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A Novel Approach to Warrantless Seizures of the Home: Inspirational or Aberrational Law?

A NOVEL APPROACH TO WARRANTLESS SEIZURES OF THE HOME: INSPIRATIONAL OR ABERRATIONAL LAW?

The Fourth Amendment to the United States Constitution prohibits both unreasonable searches and seizures of homes.[1] By interposing a judicial magistrate between the public and law enforcement officials to make the probable cause determination, the warrant requirement of the Fourth Amendment is the primary means for ensuring the reasonableness of searches and seizures.[2] The United States Supreme Court has held that a warrantless search of a home is per se unreasonable under the Fourth Amendment,[3] unless police obtain the consent[4]

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1. U.S. CONST. amend. IV.

2. *See* United States v. Martell, 654 F.2d 1356, 1361 (9th Cir. 1981) (basic test of reasonableness of searches and seizures is warrant requirement). The warrant requirement of the Fourth Amendment provides for the issuance of warrants only upon probable cause supported by oath or affirmation. *See* U.S. CONST. amend IV; *see also* Dunaway v. New York, 442 U.S. 200, 213 (1979) (Fourth Amendment probable cause standard reflects reasonableness requirement). The Supreme Court has held that a neutral and detached magistrate should make the probable cause determination in order to effectuate Fourth Amendment protections. *See, e.g.*, Franks v. Delaware, 438 U.S. 154, 165 (1978) (task of magistrate to determine independently whether probable cause exists); Jones v. United States, 362 U.S. 257, 270-71 (1960) (decision of independent judicial officer whether probable cause is present to justify invasion of liberty); Giordenello v. United States, 357 U.S. 480, 486 (1958) (magistrate must judge for himself whether facts support probable cause determination); Johnson v. United States, 333 U.S. 10, 14 (1948) (neutral magistrate rather than officer engaged in crime prevention should make probable cause determination).

3. *See* Payton v. New York, 445 U.S. 573, 590 (1980) (police may not cross threshold of home without warrant); Agnello v. United States, 269 U.S. 20, 33 (1925) (subjective belief of officer that evidence contained inside dwelling does not justify warrantless search); *see also* Vale v. Louisiana, 399 U.S. 30, 34 (1970) (police ordinarily may not search dwelling without warrant despite existence of probable cause).

4. *See* Amos v. United States, 255 U.S. 313, 317 (1921). In *Amos*, deputy collectors of the Internal Revenue Service went to the defendant's home to search the premises for violations of revenue law. *Id.* at 315. Although the revenue agents did not have a warrant, the defendant's wife submitted to the tax agents' authority and reluctantly permitted the tax collectors to search the premises. *Id.* The search uncovered illicitly distilled whiskey which the trial court admitted into evidence. *Id.* The Supreme Court reversed the trial court, holding that the search was in violation of the Fourth Amendment because the tax collectors did not possess a search warrant. *Id.* at 315-16. The Court stated that the implied coercion by the collectors precluded the Court from considering whether the defendant's wife intentionally waived her husband's Fourth Amendment rights. *Id.* at 316. Subsequent Supreme Court cases have cited *Amos* to stand for the proposition that a valid consent to search constitutes a permissible waiver of Fourth Amendment rights. *See, e.g.*, Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968) (prosecution must show that defendant freely and voluntarily gave consent prior to warrantless search before admission of challenged evidence); Trupiano v. United States, 334 U.S. 699, 712-13 (1948) (Vinson, C. J., dissenting) (federal agents properly on premises where owner gave consent to entry), *overruled*, 339 U.S. 56, 66 (1950); Johnson v. United States, 333 U.S. 10, 13 (1948) (entry into defendant's hotel room illegal when defendant granted entry in submission of authority and not by intentional waiver of constitutional right); *cf.* Davis v. United States, 328 U.S. 582, 592-93 (1946) (right to inspect public documents at place of business distinguished from warrantless search of residence conducted without voluntary consent). *See generally* Wefing & Miles, *Consent Searches*

of the owner of the home[5] or unless exigent circumstances justify an immediate search.[6] To guarantee that police do not profit from unreasonable conduct,[7]

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and the Fourth Amendment: Voluntariness and Third Party Problems, 5 SETON HALL L. REV. 217, 217-22 (1973) (discussion of Supreme Court decisions involving consent searches).

5. *See* Stoner v. California, 376 U.S. 483, 489 (1964) (hotel clerk not permitted to give consent to search room of hotel guest); Chapman v. United States, 365 U.S. 610, 616-17 (1961) (landlord-owner of home not permitted to give consent to search part of house which tenant exclusively occupied). *But see* United States v. Matlock, 415 U.S. 164, 171 (1974) (consent to justify warrantless search permissible if obtained from third party who exercised common authority over premises). *See generally* Wefing & Miles, *supra* note 4, at 253-83 (discussion of third party consent); Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COL. L. REV. 130, 149-50 (1967) (discussion of consent by co-occupants of dwelling).

6. *See* United States v. Santana, 423 U.S. 38, 42-43 (1976) (pursuit of suspect by police into private dwelling justified by exigency of situation); Warden v. Hayden, 382 U.S. 294, 298-300 (1967) (exigent circumstances permitted police to enter home which armed felon had entered).

Although the Supreme Court has not stated explicitly that the possible destruction or removal of evidence justifies a warrantless search of a home, the Court has intimitated that the potential destruction of evidence may constitute an exigent circumstance justifying an exception to the warrant requirement. *See* Johnson v. United States, 333 U.S. 10, 15 (1948) (warrantless search of hotel room held unlawful because government did not demonstrate possible destruction or removal of contraband contained within hotel room). Similarly, the Supreme Court has upheld a warrantless search of a suspect's body when the evidence contained therein would remain in the body only a short period of time. *See* Cupp v. Murphy, 412 U.S. 291, 296 (1973) (Court found warrantless removal of fingernail scrapings from suspect reasonable under Fourth Amendment because evidence was of disappearing nature); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (Court upheld blood extraction because evidence of blood-alcohol content threatened with destruction).

The strongest support, however, for the Supreme Court's approval of a destruction of evidence exception to the warrant requirement stems from the Court's language in *United States v. Santana*. 427 U.S. 38 (1976). In *Santana*, police went to the home of the defendant in search of money used to purchase contraband. *Id.* at 40. Upon arrival, police found the defendant in the doorway of the defendant's home. *Id.* After identifying themselves as policemen, the officers approached the defendant who retreated into the vestibule of her home. *Id.* The officers apprehended the defendant in the vestibule and found contraband on the floor of the vestibule which the defendant had dropped during the struggle. *Id.* The District Court for the Eastern District of Pennsylvania suppressed the evidence found by the agents, reasoning that the defendant's flight from the doorway into the house did not justify a warrantless entry on the grounds of "hot pursuit." *Id.* at 41. *See* Warden v. Hayden, 387 U.S. 294, 298 (1967) (warrantless entry into home after suspect had entered was reasonable due to exigency of situation). The Supreme Court, however, held that once the suspect retreated into her home, a realistic likelihood existed that any delay would result in the destruction of evidence. *Santana*, 427 U.S. at 43. Accordingly, the Court upheld the warrantless entry to make an arrest because of the exigencies of the situation. *Id.* The Court further noted that the contraband discovered on the floor of the defendant's home was admissible at trial because once police lawfully had arrested the defendant, a search incident to arrest was justifiable. *Id.*; *see* Vale v. Louisiana, 399 U.S. 30, 35 (1970) (warrantless search held unlawful since goods ultimately seized were not in process of destruction); United States v. Jeffers, 342 U.S. 48, 51 (1951) (warrantless search and seizure found unlawful because imminent destruction or removal of evidence not present). *See generally* Comment, *Warrantless Residential Searches to Prevent the Destruction of Evidence: A Need for Strict Standards*, 70 J. CRIM. L. & CRIMIN. 255, 269 (1979) (warrantless entries into residences to prevent destruction of evidence permitted under expanding exigent circumstances exception to warrant requirement).

7. *See, e.g.*, Brown v. Illinois, 422 U.S. 590, 599-600 (1975) (purpose of exclusionary rule is to deter unlawful police conduct); United States v. Calandra, 414 U.S. 338, 348 (1974) (exclusionary rule designed to safeguard Fourth Amendment rights through deterrent effects); Terry v. Ohio, 392 U.S. 1, 12 (1968) (rule excluding evidence seized in violation of Fourth Amendment

the Supreme Court has applied the exclusionary rule to evidence seized in violation of the Fourth Amendment.[8] Nonetheless, circuit courts have refused to apply the exclusionary rule to evidence that police obtained from a source independent of a prior illegal search.[9] The independent source doctrine permits the admission

is principal mode of discouraging unlawful police conduct); Wolf v. Colorado, 338 U.S. 25, 44 (1949) (Murphy, J., dissenting) (exclusion of unlawfully obtained evidence is only means for ensuring that police do not gain from unlawful conduct), *overruled*, 367 U.S. 643, 655 (1961). *See generally* Gilday, *The Exclusionary Rule Down and Almost Out*, 4 N. KY. L. REV. 1, 3 (1977) (rationale of exclusion assumed that potential exclusion of items seized would discourage police from utilizing unconstitutional means to obtain evidence). Although the Supreme Court consistently has maintained that the purpose of the exclusionary rule is to deter unlawful police conduct, several commentators have questioned whether the exclusionary rule effectively deters unlawful police conduct. *See, e.g.*, Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 674-709 (1970) (analysis of empirical evidence indicates exclusionary rule does not have direct effect on police conduct); Schlesinger, *The Exclusionary Rule: Have Proponents Proved That It Is A Deterrent to Police?*, 62 JUDICATURE 404, 405-409 (1979) (empirical studies reveal that exclusionary rule is ineffective deterrent); Comment, *Comparative Analysis of the Exclusionary Rule and Its Alternatives*, 57 TUL L. REV. 648, 654-57 (1983) (deterrence rationale fails to support exclusionary rule because police officers often arrest not for conviction but for harassment purposes). One commentator has suggested that alternative measures through judicial processes such as civil damage actions, criminal penalties and injunctions would more effectively deter police misconduct than does the exclusionary rule. *See* Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1386-1426 (1981) (discussion of alternatives to exclusionary rule). Moreover, another commentator has noted that the trend of the Supreme Court is to limit application of the exclusionary rule. *See* Comment, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 HOW. L.J. 299, 300-01 n.7 (1980) (listing of recent Supreme Court decisions which have restricted scope of exclusionary rule). Although the exclusionary rule has come under recent scrutiny, recent statistics and surveys show that the exclusionary rule does have a deterrent effect on unlawful police conduct. *See* Note, *The Exclusionary Rule: Alive and Well After a Decade of Surgery*, 17 GONZ. L. REV. 735, 748-52 (1982) (exclusionary rule effectively protects citizens from unlawful invasion of home and privacy).

