however, has not yet been addressed by the Court.[5] Faced with this question in *United States v. Reed*,[6] the Second Circuit recently held that a warrantless felony arrest effected in a suspect's home is prohibited by the fourth amendment, regardless of the existence of probable cause and statutory authority, if made in the absence of exigent circumstances.[7]

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on probable cause. Davis v. Mississippi, 394 U.S. 721 (1969); Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959); Giordenello v. United States, 357 U.S. 480 (1958). An arrest warrant is valid only if issued after a determination of probable cause *has been* made by a neutral and detached magistrate. *See* Shadwick v. City of Tampa, 407 U.S. 345, 354 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 449-51 (1971); Johnson v. United States, 333 U.S. 10, 13-14 (1948). The magistrate's inquiry should focus on whether the facts establish a reasonable basis for believing that an offense has been committed and that the defendant committed it. *See* Giordenello v. United States, 357 U.S. 480, 485 (1958). *See also,* Whiteley v. Warden, 401 U.S. 560, 564-65 (1971); Henry v. United States, 361 U.S. 98, 101-02 (1959).

[5] *See, e.g.*, United States v. Santana, 427 U.S. 38, 45 (1976) (Marshall, J., dissenting); United States v. Watson, 423 U.S. 411, 418 n.6, 432-33 (Powell, J., concurring), 433 (Stewart, J., concurring) (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 480-81 (1971). *See also* United States v. Berenguer, 562 F.2d 206, 210 (2d Cir. 1977); United States v. Easter, 552 F.2d 230, 235 (8th Cir.) (Heaney, J., dissenting) *cert. denied*, 434 U.S. 844 (1977); Dorman v. United States, 435 F.2d 385, 388-89 (D.C. Cir. 1970) (en banc). Over 20 years ago, the Supreme Court noted that warrantless arrests in the home present a difficult question under the fourth amendment. Jones v. United States, 357 U.S. 493 (1958). In *Jones*, federal agents arrested the defendant by means of a forcible nighttime entry, although they had obtained only a daytime search warrant. *Id.* at 494-95. The Supreme Court held that the entry was unauthorized under the terms of the warrant and ordered the seized evidence suppressed. *Id.* at 497, 500. Rejecting the government's argument that, even in the absence of a valid search warrant, the entry was justified because the agents' purpose was to arrest the defendant, the Court stated:

> These contentions, if open to the Government here, would confront us with a grave constitutional question, namely, whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment.

Id. at 499-500. Despite the language in *Jones*, the issue of warrantless home arrests, until recently, had received little attention. In fact, many have assumed that such entries are an integral part of the police power to arrest. *See* Haddad, *Arrest, Search and Seizure: Six Unexamined Issues in Illinois Law*, 26 DE PAUL L. REV. 492, 515-16 (1977); Recent Development, *Warrantless Arrest by Police Survive a Constitutional Challenge*—United States v. Watson, 14 AM. CRIM. L. REV. 193, 207-14 (1976). *See also* note 27 *infra*. The Supreme Court, in Coolidge v. New Hampshire, 403 U.S. 443, 475-76 (1971), noted that fourth amendment litigation in this area has tended to focus on issues such as the existence of probable cause and whether a search made subsequent to an arrest exceeded permissible bounds. *See, e.g.*, Fisher v. Volz, 496 F.2d 333, 338 (3d Cir. 1974); United States v. Mapp, 476 F.2d 67, 80 (2d Cir. 1973). The *Coolidge* Court also suggested that, in focusing on the issues of probable cause and the propriety of searches, the courts have been diverted from "the more fundamental question of when the police may arrest a man in his house without a warrant." 403 U.S. at 476.

[6] 572 F.2d 412 (2d Cir. 1978).

[7] *Id.* at 418.

In *Reed,* an undercover agent from the Drug Enforcement Administration (DEA) purchased heroin from Nancy Reed and Morris Goldsmith on three separate occasions.[8] Several months after the last sale, DEA agents proceeded without a warrant to Reed's apartment for the purpose of arresting Reed and Goldsmith.[9] After entering the apartment without force,[10] the agents found and seized address books that belonged to Reed and appeared to contain the names and telephone numbers of known drug dealers.[11] At trial, Reed moved to suppress the admission of the books into evidence, contending that the agents' entry without an arrest warrant was unlawful.[12] The district court denied her motion on the ground that the DEA agents had statutory authority to make warrantless felony arrests based on probable cause.[13] Both defendants subsequently were convicted on two counts of distributing heroin.[14]

On appeal, the Second Circuit noted the Supreme Court's reluctance to determine the constitutionality of warrantless arrests effected in the home and attempted to discern the proper rule from cases in which the Court considered other fourth amendment is-

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[8] *Id.* at 414-15.

