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# Arrest, Search and Seizure: Six Unexamined Issues in Illinois Law

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# ARREST, SEARCH AND SEIZURE: SIX UNEXAMINED ISSUES IN ILLINOIS LAW

*James B. Haddad**

*Illinois courts have adopted positions on several significant Fourth Amendment questions not yet resolved definitively by the United States Supreme Court. The author discusses the Illinois view in six of these situations: searches incident to arrests which violate state law; searches incident to arrests under unconstitutional statutes; searches with apparent authority; searches of homicide scenes; entries to arrest without probable cause to believe suspect is within; and, warrantless entries to arrest under non-emergency circumstances. The article's unifying theme is that Illinois courts have resolved these questions without recognition of their controversial nature and without discussion of the competing arguments. The author's purpose is not to criticize each Illinois rule but rather to suggest issues which deserve and which have never received substantial consideration.*

Courts do not agree on what constitutes a Fourth Amendment violation. In particular, there are six problem areas in the law of arrest, search and seizure: (1) searches incident to arrests which violate state law; (2) searches incident to arrests under unconstitutional penal statutes or ordinances; (3) searches with the consent of a person who merely appears to have authority over property; (4) homicide scene searches; (5) entries to arrest without probable cause to believe that the suspect is within; and (6) warrantless entries to arrest under non-emergency circumstances. This Article examines rather briefly the Illinois position in each of the first five areas and then places particular emphasis upon the final topic of warrantless non-emergency entry to arrest. The Illinois view on warrantless entries deserves special reconsideration, having been shaped at a relatively early stage of doctrinal development, without the benefit of other reviewing courts' more recent insights.

The purpose of this analysis is not to criticize six Illinois rules, but rather to demonstrate that Illinois reviewing courts have ar-

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rived at their present position in each area without recognizing the complex and controversial nature of the issues before them.[1] Because the United States Supreme Court has not settled any of the questions discussed in this Article,[2] the Illinois rules now determine the fate of Illinois defendants and perhaps will continue to do so for many years to come. It is especially important that Illinois courts devote to each topic the serious attention which it deserves but has not yet received in Illinois.

## I. FIVE RULES BRIEFLY TREATED

### 1. *The Validity of a Search Incident to an Arrest Which Violates State Law*

Illinois courts have long assumed that if an arrest is unlawful for *any* reason, a search incident to that arrest is unreasonable

1. This approach eliminates discussion of Illinois rules which may be most in need of reform. For instance, the Illinois prohibition against relief under any circumstances for a defendant who has been victimized by a perjurious warrant application, in the view of many Illinois lawyers, including the author, is the least defensible of all Illinois Fourth Amendment rules. Nevertheless, People v. Bak, 45 Ill.2d 140, 258 N.E.2d 341, *cert. denied*, 400 U.S. 882 (1970), the opinion which first announced that rule, reflected the judgment of a majority of the court after full consideration of the issues. Although the published opinion does not so reflect, the issues were considered twice, first resulting in a split decision for the defendant and then on rehearing, after a change in the court's composition, resulting in a decision for the prosecution. Perhaps this peculiar history, together with substantial scholarly and federal criticism, will prompt the newly-constituted Supreme Court of Illinois to treat the issue yet another time. *See generally* Herman, *Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit*, 36 OHIO ST. L.J. 721 (1975). *See also* Recent Development, 8 IND. L. REV. 738, 741 n.15 (1975).

2. Although the United States Supreme Court has made reference to most of the issues discussed in this Article, such mention cannot be read as a pledge to resolve them in the near future. For instance, the question of one spouse's authority to consent to a search or seizure of the other's property was left open in Amos v. United States, 255 U.S. 313, 317 (1921), and again bypassed in Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971). Differing court-fashioned spousal-consent rules have prevailed in the individual states for over half a century.

From a practical viewpoint, Stone v. Powell, 96 S.Ct. 3037 (1976), made the state rules even more important. Before *Stone*, a decision such as United States *ex rel.* Pugh v. Pate, 401 F.2d 6 (7th Cir. 1968), *cert. denied*, 394 U.S. 999 (1969) (striking down fictitious-signature affidavits for warrants), although not controlling in Illinois courts, *see* People v. Stansberry, 47 Ill.2d 541, 268 N.E.2d 431, *cert. denied*, 404 U.S. 873 (1971), had enormous impact on Illinois police practice. With *Stone's* almost total elimination of Fourth Amendment claims as grounds for federal habeas corpus relief, even those Illinois law enforcement officials who desire to "play it safe" need give no special deference to the Seventh Circuit's Fourth Amendment views.

under the Fourth Amendment. Thus, when an arrest is illegal under state law, evidence obtained in the search must be excluded from use at trial. The appellate court's decision in *People v. Carnivale*[3] illustrates the point. Although the arrests of Charles Carnivale and Nicholas Pappas were constitutionally valid because they were supported by probable cause,[4] the trial court suppressed evidence obtained incident to the arrests solely because, on the facts before the court, the Chicago police were not empowered to effectuate the arrests in neighboring Rosemont. The appellate court upheld the trial judge's suppression of the evidence.[5] It assumed, as the Supreme Court of Illinois has often done, that an illegal arrest simply cannot support a reasonable search.[6]

Courts in other jurisdictions recently have challenged the premise which was essential to the appellate court's decision in *Carnivale*. Two courts have held that a search incident to an arrest which is illegal "merely" because it violated a *state* warrant requirement is reasonable if it otherwise comports with federal constitutional requirements.[7] A third court has upheld a search incident to an arrest made beyond the officer's territorial authority.[8] Additionally, Judge John Paul Stevens, shortly before his elevation to the United States Supreme Court, declared on behalf of a unanimous Seventh Circuit panel that an arrest by state officials which is unauthorized by state law can support a reasonable search incident thereto.[9] He said that the Fourth

3. 21 Ill.App.3d 780, 315 N.E.2d 609 (1st Dist. 1974), *rev'd on other grounds*, 61 Ill. 2d 57, 329 N.E.2d 193 (1975).

4. The prosecution offered two theories to justify seizure of evidence: the doctrine of search incident to arrest, and the authority of a valid search warrant, lawfully executed.

5. The appellate court held that under the circumstances Chicago officers were not empowered to execute the search warrants in Rosemont. 21 Ill.App.3d at 783-85, 315 N.E.2d at 612-14.

6. The Illinois Supreme Court disagreed with the appellate court and found it unnecessary to reach the illegal arrest issue. The supreme court upheld the seizure under the authority of the search warrants rather than under a search-incident theory. 61 Ill.2d at 59, 329 N.E.2d at 194.

7. People v. Burdo, 56 Mich.App.48, 223 N.W.2d 358 (1974); State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973). The North Carolina Supreme Court adhered to its *Eubanks* decision in State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975).

8. State v. Mangum, 30 N.C.App. 311, 226 S.E.2d 852 (1976).

9. United States v. McCoy, 517 F.2d 41 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975).

Amendment does not require exclusion merely because state law did not authorize the arrest.[10]

There are, of course, two sides to the dispute. Those who would uphold searches incident to arrests which, though constitutional, violate state law think it illogical that identical conduct performed by officers in different states could be judged differently for Fourth Amendment purposes. The majority of jurisdictions, however, reach the same result as does Illinois,[11] apparently believing that the conduct of an officer in arresting a citizen in violation of state law is itself a constitutionally significant fact sufficient to negate the claim that the search incident to arrest was reasonable for Fourth Amendment purposes.

The lack of focus on the question in Illinois is surprising because in other contexts, such as a post-search obligation, the Illinois Supreme Court has held that a "mere" violation of state law does not make a search unreasonable under the Fourth Amendment.[12] Perhaps the explanation is that the issue is not as important in Illinois as it is in many other states. Because Illinois does not require an arrest warrant for any felony or misdemeanor

10. Justice Stevens suggested, quite tentatively, a distinction between an arrest which is merely unauthorized and one which violates some prohibition in state law. He characterized the *McCoy* arrest as unauthorized and held that such an arrest could support a constitutionally valid search. He said that the claim for reasonableness perhaps would be weaker if the state officer had affirmatively violated a state law. *Id.* at 43. To the author, the distinction between "unauthorized" and "prohibited" seems impossible to make in many situations. In *Carnivale,* for instance, the statutory scheme could be read merely to not authorize the arrest in Rosemont, or it could be read to prohibit such arrests. In any event, accidents of legislative draftsmanship ought not be accorded legal significance.

11. The cases cited in notes 7-9 *supra* represent a minority view. In most jurisdictions, for instance, if a state warrant requirement is violated, evidence seized in the search incident to the arrest is suppressed without further discussion. *See, e.g.,* State v. Koon, 133 Ga. 685, 211 S.E.2d 924 (1975); State *ex rel.* Wilson v. Nash, 41 Ohio App.2d 201, 324 N.E.2d 774 (1974); Barr v. State, 531 P.2d 1399 (Okla. Crim. App. 1975); Commonwealth v. Kirkutis, 234 Pa. Super. Ct. 18, 334 A.2d 682 (1975).

12. *See, e.g.,* People v. Curry, 56 Ill.2d 162, 306 N.E.2d 292 (1973); People v. Hawthorne, 45 Ill.2d 176, 258 N.E.2d 319, *cert. denied,* 400 U.S. 878 (1970). Typically, such cases involve the failure of an officer to comply with a search or post-search obligation, such as leaving a copy of the warrant at the place searched or filing a return after execution of the warrant. The United States Supreme Court already has acknowledged a state's right not to utilize the exclusionary rule to penalize such violations. Cady v. Dombrowski, 413 U.S. 433 (1973). Admittedly, however, there is a difference between such cases and one involving a search incident to an illegal arrest. The issue is whether the distinction is legally significant.

arrest, state law challenges to arrests are made less frequently in Illinois than they are elsewhere.[13]

Nevertheless, it is important that Illinois courts reexamine their position on search-incident-to-arrest suppression decisions. For instance, motions to suppress seem appropriate in the quite common situation in which an officer has made a warrantless arrest for an ordinance violation not committed in his presence. Such an arrest is no longer expressly authorized by Illinois statutes, and an argument can be made that it is illegal under state law.[14] If the argument were accepted, a court would have to decide whether the unlawful arrest could support a constitutionally reasonable search. Particularly in light of Mr. Justice Stevens' views, in such a case and in others posing a similar issue,[15] reflection upon the heretofore unexamined premise in Illinois law would be merited.

### 2. *Search Incident to Arrest Under Invalid Penal Statute or Ordinance*

A second Fourth Amendment issue is whether an arrest under an unconstitutional penal statute or ordinance can support a

13. The Illinois Supreme Court cases generally have involved claims that state law required a warrant for the arrest in question. The supreme court typically has responded that no arrest warrant was required. *See, e.g.*, People v. Edge, 406 Ill. 490, 94 N.E.2d 359 (1950); People v. Roberta, 352 Ill. 189, 185 N.E. 253 (1933). This approach has made it unnecessary to discuss whether an arrest which is illegal under state law validates a constitutionally reasonable search. The appellate court's decision in *Carnivale* may be the only one in Illinois in which the court found it necessary to reach the issue of the unreasonableness of such a search. Other cases could arise, however.