8. *See* Weeks v. United States, 232 U.S. 383, 398 (1914). The Supreme Court first adopted a federal rule excluding evidence seized in violation of the Fourth Amendment in *Weeks v. United States*. *See id.* (unlawfully seized letters and information obtained therefrom excluded under protections of Fourth Amendment). In *Weeks*, the Supreme Court held that the exclusion of illegally seized evidence vindicated a victim's right of privacy. *Id.* at 393-94. The Supreme Court in *Mapp v. Ohio* extended the exclusionary rule to the states. *See* 367 U.S. 643, 659-60 (1961) (lascivious books and pictures seized from defendant's home without warrant suppressed under rule of exclusion formerly applicable only to federal government). In *Mapp*, the Court stated that the exclusionary rule was an essential element of the Fourth Amendment and that the rights contained within the Fourth Amendment applied to the states through the due process clause of the Fourteenth Amendment. *Id.* at 651; *see* U.S. CONST. amend. XIV, § 1 (state can not deny person within jurisdiction equal protection under law). The Supreme Court, however, never intended the exclusionary rule to prohibit all usages of illegally seized evidence. *See* Stone v. Powell, 428 U.S. 465, 486-87 (1976) (state prisoner denied federal habeas corpus relief despite use of illegally seized evidence at trial); United States v. Calandra, 414 U.S. 338, 348-52 (1974) (illegally seized evidence admissible before grand jury); Walder v. United States, 347 U.S. 62, 65-66 (1954) (illegally seized evidence admissible at trial to impeach credibility of witness).

9. *See, e.g.*, Grimaldi v. United States, 606 F.2d 332, 336 (1st Cir. 1979) (suppression not required where affidavit supporting warrant included some illegally obtained evidence because agents gained other evidence from independent source); United States v. Pike, 523 F.2d 734, 736 (5th Cir. 1975) (suppression not required where illegally seized evidence merely intensified investigation which led police to discover additional evidence); Howell v. Cupp, 427 F.2d 36, 38 (9th Cir. 1970) (affidavit which contained unlawfully obtained information not invalidated

of evidence seized pursuant to a valid warrant following a prior illegal search provided that a causal relationship did not exist between the initial unlawful search and the evidence subsequently seized.[10] Courts, however, have experienced difficulties in consistently applying the independent source doctrine to evidence that police lawfully obtained after a prior warrantless seizure of a home.[11] Because

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because other information in affidavit established probable cause); United States v. Sterling, 369 F.2d 799, 802 (3rd Cir. 1966) (evidence obtained from subsequent search did not require suppression merely because improper material contained in affidavit supporting warrant); *see also* 3 W. LAFAVE, SEARCH & SEIZURE § 11.4, at 617-20 (illustration of independent source test); *infra* note 10 (discussion of origin of independent source doctrine).

10. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The independent source doctrine originated in the Supreme Court's decision in *Silverthorne Lumber Co. v. United States. See id.* In *Silverthorne*, a United States marshall searched and seized the books and records of the defendant Silverthorne Lumber Company without a warrant. *Id.* at 390. The defendant filed a petition with the United States District Court for the Western District of New York seeking the return of the books and records. *Id.* at 390-91. The marshall returned the books and records but kept copies of the seized documents. *Id.* at 391. Based on information gained from the papers, the government formed an indictment against the Silverthorne's. *Id.* The district court then ordered the defendants to return the originals. *Id.* The defendants refused to comply with the district court's order and the court held the Silverthornes in contempt. *Id.* On writ of certiorari, the Supreme Court reversed the defendant's contempt conviction. *Id.* at 392. The *Silverthorne* Court held that the government may not profit from a prior unlawful search and seizure of the defendants' papers and, therefore, refused to admit evidence obtained from knowledge gained from the prior illegal search and seizure. *Id.* The Court, however, commented that if the government obtained knowledge of the information contained in the illegally seized documents through a source independent of the prior unlawful seizure, the government could introduce the information into evidence at trial. *Id.*

The notion that the government may not profit from its illegal conduct led to the "fruit of the poisonous tree" doctrine. *See* Nardone v. United States, 308 U.S. 338, 341 (1939) (trial judge must allow defendant to demonstrate that government's case was fruit of poisonous tree once defendant establishes prior illegal conduct). The "fruit of the poisonous tree" doctrine provides that evidence obtained by virture of unlawful conduct becomes the "poisoned tree" and if this evidence leads to additional evidence, the secondary evidence becomes the "fruit of the poisoned tree" which is inadmissible in court. *See* Wong Sun v. United States, 371 U.S. 471, 485-87 (1963) (statements made by suspect following unlawful arrest excluded as fruits of illegal arrest). In *Wong Sun*, the Supreme Court indicated that evidence unlawfully obtained does not become "fruit of the poisoned tree" merely because the police would not have uncovered the evidence but for the police's prior illegal conduct. *Id.* at 487-88. The *Wong Sun* Court stated that evidence is not "fruit of the poisonous tree" and is admissible under the independent source doctrine if the evidence has come about by means distinguishable from the initial illegality and not by exploitation of the prior illegal conduct. *Id. See generally* Pitler, *"The Fruit of the Poisoned Tree" Revisted and Shepardized*, 56 Cal. L. Rev. 579, 593-94 (1968) (discussion of *Wong Sun* "fruit of the poisoned tree" doctrine).

11. *Compare* United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980) (independent source doctrine does not operate to admit evidence obtained pursuant to unlawful seizure of home because application of doctrine would encourage warrantless seizures while police sought independent evidentiary basis to justify warrant) *and* People v. Shuey, 13 Cal. 3d 835, 850, 533 P.2d 211, 222, 120 Cal. Rptr. 83, 94 (1975) (officers could not retroactively validate prior unlawful seizure of premises because seizure of premises constituted seizure of property contained inside home) *with* People v. Arnau, 58 N.Y.2d 27, 34, 444 N.E.2d 13, 17, 457 N.Y.S.2d 763, 767 (1982) (exclusionary rule should not suppress evidence which is product of independent source despite prior unlawful seizure of home).

the Supreme Court has not addressed the question,[12] courts have differed about whether the warrantless securing of a home constitutes an unreasonable seizure under the Fourth Amendment.[13] Consequently, courts have disagreed about whether a warrantless securing of a home mandates application of the exclusionary rule to suppress evidence subsequently obtained pursuant to a lawful search.[14]

The Ninth Circuit was the first federal court to address the admissibility of evidence seized during a valid search following a prior warrantless seizure

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12. *See* United States v. Korman, 614 F.2d 541, 549 (6th Cir.) (Merritt, J., dissenting) (Supreme Court has not recognized securing premises-in-anticipation-of-warrant exception to warrant requirement), *cert. denied*, 446 U.S. 952 (1980); State v. Ramos, 405 So.2d 1001, 1002 n.4 (Fla. Dist. Ct. App. 1981) (Supreme Court never has recognized exception to warrant requirement permitting police to secure premises in anticipation of warrant). *But see* United States v. Segura, 663 F.2d 411 (2d Cir. 1981), *cert. granted*, 103 S. Ct. 1182 (February 22, 1983). In *Segura*, police illegally entered and secured the dwelling of the defendant while awaiting the arrival of a search warrant. *Id.* at 413. The Second Circuit held that although the warrantless entry was illegal, evidence found after the issuance of a valid search warrant was admissible because the police did not seize the evidence not discovered during the unlawful entry until the lawful search pursuant to a valid warrant. *Id.* at 416-17. The Supreme Court granted certiorari on whether the police's entry and occupancy of the defendant's residence violated the constitutional requirement that a magistrate find probable cause before police may violate the privacy of a home. *See* 51 U.S.L.W. 3611, 3611 (Feb. 22, 1983). Since seizures ordinarily do not violate the privacy of a home, the Supreme Court appeared to be focusing on the warrantless entry into the defendant's dwelling rather than the warrantless seizure. *Cf.* G.M. Leasing Corp. v. United States, 429 U.S. 338, 357-58 (1977) (Court held that seizure of automobiles did not involve invasion of Fourth Amendment privacy interests); Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 648 (1981) (seizures do not intrude on individual's privacy interests but only interfere with possessory interest in item seized).