[9] *Id.*

[10] The circumstances surrounding the entry and arrest were disputed at trial. The defendants claimed that the agents entered with exposed weapons after the apartment door was opened. *Id.* at 415. Reed also testified that, upon entering, the agents immediately rushed into the bedroom where they found and arrested Goldsmith. Goldsmith claimed that the agents' weapons were drawn during the arrest. *Id.* at 415-16. The agents, in contrast, testified that their weapons were not drawn and that they had proceeded peaceably in their search for Goldsmith. *Id.* The *Reed* court did not appear to find the discrepancy significant. *See* note 20 *infra.*

[11] 572 F.2d at 415-16. One of the agents testified that he noticed an address book lying open on a telephone table in the living room-dining room and that he seized it along with two others after recognizing the alias of a known narcotics dealer. *Id.* at 416. Reed, however, testified that the agent removed one book from a kitchen drawer and one from her pocketbook. *Id.* The court did not attempt to reconcile the conflicting statements.

[12] *Id.* at 417 n.2.

[13] *Id.* at 414, 417 n.2. The DEA agents were empowered to make a warrantless arrest under § 508 of the Comprehensive Drug Abuse Prevention and Control act of 1970, 21 U.S.C. § 878 (1976), and the defendants did not contest the existence of probable cause. 572 F.2d at 418 n.4.

Reed did not make a suppression motion prior to trial in accordance with FED. R. CRIM. P. 12(b) (1975). Nevertheless, the district court found that the objection was not barred under Rule 12(f), since the prosecuting attorney had agreed to an exchange of evidence but failed to give Reed prior notice of his intention to use the address book at trial. 572 F.2d at 417 n.2; *see* FED. R. CRIM. P. 12(d), 16. Thus, although the lower court ruled against Reed's suppression motion, the issue of the legality of the arrest was preserved for appeal. 572 F.2d at 417 n.2.

[14] 572 F.2d at 414; *see* Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 202, 401(a)(1), 401(b)(1)(A)-(B), 406, 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A)-(B), 846 (1976).

sues.[15] Writing for a unanimous Second Circuit panel,[16] Judge Meskill distinguished an arrest effected in a public place from an arrest made in the home.[17] Emphasizing the reasonable expectation of privacy protected by the fourth amendment, he observed that the personal intrusion necessarily accompanying an arrest is significantly magnified when coupled with an incursion on the "sanctity of the home."[18] Thus, the *Reed* court concluded, in light of the substantial invasion of privacy involved, warrantless felony arrests conducted in the home are impermissible in the absence of exigent circumstances.[19] Since Reed was inside her home at the time of her arrest[20] and there was no apparent justification for the agents' fail-

[15] 572 F.2d at 417-20; *see* note 5 *supra*. The *Reed* court noted that, although the issue has not been definitively resolved, "the [Supreme] Court has offered important signals as to how it ought to be handled." 572 F.2d at 418. In Coolidge v. New Hampshire, 403 U.S. 443, 477-78 (1971), for example, the Court stated that its decision in Warden v. Hayden, 387 U.S. 294 (1967), which established the "hot pursuit" justification for warrantless entry to arrest, "certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." 403 U.S. at 480-81. Moreover, the *Reed* court noted, in United States v. Watson, 423 U.S. 411, 423 (1976), the Supreme Court indicated a clear judicial preference for the securing of arrest warrants whenever possible. 572 F.2d at 419 (quoting United States v. Watson, 423 U.S. 411, 427-29 (1976) (Powell, J., concurring)). *See also* 572 F.2d at 422 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976); South Dakota v. Opperman, 428 U.S. 364, 367 (1976); Gerstein v. Pugh, 420 U.S. 103, 114 (1975); United States v. United States Dist. Court, 407 U.S. 297, 313 (1972); Warden v. Hayden, 387 U.S. 294, 301 (1967); Miller v. United States, 357 U.S. 301, 307 (1958); McDonald v. United States, 335 U.S. 451, 453, 456 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948)).