14. Under former law, the statutory authority to make warrantless arrests in felony and misdemeanor cases was interpreted to include ordinance violation cases. *See* People v. Edge, 406 Ill. 490, 497-98, 94 N.E.2d 359, 363-64 (1950). The word "offense," however, as used in the Code of Criminal Procedure, was re-defined in 1969 to exclude ordinance violations. *See* ILL. REV. STAT. ch. 38, §102-15 (1975). The amendment would form the basis of the argument that the common law has been revived, so that in this class of petty cases, an officer cannot arrest without a warrant if the offense was not committed in his presence. So far the argument has not been presented to any Illinois reviewing court.

15. The United States Supreme Court has never considered the issue, nor has it made explicit reference to it. An argument can be made that the Supreme Court has indulged in the very same assumption which is reflected in the Illinois decisions, namely that an arrest which is illegal under state law cannot support a reasonable search. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 15 (1948). In no case, however, has it invalidated a search incident to arrest merely because of a state law violation.

search which is otherwise reasonable. For instance, in a search incident to an arrest for one crime, an officer sometimes discovers evidence of a more serious offense. After the prosecution has charged the accused with the second crime,[16] defense counsel sometimes argues that the ordinance or statute under which the original arrest was made violated the United States Constitution, and that, therefore, the search incident to the arrest was unreasonable. Although the issue resembles that discussed in the first part of this Article, whether an arrest which violated state law can support a reasonable search,[17] it is also akin to the apparent authority-consent search topic discussed below.[18] The issue of arrests under invalid statutes, like apparent authority questions, requires reflection upon the purpose of the exclusionary rule itself.[19]

Three recent Illinois Appellate Court cases have considered the reasonableness of a search incident to an arrest under an invalid ordinance. The cases reach two diametrically opposed positions, and yet they have common failings. Each of the the three decisions proceeds as if the issue previously had not confronted any court. None cites any precedent or any cases useful by analogy. Nor does any of the three consider arguments which might be offered against the position which the court adopts.

In *People v. Battiste*[20] the defendant sought to exclude from his trial on a weapons charge a revolver discovered in a search incident to his arrest under a disorderly conduct ordinance. He argued that the municipal ordinance violated the United States Constitution, so that the arrest was unconstitutional and the search incident to that arrest was unreasonable. The First Appellate District rejected the Fourth Amendment claim without ruling on the ordinance's validity. It characterized that argument as "novel,"[21] apparently using that adjective as a synonym for

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16. The questions of whether the first charge is pursued, and whether a trial on the first charge results in a conviction, have no bearing on the motion to suppress issue in connection with the trial on the second charge. *See* People v. Ambrose, 84 Ill.App.3d 402, 228 N.E.2d 517 (1967); People v. Edge, 406 Ill. 490, 94 N.E.2d 359 (1950).

17. *See* text accompanying notes 3-15 *supra*.

18. *See* text accompanying notes 37-54 *infra*.

19. *See* text accompanying notes 29-30 *infra*.

20. 133 Ill.App.2d 62, 272 N.E.2d 808 (1st Dist. 1971).

21. *Id.* at 64, 272 N.E.2d at 811.

"wild" or "preposterous." Focusing upon the conduct of the officer, the court noted that he had reasonable grounds to conclude that the accused had violated the ordinance. This was the beginning and the end of the relevant inquiry as far as the court was concerned.[22]

One year later the Second Appellate District decided *People v. Harter*[23] in a remarkably different fashion. Although his trial counsel had made no motion to suppress, the defendant on appeal argued that certain checks should have been excluded from his forgery trial because the checks were the fruit of an arrest under an unconstitutional vagrancy ordinance.[24] Without passing judgment on the validity of that ordinance, the Second Appellate District declared that if the ordinance were unconstitutional, "it seems quite clear that evidence discovered in the search which followed the arrest would have been subject to suppression."[25] The *Harter* opinion, in effect, declared that trial counsel had been incompetent[26] for failing to advance the argument dismissed by the *Battiste* court as novel or preposterous. The *Harter* court cited neither *Battiste* nor any other authority. It advanced no arguments for its position, and it responded to no arguments for a contrary view. It accepted as obvious the premise that an arrest under an unconstitutional ordinance cannot support a reasonable search.

Three years later the Third Appellate District utilized the opposite assumption in deciding *People v. Sobol.*[27] The accused argued that he had been arrested under a public intoxication

22. The court did note that the disposition of the first charge was not controlling on the motion to suppress in connection with the second charge. *See* note 16 *supra.* The accused, however, was not arguing that the motion should be sustained because he had not been tried or convicted on the first charge. Rather he claimed that evidence should be excluded as the fruit of an unconstitutional arrest.

23. 4 Ill.App.3d 772, 282 N.E.2d 10 (2d Dist. 1972).

24. The constitutional defect in a vagrancy ordinance may be related to the very values which the Fourth Amendment protects. *See* Note, *Evidence Excluded when Obtained by Search Incident to Vagrancy Arrest under Statutes Previously Held Void for Vagueness,* 18 VILL. L. REV. 117 (1972).

25. 4 Ill.App.3d at 775, 282 N.E.2d at 13.

26. Although on appeal the defendant urged that trial counsel had been incompetent, the reviewing court preferred to say simply that, all things considered, the proceedings below had not been fair and that the accused had been deprived of substantial rights. *Id.*

27. 26 Ill.App.3d 303, 325 N.E.2d 118 (3d Dist. 1975).

ordinance which was unconstitutional and that, therefore, the seizure of marijuana from his person in a search incident to that arrest violated the reasonableness requirement of the Fourth Amendment. The appellate court held that if the officer reasonably believed the ordinance had been violated, the search was reasonable even if the ordinance were invalid. The court overlooked both *Battiste* and *Harter*. Although such oversight of precedents precisely on point is fairly common in Illinois search and seizure decisions,[28] the author's purpose is not to criticize faulty research. Instead, the obvious contrast in the three cases highlights the existence of another Fourth Amendment issue which deserves but has not received serious attention from Illinois reviewing courts.

The Ninth Circuit decision in *Powell v. Stone*[29] suggests the dimensions of the issue. It represents an attempt to engage in reasoned analysis, weighing the competing arguments and drawing upon decisions from analogous areas of the law. Considering the relationship between an unconstitutional penal provision and the doctrine of search incident to arrest, the Ninth Circuit reflected upon the purpose of the exclusionary rule. The court reiterated a major rationale of the exclusionary rule, that exclusion of illegally obtained evidence is necessary to uphold judicial integrity. From this proposition the court concluded that judicial integrity would be offended if the fruits of an unconstitutional arrest were admitted into evidence. A focus upon the conduct of the arresting officer is too narrow. The Ninth Circuit argued that in many instances in which police in good faith have relied upon unconstitutional statutes,[30] the United States Supreme Court has

28. For illustrations of other Fourth Amendment questions on which Illinois reviewing courts have adopted conflicting positions while overlooking directly relevant precedent, see J. HADDAD, ILL. INST. CLE—ARREST, SEARCH & SEIZURE §§ 18-31, 18-33, 18-34 (1976) [hereinafter cited as HADDAD]. Although there are many explanations for this phenomenon, including the weakness of attorneys' research, a "mind set" which assumes that no court has considered a similar problem contributes to the promulgation of conflicting precedents. This same attitude or approach helps explain some of the other problems in Illinois law discussed in this Article.

29. 507 F.2d 93 (9th Cir. 1974), *rev'd on other grounds*, 96 S.Ct. 3037 (1976).

30. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973). All of the unconstitutional statutes cited were procedural rather than substantive. They empowered the officers to engage in the very search which the Supreme Court held violative of the Fourth Amendment. Arguably there is a difference between reliance upon this type of statute and

utilized a broader concept of "reasonableness" and has excluded evidence without regard to the officers' good faith reliance upon the apparent authority granted them by statute. Finally, the Ninth Circuit concluded, perhaps exclusion of evidence seized following an arrest under an unconstitutional penal provision would deter legislatures from enacting invalid statutes and ordinances.

Surely responses to the Ninth Circuit's arguments can be made. Many people, including perhaps a majority of today's United States Supreme Court, have significant doubts about whether the demands of judicial integrity require exclusion of evidence where the police have acted in good faith.[31] Some persons argue, in fact, that exclusion of evidence when the police have acted reasonably and in good faith breeds a disrespect for the courts.[32] Additionally, some of the decisions which the Ninth Circuit relied upon to establish that good faith is not dispositive have been denied retrospective application.[33] Such a denial is a recognition that conduct which the officer carried out in good faith before the old law or practice was declared improper ought not to give rise to the exclusion of evidence.[34] Exclusion under such circumstances clearly will not deter police officers,[35] and the possibility of deterring legislatures through exclusion of evidence appears highly speculative.

Thus arguments can be advanced on both sides of the question of whether an arrest under an unconstitutional law or ordinance can support a reasonable search. If the issue presents itself again to an Illinois reviewing court, some thoughtful consideration of the arguments would be appropriate. Because the question is so closely tied to the debate over the nature and the purpose of the exclusionary rule,[36] a court's resolution of the question probably

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reliance upon a penal provision which later is held to violate the First or the Fourteenth Amendment.

31. Stone v. Powell, 96 S.Ct. 3037, 3071 (1976) (White, J., dissenting).

32. *Id.* at 3073-74 (1976).

33. *See, e.g.*, United States v. Peltier, 422 U.S. 531 (1975).

34. *Id.* at 536-39.

35. *Id.* at 539.

36. There is a possibility that this narrow issue could be resolved by implication in a future decision of the United States Supreme Court which declares that the exclusionary rule should *never* be utilized when the police have acted in good faith. See the prediction in United States v. Peltier, 422 U.S. 531, 551-52 (Brennan, J., dissenting).

will reflect its attitude toward the exclusionary rule itself.

### 3. *Apparent Authority in Consent Search Cases*

Can a search ever be considered reasonable under the Fourth Amendment when its sole justification was consent given by a person who apparently had authority over the property in question but who, in fact, had no such authority? The United States Supreme Court provided no clear answer in its 1964 decision, *Stoner v. California.*[37] The prosecution argued that a search of a guest's room conducted pursuant to the consent of a hotel clerk was reasonable. The Court's response in rejecting the argument was a classic in ambiguity: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of agency or by unrealistic doctrines of 'apparent authority.' "[38] Are all doctrines of apparent authority in consent search cases inherently "unrealistic" and therefore to be rejected as unreasonable? Or was the Supreme Court merely condemning those applications of apparent authority doctrines which happen to be unrealistic? The United States Supreme Court had an opportunity in 1974 to clarify the law in this area but specifically left the question open.[39]

In 1968 the Illinois Supreme Court in *People v. Miller*[40] established the standard to be utilized in Illinois courts: apparent authority cannot justify a consent search.[41] *Miller* presented as compelling a factual situation as any prosecutor could hope for in his efforts to persuade a court to uphold a search conducted pursuant to the consent of one who had apparent but not actual authority over property. Police officers in *Miller* had come to a home owned by a Mrs. Johnson. A police investigation revealed that license plates on the vehicle parked in the garage were registered to Mrs. Johnson. Believing her to own the car, the police sought and received her permission to search the vehicle. Evidence which was discovered was admitted against Eugene Miller

37. 376 U.S. 483 (1964).