13. *See, e.g.*, United States v. Lomas, 706 F.2d 886, 894 (9th Cir. 1983) (warrantless seizure of dwelling is unreasonable absent exigent circumstances); United States v. Allard, 634 F.2d 1182, 1187 (9th Cir. 1980) (securing of dwelling without warrant constitutes illegal seizure); People v. Shuey, 13 Cal. 3d 835, 850, 533 P.2d 211, 222, 120 Cal. Rptr. 83, 94 (1975) (warrantless securing of dwelling analogous to police seizing individual items within home prior to acquisition of search warrant); State v. Ramos, 405 So. 2d 1001, 1002-03 (Fla. Dist. Ct. App. 1981) (seizure of home illegal under Fourth Amendment absent warrant or presence of exigent circumstances); State v. Bean, 89 Wash. 2d 467, 473, 572 P.2d 1102, 1104 (1978) (securing of residence without warrant or exigent circumstances constitutes illegal seizure of all items contained within residence); *see also* State v. Dorson, 62 Haw. 377, ____, 615 P.2d 740, 744 (1980) (warrantless seizure of home amounted to unlawful seizure of home and contents); State v. Hansen, 295 Or. 78, ____, 664 P.2d 1095, 1105-06 (1983) (warrantless seizure of home constitutes unlawful seizure of home and objects which police intended to subsequently seize). *But see* People v. Arnau, 58 N.Y.2d 27, 34-35, 444 N.E.2d 13, 17, 457 N.Y.S.2d 763, 767 (1982) (warrantless seizure of dwelling not unreasonable seizure); Grano, *supra* note 12, at 647 (warrantless seizures based on probable cause should be permissible under Fourth Amendment).

14. *See* United States v. Allard (*Allard II*), 634 F.2d 1182, 1187 (9th Cir. 1980) (warrantless seizure of home requires suppression of evidence subsequently obtained pursuant to lawful search unless government can show that illegal seizure did not make difference); *People v. Shuey*, 13 Cal. 3d 835, 850, 533 P.2d 211, 222, 120 Cal. Rptr. 83, 94 (1975) (securing of dwelling without warrant mandates application of exclusionary rule to suppress evidence obtained during subsequent lawful search). *But see People v. Arnau*, 58 N.Y.2d 27, 35, 444 N.E.2d 13, 17, 457 N.Y.S. 2d 763, 767 (1982) (unlawful act of securing apartment should not result in exclusion of evidence obtained independent of unlawful activity).

of a home.[15] In *United States v. Allard (Allard I)*,[16] government agents arrested Wayne Allard for distribution of cocaine at the apartment of Allard's accomplice.[17] The government agents then went to Allard's hotel room to search for contraband.[18] Although the government agents did not obtain a warrant prior to proceeding to Allard's hotel room, an occupant of Allard's hotel room reluctantly permitted the agents to enter.[19] Once inside Allard's hotel room, a government agent called the Assistant United States Attorney to request a search warrant.[20] The government agents then remained in the hotel room and detained the occupant until the warrant arrived.[21] During the ensuing search pursuant to the search warrant, the agent discovered contraband which the government utilized to bring an indictment against Allard.[22] At trial, the United States District Court for the Western District of Washington characterized the agents' warrantless entry as an unlawful search and suppressed the evidence seized pursuant to a valid warrant, reasoning that the exclusionary rule mandated the suppression of evidence obtained after a prior unlawful entry.[23]

On appeal, the Ninth Circuit did not address the agents' warrantless securing of the defendant's hotel room.[24] Instead, the court stated that the agents' warrantless entry and occupancy constituted an unlawful search under the Fourth Amendment since neither consent nor exigent circumstances were present to justify the agents' conduct.[25] To determine whether the exclusionary

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15. *See Allard II*, 634 F.2d at 1183 (seizure prior to issuance of warrant is unlawful under Fourth Amendment); *see also United States v. Lomas*, 706 F.2d 886, 894 (9th Cir. 1983) (warrantless securing of dwelling constitutes unreasonable seizure absent exigent circumstances); *infra* notes 32-37 and 53-57 and accompanying text (*Allard II* and *Lomas* courts' rationale on warrantless securing of dwelling).

16. *United States v. Allard (Allard I)*, 600 F.2d 1301 (9th Cir. 1979).

17. *Id.* at 1302. In *Allard I*, government agents arrested Douglas Richmond for possession of cocaine. *Id.* Richmond identified his source as Wayne Allard who was to deliver additional cocaine to Richmond at Richmond's apartment. *Id.* The government agents went to Richmond's apartment and found Allard there. *Id.* The agents arrested Allard but a search incident to arrest did not uncover contraband. *Id.* Consequently, the agents decided to go to Allard's hotel room to continue the investigation. *Id.* at 1303.

18. *Id.*

19. *Id.* In *Allard I*, the agents asked the occupant if the agents could enter and speak with the occupant. *Id.* The occupant responded: "I suppose I don't have any choice." *Id.* The agents entered and questioned the occupant about participation in the cocaine operation. *Id.*

20. *Id.*

21. *Id.* In *Allard I*, the agents testified that they would not have permitted the removal of the room's contents or allowed the occupant to leave. *Id.* The agents also testified that they remained in the hotel room because the agents believed that they had probable cause which justified their presence inside the room. *Id.* The agents further testified that they did not conduct a search of the hotel room until a warrant arrived. *Id.*

22. *Id.*

23. *See Id.* at 1302.

24. *See* United States v. Allard, 634 F.2d 1182, 1185 (9th Cir. 1980) (Ninth Circuit previously had no occasion to consider effect of warrantless seizure of hotel room).

25. 600 F.2d at 1304. In deciding that the agents' warrantless entry and occupancy violated the Fourth Amendment, the Ninth Circuit in *Allard I* found that the occupant of the room did not voluntarily consent to the agents' warrantless entry. *Id.*; *see supra* note 19 and accompanying text (facts underlying nonconsensual entry determination). The *Allard I* court also acknowledged

rule required the suppression of the evidence seized, the Ninth Circuit remanded the case to the district court for a determination of whether the prior unlawful search provided the agents with information that motivated the agents to seek a search warrant.[26] The Ninth Circuit reasoned that if the agents' observations while unlawfully inside the hotel room were a substantial factor in the agents' decision to request a search warrant, then the independent source doctrine would not permit the admission of the evidence subsequently seized pursuant to the lawful search.[27]

On remand, the district court denied the defendant's motion to suppress the evidence seized pursuant to the lawful search.[28] The district court determined that the agents did not obtain information from the prior unlawful search influencing the agents' subsequent decision to seek a search warrant.[29] The court then applied the independent source doctrine to admit the evidence subsequently seized pursuant to the lawful search.[30] Allard appealed the district court's decision to the Ninth Circuit.[31]

On appeal, the Ninth Circuit in *United States v. Allard* (*Allard II*)[32] held that the agents' warrantless occupation of the defendant's hotel room constituted an unreasonable seizure of the room and the room's contents under the Fourth Amendment.[33] The *Allard II* court observed that the agents would

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that exigent circumstances did not exist to justify a warrantless entry. 600 F.2d at 1304. As support for the court's position, the *Allard I* court noted that the government did not produce any evidence demonstrating that the agents believed that the occupant of the room was about to destroy evidence. *Id.*

26. 600 F.2d at 1306. The Ninth Circuit in *Allard I* stated that the court could not determine from the record whether the defendant had established that the challenged evidence had resulted from exploitation of the agents' illegal entry into Allard's hotel room. *Id.* Since the district court did not fully develop the facts underlying the agents' motivation for the issuance of a search warrant, the *Allard I* court remanded the case to the district court to explicate the underlying facts. *Id.*

27. *Id.* The *Allard I* court commented that if the agents' observations gained from the unlawful entry merely intensified and already ongoing investigation, the unlawful entry would not render the evidence subsequently obtained inadmissible because the agents would not have recovered evidence through exploitation of the unlawful entry. *Id.* at 1305; *see* United States v. Choate, 576 F.2d 165, 186 (9th Cir. 1978) (Hufstedler, J., concurring in part, dissenting in part) (courts should suppress only evidence specifically derived from illegal conduct); United States v. Cella, 568 F.2d 1266, 1283-86 (9th Cir. 1977) (as amended January 18, 1978) (illegal search intensifying investigation does not require suppression of evidence subsequently obtained in lawful manner).

28. 634 F.2d at 1183.

29. *Id.* at 1184. The district court in *Allard II* stated that even if the agents' observations were a motivating factor in the agents' subsequent decision to seek a warrant, the illegally obtained observations were so insubstantial that their role in the subsequent discovery of the evidence was minimal. *Id.*

30. *Id.*

31. *Id.* at 1183.

32. 634 F.2d 1182 (9th Cir. 1980) (*Allard II*).