[16] The *Reed* panel was comprised of Circuit Judges Meskill and Feinberg and Judge Bartels of the Eastern District of New York, who sat by designation.

[17] 572 F.2d at 422.

[18] *Id.* at 423. Conceding that the exacting rules governing warrantless searches are not applicable in the area of warrantless public arrests, Judge Meskill nevertheless concluded that the rule governing public arrests does not afford sufficient protection when the arrest is made "in an intrinsically private place." *Id.* at 422. In support of this position, the court cited a number of cases indicating that the fourth amendment provides the greatest degree of protection when the search and seizure involves a private dwelling. *Id.* (citing United States v. Martinez-Fuerte, 428 U.S. 543 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976); United States v. United States Dist. Court, 407 U.S. 297 (1972); Warden v. Hayden, 387 U.S. 294 (1967); Silverman v. United States, 365 U.S. 505 (1961); Miller v. United States, 357 U.S. 301 (1958); McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948); Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970); Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975)).

[19] 572 F.2d at 418, 423.

[20] *Id.* at 422-23. The Second Circuit attached little significance to the question whether Reed was arrested at the door to her apartment, as the district court found, or in her living room-dining room, as Reed contended since, at the time of her arrest, she was not in a public area of the apartment bulding or " 'as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house.' " *Id.* at 423 (quoting United States v. Santana, 427 U.S. 38, 42 (1976)). In addition, the court stated that it would have been extremely difficult for the government to prove that Reed consented to a search or arrest. Although no such argument was advanced, the court noted:

ure to secure a warrant,[21] the court ruled that the seized evidence should have been suppressed and reversed Reed's conviction.[22]

The *Reed* holding, it is submitted, represents a salutary expansion of the fourth amendment protection against unreasonable invasions of the right of privacy.[23] When the government seeks to intrude

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> We do not believe that the fact that Reed opened the door to her apartment in response to the knock of three armed federal agents operated in such a way as to eradicate her Fourth Amendment privacy interests. To hold otherwise would be to present occupants with an unfair dilemma, to say the least—either open the door and thereby forfeit cherished privacy interests or refuse to open the door and thereby run the risk of creating the appearance of an "exigency" sufficient to justify a forcible entry. This would hardly seem fair in situations that present no exigent circumstances in the first place.

572 F.2d at 423 n.9 (citations ommitted).

[21] To measure the existence of exigency, the Second Circuit utilized a test devised by the District of Columbia Circuit in Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en banc). The *Dorman* test requires:

> First, that a grave offense is involved, particularly one that is a crime of violence. . . .
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> Second, and obviously inter-related, that the suspect is reasonably believed to be armed. . . .
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> Third, that there exists not merely the minimum of probable cause, that is requisite even when a warrant has been issued, but beyond that a clear showing of probable cause, including "reasonably trustworthy information," to believe that the suspect committed the crime involved.
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> Fourth, strong reason to believe that the suspect is in the premises being entered.
>
> Fifth, a likelihood that the suspect will escape if not swiftly apprehended.
>
> Sixth, the circumstance that the entry, though not consented, is made peaceably.

Id. at 392-93 (footnotes omitted). The *Dorman* court also stated that the reasonableness of a warrantless intrusion must be examined more critically in cases involving a nighttime entry made for the purpose of arrest. *Id.* at 393. Applying the *Dorman* criteria to the facts in *Reed*, the Second Circuit concluded that the warrantless arrest could not be justified on the grounds of exigency. 572 F.2d at 424-25.

[22] 572 F.2d at 425, 427. Since the agents' entry was unlawful, the phone books that were seized as evidence in "plain view" were held inadmissible. *Id.* at 425. The court rejected the government's argument that use of the books was "harmless" error, noting that they were used at trial to counter Reed's defense of entrapment. *Id.* Judge Meskill refused to reverse defendant Goldsmith's conviction, however, since Goldsmith failed to raise the issue of the legality of his arrest at trial. Moreover, the court noted that Goldsmith "specifically declin[ed] on a number of occasions to associate himself with Reed's efforts to gain suppression of the books." *Id.* at 417 n.2.