38. *Id.* at 488.

39. *See* United States v. Matlock, 415 U.S. 164, 177 n.14 (1974).

40. 40 Ill.2d 154, 238 N.E.2d 407, *cert. denied,* 393 U.S. 961 (1968).

41. *See, e.g.,* People v. Taylor, 31 Ill.App.3d 576, 333 N.E.2d 41 (4th Dist. 1975); People v. Johnson, 21 Ill.App.3d 799, 329 N.E.2d 464 (1st Dist. 1975).

in his trial on abortion charges.[42] The appellate court affirmed his conviction, declaring that the officers had acted reasonably in searching the vehicle with the permission of the apparent owner.[43] The Illinois Supreme Court reversed upon a determination that Eugene Miller, not Mrs. Johnson, had owned the vehicle.[44] The search was declared unreasonable as a matter of law because it was not authorized by a person having a sufficient interest in the vehicle. Thus, the Illinois Supreme Court read *Stoner* to condemn any utilization of apparent authority doctrines in consent search cases.

The citizen's viewpoint supports the Illinois position that apparent authority cannot validate a search. A person has a privacy interest in his or her home, car, or other property which no stranger has a right to invade. If a party who is legally a stranger to that property cannot enter lawfully upon it or search through the property, that stranger cannot authorize a police officer to do so. How can a legal right be derived from someone who himself has no legal claim? The law should deem unreasonable any search whose only justification is the consent of one who has no legal interest in the place searched or the property seized.

The Illinois Supreme Court in *Miller* did not suggest that there was another way of reading *Stoner.* Furthermore, it did not deal with any of the arguments for or against use of the apparent authority concept in consent search cases. In omitting to do so, it avoided complexities faced by other courts and rather effortlessly reached a result which is inconsistent with the position adopted by a number of other well respected courts.[45]

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42. The facts in *Miller* are stated more fully in the appellate court opinion than in the supreme court opinion. *See* note 43 *infra.*

43. People v. Miller, 82 Ill.App.2d 304, 226 N.E.2d 413 (1st Dist. 1967), *rev'd,* 40 Ill. 2d 154, 238 N.E.2d 407, *cert. denied,* 393 U.S. 961 (1968).

44. People v. Miller, 40 Ill.2d 154, 238 N.E.2d 407 (1968).

45. *See* the California decisions cited in note 46 *infra. See also* United States v. Peterson, 524 F.2d 167, 180 n.20 (4th Cir.), *cert. denied,* 423 U.S. 1088 (1975); Hayes v. Cady, 500 F.2d 1212 (7th Cir.), *cert. denied,* 419 U.S. 1058 (1974); United States v. Sells, 496 F.2d 912, 914 (7th Cir. 1974). *But see* post-*Miller* Illinois decisions, two of which suggest that for a consent search to be reasonable the consenting party must have had actual authority *and* must have appeared to have authority. People v. Taylor, 31 Ill.App.3d 576, 333 N.E.2d 41 (4th Dist. 1975); People v. Johnson, 28 Ill.App.3d 799, 329 N.E.2d 464 (1st. Dist. 1975); People v. Miller, 19 Ill.App.3d 161, 310 N.E.2d 808 (4th Dist. 1974). *Johnson* might be read to uphold a consent based upon apparent authority. A more likely construc-

The California courts, for instance, both before and after *Stoner*, had opted for a "realistic" application of the apparent authority doctrine. They upheld searches in which the police reasonably but erroneously concluded that the consenting person had authority over the property in question.[46] Justice Roger Traynor was the most eloquent champion of the doctrine. Analyzing the language of the Fourth Amendment, Traynor argued that the Constitution prohibits not every tortious interference with property rights, but only unreasonable police conduct. In a "realistic" case of apparent authority, the police, by definition, have acted reasonably in concluding that they were dealing with someone having legal authority over the property. During the hearing on the motion to suppress, the concern should be "discouraging unreasonable activity on the part of law enforcement officers" rather than "enforcing defendant's rights under the law of trespass. . . ."[47] Faced with similar facts in some future case, good police officers would behave precisely as did the officers in *Miller*. To persons who believe that the justification, if any, for the exclusionary rule is the deterrence of unreasonable police conduct, exclusion of evidence when the police have acted reasonably is outrageous. Congratulating an officer for proper behavior and then suppressing the evidence is intolerable.[48] Thus, as has been suggested earlier, apparent authority questions call for earnest reflection upon the purpose and application of the exclusionary rule.[49]

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tion, and one consistent with the supreme court's 1968 *Miller* decision, is that when the only available evidence at trial suggests that the consenting party did have authority, the trial and reviewing courts can conclude that he did have actual authority.

46. *See, e.g.*, People v. Smith, 63 Cal.2d 770, 409 P.2d 222, 48 Cal.Rptr. 382 (1966); Bielicki v. Superior Court, 57 Cal.2d 602, 371 P.2d 288, 21 Cal.Rptr. 552 (1962); People v. Gorg, 45 Cal.2d 776, 291 P.2d 469 (1955). *See also* People v. Robinson, 41 Cal.App.3d 658, 116 Cal.Rptr. 455 (1974), and cases cited therein.

47. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 337 n.48. *See also* Traynor's opinion in People v. Gorg, 45 Cal.2d 776, 291 P.2d 469 (1955).

48. Two years before *Miller*, without necessarily adopting this argument for apparent authority, Professor LaFave stated it with precision in his outstanding article, LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, 321.

49. *See* text accompanying note 36 *supra*. For a concise modern statement of the argument in favor of apparent authority based upon recent United States Supreme Court statements about the exclusionary rule, see United States v. Peterson, 524 F.2d 167, 180 n.20 (4th Cir. 1975).

The question is not as simple as advocates of apparent authority would have us believe, however. If we accept apparent authority arguments in a case like *Miller,* where shall we draw the line? Consider various circumstances under which claims of apparent authority might be made:

(1) An officer honestly believes that a hotel clerk can consent to a search of the guest's room (the situation in *Stoner*);

(2) An officer executes a search warrant which turns out to have been invalidly issued;[50]

(3) An officer conducts a search expressly or arguably authorized by a statute which later is declared violative of the Fourth Amendment or is construed not to authorize the conduct;[51]

(4) An officer conducts a search incident to an arrest under a penal provision which later is held to violate the First Amendment;[52]

(5) An officer executes an arrest warrant which, unknown to him, has just been withdrawn;[53]

(6) An officer arrests *A,* reasonably believing him to be *B,* for whom a valid arrest warrant is outstanding. The officer then searches *A* incident to the mistaken-identity arrest.[54]

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50. Some persons who advocate modification of the exclusionary rule would not apply it when an invalid search warrant has been issued. The apparent authority argument on such facts was made in Wolff v. Rice, reported as a companion to Stone v. Powell, 96 S.Ct. 3037 (1976).

51. Like the immigration agents in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), the Internal Revenue Agents in G.M. Leasing Corp. v. United States, 97 S.Ct. 619 (1977), were acting under a statutory scheme which they arguably believed authorized their conduct. This kind of apparent authority issue is of the type discussed in Powell v. Stone, 507 F.2d 93 (9th Cir. 1974). *See* notes 31-32 and accompanying text *supra.*

52. *See* notes 16-36 and accompanying text *supra.*

53. ILL. REV. STAT. ch. 38, §107-2(b) (1975) purports to authorize an arrest by an officer who *reasonably believes* that a warrant is outstanding. The statute has been challenged at the trial level on various occasions. The defense argument is that if an invalid warrant would not sustain the conduct of the officer, *see* hypothetical in text at note 50 *supra,* the argument for legality can be no better when no warrant at all purports to authorize an arrest.

54. Both the United States Supreme Court and the Illinois Supreme Court already have resolved this type of mistake-of-fact apparent authority argument in favor of the prosecution. *See* Hill v. California, 401 U.S. 797 (1971); People v. Gwin, 49 Ill.2d 255, 274 N.E.2d 43 (1971). Interestingly, the California Supreme Court used the apparent authority consent search cases to support the conclusion that mistaken identity can be the basis for a reasonable search incident to arrest. *See* People v. Hill, 69 Cal.2d 550, 555, 446 P.2d 521, 525, 72 Cal. Rptr. 641, 645 (1968), *aff'd,* 401 U.S. 797 (1971). Both the consent search and

As far as the author knows, no one has suggested a unified approach to problems of apparent authority. Any formulation, at a minimum, must alleviate the grave concern of those who are wary of apparent authority doctrines: a government official's ignorance of constitutional or other legal principles must not be allowed to diminish a citizen's protection under the Fourth Amendment.

The age-old distinction between mistake of fact and mistake of law would achieve the desired result. Evidence obtained by a police officer's honest and reasonable mistake of fact would be admissible under the doctrine of apparent authority. Evidence obtained by mistake of law, whether by police officer, magistrate, or legislature, would not. In example one, above, the officer has made a mistake of law. Such mistakes of law have been made by the magistrate in example two, by the legislature or the officer in example three, and by the legislature in example four. In none of these instances would the search be deemed reasonable under the suggested apparent authority doctrine. In examples five and six, the officer's reasonable mistake of fact would justify the search. The suggested formulation would permit a result contrary to *Miller* yet reconcilable with *Stoner*.

### 4. *Homicide Scene Searches*

Until recently there have not been many opinions considering Fourth Amendment challenges to the admission of evidence seized during searches of homicide scenes. One explanation is that to raise such a challenge ordinarily the defendant must have an interest in the place searched.[55] Another is that before *Chimel*

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the mistaken identity situations involve what the author classifies as a reasonable mistake of fact.

55. Occasionally standing is derived from an interest in the items seized. *See, e.g.*, United States v. Birrell, 470 F.2d 113 (2d Cir. 1972). In most of the cases, however, both victim and accused lived at the place where the slaying occurred. Almost all the cases involved homicides and at the time of the search the victim was either dead or very gravely injured. The line of cases under discussion do not concern searches of other crime scenes. The calculation of reasonableness might well be different if the crime were less serious than homicide. *See* text following note 72 *infra*. From the police perspective, the search and the processing of the scene of a homicide are practices routinely required, as they are in the case of few other crimes. The traditional, routine, and distinct nature of the homicide scene searches may explain why until recently so few defense lawyers challenged such searches. Additionally, when the victim has survived the attack, as an occupant of the

*v. California,*[56] officers who lawfully arrested a suspect in his own home could search the entire house incident to the arrest. When *Chimel* limited such searches to the area "within reach," a new rationale for such searches was needed if they were to be deemed lawful. Some courts have invalidated homicide scene searches except when the facts fit within one of the recognized exceptions to the warrant requirement, such as consent, plain view, or the narrowed doctrine of search incident to arrest.[57] Others have upheld these searches on the notion that the need to prevent destruction of evidence permits emergency warrantless searches. Still others have concluded that homicide scene searches are per se reasonable.[58]

In the last decade several courts have analyzed thoughtfully and debated extensively the right of authorities to search the scene of a very recent homicide.[59] When the Illinois Supreme Court dealt with this issue, however, in the 1973 case of *People v. King,*[60] it took note of none of the conceptual difficulties in homicide scene searches. In *King,* a police officer entered the defendant's bedroom which was next to the doorway where two bodies had been found. Once in the room, the officer was able to see "in plain view" a box for a gun. He seized the box and also searched through various drawers, finding nothing else of evidentiary value. The Illinois Supreme Court upheld the entry, search,

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home, his or her consent eliminates the necessity for reliance on a crime scene exception to the warrant requirement.