33. *Id.* at 1184 (*Allard II* court concluded that by any rational test agents' occupancy of Allard's hotel room constituted seizure of room). In holding that the agents' occupancy constituted a seizure of the room and the room's contents, the *Allard II* court relied on the Ninth Circuit's earlier decision in *United States v. Bacall*. *Id.* at 1185-86; *see* United States v. Bacall,

not have permitted the occupant of the hotel room to leave and that the agents would not have permitted the removal of the room's contents.[34] The court further observed that the agents continued to secure Allard's hotel room until the search warrant arrived.[35] Since the Ninth Circuit previously had determined that exigent circumstances did not justify the warrantless seizure,[36] the *Allard II* court stated that the agents' seizure of the defendant's hotel room was unreasonable because normal police procedures provided alternative measures to guard against the potential destruction of the evidence.[37]

After establishing that the agents' conduct was unreasonable under the Fourth Amendment, the *Allard II* court next considered the admissibility of evidence lawfully seized subsequent to the prior unlawful seizure of the defendant's hotel room.[38] The Ninth Circuit rejected application of the independent source doctrine to admit evidence seized pursuant to the unlawful seizure, reasoning that application of the independent source doctrine to evidence obtained pursuant to an unlawful seizure would encourage police to seize places without probable cause while police sought an independent evidentiary basis to justify issuance of a search warrant.[39] Instead, the *Allard II* court advocated a new test to determine the admissibility of evidence lawfully seized following

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443 F.2d 1050, 1057 (9th Cir. 1971), *cert. denied*, 404 U.S. 1004 (1972). In *Bacall*, customs agents seized the defendant's warehouse which resulted in the seizure of the fabrics contained inside. 443 F.2d at 1053. The government, however, based its case on evidence obtained from a foreign investigation resulting from an inventory of the items unlawfully seized and not on the fabrics seized themselves. *Id.* at 1057. The *Bacall* court stated that the determination whether the contested evidence came about by exploitation of the illegal seizure rested on the role the illegal seizure played in the subsequent discovery of the evidence. *Id.* Since the agents did not secure the defendant's warehouse with the intent of seizing the fabrics inside, the *Bacall* court reasoned that the evidence subsequently obtained did not result from exploitation of the illegal seizure. *Id.* at 1057, 1061. The *Bacall* court, therefore, applied the independent source doctrine to admit the evidence at trial. *Id.* at 1061 (court noted that admission of evidence would not encourage unlawful seizures since normally evidence obtained would be inadmissible except for evidence remotely and fortuitously acquired). The Ninth Circuit in *Bacall*, however, acknowledged that the evidence subsequently obtained would not be admissible if the object of the illegal seizure was the securing of the evidence which the defendant sought to suppress. *Id.* at 1062; *see* Allen v. Cupp. 426 F.2d 756, 759 (9th Cir. 1970) (voluntary confession not suppressed because of illegal arrest when purpose of illegal arrest was not to secure confession).

34. 634 F.2d at 1184; *see supra* note 21 and accompanying text (facts supportive of seizure determination). 634 F.2d at 1184.

35. *Id.* The *Allard II* court observed that the agents' occupancy of the room lasted two hours while the agents awaited a warrant. *Id.* at 1186.

36. *See supra* note 25 (*Allard I* court found that exigent circumstances were not present).

37. 634 F.2d at 1187; *see* United States v. Flickinger, 573 F.2d 1349, 1352 (9th Cir.) (court observed that alternative to immediate entry was escalation of precautionary measures), *cert. denied*, 439 U.S. 836 (1978); United States v. Hayes, 518 F.2d 675, 678 (6th Cir. 1975) (court stated that agents could have watched door while awaiting arrival of search warrant); *see also* United States v. Calhoun, 542 F.2d 1094, 1102 (9th Cir. 1976) (warrantless entry held invalid because policce could have maintained surveillance until warrant arrived), *cert. denied*, 429 U.S. 1064 (1977); United States v. McLaughlin, 525 F.2d 517, 521 (9th Cir. 1975) (police should maintain surveillance until warrant obtained unless exigent circumstances justify warrantless entry).

38. 634 F.2d at 1186-87.

39. *Id.* at 1187.

a prior unlawful seizure of a home.[40] The *Allard II* court's test provided that once a defendant had demonstrated that the government illegally secured the defendant's premises, the government must prove that the prosecution would have both independently discovered and successfully obtained the evidence discovered during the subsequent lawful search of the premises to permit the admission of the illegally seized evidence.[41] Applying the new test, the *Allard*

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40. *Id.*

41. *Id.* To demonstrate that the agents would have both independently discovered and successfully obtained the contested evidence, the *Allard II* court suggested that the government could have shown that the agents did not benefit from the illegal seizure of Allard's hotel room by proving that the discovery of the contraband was inevitable and that no one would have moved the cocaine. *Id.* at 1187 n.6.

Requiring the government to prove that the agents would have both independently discovered and successfully obtained the proffered evidence appears similar to the emerging inevitable discovery exception to the warrant requirement. The inevitable discovery doctrine permits the admission of evidence unlawfully obtained if the government can show that the police would have inevitably discovered the evidence lawfully notwithstanding the prior illegal seizure of the evidence. *See* 3 W. LAFAVE, *supra* note 9, § 11.4, at 620-24 (illustrations of application of inevitable discovery doctrine); Note, *The Inevitable Discovery Exception in California: A Need for Clarification of the Exclusionary Rule*, 15 U.S.F. L. REV. 283, 286 (1980) (discussion of inevitable discovery doctrine). *See generally* LaCount & Grose, *The "Inevitable Discovery" Rule, An Evolving Exception to the Constitutional Exclusionary Rule*, 40 ALB. L. REV. 483, 491-511 (1976) (discussion of application of inevitable discovery doctrine to permit admission of evidence unlawfully obtained). Since the *Allard II* court's test required that the government demonstrate that the illegal seizure did not make a difference, the *Allard II* test and the inevitable discovery doctrine appear identical. *Compare* 634 F.2d at 1187 n.7 (*Allard II court's test) with* 3 W. LAFAVE, *supra* note 9, § 11.4 at 621 (inevitable discovery doctrine).

Although the Supreme Court had not adopted expressly the inevitable discovery doctrine, the Court in *Brewer v. Williams* acknowledged that the exclusionary rule did not require the suppression of unlawfully obtained evidence if lawful discovery of the evidence was inevitable. 430 U.S. 387, 407 n.12 (1977). In *Brewer*, police arrested the defendant for the abduction and murder of a young girl whose body police had not found. *Id.* at 390. While transporting the defendant to prison, police enticed Williams into making incriminating statements concerning the location of the girl's body. *Id.* at 392-93. The trial court convicted Williams of murder and the Supreme Court of Iowa affirmed. *Id.* at 394. The United States Supreme Court refused to admit the defendant's incriminating statements into evidence, holding that the police denied Williams his right to counsel prior to the initiation of judicial proceedings. *Id.* at 404-06 (defendant entitled to counsel during interrogation while police transported defendant to prison since issuance of arrest warrant and arraignment had taken place). The *Brewer* Court, however, commented that although the incriminating statements were inadmissible at trial, the girl's body was admissible since the government had proven that discovery of the girl's body was inevitable. *Id.* at 407 n.12; *see* United States v. Miller, 666 F.2d 991, 996-97 (5th Cir. 1981) (corroborating testimony of witnesses admissible despite illegal seizure of diary since police would have obtained testimony even without access to diary), *cert. denied*, 456 U.S. 464 (1982); United States ex rel. Owens v. Twomey, 508 F.2d 858, 866 (7th Cir. 1974) (work address obtained from unlawfully seized booklet admissible since witnesses inevitably would have verified address); United States v. Seohnlein, 423 F.2d 1051, 1053 (4th Cir.) (evidence seized pursuant to an unlawful search admissible because outstanding arrest warrants issued against defendant insured that police would have arrested defendant and obtained evidence notwithstanding prior unlawful search), *cert. denied*, 399 U.S. 913 (1970); Somer v. United States, 138 F.2d 790, 791-92 (2d Cir. 1943) (evidence found pursuant to unlawful search would be admissible if police demonstrate that police would have lawfully discovered evidence despite prior illegal seizure); *see also* People v. Payton, 45 N.Y.2d 300, 313,

II court determined that the government failed to demonstrate that the agents would have both independently discovered and successfully obtained the evidence seized pursuant to the unlawful seizure.[42] The Ninth Circuit then reversed the judgement of the district court and suppressed the evidence that the agents seized during the search conducted pursuant to the valid search warrant.[43]

The Ninth Circuit subsequently extended the *Allard II* court's test to situations in which police did not enter the premises but merely seized the premises pending application of a search warrant.[44] In *United States v. Lomas*,[45] government agents arrested Robert Lomas and Peter Margolis for conspiracy to possess cocaine with intent to distribute.[46] An agent went to Margolis' hotel room to secure the room until a warrant arrived.[47] After finding no one inside the room, the agent locked the door from the outside to prevent anyone from entering without assistance from hotel management.[48] The agents subsequently obtained a warrant and searched Margolis' hotel room uncovering evidence

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380 N.E.2d 224, 231, 408 N.Y.S.2d 395, 402 (1978) (only high degree of probability that police would have obtained evidence independent of illegality necessary to justify application of inevitable discovery rule), *rev'd on other grounds*, 445 U.S. 573 (1980).

42. 634 F.2d at 1187.

43. *Id.* at 1187. In suppressing the contraband seized by the government agents, the *Allard II* court noted that the suppression of evidence subsequently obtained pursuant to the lawful search would not be appropriate if the seized object was a vehicle. *Id.* at 1187 n.7. The United States Supreme Court has permitted the warrantless seizure of transient objects upon a subjective determination of probable cause by police. *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753, 761-62 (1979) (court upheld warrantless seizure of trunk on subjective probable cause); United Stated v. Chadwick, 433 U.S. 1, 13 (1977) (federal agents permitted to seize footlocker on probable cause sufficient to seize automobile until warrant obtained). The Court has justified the warrantless seizure of transient objects because of the inherent mobility of the object. *See* Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (seizure of suitcase from trunk of automobile due to possibility of evidence being transported out of jurisdiction); United States v. Chadwick, 433 U.S. 1, 13 (1977) (seizure of footlocker reasonable to prevent possible removal or destruction of evidence); Chambers v. Maroney, 399 U.S. 42, 52 (1970) (Fourth Amendment permits warrantless seizure of automobile due to automobile's mobility). Since a home is not an inherently mobile object, the *Allard II* court correctly observed that a warrantless seizure should not be permissible merely because the police subjectively determined probable cause. *See* Chambers v. Maroney, 399 U.S. 42, 52 (1970) (purposes underlying Fourth Amendment dictate different standards applicable to warrantless seizures of homes).