[23] The purpose of the fourth amendment is to guard against unreasonable intrusions by the government into a person's expectation of privacy. *See, e.g.*, United States v. Santana, 427 U.S. 38, 42 (1976); United States v. Watson, 423 U.S. 411, 445-48 (1976) (Marshall, J., dissenting); Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 510-15 (1971) (White, J., concurring and dissenting); Katz v. United States, 389 U.S. 347, 350-52 (1967); Warden v. Hayden, 387 U.S. 294, 312-13, 323 (1967) (Douglas, J., dissenting); Jones v. United States, 357 U.S. 493, 497-99 (1958); McDonald v. United States, 335 U.S. 451, 453, 456 (1948); Johnson v. United States, 333 U.S. 10, 13-14 (1948). In *Santana*, the Supreme Court held that the warrantless public arrest rule, *see* note 3 and accompanying

upon the sanctity of the home, the need for a detached magistrate to determine whether probable cause exists is underscored and the standard for evaluating what is reasonable under the fourth amendment should become more exacting.[24] While these principles were developed primarily in the area of government *searches,*[25] they would appear to be equally applicable when the invasion is for the purpose of effecting an in-home *arrest.*[26]

Proponents of a rule permitting police to arrest a suspect in his home without a warrant often point out that the courts traditionally have treated searches and arrests as analytically distinct issues.[27] In

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text *supra,* is applicable when the suspect is arrested while standing in the open doorway of his home. 427 U.S. at 42. The *Santana* Court reasoned that a citizen who stands in a doorway does not have a "reasonable expectation of privacy" within the coverage of the fourth amendment. *Id.* It is submitted, however, that the *Santana* ruling has no application in cases such as *Reed,* where the arrestee was summoned from her home by a police knock.

[24] The Supreme Court has taken the position that, although the fourth amendment "protects people, not places," the nature of the place in which the intrusion occurs is nevertheless significant in measuring the citizen's expectation of privacy. Katz v. United States, 389 U.S. 347, 351 (1967). Concern for safeguarding a reasonable expectation of privacy grows as the citizen retires from public to private places since "[t]he right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." Johnson v. United States, 333 U.S. 10, 14 (1948). Thus, while the fourth amendment protections have been extended to govern such non-physical intrusions as electronic surveliance, it is recognized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

[25] *See* note 2 and accompanying text *supra.*

[26] The Supreme Court has acknowledged the difficulty involved in reconciling the principle that warrantless arrests are permissible with the general rule that warrantless searches are *per se* unreasonable:

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is *per se* legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are *per se* unreasonable in the absence of some one of a number of well defined "exigent circumstances."

Coolidge v. New Hampshire, 403 U.S. 443, 477-78 (1971).

[27] *See* United States v. Fairchild, 526 F.2d 185, 188 n.6 (7th Cir. 1975), *cert.denied,* 425 U.S. 942 (1976); United States v. Hall, 348 F.2d 837, 841 (2d Cir. 1965); People v. Payton, 45 N.Y.2d 300, 311-12, 380 N.E.2d 224, 229-30, 408 N.Y.S.2d 395, 400-01 (1978). *See also* United States v. Watson, 423 U.S. 411, 417 (1976). English common law courts consistently recognized the validity of warrantless arrests. One commentator noted that the common-law rule was so severe that "[a]ny person having 'reasonable suspicion' that another had committed a felony could arrest him and deliver him into official custody. If necessary to effectuate such an arrest, the person making the arrest, whether a private citizen or constable, could break into a house to take the offender into custody." Barrett, *Personal Rights, Property Rights, and the Fourth Amendment,* 1960 SUP. CT. REV. 46, 49; *see* 1 J. CHITTY, CRIMINAL LAW 11-71 (1816). Influenced by the common law approach, courts in the United States took a similar view in cases involving police arrests. *E.g.,* Grau v. Forge, 183 Ky. 521, 209 S.W. 369 (1919); Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242 (1924). *See also Ex parte* Rhodes, 202 Ala. 68, 79 So. 462 (1918); People v. Kilvington, 104 Cal. 86, 37 P. 799 (1894); Robinson v. State,

addition, some argue that an entry into a home to effect an arrest is less intrusive than is an entry for the purpose of conducting a search.[28] Others contend that a warrant requirement would unduly hinder effective law enforcement.[29]

These arguments, however, do not appear to offer a sufficiently cogent basis for sanctioning the invasion of privacy that necessarily results from a rule permitting warrantless arrests in the home. At the outset, it seems clear that, unless property interests are to be accorded greater constitutional protection than individual rights, the fourth amendment demands that a neutral magistrate make the

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93 Ga. 77, 18 S.E. 1018 (1893).