56. 395 U.S. 752 (1969).

57. The author's generalization is based upon his reading of the cases cited in note 59 *infra* and a few other decisions either following the cited decisions or referred to in the cited opinions.

58. *See* cases cited in note 59 *infra.*

59. Cases upholding crime scene searches include United States v. Birrell, 470 F.2d 113 (2d Cir. 1972); Brown v. Jones, 407 F. Supp. 686 (W.D. Tex.), *remanded on other grounds,* 489 F.2d 1040 (5th Cir. 1974), *aff'd sub nom.* Brown v. Estelle, 526 F.2d 1391 (5th Cir. 1976); Stevens v. State, 443 P.2d 600 (Alaska 1968), *cert. denied,* 393 U.S. 1039 (1969); People v. Wallace, 31 Cal.App.3d 865, 509 P.2d 1121, 107 Cal.Rptr. 659 (1973), and cases cited therein; State v. Chapman, 250 A.2d 203 (Me. 1969); Tocher v. State, 501 S.W.2d 921 (Tex. Crim. App. 1973). Cases invalidating crime scene searches include Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972); People v. Williams, 557 P.2d 399 (Colo. 1976) (Claudine Longet case); State v. Brothers, 4 Ore.App. 253, 478 P.2d 442 (1970); State v. Pires, 55 Wis.2d 597, 201 N.W.2d 153 (1972).

60. 54 Ill.2d 291, 296 N.E.2d 731 (1973).

and seizure without citation of any authority or analysis of the issue.

Because the officers in *King* had conducted the search while still seeking the identity of both the perpetrator and the victim, it is possible to construe the decision's approval of homicide scene searches narrowly to cases involving such facts. Utilizing the *King* court's own language, one also can argue that the court approved any "*unplanned* search in a setting of immediate violence."[61] However, the Illinois Appellate Court has broadly interpreted *King*, apparently approving homicide scene searches without qualification.[62] For now, therefore, it is fair to say that in Illinois, homicide scene searches are deemed to be reasonable under the Fourth Amendment. Because the issue surely will come before the Illinois Supreme Court again,[63] the court perhaps will provide more practical guidance and a more reasoned analysis than it has in the past.[64]

The debate between courts which uphold warrantless homicide scene searches and those which invalidate such searches mirrors a larger debate over warrantless searches. The broad question is whether we should accept at face value the United States Supreme Court's proclamation that warrantless searches are permissible only if they fit under a specially established, well-

61. *Id.* at 300, 296 N.E.2d at 737 (emphasis added).

62. *See* People v. Johnson, 32 Ill.App.3d 36, 335 N.E.2d 144 (1975).

63. Nothing breeds discussion of a fine legal point as does the well-publicized trial of a public figure. Thus the recent success of actress Claudine Longet in suppressing the fruits of a homicide scene search undoubtedly will give rise to new challenges in Illinois and elsewhere. *See* People v. Williams, 557 P.2d 399 (Colo. 1976).

64. People v. Cole, 54 Ill.2d 401, 298 N.E.2d 705 (1973), decided in the same term of court as *King*, also posed homicide scene search problems. *Cole* is different from other cases mentioned in this section in that authorities knew that the bodies of the victims were no longer at the scene of the homicides when the police arrived. The nuance could have posed an interesting question concerning homicide scene searches. Instead, in a case in which the suspect had been arrested on the roof, the Illinois Supreme Court upheld the pre-*Chimel* search of the dwelling through a tortured extension of the search-incident doctrine. *Cf.* Vale v. Louisiana, 399 U.S. 30 (1970); Shipley v. California, 395 U.S. 818 (1969); Preston v. United States, 376 U.S. 364 (1964); People v. Erickson, 31 Ill.2d 230, 201 N.E.2d 422 (1964); People v. Kalpak, 10 Ill.2d 411, 140 N.E.2d 726 (1957). As to searches conducted after the date of Chimel v. California, 395 U.S. 752 (1969), the search incident to arrest doctrine, despite *Cole*, will not provide justification for most crime scene searches. Such searches almost always extend to places beyond the reach of the arrestee, thus exceeding search-incident boundaries set by *Chimel*.

delineated exception.[65] If the well-recognized exception doctrine is taken literally, the homicide scene search question can be resolved easily. There is no "homicide scene" exception. The United States Supreme Court has never approved or delineated such a doctrine. Unless the search can be justified on a consent, search incident to arrest, or plain view theory, routine warrantless crime scene searches must be invalidated.

Faced with this situation, prosecutors typically have justified entry in a homicide scene search case on a civil emergency theory: a victim within the home may be in dire need of medical assistance. Rather than challenging the officers' right to enter, defense counsel will question the exploratory search. The defense will demand to know what gave the police the right, without a warrant, to search for evidence which might link a suspect to the homicide, or which might negate a defense such as accident or suicide. If the prosecution advances an emergency theory, based upon the need to prevent the destruction of evidence,[66] often the defense can respond that no emergency existed. The case for exclusion of evidence found in an "emergency" search appears strongest when a suspected or known perpetrator is already in custody or otherwise away from the scene; when the victim has been removed to the hospital or the morgue; when the police, once having controlled the premises, have left and later re-entered;[67] when the search is extremely expansive; or when the seizure is of personal papers or other documents.[68] The defense thus argues that because there was no emergency, there was no excuse for the failure to obtain a warrant.[69] The defense argument has carried

65. Katz v. United States, 389 U.S. 347, 357 (1967). *See also* Vale v. Louisiana, 399 U.S. 30, 34 (1970); Chimel v. California, 395 U.S. 752, 763 (1969).

66. It still is debatable whether the probability that evidence will be destroyed is a good enough reason to justify a warrantless entry into a home. *See generally*, HADDAD, *supra* note 28, §7-11. Assuming that entry has already been made on a civil emergency, entry-to-arrest, or other theory, the right to search the whole house to prevent the possible destruction of evidence certainly is not well established. Chimel v. California, 395 U.S. 752 (1969), can be read to hold that no such right exists.

67. The fact that several hours may pass before crime technicians arrive belies the notion that swift action is necessary.

68. The author's generalization is based upon his reading of the cases cited in note 59 *supra* and a few other decisions either following the cited decisions or referred to in the cited opinions.

69. More particularly, the defense argues that searches without warrants are violative

the day in several jurisdictions.[70]

The most thoughtful among the opinions which have upheld crime scene searches are those which do not stretch the emergency concept in an intellectually dishonest fashion. Instead these decisions conclude that crime scene searches are reasonable even absent an emergency.[71] The authors of these opinions start from the premise that the Fourth Amendment requires that warrantless searches be reasonable, and nothing more. Whether the crime scene search can be "slotted" into one of the traditional warrantless search categories is not the ultimate test.[72] The courts argue that the familiar practice of making a thorough search of the scene of a recent homicide is inherently reasonable, even though it may intrude upon the privacy of survivors. Reasonableness under the Fourth Amendment requires a balancing of interests, and a proper consideration in the calculation is the seriousness of the crime which has been committed. The alternative to a warrantless search of a homicide scene may be no search at all. Homicide scene searches are by their nature exploratory, so that the police often would not be able to provide a magistrate with probable cause to believe that a specifically designated item would turn up at the scene and would constitute evidence of a crime.[73]

The Supreme Court in recent years has upheld some searches under a general notion of reasonableness, taking into account all the circumstances, even though the facts fit none of the well-delineated exceptions.[74] In practice, the philosophy of Mr. Justice

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of the Fourth Amendment unless made under one of the "few specially established and well-delineated exceptions" to the warrant requirement. Katz v. United States, 389 U.S. 347, 357 (1967). *See also* Vale v. Louisiana, 399 U.S. 30, 34 (1970); Chimel v. California, 395 U.S. 752, 763 (1969). The non-emergency search of a crime scene fits into none of the exceptions.

70. *See* cases cited in note 59 *supra*. Nevertheless, even the presence of each of these factors might not be sufficient to win exclusion in certain jurisdictions.

71. *See, e.g.*, People v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971), *vacated sub nom.* Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972); People v. Wallace, 31 Cal. App.3d 865, 107 Cal. Rptr. 659 (1973). *See also* State v. Chapman, 250 A.2d 203 (Me. 1969), for another well-reasoned opinion.

72. *See* People v. Wallace, 31 Cal. App.3d 865, 870, 107 Cal. Rptr. 659, 662 (1973).

73. State v. Chapman, 250 A.2d 203, 211 (Me. 1969), makes the point especially well.

74. The seizure for inspection of a prisoner's clothes many hours after his arrest, approved in United States v. Edwards, 415 U.S. 800 (1974), fits under neither the search-

Schaefer of the Illinois Supreme Court, that the recognized exceptions are not exclusive but instead are merely guides to aid courts in deciding what is reasonable police conduct, may prevail.[75]

However, if the only guidance courts have is some general notion of reasonableness, crime scene searches inevitably will create problems. Even if courts are prepared to approve most homicide scene searches, some searches, such as the reading of a suspect's diary for evidence which will reveal a motive or negate a claim of accident, will be so offensive to the sensibilities of many judges that they will hold illegal the crime scene actions of the officers. A case-by-case adjudication of the reasonableness of homicide scene searches will lead to differing results in various tribunals, and it will give little guidance to homicide investigators.

Homicide scene search problems are extremely troublesome. No solution may be entirely satisfactory. Nevertheless, a first step toward an Illinois resolution must be the recognition by Illinois courts of the complexity of the issues.

### 5. *Entry of Home to Arrest Resident Without Probable Cause to Believe That He is Within*

When the police have probable cause to believe that a suspect has committed a crime, how certain must they be that the suspect is at home before they can enter with or without an arrest warrant?[76] Must they have probable cause to believe that the

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incident exception nor some administrative search theory. Nevertheless it was approved as reasonable under all the circumstances. For want of an arrest, the inspection of the suspect's fingernails in Cupp v. Murphy, 412 U.S. 291 (1973), could not be considered a search incident to arrest. Assuming that "disappearing evidence emergency" is not a well recognized, specially-delineated exception, *see* note 61 *supra*, the Court's approval of the inspection must be viewed as a decision that the inspection was reasonable under the totality of the circumstances.

75. *See* People v. Boykin, 39 Ill.2d 617, 237 N.E.2d 460 (1968). *See also* People v. Moore, 35 Ill.2d 399, 220 N.E.2d 443 (1966), in which Justice Schaefer commented that the chance boundaries of decided cases should not be dispositive of a question of reasonableness under the Fourth Amendment.

76. The question whether the police must have an arrest warrant to justify an entry to arrest is treated in Part II of this Article. That question is distinct from the probable cause question now under discussion. Even if an officer has obtained an arrest warrant, he still cannot enter the suspect's home without any regard to the likelihood that the suspect is at home.

suspect is at home, or will a lesser quantum of data suffice? The issue typically arises when although the suspect was not found at home, the police seized evidence following entry. The prosecutor argues that entry was justified to arrest and that, once inside, under plain view principles, the police lawfully seized evidence which they came upon while looking in a place where the suspect could have been hiding. The argument is valid if the premise is correct.[77] Thus it becomes necessary to consider the reasonableness of an entry to arrest without certain knowledge that the suspect is within.