44. *See* United States v. Lomas, 706 F.2d 886, 893-94 (9th Cir. 1983) (*Allard II* test applies to all efforts by law enforcement officials to maintain status quo over residence).

45. 706 F.2d 886 (9th Cir. 1983).

46. *Id.* at 889-90. In *Lomas*, an undercover government agent sold cocaine to Craig Para. *Id.* at 889. Other government agents observed Para take a briefcase filled with money from a white Mustang. *Id.* The undercover agent and Para subsequently proceeded to the First National Bank Tower to exchange contraband for money inside a safe deposit vault. *Id.* Once inside the vault, and after the exchange, the agents arrested Para. *Id.* Outside the bank, the agents identified Lomas and Margolis as the two occupants of the white Mustang and placed both Lomas and Margolis under arrest. *Id.* at 889-90.

47. *Id.* at 890.

48. *Id.* In *Lomas*, the government agent used a passkey to enter Margolis' hotel room and conducted a cursory security check to ensure that no one was hiding inside. *Id.* The *Lomas* court found that the agent was inside the room less than thirty seconds and did not notice any incriminating evidence. *Id.*

incriminating both Lomas and Margolis.[49] Before trial, both Lomas and Margolis moved to suppress the evidence discovered in the hotel room.[50] The United States District Court for the District of Oregon denied the defendant's motion to suppress, reasoning that the agents' securing of the hotel room was proper and did not constitute an unreasonable seizure.[51] Consequently, the district court did not consider whether exigent circumstances were present to justify the warrantless seizure.[52]

On appeal, the Ninth Circuit in *Lomas* found that the agents' warrantless securing of the hotel room constituted an unreasonable seizure under the Fourth Amendment and reversed the district court's decision.[53] The *Lomas* court refused to distinguish between searches and seizures of dwellings, reasoning that unless exigent circumstances were present, both searches and seizures of dwellings required a prior judicial magistrate's determination of probable cause.[54] The *Lomas* court decided that the *Allard II* court's holding that a warrantless securing of a dwelling constituted an unreasonable seizure applied to any attempt by law enforcement officials to maintain the status quo over a dwelling while other officials sought a search warrant.[55] The *Lomas* court, therefore, did not distinguish *Allard II* on the grounds that *Allard II* involved both a warrantless entry and seizure whereas in *Lomas* police did not enter the dwelling but secured the dwelling while awaiting a search warrant.[56] The Ninth Circuit then remanded the case to the district court to determine whether exigent circumstances justified the warrantless seizure of the hotel room.[57]

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49. *See id.* (three hours elapsed between initial securing of Margolis' hotel room and arrival of search warrant).

50. *Id.* at 888.

51. *See id.* at 894.

52. *Id.*

53. *Id.* at 893.

54. *Id.* The Ninth Circuit in *Lomas* relied on *United States v. Kunkler* to support the court's proposition that seizures of premises require a warrant, absent exigent circumstances. *Id.*; *see* United States v. Kunkler, 679 F.2d 187, 191 (9th Cir. 1982). In *Kunkler*, undercover agents entered the defendant's home to prevent the potential destruction of evidence. *Id.* at 190. The agents apprehended the defendant and secured the premises pending application for a search warrant. *Id.* A search of the defendant's home pursuant to the search warrant uncovered drug paraphernalia and contraband. *Id.* The district court denied the defendant's motion to suppress the evidence obtained pursuant to the subsequent lawful search. *Id.* On appeal, the Ninth Circuit stated that the prohibitions of the Fourth Amendment applied not only to searches but also to seizures of the premises. *Id.* at 191. The *Kunkler* court, however, affirmed the district court's decision to admit the evidence on the grounds that the potential destruction of evidence amounted to an exigent circumstance justifying a warrantless seizure of the defendant's residence. *Id.* at 192. *But see* Grano, *supra* note 12, at 642 (warrantless seizures of residences should be permissible since seizures do not intrude on individual's right of privacy). *See generally* Dix, *Means of Executing Searches and Seizures as Fourth Amendment Issues*, 67 MINN. L. REV. 89 106-107 n.88 (1982) (unclear why courts should regard seizures as less intrusive on the privacy rights of individuals than searches).

55. 706 F.2d at 893-94.

56. *Id.* at 893-94; *see Allard II*, 634 F.2d at 1186-87 (9th Cir. 1980) (agent unlawfully entered and secured apartment until search warrant arrived).

57. 706 F.2d at 894. The *Lomas* court remanded the case to the district court not only for a determination of whether exigent circumstances justified the warrantless seizure but also for a determination of whether Lomas had his own Fourth Amendment rights violated by the

The *Lomas* court also reaffirmed the *Allard II* court's rejection of the independent source doctrine with respect to unlawful seizures of dwellings.[58] The Ninth Circuit in *Lomas* found that application of the independent source doctrine to evidence obtained pursuant to an unlawful seizure of a dwelling was impractical because of the difficulty courts have assessing whether police possessed sufficient evidence to justify issuance of a search warrant prior to an illegal seizure of a dwelling.[59] The *Lomas* court stated that to permit the admission of evidence seized subsequent to the unlawful seizure of a dwelling, the government must prove that law enforcement officials would have obtained the disputed evidence notwithstanding the illegal seizure of the dwelling.[60] The Ninth Circuit remanded the case to the district court for a determination of whether the government would have recovered the incriminating evidence by means independent of the prior unlawful seizure.[61]

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warrantless seizure of Margolis' hotel room. *Id.*; *see* Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (defendant bears burden of proving not only unlawful police conduct but also legitimate expectation of privacy in place that police illegally seized).

58. 706 F.2d at 894.

59. 706 F.2d at 894 n.4. *See generally* 3 W. LAFAVE, *supra* note 9, § 11.4 at 618 (courts have encountered difficulties ascertaining whether quantum of evidence which police possessed at time of initial illegal conduct would establish probable cause). In *Lomas*, the Ninth Circuit relied on the court's previous holding in *Allard II* as support for the proposition that the government must demonstrate that it would have obtained the incriminating evidence without a seizure. *Id.*; *see Allard II*, 634 F.2d at 1186-87 (application of independent source doctrine to warrantless seizures is impractical); *supra* notes 41-43 and accompanying text (discussion of *Allard II* test).

60. 706 F.2d at 894 n.4. The *Lomas* court maintained that without an inevitable discovery requirement, evidence that police seized on a subjective determination of probable cause would be admissible, thereby vitiating the Fourth Amendment's warrant requirement. *Id.*; *see supra* note 2 and accompanying text (Fourth Amendment warrant requirement places neutral and detached magistrate between public and police).

61. 706 F.2d at 895. In *Lomas*, the Ninth Circuit held that the additional evidence incriminating Margolis which police offered into evidence rendered the district court's admission of the illegally seized evidence harmless error. *Id.* at 894. The *Lomas* court, therefore, affirmed Margolis' conviction. *Id.*

The dissent in *Lomas* criticized the majority's extension of the *Allard II* court's rationale because in *Lomas*, the agents went to obtain a warrant prior to the warrantless seizure of the hotel room. *Id.* at 896 (Wallace, J., dissenting). The dissent observed that in *Allard II*, the agents did not decide to seek a warrant until after the warrantless entry and occupancy of the room. *Id.* The dissent thus maintained that the difference in timing where police sought to obtain a warrant prior to the unlawful seizure alleviated the *Allard II* court's fears that police would secure a dwelling without probable cause in the hope of finding a subsequent evidentiary basis to justify a search warrant. *See id.* (police unlikely to search for independent evidentiary basis to justify warrant if already in process of obtaining warrant).

Moreover, the *Lomas* dissent criticized the majority's adherence to the *Allard II* court's rejection of the independent source doctrine with respect to unlawful seizures. *Id.* at 897. Noting that several circuit courts have rejected the *Allard II* court's rationale, the dissent advocated application of the independent source doctrine to permit the admission of the contested evidence despite a prior unlawful seizure. *Id.*; *see* United States v. Segura, 663 F.2d 411, 416-17 (2d Cir. 1981) (evidence discovered through independent lawful search is admissible despite prior warrantless entry and occupancy of dwelling), *cert. granted*, 103 S. Ct. 1182 (1983); United States v. Beck, 662 F.2d 527, 530 (8th Cir. 1981) (trial court should not suppress evidence obtained through independent source notwithstanding prior illegal search or seizure); United States v. Korman,

Concurring with the Ninth Circuit's rationale in *Allard II* and *Lomas*, the majority of state courts have held that absent exigent circumstances, a warrantless securing of a dwelling constitutes an unreasonable seizure under the Fourth Amendment.[62] The majority of state courts have maintained that

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614 F.2d 541, 547 (6th Cir.) (evidence lawfully obtained admissible despite prior illegal entry to secure premises), *cert. denied*, 446 U.S. 952 (1980); *see also* United States v. Annese, 631 F.2d 1041, 1042 (1st Cir. 1980) (evidence admissible since probable cause for issuance of warrant was independent of unlawful entry). The cases that the dissent relied on, however, did not rule on the validity of a warrantless seizure of the premises but focused solely on the warrantless entry or search of the premises. *See Segura*, 663 F.2d at 416-17; *Beck*, 662 F.2d at 529-30; *Korman*, 614 F.2d at 547; *see also* Annese, 631 F.2d at 1042. Consequently, the circuit court decisions cited by the *Lomas* dissent merely reiterate the independent source analysis used to permit the admission of evidence obtained pursuant to an unlawful search, but do not delve into the admissibility of evidence obtained pursuant to an unlawful seizure of a home. *See Allard I*, 600 F.2d at 1304-05 (*Allard I* court's analysis of unlawful entry and discussion of independent source doctrine).