The assumption that the fourth amendment warrant requirement does not extend to arrest has been codified at both the federal and state levels. *E.g.*, 18 U.S.C. §§ 3052, 3053, 3056(a), 3061(a) (1976); 26 U.S.C. § 7607 (1976); ALASKA STAT. § 12.25.030 (1962); FLA. STAT. ANN. § 901.15(1)-(3) (West 1973); MICH. STAT. ANN. § 28.874 (1978); N.Y. CRIM. PRC. LAW § 140.10(1) (McKinney 1971). Section 120.6(1) of the Model Code of Pre-Arraignment Procedure permits law enforcement officers to make warrantless arrests without regard to the arrest site. The only limitation on this authority is contained in § 120.6(3) which prohibits warrantless entry into a private dwelling between 10 P.M. and 7 A.M. except where certain defined exigencies exist. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §120 (Proposed Official Draft 1975).

[28] *See* People v. Payton, 45 N.Y.2d 300, 380 N.E.2d 224, 408 N.Y.S.2d 395, *prob.juris. noted*, 47 U.S.L.W. 3408 (U.S. Dec. 11, 1978). In *Payton*, which was decided after *Reed*, the New York Court of Appeals held that warrantless felony arrests effected in the home based on probable cause do not violate the fourth amendment in the absence of exigency. 45 N.Y.2d at 305, 312, 380 N.E.2d at 225, 230, 408 N.Y.S.2d at 396, 401; *accord*, State v. Perez, 277 So. 2d 778 (Fla.), *cert. denied*, 414 U.S. 1064 (1973); State v. Pontier, 95 Idaho 707, 518 P.2d 969 (1974). The *Payton* court reasoned that warrantless arrests are permissible since a "substantial difference" exists between the intrusion attendant to a warrantless search and that attendant to a warrantless arrest. 45 N.Y.2d at 310, 380 N.E.2d at 228-29, 408 N.Y.S.2d at 399. While the drafters of the Model Code of Pre-Arraignment Procedure, *see* note 27 *supra*, did not wholeheartedly adopt this approach, they stated: "[I]t is far from clear that an arrest in one's home is so much more threatening or humiliating than a street arrest as to justify further restrictions on the police." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.6, at 307 (Proposed Official Draft 1975).

Numerous courts have declined to rule on the validity of warrantless in-home arrests and thus have left standing the common law rule that an officer with probable cause may effect an arrest in the home. *See* United States v. Brown, 540 F.2d 1048 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); United States v. Fairchild, 526 F.2d 185 (7th Cir. 1975), *cert. denied*, 425 U.S. 942 (1976); United States v. Hofman, 488 F.2d 287 (5th Cir. 1974); United States v. Morris, 477 F.2d 657 (5th Cir.), *cert. denied*, 414 U.S. 852 (1973); United States v. Miles, 468 F.2d 482 (3rd Cir. 1972); United States v. Davis, 461 F.2d 1026 (3rd Cir. 1972).

[29] In People v. Payton, 45 N.Y.2d 311, 380 N.E.2d 229, 408 N.Y.S.2d 400, the court concluded that a concern for the suspect's privacy interest must give way to the significant community interest in apprehending criminals and the risk of escape where police must secure a warrant before effecting an in-home arrest. *Accord*, United States v. Fairchild, 526 F.2d 185, 188 n.6 (7th Cir. 1975) (dictum), *cert. denied*, 425 U.S. 942 (1976). In addition, in an earlier decision, the Second Circuit suggested that warrantless arrests should be permitted, since people always have "the same potential mobility as do objects which are in a moving vehicle." United States v. Hall, 348 F.2d 847, 841 (2d Cir. 1965). It appears, however, that the Second Circuit abandoned this line of reasoning in *Reed*.

determination as to the existence of probable cause.[30] That an entry for purposes of effecting an arrest constitutes a less drastic incursion than an entry made to conduct a search seems a particularly questionable ground for drawing a distinction.[31] Moreover, it seems clear that a violation of constitutional rights cannot be justified solely on the ground that the specific practice is supported by tradition or legislative affirmation.[32] Finally, a rule for arrests on private premises that parallels the rule governing searches does not seem unduly burdensome to law enforcement officials, since it would allow the police to forego obtaining a warrant when delay would seriously impede their efforts.[33] Such a rule would involve the use of a