Although the Illinois courts have not quantified the required degree of probability by using an abstract phrase such as "reasonable suspicion," "clear indication," or "probable cause," the Illinois decisions provide a discernible standard: unless the police know that the suspect is *not* within, they may enter to arrest.[78] The Supreme Court of Illinois in *People v. Sprovieri*[79] announced the Illinois rule without citing a single authority even though it had not previously considered the question. The court dismissed the issue with only a few sentences.

Sprovieri had come upon the scene more than an hour after the police had discovered Leslie Vana's body. Sprovieri viewed the deceased, denied knowing him, and then left. A subsequent investigation showed that Sprovieri knew Vana as a rival for the affections of Judith Blaha. Sprovieri had threatened violence against both Vana and Blaha if their relationship continued. The police also learned that Blaha had planned to leave town and that she and a man fitting Sprovieri's description had been seen leaving her apartment, red suitcase in hand, a few hours after the discovery of Vana's body.[80] More than twenty hours after the discovery,

77. *See, e.g.*, People v. Morales, 48 Ill.2d 396, 271 N.E.2d 33 (1971); People v. Sprovieri, 43 Ill.2d 223, 252 N.E.2d 531 (1969); People v. Barbee, 35 Ill.2d 407, 220 N.E.2d 401 (1966); People v. Carter, 132 Ill.App.2d 572, 270 N.E.2d 603 (1st Dist. 1971), *cert. denied*, 406 U.S. 962 (1972). *See also* Warden v. Hayden, 387 U.S. 294, 299-300 (1967).

78. People v. Bussie, 41 Ill.2d 323, 243 N.E.2d 196 (1968), *cert. denied*, 396 U.S. 819 (1969), makes the obvious observation that the entry-to-arrest theory is not viable when the police know that the suspect is not at home.

79. 43 Ill.2d 223, 252 N.E.2d 531 (1969). People v. Barbee, 35 Ill.2d 407, 220 N.E.2d 401 (1966), contains similar facts, but it yielded no rule about the question of data necessary to justify entry.

80. 43 Ill.2d at 224-25, 252 N.E.2d at 532.

the police arrived at Sprovieri's home and were told by neighbors that he had not been seen that day. Looking through a window, they observed a piece of red luggage and a woman's garment. After no one responded to their knocks, the officers entered, looked around, and found no one. They then approached Sprovieri's garage and through a small opening spotted a car fitting the description of one owned by Blaha. When the police entered the garage, they found no one within. In plain view, however, they saw and seized a bicycle chain, which later was alleged to have been the murder weapon.[81] The trial judge prohibited use of the chain as evidence. The appellate court reversed, and the supreme court upheld the appellate court's decision.[82]

The Illinois high court's opinion yielded a black-letter rule: "Normal precautionary measures require that the police eliminate all hiding places before moving on."[83] This principle is now controlling law in Illinois courts. It has been applied in later cases without a careful assessment of the probability that the suspect might have been found at home, and without a comparison to the degree of probability present in the *Sprovieri* case.[84] When the Illinois Supreme Court next considered the issue in *People v. Morales*[85] it seemed to say that as long as the police had grounds for arresting the suspect, they had a right and a duty to enter his garage to see if he was there. Thus the Illinois rule is that the police may enter the suspect's home and garage unless they know that he is absent.

This principle is at odds with the belief widely held by com-

81. *Id.* at 227, 252 N.E.2d at 532-33. Whether the chain was the murder weapon was never established. After remand and before trial, Sprovieri met a fate similar to Leslie Vana's.

82. People v. Sprovieri, 95 Ill.App.2d 10, 238 N.E.2d 115 (1st Dist. 1968), *aff'd*, 43 Ill.2d 223, 252 N.E.2d 531 (1969).

83. *Id.* at 225, 252 N.E.2d at 534. This declaration echoed the appellate court's observation in Sprovieri that "rudimentary police procedure dictates that a suspect's residence be eliminated as a possible hiding place before a search is conducted elsewhere." 95 Ill. App.2d at 14, 238 N.E.2d at 118.

84. *See* People v. Morales, 48 Ill.2d 396, 271 N.E.2d 33 (1971); People v. Carter, 132 Ill.App.2d 572, 270 N.E.2d 603 (1st Dist. 1971). Later decisions have ignored the fact that the *Sprovieri* court figured into the Fourth Amendment calculation of reasonableness a civil emergency factor, namely the possibility that Judith Blaha might have lain in the house or garage in dire need of medical assistance.

85. People v. Morales, 48 Ill.2d 396, 271 N.E.2d 33 (1971).

mentators and by other courts that the police can enter a suspect's dwelling for arrest purposes only if they have probable cause to believe that the suspect is within.[86] The United States Supreme Court has not considered the issue of probable cause, but in discussing entries to arrest, it also has referred to the existence of probable cause to believe that the suspect was within.[87] The issue is not an easy one. Entry into a home, even for arrest purposes, is a search.[88] In most other contexts, to justify a search we require probable cause to believe that the search will prove fruitful. For instance, issuance of a valid search warrant requires a probability that the specified evidence will turn up at the place named in the warrant.[89] For this purpose, no distinction is drawn between the search of the property of a probable offender and the search of the property of a third person. The only question is whether the search probably will yield criminal evidence.[90]

There is logic, however, to the Illinois position that police officers seeking a suspect, whether in hot pursuit or not, might well

86. United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974), is a leading decision in this regard. It equates the sanctity of a person's locked office, "at least at night," with entry into a person's dwelling. *Id.* at 1134. It then holds that an officer must have probable cause to believe that the person he is attempting to arrest is within the building before the officer can enter. *Id.* at 1136. *See also* Gibson v. United States, 149 F.2d 381 (D.C. Cir. 1945); United States v. Watson, 307 F. Supp. 173 (D.D.C. 1969); United States v. Sims, 231 F. Supp. 251 (D. Md. 1964); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974); Comment, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 STAN. L. REV. 995, 997 (1971). *See generally* Part II *infra*.

87. When Mr. Justice Harlan spoke in Jones v. United States, 357 U.S. 493, 499-500 (1958), of the "grave constitutional question" posed by a warrantless forceful nighttime entry into a dwelling to arrest a suspect, he included in his hypothetical, as if it were obviously necessary, the supposition that the suspect was "reasonably believed within." See text at notes 88-94 *infra* for a discussion of the warrant requirement in the arrest-entry situation. In other cases in which warrantless entries for arrest purposes have been upheld, the police have had, if not positive knowledge, at least a substantial probability to believe that the suspect was within. *See* United States v. Santana, 96 S.Ct. 2406 (1976); Warden v. Hayden, 387 U.S. 294 (1967); Ker v. California, 374 U.S. 23 (1963).

88. *See* United States v. Shye, 492 F.2d 886, 888-900 (6th Cir. 1974); Lankford v. Gelston, 364 F.2d 197, 206 (4th Cir. 1966); Commonwealth v. Forde, 329 N.E.2d 717, 721 (Mass. 1975). *See generally* Rotenberg & Tanzer, *Searching for the Person to be Seized*, 35 OHIO ST. L.J. 56 (1974).

89. *See, e.g.*, United States v. DiNovo, 523 F.2d 197 (7th Cir.), *cert. denied*, 423 U.S. 1016 (1975); United States v. Spach, 518 F.2d 866 (7th Cir. 1975); People v. Francisco, 44 Ill.2d 373, 255 N.E.2d 413 (1970); People v. Billerbeck, 323 Ill. 48, 153 N.E. 586 (1926).

90. *See* People v. Simmons, 330 Ill. 494, 161 N.E. 716 (1928); People v. Daugherty, 324 Ill. 160, 154 N.E.2d 907 (1927).

be unreasonably inconvenienced by restrictions against entering the suspect's home. The suspect's home would be a sanctuary if he could avoid being seen or heard. Wasteful police surveillance might be mandated, detracting from more fruitful investigative efforts. The precedent for forbidding entry without probable cause to believe that the suspect is within is not as weighty as it seems because most of the cases involve warrantless entries into the home of a third person, to whom the suspect is legally a stranger.[91] The argument is plausible that the invasion of the privacy of an innocent third party needs more justification than the invasion of the privacy of one whom there is probable cause to arrest.[92] The relevant requirement of the Fourth Amendment for judging the validity of a warrantless search is "reasonableness," not "probable cause." If full probable cause is demanded for issuance of a valid search warrant, it is only because the warrant clause of the Fourth Amendment uses the phrase "probable cause" and governs the issuance of search warrants. That clause has no application to warrantless searches. Elsewhere, in emergency situations, warrantless searches have been permitted on reasonable grounds falling short of probable cause.[93]

The *Sprovieri* issue deserves more studied consideration than it has so far received in Illinois. Its importance would not diminish greatly even if our courts mandated more frequent use of arrest warrants because the entry-probable cause issue must be faced even when the police have obtained an arrest warrant.[94]

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91. *See, e.g.*, Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), *rev'd on other grounds sub nom.* Stone v. Powell, 96 S. Ct. 3037 (1976); Fisher v. Volz, 496 F.2d 333 (3d Cir. 1974); Government of Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 S.Ct. 909 (1975); United States v. Brown, 467 F.2d 419 (D.C. Cir. 1972); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); Palmer v. United States, 192 A.2d 801 (D.C. App. 1963).

92. In many of the cases cited in note 91 *supra* the courts have been careful to point out that the home entered was not the suspect's, suggesting that a different issue would be presented if it had been.

93. *See, e.g.*, People v. DeVito, 77 Misc.2d 463, 353 N.Y.S.2d 990 (1974); People v. Superior Court, 6 Cal.App.3d 379, 85 Cal. Rptr. 803 (1970). The theory is that in a now-or-never emergency, action may be reasonable to prevent a possible disaster or the destruction of evidence even when the data falls short of probable cause.

94. *See* note 76 *supra*.

## II. WARRANTLESS ENTRIES TO EFFECT NON-EMERGENCY ARRESTS

Must authorities obtain an arrest warrant before making a non-consensual entry into a home to arrest a suspect under non-emergency circumstances? Prior to 1970, this question received little attention because of the general assumption that the right to arrest necessarily included the right to enter to effect the arrest. In 1970 the Illinois Supreme Court in *People v. Johnson*[95] summarily adhered to the traditional view that warrantless entries are reasonable per se even in non-emergencies. That same year, the United States Court of Appeals, in *Dorman v. United States*,[96] provided a more thoughtful analysis and established a balancing approach that has gained wide acceptance.[97] In 1976, the Supreme Court examined a related issue in *United States v. Watson*,[98] and employed an historical approach which, if used to resolve the warrantless entry to arrest question, would uphold the Illinois position. Whether Illinois should retain its present stance on warrantless entries to arrest merits consideration.

### 1. *The Law Before 1970*

Challenges to warrantless entries to arrest were rare before 1970. Consistent with the view of early writers, it was widely assumed that a necessary adjunct to the right to arrest[99] was the power to enter a home, by force if necessary, to effect the arrest.[100]

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95. 45 Ill. 2d 283, 259 N.E.2d 57, *cert. denied*, 407 U.S. 914 (1970). The author argued on behalf of Johnson.