Alternatively, the *Lomas* dissent stated that even if the test developed by the *Allard II* court applied to the case at bar, the government had proven that the agents would have both independently discovered and successfully obtained the proffered evidence. 706 F.2d at 897-98. The *Lomas* dissent noted that the hotel receipt found on Margolis pursuant to a lawful search incident to arrest satisfied the requirement that police would have discovered the contested evidence independent of the illegal seizure of the premises. *Id.* The *Lomas* dissent also maintained that since both occupants of Margolis' hotel room were under arrest, the government had shown that the agents successfully would have obtained the evidence notwithstanding the prior illegal seizure. *Id.* Accordingly, the *Lomas* dissent advocated affirmation of the convictions of both defendants since the evidence obtained pursuant to the lawful search of Margolis' hotel room was admissible. *Id.*

62. *See, e.g.*, People v. Shuey, 13 Cal. 3d 835, 849, 533 P.2d 211, 222, 120 Cal. Rptr. 83, 94 (1975); State v. Ramos, 405 So. 2d 1001, 1002 (Fla. Dist. Ct. App. 1981); State v. Dorson, 62 Haw. 377, ____, 615 P.2d 740, 744 (1980); State v. Bean, 89 Wash. 2d 467, 473, 572 P.2d 1102, 1105 (1978); *see also* State v. Hansen, 295 Or. 78, ____, 664 P.2d 1095, 1104 (1983).

In *Shuey*, police entered and secured the defendant's residence while an officer went for a search warrant. 13 Cal. 3d at 838-39, 533 P.2d at 214, 120 Cal. Rptr. at 86. Approximately three hours later, officers returned with a warrant and seized contraband. *Id.* at 839, 533 P.2d at 214, 120 Cal. Rptr. at 86. The Supreme Court of California ruled that the warrantless securing of the residence was unreasonable because the government did not demonstrate the presence of exigent circumstances. *Id.* at 849, 533 P.2d at 221, 120 Cal. Rptr. at 93.

Similarly, in *Ramos*, police arrested the defendant for distribution of cocaine. 405 So. 2d at 1001. A search incident to arrest revealed contraband. *Id.* Believing more contraband was inside the defendant's home, police took the defendant to his residence and entered the dwelling. *Id.* Police then secured the residence while an officer went to obtain a warrant. *Id.* A subsequent search pursuant to a warrant revealed more contraband. *Id.* at 1002. Adopting the analysis of the Ninth Circuit in *Allard II*, the Florida Court of Appeals held that the seizure of the defendant's residence was illegal. *See id.* at 1003 (*Ramos* court followed *Allard II* court's rationale that failure to disclose illegal seizure in affidavit supporting warrant frustrated warrant requirement); *see Allard II*, 634 F.2d at 1187 (failure to mention illegal seizure on affidavit supporting warrant debases Fourth Amendment function of magistrates). The Florida Court reasoned that permitting police to secure dwellings without a warrant would encourage police to disregard the Fourth Amendment's warrant requirement until the unlawful seizure produced indications that a subsequent lawful search would reveal contraband. *Id.* at 1003. Accordingly, the court suppressed the contraband although the police did not discover or seize the contraband until a search warrant arrived. *Id.*

In *Dorson*, police entered the defendant's home to secure the premises to prevent the potential destruction of evidence. 62 Haw. at ____, 615 P.2d at 743. After a search warrant arrived,

a seizure of a home amounts to a seizure of all articles contained within the home.[63] The majority, therefore, have reasoned that a subsequent seizure of evidence during a lawful search could not retroactively validate a prior unlawful seizure of a home and the home's contents.[64] Consequently, the majority of state courts have decided that the evidence subsequently seized pursuant to a lawful search was inadmissible at trial because of the prior unlawful seizure of the home and the home's contents.[65]

Although the majority of state courts have agreed with the reasoning of the Ninth Circuit in *Allard II* and *Lomas*, the New York Court of Appeals held in *People v. Arnau*[66] that a warrantless securing of a dwelling did not constitute an unreasonable seizure under the Fourth Amendment.[67] In *Arnau*, police arrested the defendant in the first floor foyer of the defendant's apartment building for distribution of cocaine.[68] The police led the defendant to the defendant's apartment and entered the apartment without the defendant's consent.[69] The police then conducted a brief security check of the apartment

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the police searched the premises and uncovered contraband. *Id.* at ____, 615 P.2d at 743. The trial court denied the defendant's motion to suppress, reasoning that although the police conduct constituted an impounding, the impounding did not amount to a search or seizure of items inside the dwelling. *Id.* at ____, 615 P.2d at 744. The Supreme Court of Hawaii reversed the decision of the trial court and stated that an impounding of a home constitutes an impoundment of the home's contents. *Id.* at ____, 615 P.2d at 744. The court further acknowledged that the securing of the home curtailed the freedom of movement of the occupants. *Id.* at ____, 615 P.2d at 744. Consequently, the Supreme Court held that the police's conduct amounted to a seizure of the home and the home's contents under the Fourth Amendment. *Id.* at ____, 615 P.2d at 744. Since the government failed to demonstrate that the delay in obtaining a warrant would have resulted in the destruction of evidence, the Hawaii Supreme Court ruled that exigent circumstances did not justify the warrantless seizure. *Id.* at ____, 615 P.2d at 746.

In *Bean*, police went to obtain a warrant prior to securing the home of the defendant. 89 Wash. 2d at 470, 572 P.2d at 1103. Prior to the arrival of the warrant, however, police officers entered and secured the residence until a search warrant arrived. *Id.* The officers subsequently seized contraband in the search of Bean's home. *Id.* at 470, 572 P.2d at 1104. The Washington Supreme Court determined that exigent circumstances did not justify the warrantless entry and occupancy of Bean's home. *Id.* at 473, 572 P.2d at 1105. Consequently, the Supreme Court of Washington held that the warrantless securing of the defendant's home constituted an unreasonable seizure and suppressed the evidence seized pursuant to the lawful search. *Id.*

63. *See* People v. Shuey, 13 Cal. 3d 835, 850, 533 P.2d 211, 222, 120 Cal. Rptr. 83, 94 (1975) (warrantless securing of home similar to situation where police seized particular items which defendant sought to suppress prior to issuance of search warrant); State v. Dorson, 62 Haw. 377, ____, 615 P.2d 740, 744 (1980) (impoundment of dwelling constitutes seizure of home and home's contents). *But see* People v. Arnau, 58 N.Y.2d 27, 34-35, 444 N.E.2d 13, 17, 457 N.Y.S.2d 763, 767 (1982) (seizure of dwelling does not automatically constitute seizure of dwelling's contents).

64. *See supra* note 62 (state courts' analysis of situations involving evidence lawfully obtained following a prior unlawful seizure of a home).

65. *Id.*

66. 58 N.Y.2d 27, 444 N.E.2d 13, 457 N.Y.S.2d 763 (1982).

67. *Id.* at 36-37, 444 N.E.2d at 18-19, 457 N.Y.S.2d at 768-69.

68. *Id.* at 30, 444 N.E.2d at 14, 457 N.Y.S.2d at 764. In *Arnau*, an undercover police officer purchased cocaine from the defendant. *Id.* at 29, 444 N.E.2d at 14, 457 N.Y.S.2d at 764. The undercover police officer informed a narcotics squad surveillance team that cocaine was inside the defendant's apartment. *Id.* at 30, 444 N.E.2d at 14, 457 N.Y.S.2d at 764. The narcotics squad decided to enter and secure the premises immediately. *Id.*

69. *Id.*, 444 N.E.2d at 14-15, 457 N.Y.S.2d at 764-65.

and called for assistance to secure the apartment pending application for a search warrant.[70] A subsequent search of the defendant's apartment pursuant to a search warrant revealed contraband.[71] At trial, the defendant moved to suppress the evidence obtained during the search pursuant to the warrant.[72] The Appellate Division granted the defendant's motion to suppress, reasoning that absent the presence of exigent circumstances, the police unlawfully entered and secured the defendant's apartment.[73] Accordingly, the Appellate Division decided that the unlawful securing of the defendant's apartment mandated application of the exclusionary rule to suppress evidence subsequently obtained during the lawful search.[74]

On appeal, the New York Court of Appeals reversed the Appellate Division's decision that the police's warrantless securing of Arnau's apartment constituted an unreasonable seizure of the apartment and the contents of the apartment.[75] The *Arnau* court reasoned that a seizure of an apartment did not constitute a seizure of all items contained within the apartment, but only a seizure of items which police discovered during the initial unlawful entry and seizure of the apartment.[76] The *Arnau* court maintained that evidence contained within the apartment which police did not discover until the subsequent search pursuant to a valid warrant did not result from exploitation of the prior illegal entry and seizure of the apartment.[77] The New York Court of Appeals concluded that the police, by securing the apartment pending application for a search warrant, did not seize any evidence which the police did not discover until the subsequent search pursuant to a valid warrant.[78]

The *Arnau* court also rejected the *Allard II* court's interpretation of the exclusionary rule with respect to evidence seized pursuant to a lawful search following a prior warrantless seizure of a defendant's dwelling.[79] The court stated that where contested evidence was the product of an independent source, a court should admit the evidence since the exclusionary rule does not apply

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70. *Id.*, 444 N.E.2d at 15, 457 N.Y.S.2d at 765. The *Arnau* court found that police checked the apartment for occupants and possible exits or entrances but did not conduct a search of the defendant's apartment. *Id.* The *Arnau* court further determined that police did not discover or seize evidence during the initial entry into Arnau's apartment. *Id.*

71. *Id.* at 30-31, 444 N.E.2d at 15, 457 N.Y.S.2d at 765.