[30] *See* 572 F.2d at 422; United States v. Calhoun, 542 F.2d 1094, 1109-03 (9th Cir. 1976), *cert. denied sub nom.* Stephenson v. United States, 429 U.S. 1064 (1977); Dorman v. United States, 435 F.2d 385, 390-91 (D.C. Cir. 1970) (en banc); People v. Ramey, 16 Cal. 3d 263, 275, 545 P.2d 1333, 1340, 127 Cal. Rptr. 629, 636, *cert. denied,* 429 U.S. 929 (1976); People v. Payton, 45 N.Y.2d 300, 323-24, 380 N.E.2d 224, 237, 408 N.Y.S.2d 395, 408 (1978) (Cooke, J., dissenting), *prob. juris. noted,* 47 U.S.L.W. 3408 (U.S. Dec. 11, 1978). *See generally* Rotenberg *and* Tanzer, *Searching for The Person to Be Seized,* 35 OHIO ST. L.J. 56 (1974); Note, *The Neglected Fourth Amendment Problem in Arrest,* 23 STAN. L. REV. 995 (1971) [hereinafter cited as Note].

[31] Opponents of a bifurcated approach to searches and arrests argue that it "accords an individual's bare possessions a greater quantum of protection than his very person, reviving the values of an era in which property interests were exalted over personal liberties." People v. Payton, 45 N.Y.2d 300, 320, 380 N.E.2d 224, 235, 408 N.Y.S.2d 395, 406 (Cooke, J., dissenting), *prob. juris. noted,* 47 U.S.L.W. 3408 (U.S. Dec. 11, 1978). It also has been argued that a search in the home involves a less drastic invasion of personal liberty than does an arrest, since a search "cause[s] only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality." United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring). On the other hand, an arrested individual suffers the irreversible indignity of detainment and acquires a record that is difficult to expunge, even when he ultimately is found innocent. *See* Barret, *supra* note 27, at 46-47.

[32] In his dissenting opinion in United States v. Watson, 423 U.S. 411 (1976), Justice Marshall argued: "While we can learn from the common law, the ancient rule does not provide a simple answer directly transferable to our system. . . . [Moreover, reliance on] numerous state and federal statutues . . . is no substitute for reasoned analysis . . . . [W]here reasoned analysis shows a practice to be constitutionally deficient, [the Court's] obligation is to the Constitution . . . . " *Id.* at 442-43 (Marshall, J., dissenting). Similarly, in People v. Payton, Judge Cooke noted that "neither antiquity nor legislative unanimity can be determinative of the grave constitutional question presented here and can never be a substitute for reasoned analysis." 45 N.Y.2d at 324, 380 N.E.2d at 238, 408 N.Y.S.2d at 409 (Cooke, J., dissenting) (citations omitted). Both Justice Marshall and Judge Cooke took the position that the fourth amendment mandates consideration of, on the one hand, whether a warrant requirement would further a citizen's privacy interest and, on the other hand, whether such a requirement would unduly burden legitimate law enforcement interests. 423 U.S. at 445 (Marshall, J., dissenting); 45 N.Y.2d at 322, 380 N.E.2d at 236, 408 N.Y.S.2d at 407-08 (Cooke, J., dissenting).

[33] The Supreme Court has noted that, when faced with the question of warrantless search, "[w]e cannot be true to [the fourth amendment] and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." McDonald v. United

"balancing" approach whereby the suspect's privacy interests would be weighed against such factors as the gravity of the offense, the likelihood that the suspect is armed and inside the premises, the persuasiveness of the probable cause showing, the risk of escape and the anticipated manner of entry.[34] If any combination of these factors weigh heavily in favor of immediate arrest, the fourth amendment's "reasonableness" requirement presumably would be satisfied and the need for a warrant overridden.