96. 435 F.2d 385 (D.C. Cir. 1970) (en banc).

97. Since 1970 state and federal courts have considered the question. *See* notes 119-24 and accompanying text *infra*. The United States Supreme Court has made frequent reference to the issue. *See* text accompanying notes 123-41 *infra*. Law review writers have wrestled with the problem. *See, e.g.*, Watson & Ramey, *The Balance of Interests in Non-Exigent Felony Arrests*, 13 SAN DIEGO L. REV. 838 (1976); Note, *Warrantless Arrests By Police Survive a Constitutional Challenge*, 14 AM. CRIM. L. REV. 193, 207-14 (1976); Comment, *The Neglected Fourth Amendment Problem in Arrest Entries*, 23 STAN. L. REV. 995 (1971). The Stanford comment appeared in the May 1971 issue, but did not mention *Dorman*, which had been decided on April 15, 1970. Publication of *Dorman* in the West system was delayed substantially, but the case became widely known and was frequently cited after it appeared in 7 Crim. L. Rptr. 2107 (1970).

98. 423 U.S. 411 (1976).

99. As long as probable cause exists, police officers without a warrant validly can arrest felons and certain misdemeanants.

100. *See* United States v. Watson, 423 U.S. 411 (1976), for an account of the relevant

To say that a warrantless arrest was proper also meant that a warrantless entry for arrest purposes was permissible, at least when the suspect was reasonably believed to be within.[101]

*People v. Scott*,[102] a 1965 Illinois Appellate Court opinion, typified the occasional case in which a defendant challenged the absence of an arrest warrant. On July 3, 1963, probable cause developed to arrest Walter Scott for a burglary which had been committed on June 24, 1963. Without obtaining a warrant, Chicago police officers went to the apartment where Scott had been staying. When they arrived there at 1 P.M., they were told that Scott was at work a short distance away. The officers awaited his return. According to the defense version, which apparently was uncontested, "three detectives spent the next fourteen hours drinking coffee in Scott's apartment and resting in front of the building in which Scott lived. At no time during this protracted period did any of the three go to Scott's place of employment. Nor did any of them make an attempt to obtain a warrant for Walter Scott's arrest."[103] The officers arrested the suspect at 3 A.M. after Scott returned to his apartment. The appellate court rejected the

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history. The common law warrantless arrest power extended to misdemeanors committed in the officer's presence. In Illinois the warrantless arrest power has been expanded to include all misdemeanors. *See* ILL. REV. STAT. ch. 38, §§107-2(b), 102-15 (1975). *See also* People v. Edge, 406 Ill. 490, 94 N.E.2d 359 (1950); People v. Hill, 28 Ill.App.3d 719, 329 N.E.2d 515 (1975). The United States Supreme Court has never passed upon a Fourth Amendment challenge to such an expansion of the common law doctrine of warrantless arrests. Some state courts have invalidated statutes which provided for warrantless arrests for all misdemeanors. *See* United States v. Watson, 423 U.S. 411, 455 (1976) (Marshall, J., dissenting).

For treatment of the views of the early writers, see Commonwealth v. Forde, 329 N.E.2d 717, 726-27 (Mass. 1976) (Quirico, J., dissenting). *See also* E. FISHER, LAWS OF ARREST §121 (1967); Wilgus, *Arrest Without a Warrant*, 22 MICH. L.REV. 541, 550-52 (1924); Note, *Warrantless Arrests Survive a Constitutional Challenge*, 14 AM. CRIM. L. REV. 193, 210-11 (1976). Justice Marshall's feeling that United States v. Watson, 423 U.S. 411 (1976), effectively resolved the question now under discussion apparently was based upon a belief that the common law drew no distinction between warrantless arrests and warrantless entries to arrest. *See* 423 U.S. at 453-54 (Marshall, J., dissenting). *See also* text accompanying note 155 *infra*.

101. *Id.* The requirement of a probability that the suspect is within is a separate issue which can arise even when an arrest warrant has been secured. *See* text accompanying notes 76-93 *supra*.

102. 63 Ill. App.2d 232, 211 N.E.2d 418 (1st Dist. 1965).

103. *Id.* at 244, 211 N.E.2d at 423. The quoted material appeared in the opinion and was apparently taken verbatim from appellant Scott's brief.

Fourth Amendment challenge to the warrantless arrest. In so doing it did not indicate clearly whether the arrest had occurred in the apartment, and, if so, whether entry had been by consent. The only question treated was the legality of a warrantless, non-emergency arrest, an issue which the Illinois Supreme Court already had settled.[104] The discussion ended without any separate consideration of the warrantless entry into Scott's apartment.

### 2. *1970 and Beyond: Illinois Adheres to the Traditional Rule*

*People v. Johnson*,[105] decided by the Supreme Court of Illinois in 1970, was apparently the first case in which an Illinois reviewing court confronted the argument that without a warrant or consent the police have no right to enter a home in non-emergency circumstances to effect an otherwise valid arrest.[106] For the first time, focus was upon the warrantless entry, not just upon the warrantless arrest. The Chicago police had probable cause to arrest Rudolph Johnson for a series of armed robberies committed between October 1966 and early June 1967.[107] At 5:30 P.M. on July 6, 1967, without a warrant, four officers went to Johnson's second-floor apartment where they found no one home. When Johnson returned at 8:30 P.M., they permitted him to enter unmolested and then knocked. When Johnson opened the door, the police announced their office and, without consent, stepped across the threshold and immediately arrested Johnson.[108] They

104. *See, e.g.*, People v. Braden, 34 Ill.2d 516, 216 N.E.2d 808 (1966); People v. Jones, 31 Ill.2d 240, 201 N.E.2d 402 (1964).

105. 45 Ill.2d 283, 259 N.E.2d 57 (1970).

106. At least the court's opinion was the first Illinois decision to distinguish the warrantless entry issue from the more general question of warrantless arrests.

107. A stuttering man had taken purses from women in a series of neighborhood robberies. One witness recognized the fleeing robber to be a resident of her building. The robber had been seen disappearing in the vicinity of the same building. On June 4, 1967 the witness supplied the police with Rudolph Johnson's name. By July 5, 1967, at the latest, the police confirmed that Johnson lived in the building, fit a composite description of the suspect, and stuttered when he spoke. Indeed the police apparently knew all this sometime in June. Record at 97-99, 112. As the court's opinion vaguely hints, the delay in arresting Johnson may have resulted from a police desire to keep Johnson's building under surveillance in the hope of catching the robber either in the commission of a robbery or in flight following a crime. 45 Ill.2d at 285, 259 N.E.2d at 59. Other facts stated in this note and in the accompanying text, if not found in the opinion, appear in the record at 104-07.

108. 45 Ill.2d at 285, 259 N.E.2d at 59.

then conducted a pre-*Chimel* search incident to arrest, looking through various rooms while detaining Johnson elsewhere in the apartment. In a bedroom closet they found property which belonged to some of the robbery victims.[109]

The Illinois Supreme Court noted the defendant's assertion "that since the officers entered the premises without an arrest warrant, and without defendant's consent, there was no authority for the entry."[110] The court rejected defendant's argument that "a warrantless entry is permissible only in hot pursuit or in any emergency when it is impractical to obtain a warrant."[111] Despite the state's concession that entry was not under the authority of a warrant or of consent, the court ruled that entry was lawful.[112]

In explaining why Johnson's Fourth Amendment claim was incorrect, the court engaged in very little Fourth Amendment analysis. Much of the single paragraph in which it discussed the argument was devoted to statutory construction. The court determined that Illinois statutes authorized warrantless entries to arrest in non-emergency circumstances even though those laws were not as explicit on this point as were the statutes of some other jurisdictions.[113] The court reiterated what the defendant apparently had conceded: the police had probable cause to arrest before they entered Johnson's apartment. This was not a case in which the police gained probable cause data only after entering a residence.[114] Finally, the court cited several cases, including *Ker v. California*,[115] in which the *right* to make a warrantless entry was not litigated, but rather the *method* of the entry was at issue.[116]

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109. *Id.*

110. *Id.* at 287, 259 N.E.2d at 60.

111. *Id.* at 287-88, 259 N.E.2d at 60.

112. *Id.* at 287, 259 N.E.2d at 60.

113. The statutes in question permitted warrantless arrests and allowed the use of force when necessary to effect entry for the purpose of arrest. They did not expressly speak of the *right* to enter to arrest. *See* ILL. REV. STAT. ch. 38, §§107-2(b), 107-5(d) (1975). The statutes of some other jurisdictions expressly authorize entry into a building to arrest a suspect who is reasonably believed to be within. *See* Note, *Warrantless Arrests by Police Survive a Constitutional Challenge*, 14 AM. CRIM. L. REV. 193, 211 n.121 (1976).

114. 45 Ill.2d at 288, 259 N.E.2d at 60.

115. 374 U.S. 23 (1963).

116. These cases involved questions of force, trickery, and absence of notice. It was this type of question, rather than the right to enter, which had been at issue at common law. *See* Wilgus, *Arrest Without a Warrant*, 22 MICH. L.REV. 541, 550-52 (1924), and Note,

Aided by hindsight, a critical reader might conclude that *Johnson* is not a very sophisticated opinion. The Illinois high court discussed none of the arguments which would persuade other courts in subsequent cases and cited no authority which was directly on point. From a 1970 perspective, however, the decision is difficult to criticize. The conclusion reached merely upheld a principle which was widely accepted as the prevailing common law view.[117] The Illinois Supreme Court had no special reason to believe that the issue would become one of the most important questions in subsequent Fourth Amendment litigation. Nor did the court have any way of knowing that the result it reached in *Johnson* would be rejected almost universally by courts of other jurisdictions in their subsequent decisions.[118]

Whether *Johnson* was decided wisely or not, it became controlling law in Illinois. No Illinois Supreme Court since *Johnson* has reconsidered the question. Thus when the First Appellate District considered a challenge to a warrantless entry in 1974, its task was simple. Citing *Johnson,* the court stated that it was unnecessary to decide whether the entry was by consent despite a claim that no emergency had been present. "We deem it now well settled in Illinois that the legality of arrests is to be tested by the presence or absence of probable cause and not the presence or absence of a warrant."[119]

For the most part, other post-*Johnson* decisions in Illinois fit a pre-1970 mold. Although they hold that the police were not required to secure a warrant, these opinions do not always focus

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*Warrantless Arrests By Police Survive a Constitutional Challenge,* 14 AM. CRIM. L.REV. 193, 210-11 (1976).

117. *See* text accompanying note 100 *supra.*

118. *See* Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970); People v. Ramey, 16 Cal.3d 269, 545 P.2d 1333, 127 Cal.Rptr. 629, *cert. denied,* 97 S.Ct. 335 (1976); Commonwealth v. Forde, 329 N.E.2d 717 (Mass. 1975).