72. *See id.* at 31, 444 N.E.2d at 15, 457 N.Y.S.2d at 765. (trial court denied Arnau's motion to suppress evidence discovered during lawful search of apartment).

73. 85 A.D.2d 607, 608, 444 N.Y.S.2d 683, 684 (1981). In reversing the district court's decision to admit the evidence seized from Arnau's apartment, the Appellate Division in *Arnau* stated that the mere fact that contraband can be easily disposed of does not constitute an exigent circumstance justifying a warrantless seizure. *Id.* The Appellate Division observed that although probable cause existed to arrest the defendant, the objective of police in entering and securing the dwelling was to secure the apartment without a warrant and absent exigent circumstances. *Id.*

74. *Id.*

75. 58 N.Y.2d at 34-35, 444 N.E.2d at 17, 457 N.Y.S.2d at 767.

76. *See id.* (unlawful act of securing apartment did not amount to seizure of contraband because police did not discover contraband during initial entry).

77. *Id.*

78. *Id.*

79. *Id.*; *see infra* notes 80-82 and accompanying text (*Arnau* court rejected *Allard II* test and applied traditional independent source doctrine to permit admission of evidence).

to situations in which no causal connection exists between an initial unlawful seizure of a dwelling and a subsequent lawful seizure of the evidence.[80] Reasoning that the police did not obtain the evidence through exploitation of the prior seizure of Arnau's apartment, the *Arnau* court determined that the suppression of evidence lawfully seized would not further the exclusionary rule's goal of deterrence of unlawful police conduct.[81] Consequently, the *Arnau* court held that the evidence subsequently seized from Arnau's apartment was admissible.[82]

As support for the holding that a warrantless securing of a dwelling constitutes a reasonable seizure under the Fourth Amendment, the *Arnau* court relied on the United States Supreme Court's decision in *Mincey v. Arizona*.[83] In *Mincey*, police executed a narcotics raid of Mincey's apartment.[84] During the raid, a shootout ensued and one of the occupants of the apartment killed a police officer.[85] After restoring order, police awaited the arrival of homicide detectives who proceeded to conduct an exhaustive search of the apartment over the course of several days.[86] The search resulted in the seizure of

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80. 58 N.Y.2d at 35, 444 N.E.2d at 17, 457 N.Y.S.2d at 767 (courts should apply independent source doctrine to evidence which is not product of prior illegality); *see* United States v. Crews, 445 U.S. 463, 471 (1980) (witnesses' in-court identification of defendant not derived from prior illegal arrest where witness knew victim's identity prior to unlawful arrest); *see also* 3 W. LAFAVE, *supra* note 9, § 11.4, at 617 (soundness of independent source doctrine is beyond question). *See generally* note 10 and accompanying text (discussion of independent source doctrine).

81. *See* 58 N.Y.2d at 37, 444 N.E.2d at 19, 457 N.Y.S.2d at 769 (exclusionary rule not intended to exclude evidence seized pursuant to valid warrant which did not contain illegally obtained information); *supra* note 7 and accompanying text (discussion of purposes underlying exclusionary rule).

82. 58 N.Y.2d at 37, 444 N.E.2d at 19, 457 N.Y.S.2d at 769. The dissent in *Arnau* stated that an illegal seizure occurred when police secured the dwelling prior to obtaining a warrant. *Id.* at 40, 444 N.E.2d at 21, 457 N.Y.S.2d at 771 (Jones, J., dissenting). The dissent observed that the Fourth Amendment guarantees the right of the people to dominion and control over their premises and a trespass occurs when police deny an individual access to and possession of his property. *Id.* at 39, 444 N.E.2d at 20, 457 N.Y.S. at 770; *see* Hale v. Henkel, 201 U.S. 43, 76 (1906) (seizure constitutes forcible dispossession of owner). The dissent maintained that the independent source doctrine applies only to situations where the police have two avenues of access to obtain the evidence seized, one legal and the other illegal. 58 N.Y.2d at 41, 444 N.E.2d at 21, 457 N.Y.S. at 771. The dissent asserted, however, that the independent source doctrine did not apply to admit evidence seized in violation of Arnau's constitutional rights because police subsequently obtained a search warrant under which the police lawfully could have seized the evidence. *Id.*

83. 437 U.S. 385 (1978).

84. *Id.* at 387. In *Mincey*, an undercover officer who had arranged to purchase narcotics from the defendant entered Mincey's apartment. *Id.* Other officers heard the undercover officer shout "police" as the officer entered. *See State v. Mincey* 115 Ariz. 472, ____, 566 P.2d 273, 283 (1977).

85. 437 U.S. at 387.

86. *Id.* at 388-89. In *Mincey*, a Tucson Police Department directive mandated that police officers should not investigate incidents which the officers personally participated in. *Id.* at 388. Consequently, the officers on the scene guarded the suspects and the premises while awaiting the homicide detectives, *Id.* When the detectives arrived, the detectives conducted a four day search of the apartment and seized between 200 and 300 items. *Id.* at 389.

contraband.[87] The defendant moved to suppress the evidence reasoning that the police unlawfully seized the contraband from his apartment.[88] Affirming the district court's denial of the defendant's motion to suppress, the Supreme Court of Arizona held that, when police were legally on the premises,[89] a "murder scene" exception to the warrant requirement permitted police to conduct a warrantless search of the scene of a homicide without violating the Fourth Amendment.[90] The United States Supreme Court, however, repudiated the Arizona Supreme Court's "murder scene" exception to the warrant requirement.[91] The *Mincey* court reasoned that exigent circumstances did not exist to justify the warrantless search of Mincey's apartment since the record did not indicate that the delay in obtaining a warrant to search the premises would have resulted in the destruction or removal of evidence.[92] The Supreme Court in *Mincey* observed, however, that the presence of a police guard on the premises minimized the potential destruction or removal of evidence.[93]

Tracking the language of the Supreme Court in *Mincey*, the *Arnau* court found the Supreme Court's approval of utilizing police to maintain the status quo over a dwelling prior to the issuance of a search warrant without violating the Fourth Amendment's prohibition against unreasonable seizures.[94] The *Arnau* court, however, misplaced reliance on *Mincey* as supportive of the court's position that a warrantless securing of a dwelling constitutes a reasonable seizure.[95] In *Mincey*, some evidence contained within the apart-

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87. *Id.* at 389.

88. *Id.*

89. *See* ARIZ. REV. STAT. ANN. § 13-3891 (1978) (previously codified at *id.* § 13-1411 (1956)) (officer may break open door of any building in which felon who officer seeks to arrest without warrant is, or officer believes to be, provided that felon has refused officer admittance after officer announced his authority and purpose); *supra* note 84 (officer announced authority and purpose when door opened). Although the entry and arrest was pursuant to statute and lawful when the Arizona Supreme Court decided *Mincey*, the Supreme Court subsequently prohibited police from making warrantless entries into a suspect's home to make a felony arrest. *See* Payton v. New York, 445 U.S. 573, 583 (1980) (warrantless entry into home to make arrest prohibited by Fourth Amendment unless exigent circumstances present).

90. 115 Ariz. 472, ____, 566 P.2d 273, 283 (1977) (warrantless search permissible under "murder scene" exception where police restricted search to evidence relevant to intent or establishing circumstances of officer's death).

91. 437 U.S. at 390. The *Mincey* Court refused to classify the Arizona "murder scene" exception under one of the pre-existing exceptions to the warrant requirement because a four day search would not fall within the exigent circumstances exception which permits an emergency search. *Id.* at 393; *see supra* note 6 and accompanying text (discussion of exigent circumstance exception to warrant requirement).

92. *Id.* at 393. In refusing to hold that exigent circumstances justified a warrantless search, the *Mincey* court acknowledged that police had located all persons within the apartment prior to the detective's arrival. *Id.* The *Mincey* court, therefore, stated that police could not justify an exhaustive four day search by the exigencies of the situation present. *Id.*

93. *Id.* at 394.

94. 58 N.Y.2d at 34-36, 444 N.E.2d at 18-19, 457 N.Y.S.2d at 768-69.