Arguments supporting a dual standard where the privacy of the home is at stake seem particularly untenable in light of the close theoretical and practical relationship that exists between arrests and searches. An arrest is "quintessentially a seizure" of the person.[35] Moreover, a valid arrest may serve as the predicate for the seizure of evidence without a warrant under the search incident to arrest and plain-view doctrines.[36] Thus, the propriety of warrantless

States, 335 U.S. 451, 456 (1948); *see* Vale v. Louisiana, 399 U.S. 30, 34-35 (1970); United States v. Jeffers, 342 U.S. 48, 51 (1951); Johnson v. United States, 333 U.S. 10, 14-15 (1948). Exceptions to the warrant requirement have been recognized in instances where "exigent circumstances" outweighed the need for obtaining a search warrant. *E.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969); Warden v. Hayden, 387 U.S. 294 (1967). The Court, however, has been reluctant to adopt a general "exigent circumstances" exception in the area of searches similar to that approved in *Reed* for warrantless in-home arrests. *See* Vale v. Louisiana, 399 U.S. 30, 34 (1970); Katz v. United States, 389 U.S. 347, 357 (1967). It should be noted that the rule formulated in *Reed*, with its reliance on the balancing approach suggested in *Dorman*, *see* notes 21 & 34 *supra*, provides a more flexible standard for identifying exigency than does the rule permitting warrantless searches in only a " 'few specifically established and well-delineated' situations." 399 U.S. at 34 (quoting Katz v. United States, 389 U.S. at 357).

[34] *See* Haddad, *supra* note 5, at 520-23. The "balancing" approach to assessing the reasonableness of a warrantless arrest was developed in Dorman v. United States, 435 F.2d 1 (D.C. Cir. 1970) (en banc); *see* note 21 *supra*. The *Dorman* criteria subsequently were endorsed by the Second Circuit in United States v. Jarvis, 560 F.2d 494 (2d Cir. 1977), which involved the use of a "John Doe" arrest warrant to conduct a forcible, daytime entry at the suspect's home. Several other courts have adopted the *Dorman* court's view. *E.g.* United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977); United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976), *cert. denied sub nom.* Stephenson v. United States, 429 U.S. 1064 (1977); Salvador v. United States, 505 F.2d 1348 (8th Cir. 1974); United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); United States v. Shye, 492 F.2d 886 (6th Cir. 1974); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970); Commonwealth v. Forde, 367 Mass. 798, 329 N.E.2d 717 (1975). Some jurisdictions, however, have prohibited warrantless arrests effected in the home in the absence of exigency but have not accepted the *Dorman* criteria as the appropriate test for exigency. *E.g.*, State v. Cook, 115 Ariz. 188, 564 P.2d 877 (1977); People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629, *cert. denied*, 429 U.S. 929 (1976); Laasch v. State, 84 Wis. 2d 587, 267 N.W.2d 278 (1978).

[35] United States v. Watson, 423 U.S. 411, 428-29 (1976) (Powell, J., concurring); *see* Terry v. Ohio, 392 U.S. 1, 10 (1968); Giordenello v. United States, 357 U.S. 480, 485-86 (1958); McGrain v. Daugherty, 273 U.S. 135, 154-57 (1927); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806). *See also* Beck v. Ohio, 379 U.S. 89 (1964); Ker v. California, 374 U.S. 23 (1963).

[36] Under the "plain view" doctrine, a law enforcement officer may seize evidence that he inadvertently discovers when he is properly on the premises. Coolidge v. New Hampshire,

in-home arrests will be determinative of the question whether evidence seized in the arrest is admissible or should be suppressed as the fruit of an illegal search.[37]

It is submitted that the position taken by the Second Circuit in *Reed* provides significant constitutional protections for the citizen while not unduly burdening law enforcement officers in the exercise of their duties. By requiring a showing of exigent circumstances before a warrantless arrest may be effected in a suspect's home, the *Reed* court balanced the individual's privacy interests against the needs of effective law enforcement in a manner consistent with the demands of the fourth amendment.

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403 U.S. 443, 466 (1971). Similarly, under the "search incident to arrest" principle, an officer may make a limited search after a lawful arrest for the purpose of removing weapons and preventing the concealment or destruction of evidence. Chimel v. California, 395 U.S. 752, 762-63 (1969); *see* 8A MOORE'S FEDERAL PRACTICE ¶ 41.07[1][a], at 41-66 (2d ed. 1978); W. RICHARDSON, EVIDENCE § 562(d) (10th ed. J. Prince 1973). *See generally* Note, *supra* note 30, at 1002.

[37] *See* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); FED. R. CRIM. P. 12(b)(3), 41(e).