*Dorman* was decided during the two month period in which *Johnson* awaited decision on the Illinois Supreme Court's advisement docket. Although records are incomplete and memories have faded, appellant apparently cited an earlier slip sheet opinion in *Dorman* (which opinion was later withdrawn in favor of the en banc opinion) in a Memorandum of Additional Authority filed with the Illinois Supreme Court. The final April 15, 1970 *Dorman* opinion was not argued to the Illinois Supreme Court in any meaningful fashion, if at all. For this reason, *Johnson* may be considered a pre-*Dorman* opinion even though it was decided a few weeks after *Dorman.*

119. People v. Weathers, 18 Ill.App.3d 338, 343, 309 N.E.2d 795, 799 (1st Dist. 1974).

upon the warrantless entries preceding the arrests.[120] In some cases it is not clear whether the warrantless entry was justified by the consent of an occupant. This is understandable because under *Johnson* consent is irrelevant. Three other Illinois decisions, one in a holding and two in dictum, do indicate that sometimes a warrant may be necessary to justify an entry to arrest.[121] However, because these opinions make no reference to *Johnson*, they must be considered aberrations in Illinois law resulting from faulty legal research.[122] Until the Supreme Court of Illinois says otherwise, or until the United States Supreme Court mandates a different conclusion, the *Johnson* rule governs Illinois practice: police may make warrantless, non-consensual entries to arrest suspects upon probable cause even in the absence of emergency circumstances.

### 3. *The Balancing Approach:* Dorman v. United States

In 1970 the Court of Appeals for the District of Columbia Circuit, through dictum in *Dorman v. United States*,[123] declared that the Fourth Amendment prohibits a warrantless entry of a home to arrest a suspect under non-emergency circumstances. Although it was not the very first opinion to so indicate,[124] *Dorman* has assumed the role of a seminal decision. As one court recently noted,[125] almost every subsequent decision discussing *Dorman* has either explicitly accepted its basic proposition or else has assumed the truth of that proposition.[126]

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120. *See, e.g., In re* Williams, 30 Ill.App.3d 1025, 333 N.E.2d 674 (4th Dist. 1975); People v. Franklin, 22 Ill.App.3d 775, 317 N.E.2d 611 (1st Dist. 1974).

121. People v. Mitchell, 35 Ill.App.3d 151, 341 N.E.2d 153 (1st Dist. 1975), contained a careless dictum which correctly stated that the United States Supreme Court had left the issue open, without mentioning that the Illinois Supreme Court had resolved the issue in *Johnson*. People v. Wolgemuth, 356 N.E.2d 1139 (3d Dist. 1976), *motion for leave to appeal granted* (Mar. 31, 1977), cited the *Mitchell* dictum and also overlooked *Johnson*. *Mitchell* followed *Dorman* and invalidated a warrantless non-emergency entry. People v. Spence, 357 N.E.2d 1245 (1st Dist. 1976), also cited *Mitchell* and *Dorman* without mentioning *Johnson*. Like *Mitchell*, it upheld the warrantless entry after finding exigent circumstances sufficient to justify entry without a warrant.

122. *See* note 28 and accompanying text *supra*.

123. 435 F.2d 385 (D.C. Cir. 1970)(en banc).

124. In Morrison v. United States, 262 F.2d 449 (1958), the same circuit which later decided *Dorman* had invalidated an entry on that very ground.

125. Commonwealth v. Forde, 329 N.E.2d 717, 723-24 (Mass. 1975).

126. The most complete list of cases is found in Commonwealth v. Forde, *id.* at 724.

On December 2, 1966, shortly after 6 P.M., four men robbed several persons in a District of Columbia clothing store. By 8:30 P.M. the police had probable cause to arrest Harold Dorman,[127] and so they contacted an Assistant United States Attorney to obtain assistance in securing an arrest warrant. The prosecutor advised the officers that although no magistrate was available to issue a warrant, the officers could lawfully arrest Dorman on a felony charge without a warrant.[128] The police arrived at Dorman's home at 10:20 P.M., Dorman's mother answered the door and, in response to police inquiry, indicated that her son was not home. When the police heard a noise,[129] they entered without consent and soon thereafter looked into a closet, where they saw and seized evidence of the robbery. At trial, Harold Dorman, who had not been home at the time, challenged the warrantless entry and argued for the suppression of the evidence.

*Dorman's* first premise is that a non-consensual entry into a home is a search even if its ultimate purpose is the arrest of an occupant.[130] This proposition is easy to accept because an unconsented entry of a home is the type of invasion of privacy with which the Fourth Amendment is concerned.[131] *Dorman's* second premise is well grounded in recent United States Supreme Court opinions: warrantless seraches are permissible only under specially established well-delineated exceptions.[132] The third and

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For a more recent decision see People v. Ramey, 16 Cal.3d 269, 545 P.2d 1333, 127 Cal.Rptr. 629 (1976). *See also* Note, *Warrantless Arrests Survive a Constitutional Challenge*, 14 AM. CRIM. L.REV. 193, 207-08 nn.104, 108 (1976).

127. After changing into a blue sharkskin suit, Dorman left behind in the men's shop his corduroy trousers, which contained probation papers bearing his name and address. Police quickly obtained Dorman's photograph from their files, and witnesses identified Dorman from this photo.

128. 435 F.2d at 388.

129. The noise had been made by a male friend of Mrs. Dorman.

130. 435 F.2d at 390. For other authorities supporting this proposition, see Morrison v. United States, 262 F.2d 449, 452 (D.C. Cir. 1958); Commonwealth v. Forde, 329 F.2d 717, 722 (Mass. 1975); *see* note 88 and accompanying text *supra*.

131. The only Supreme Court suggestion that a government agent's non-consensual entry into a home under some circumstances would *not* be a Fourth Amendment activity is found in dictum in Wyman v. James, 400 U.S. 309, 317-18 (1970). The general view, as *Dorman* states, is that freedom from intrusion into the home is the "archetype of the privacy protection secured by the Fourth Amendment." 435 F.2d at 389.

132. In support of this proposition, the *Dorman* court asserted that although much has been written about warrantless arrests, little attention has focused upon entry into a dwelling to effect an arrest. 435 F.2d at 388-89.

critical premise is that entry into a home to arrest a suspect upon probable cause is not one of the well established exceptions.[133]

The *Dorman* court, rejecting a per se rule of reasonableness, decided that warrantless entries to arrest are proper only under necessitous circumstances. The court, in essence, constructed a balancing formula to determine when such circumstances are present.[134] As under any such Fourth Amendment calculus, several factors must be considered: the intensity of the intrusion, the gravity of the situation, the necessity for quick action and the "costs" of delay, and the probability that the intrusion will bear fruit.[135] The *Dorman* court, mindful of these factors, deemed relevant (1) the relative peacefulness of the entry, (2) the time of day or night when the entry is made, (3) the seriousness of the crime, (4) the probability that the suspect is armed, (5) the danger of flight, (6) the delay which would be occasioned by application for a warrant, (7) the probability, beyond the minimum requirement of a probable cause, that the suspect is guilty, and (8) the probability that the suspect is within the home which is to be entered.[136] Applying these principles, the court upheld the warrantless entry into Harold Dorman's home.

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133. The court also noted that in 1958 dictum Justice Harlan had suggested that warrantless entries to arrest posed a grave, unresolved Fourth Amendment question. The *Dorman* opinion overlooks the fact that the same historical support for warrantless arrests also supports warrantless entries to arrest. *See* text at notes 99-101 *supra*. The opinion also ignores the fact that in the 1958 case Justice Clark had responded to Justice Harlan by asserting that it *was* well established that the police without a warrant could enter a home, by force if necessary, to effect an arrest of a suspect who was reasonably believed to be within.

In Jones v. United States, 357 U.S. 493, 503 (1958) (Clark, J., dissenting), Justice Clark cited opinions which assumed that warrantless entries could be made to effect otherwise valid arrests. He also cited writers who agreed that such entries were permissible at common law and continued to be so under reported state decisions. The views of those writers were consonant with the views reflected in the authorities cited in note 100 *supra*.

134. The court did not specifically use the term "balancing formula," nor did it spell out general criteria for use in any such formula, as has the author.

135. Compare the factors considered in warrantless entries to arrest with the criteria utilized to determine whether the circumstances surrounding apparent *civil* emergency are sufficient to justify a warrantless entry. Usually the determination of the reasonableness of an emergency entry to preserve life and health requires an assessment of (1) the substantial probability that someone's safety is seriously endangered and (2) the probability that the entry may prove helpful. *See* HADDAD at §§7-3, 7-7 note 28 *supra*. People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246 (1976).

136. The author has re-numbered and grouped the *Dorman* criteria so that they follow the pattern of the generalized balancing formula referred to in the text at note 135.

Those courts which have followed *Dorman* have accepted the conclusion that warrantless entries to arrest are permissible only under special circumstances.[137] Most of them also have adopted the *Dorman* balancing formula or criteria for evaluating a warrantless entry to arrest. Moreover, the *Dorman* dictum has become a holding in many jurisdictions in that courts have used the *Dorman* standards to invalidate warrantless entries made under non-exigent circumstances.[138]

One cannot easily challenge the notion that determining the reasonableness of a search requires a balancing of the legitimate interests of law enforcement against the valued privacy and liberty of the citizenry. Perhaps for this reason, decisions following *Dorman* have acquiesced readily in that opinion's basic theme: unless necessitous circumstances make a warrantless entry essential, a neutral judicial officer must determine whether sufficient cause exists to justify an intrusion against liberty or privacy.[139] Individuals can quarrel about what circumstances should be enough to justify a warrantless entry, but there must be *some* situations in which delaying an entry in order to secure a warrant would be nothing more serious to law enforcement than a petty inconvenience. Under a balancing formula, therefore, the general approach of *Dorman,* if not its details, is correct and the per se rule of *People v. Johnson*[140] is wrong. Nevertheless, there is a different approach to the issue, utilized in a recent United States Supreme Court decision,[141] which could foreshadow a triumph of the Illinois Supreme Court's position in *Johnson* over the Court of Appeal's position in *Dorman.*

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137. *See* cases cited at note 126 *supra.*

138. In Commonwealth v. Forde, 329 N.E.2d 717 (Mass. 1975), for instance, the Supreme Judicial Court of Massachusetts invalidated a nighttime entry which had been made to arrest occupants of an apartment on drug charges. The court found it impossible to "find one's way around" a delay of three hours during which no effort had been made to secure an arrest warrant. *Id.* at 723. In People v. Ramey, 16 Cal.2d 269, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976), the California Supreme Court held violative of the Fourth Amendment a non-emergency daytime warrantless entry to arrest made when a magistrate was readily available to consider a warrant application. Both *Forde* and *Ramey* emphasized that the authorities by their own delay demonstrated that no emergency existed.

139. 435 F.2d at 390.

140. 45 Ill.2d 283, 259 N.E.2d 57 (1970).

141. United States v. Watson, 423 U.S. 411 (1976). *See* text accompanying notes 142-52 *infra.*

### 4. *The Historical Approach:* United States v. Watson

In *United States v. Watson*,[142] the Supreme Court held that officers, even under non-emergency circumstances, may effect a warrantless arrest of a suspected felon in a public place upon probable cause. The question of a warrantless entry of a home for purposes of arrest was not resolved in *Watson* any more than it had been in earlier Supreme Court decisions.[143] Still, the historical approach utilized in resolving the warrantless arrest question in *Watson* could be of great significance to the warrantless entry dispute.

The Ninth Circuit ruled that a warrantless arrest was illegal absent emergency circumstances. The Court of Appeals declared that Watson's illegal arrest had fatally tainted his subsequent consent to a search of his vehicle.[144] On appeal, the United States Supreme Court considered the merits of the claim that the Fourth Amendment mandates the use of a warrant in non-emergency circumstances even if the arrest is made in a public place.[145] Rest-

142. *Id.*

143. *See* Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975); Johnson v. Louisiana, 406 U.S. 356, 365 (1972); Coolidge v. New Hampshire, 403 U.S. 443, 474-80 (1971); *id.* at 492 (Harlan, J., concurring in part); *id.* at 510-12, 521 (White, J., dissenting); Jones v. United States, 357 U.S. 493, 499-500 (1958); *id.* at 503 (Clark, J., dissenting). Although in *Watson* the majority did not expressly deny that its opinion reached the issue of warrantless entries to arrest, two concurring opinions made such a disclaimer. *Id.* at 423-33 (Powell, J., concurring); *id.* at 433 (Stewart, J., concurring).

144. United States v. Watson, 504 F.2d 849 (9th Cir. 1975), *rev'd*, 423 U.S. 411 (1976).

145. On appeal, the United States Supreme Court treated the case as if there were no particular justification for the federal officers' "failure" to obtain an arrest warrant. In *Watson* the police had probable cause to arrest the suspect for six days before the actual arrest. The "failure" to get a warrant, however, in the author's mind, is readily explainable. An arrest warrant signifies the beginning of a prosecution, and the federal authorities did not have a case worthy of prosecution until the day of the arrest. In essence all they had was the word of a reliable informant that the source of a stolen credit card, which the informant turned over to the police, was Henry Watson. No respectable federal prosecutor would approve the initiation of a prosecution on so little evidence. It would be the informant's word against the defendant's in such a prosecution, and the rules of evidence would even prevent the jury from learning of the informant's past reliability. The federal officers in *Watson* on the day of the arrest did not move in until the informant signalled that Watson presently possessed additional contraband. Subsequently the prosecutor did charge both the earlier offense and the one which occurred on the day of the arrest. However, the jury acquitted on the earlier offense despite hearing evidence about the day of the arrest which provided some corroboration for the informant's account of the earlier offense. 504 F.2d at 850.

ing its opinion largely upon history, the Court noted that warrantless felony arrests were permitted at common law even in non-emergencies. Federal and state statutes, dating back as far as the Fourth Amendment itself, have approved such warrantless arrests.[146] The United States Supreme Court for decades acquiesced in the assumption that warrantless felony arrests are lawful, without suggesting a distinction between emergency and non-emergency arrests.[147] Thus, the majority opinion, in utilizing an historical approach, clearly did not adopt the *Dorman* balancing process.[148]

Justice Marshall, dissenting, noted that the majority's approach could answer the question whether under non-emergency circumstances a warrant is required to justify entry into a home for the purpose of arrest.[149] Marshall argued that balancing the liberties of citizens with the legitimate needs of law enforcement was essential to any interpretation of the reasonableness requirement of the Fourth Amendment.[150] Under such an approach, the warrantless-entry-to-arrest issue could be decided differently from the question of a warrantless arrest in a public place. The added intrusion embodied in a non-consensual entry into a suspect's home could tip the balance in favor of a warrant requirement under non-emergency circumstances.

A court following the majority approach in *Watson* could uphold a warrantless non-emergency entry to arrest with historical support. The sources which approve warrantless arrests also approve warrantless entries to arrest.[151] Thus, a well-established exception does exist in the case of entries upon probable cause to

146. 423 U.S. at 418-22.

147. *Id.* at 416-17.

148. The Court's only concern for practicalities is reflected in its claim that an "exigent circumstances" test for warrantless arrests would spawn substantial litigation. While this may be of some concern, one would hardly expect such an argument, by itself, to carry the day. The dissent takes Justice White to task for this argument. *Id.* at 452 n.19 (Marshall, J., dissenting).

149. *Id.*

150. *Id.* at 444-45.

151. *Id.* at 453-54. *See* text accompanying notes 99-101 *supra*. Justice Marshall did not challenge the proposition that warrantless felony arrests were permissible at common law, whether made in a public place or elsewhere. Instead he argued that historically felonies were only the most serious offenses at common law, so that history does not support warrantless arrests for all crimes which we call felonies today. *Id.* at 438-43.

make an otherwise valid arrest. Indeed, judges who have expressed the belief that such entries are per se reasonable typically have utilized an historical approach to the question.[152]

### 5. *The Issue in Illinois After* Dorman *and* Watson

The question of warrantless entries to arrest merits more consideration than was evidenced by the single paragraph devoted to it in the Illinois Supreme Court's 1970 decision in *Johnson.*[153] The wisdom of the Illinois per se rule of reasonableness has been called into question by numerous tribunals including the Court of Appeals for the District of Columbia, the Supreme Judicial Court of Massachusetts, and the California Supreme Court.[154] Yet, the Illinois Supreme Court could defend the rule announced in *Johnson* using an historical approach as outlined in *Watson* and other decisions.

There are intermediate positions, of course. For instance, the court could accept *Dorman's* basic premise without undermining the results reached in *Johnson.* Recall that in *Johnson* the police did not go from room to room in search of the suspect, but merely stepped across the threshold and immediately arrested the suspect.[155] Although an unconsented entry may in itself be a search within the meaning of the Fourth Amendment, it certainly is not as intrusive as the kind of invasion of privacy with which *Dorman* was concerned.[156] *Dorman* implicitly acknowledged that the intensity of the intrusion is relevant to the determination of the reasonableness of a warrantless entry. However, the factors by which it would gauge this intensity, namely whether the entry was at day or at night, or was peaceful or forcible, should not be

152. *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 510-11 n.1 (1971) (White, J., dissenting); Jones v. United States, 357 U.S. 493, 503 (1958) (Clark, J., dissenting); Commonwealth v. Forde, 329 N.E.2d 717, 726-27 (Mass. 1976) (Quirico, J., dissenting).

153. *See* text accompanying notes 113-18 *supra.*

154. *See* note 126 *supra.*

155. *See* text accompanying note 108 *supra.*

156. None of the cases in which other courts have adopted *Dorman* for use in their own jurisdictions involved an intrusion into the home as slight as that which occurs when police officers make an arrest immediately inside the door. Officers in *Johnson* did search the entire apartment, but this was under a pre-*Chimel* search incident to arrest theory. Today an arrest immediately inside the door would not support a search of other rooms of the house.

exclusive. Rummaging through an entire home during the day, for instance, may be a greater intrusion than merely stepping across the home's threshold at night. Thus, the Illinois court could hold that when a suspect responds to a knock, police officers can make a warrantless arrest immediately even if such an arrest requires that the police step inside the home.[157]

The American Law Institute's Model Code of Pre-Arraignment Procedures provides another approach to the *Dorman* problem.[158] The A.L.I. would require exigent circumstances only when the entry to arrest is made between 10 P.M. and 7 A.M. In all other cases the police could enter without a warrant to make an otherwise valid arrest of a suspect reasonably believed to be within. Although the proposal would be easier to administer than a formula like *Dorman's* which balances numerous factors, it appears too simplistic. Again the problem is that the intensity of the intrusion is a function of more than the lateness of the hour of entry.[159]

Perhaps the United States Supreme Court will resolve the warrantless entry to arrest question before the Illinois Supreme Court has occasion to reconsider *Johnson.* If this does not happen, however, the Illinois high court should give thoughtful attention to the contrasting alternatives suggested by *Dorman* and *Watson*

157. Such a rule can be supported by reference to a somewhat different situation. The cases indicate that, even without probable cause, a police officer can knock at someone's door. If an occupant opens the door and thereby reveals criminal activity in plain view, the officer can enter to arrest. *See, e.g.,* People v. Phillips, 30 Ill.2d 158, 195 N.E.2d 717 (1964). By analogy it would seem permissible for an officer, already having probable cause to arrest, to step across a threshold to arrest a suspect who is in plain sight after the suspect or some other occupant has opened the door.

If the suspect, having opened the door and confronted the police, fled into the interior of the house, under the present suggestion the police then would be able to follow the suspect so as to effect the arrest. United States v. Santana, 427 U.S. 38 (1976), would support such a result. Under facts not precisely identical to the present hypothetical, *Santana* held that a suspect could not defeat the officer's right to make an otherwise valid arrest by fleeing into the suspect's house when the officer approached.

158. ALI MODEL CODE OF PREARRAIGNMENT PROCEDURE §120.6(3) (Approved Draft 1975).

159. Under Illinois law any search warrant can be executed at any hour of the day or night. *See* ILL. REV. STAT. ch. 38, §108-13 (1975). The absence of special requirements for nighttime execution may suggest either that the hour of entry is not of great concern or that the strategic advantages of entering at night outweigh negative considerations. In the arrest context, the *Dorman* court noted that entry at night may increase the probability that the suspect is at home, thereby increasing the reasonableness of entry at night. 435 F.2d at 393.

and to intermediate positions in the dispute concerning warrantless entries to arrest.[160]

## III. Concluding Reflections on Unexamined Principles

This article has examined six issues arising under the Fourth Amendment which have been resolved differently by Illinois reviewing courts than by some other appellate tribunals. In each area the Illinois courts have not appeared to recognize the controversial nature of the issue before them. They have cited little or no precedent and have not acknowledged that differing results have been reached by other courts. In at least two areas, Illinois courts have even overlooked *Illinois* precedents which were directly on point.[161]

It may be improper, however, to harshly critize the performance of the Illinois courts. One must suspect that other jurisdictions have given quick treatment to many Fourth Amendment issues which have received the careful attention of Illinois reviewing courts. Such is the nature of the appellate process. Every issue before every court in every case simply cannot be given full consideration.[162] Failure to recognize this simple proposition may be the major fault of those among us who write in criticism of judicial opinions.

The Supreme Court of Illinois will have further opportunities to consider the principles discussed in this Article. Petitioners will urge the court to review the Illinois rules in light of the deci-

160. The confusion engendered by appellate court decisions which ignore *Johnson* is an added reason for the Illinois Supreme Court to grant leave to appeal in a case involving a challenge to a warrantless entry for arrest purposes. *See* note 121 *supra*.

161. *See* note 28 and accompanying text *supra*.

162. In *Johnson* itself several other then-unsettled constitutional issues were presented, including the retroactivity of Chimel v. California, 395 U.S. 752 (1969), and the scope of the right to counsel at lineups. *See* 45 Ill.2d at 289-92, 259 N.E.2d at 61-62. *Johnson* was one of perhaps eight cases orally argued in a single day of the March 1970 Illinois Supreme Court term. Typically the court during that period had at least nine such heavy days of oral argument during a period of three weeks. Now that the Illinois Supreme Court functions almost exclusively as a leave-to-appeal tribunal, we can expect that court to be better able to focus upon controversial legal principles. Litigants may often be required to demonstrate that the appellate court's decision is debatable before receiving a hearing on the merits. This, in turn, may mean that the briefs will be more useful to the court in preparing its opinion.

sions of other appellate courts. These heretofore unexamined principles of Illinois Fourth Amendment law deserve the court's serious attention.