95. *Id.*; see *infra* notes 96-102 and accompanying text (discussion of *Arnau* court's misplaced reliance on *Mincey*).

ment, such as blood on the floor, required immediate examination.[96] Moreover, an Arizona statute granted police the authority to enter a dwelling to make a lawful arrest if police believed a felon was inhabiting the dwelling.[97] Since the police in *Mincey* were lawfully present on the premises to conduct a lawful arrest,[98] the exigency of the possible loss of evidence due to delay would have permitted a brief warrantless search of the premises.[99] Generally, courts have held that exigent circumstances justifying a warrantless search of a dwelling also would justify a warrantless seizure of a dwelling.[100] Consequently, the exigency of the possible loss of evidence would have justified a brief warrantless seizure until a warrant arrived.[101] The *Arnau* court, therefore, incorrectly characterized the warrantless securing of a dwelling, absent exigent circumstances, as reasonable under *Mincey* since the police were lawfully present on the premises and the potential loss of evidence constituted an exigent circumstance justifying a brief warrantless seizure of the premises.[102]

A warrantless seizure of a dwelling until police obtain a search warrant arguably is permissible whenever police have probable cause to seize.[103] One possible justification for allowing seizures on the police's subjective determination of probable cause is that seizures only interfere with the victim's possessory interest in the item seized and do not constitute a grave intrusion upon the victim's privacy interests.[104] Police, therefore, can rectify a wrongful seizure

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96. *See* 437 U.S. at 406 (Rehnquist, J., concurring in part, dissenting in part) (Arizona court should consider on remand whether blood on floor required immediate examination).

97. *See* ARIZ. REV. STAT. ANN. § 13-3891 (1978) (previously codified at *id.* § 13-1411 (1956)) (Arizona statute permits warrantless entry to make felony arrest).

98. *See supra* note 89 and accompanying text (officer justified in entering apartment pursuant to Arizona statute).

99. 437 U.S. at 406 (Rehnquist, J., concurring in part, dissenting in part). In *Mincey*, Justice Rehnquist, in his concurring and dissenting opinion, stated that the Arizona courts should consider on remand what evidence police would have lost if police did not conduct an immediate examination. *Id.*; *see supra* note 96 (blood on floor necessitated immediate examination). By advocating that the Arizona courts consider what evidence required an immediate examination, Justice Rehnquist acknowledged that evidence which required immediate attention would have justified a warrantless search. 437 U.S. at 406.

100. *See, e.g.*, United States v. Kunkler, 679 F.2d 187, 191-92 (9th Cir. 1982) (imminent destruction of evidence permits warrantless seizure of premises); *Allard II*, 634 F.2d at 1187 (police may secure premises if exigent circumstances such as potential destruction of evidence exist); United States v. Picariello, 568 F.2d 222, 226-27 n.2 (1st Cir. 1978) (exigent circumstances justified entry and securing without warrant); *see also supra* note 6 and accompanying text (discussion of exigent circumstances exception to warrant requirement).

101. *See supra* note 100 and accompanying text (warrantless seizures permitted if exigent circumstances are present).

102. *See supra* notes 94-101 and accompanying text (*Arnau* court incorrectly interpreted *Mincey*); *see also* Brief of Petitioners at 41-42, United States v. Segura, 663 F.2d 411 (2d Cir. 1981), *cert. granted*, 103 S. Ct. 1182 (Feb. 22, 1983) (*Mincey* court might have permitted limited impoundment of apartment because police were lawfully on premises and could have obtained warrant while awaiting arrival of homicide detectives).

103. *See* Grano, *supra* note 12, at 647 (seizures do not require warrant because seizures are less intrusive than searches).

104. *Id.* at 648. Other than justifying warrantless seizures of a home on the basis that seizures do not invade the privacy interests of the victim, Grano offers two additional justifications for

merely by return of the seized item.[105] In contrast, an unlawful search represents an irrevocable intrusion upon the victim's privacy interests.[106] Although a warrantless seizure of a dwelling does not represent as great an intrusion upon the privacy rights of the individual as a warrantless search,[107] the seizure, nonetheless, constitutes a significant invasion into the privacy interests of the owner[108] and innocent third parties who are on the premises.[109] With reference to other constitutional rights, the Supreme Court has forbidden one means of obtaining a societal goal in favor of a less intrusive alternative which achieves the same societal goal.[110] The Ninth Circuit in *Allard II* and *Lomas*, therefore, was correct in denouncing warrantless seizures of dwellings on the police's subjective determination of probable cause because normal police procedures reveal a less intrusive alternative, such as surveillance, which guards against the potential destruction or removal of evidence.[111]

The Supreme Court has not delineated an exception to the warrant requirement that would, absent exigent circumstances, permit a warrantless seizure of a home.[112] One commentator has suggested that impounding a home

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permitting the warrantless seizure of a dwelling. *Id.* at 647-48. First, Grano contends that the constitutional framers did not intend for warrantless seizures, when apart from searches, to be violative of the Constitution. *Id.* at 648. Second, the warrant clause requirement that the warrant specifically describe the place which police intend to search has no relevance when a seizure occurs distinct from a search. *Id.*

105. *Id.*; *see also* United States v. Lisk, 522 F.2d 228, 230 (7th Cir. 1975) (seizures do not invade privacy interests but instead constitute taking of property), *cert. denied*, 423 U.S. 1078 (1976).

106. *See* Grano, *supra* note 12, at 648 (damages may recompense but can not restore invasion of privacy interests).

107. *See* United States v. Chadwick, 433 U.S. 1, 13-14 (1977) (search of interior of footlocker much greater intrusion than impoundment); *supra* notes 104-05 and accompanying text (Grano discussion of warrantless seizures constituting lesser intrusion than searches). *But see* Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (highly debatable question whether seizure of automobile amounts to lesser intrusion than search).

108. *See* Arkansas v. Sanders, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting) (seizure of personal property amounts to significant intrusion of owner's privacy interests); United States v. Chadwick, 433 U.S. 1, 14 n.8 (1977) (impoundment of footlocker amounted to substantial infringement of owner's use and possession); *Arnau*, 58 N.Y.2d at 39, 444 N.E.2d at 20, 457 N.Y.S.2d at 770, (Jones J., dissenting) (unreasonable seizure of home excludes owner from use and possession constituting trespass on owner's Fourth Amendment rights).

109. *See* Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1475 (1971) (police should not have authority to restrict person's freedom of movement merely because evidence of crime may be present) [hereinafter cited as *Police Practices*].

110. *See Police Practices, supra* note 109, at 1476 (Supreme Court consistantly has adopted least intrusive method of obtaining societal goals); *see also* Chambers v. Maroney, 399 U.S. 42, 51 (1970) (only lesser intrusion permissible until magistrate authorizes greater intrusion). *See generally* Warmuth & Minkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 306 (1964) (doctrine of reasonable alternative requires acceptance of least intrusive alternative which obtains same ends as more intrusive measure).

111. *See infra* notes 112-21 and accompanying text (warrantless seizures are impermissible under Fourth Amendment absent exigent circumstances); *see also* United States v. Calhoun, 542 F.2d 1084, 1102 (9th Cir. 1976) (surveillance is viable alternative to exigent seizure).

112. *See supra* note 12 and accompanying text (Supreme Court has not sanctioned warrantless seizure of dwelling while awaiting search warrant).

is appropriate if police have probable cause to search at the time police initiate the seizure and have reasonable cause to believe that the destruction of evidence inside the dwelling is imminent.[113] The commentator recognizing such an exception to the warrant requirement, however, premised permitting the warrantless seizure of a dwelling on the presence of exigent circumstances.[114] If the police have reasonable cause to believe that the destruction of evidence contained within a dwelling is imminent, then the majority of courts have found that exigent circumstances exist to justify a seizure of a home without a warrant.[115] Because the commentator advocated the impounding of a home under circumstances which are subsumed by the exigent circumstances exception to the warrant requirement, the commentator, therefore, would not support the *Arnau* court's approval of a warrantless seizure of a dwelling absent the presence of exigent circumstances.[116]

Permitting a warrantless seizure of a home based on probable cause would alleviate the *Allard II* court's fears that police might seize a dwelling and then seek an independent evidentiary basis to justify issuance of a warrant because police already would possess a sufficient probable cause to justify issuance of a search warrant.[17] Allowing police to secure a home without a warrant, however, authorizes police subjectively to determine the existence of probable cause, obviating the Fourth Amendment's mandate that a neutral and detached magistrate make the probable cause determination.[118] Even if police are in the process of obtaining a warrant prior to securing a dwelling, the police, nonetheless, still would seize the dwelling on a subjective determination of probable cause.[119] Since the Supreme Court has drawn only a few well delineated exceptions to the warrant requirement,[120] courts should follow the Ninth Circuit's holding in *Allard II* and *Lomas* that a warrantless securing of a dwelling, absent exigent circumstances, constitutes an unreasonable seizure under the Fourth Amendment.[121]

Once a court had established that a warrantless seizure of a home would

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113. *See Police Practices, supra* note 109, at 1480-81 (discussion of limits placed on warrantless impoundings of homes).

114. *Id.*

115. *See supra* note 100 (cases involving warrantless seizures of homes due to exigent circumstances).

116. *See Police Practices, supra* note 109, at 1481 (warrantless seizures only permissible if evidence threatened with destruction which constitutes exigent circumstance); *see also* 2 W. LAFAVE, *supra* note 9, § 65, at 450 (impounding of home is alternative to exigent entry).

117. *See* United States v. Lomas, 706 F.2d 886, 896-97 (9th Cir. 1983) (*Lomas* dissent distinguished *Allard II* from *Lomas* on basis that police sought warrant in *Lomas* prior to illegal seizure; *see also* note 61 (discussion of *Lomas* dissent).

118. *See supra* note 2 and accompanying text (warrant requirement provides that impartial judicial magistrate should make probable cause determination).

119. *See Lomas*, 706 F.2d at 894 n.4 (adoption of *Lomas* dissent's distinction in timing as to when police attempt to obtain search warrant does not alleviate problem of police subjectively determining probable cause).

120. *See supra* notes 4, 6 and accompanying text (consent and presence of exigent circumstances are only exceptions to warrant requirement for search or seizure of home).

121. *See supra* text accompanying notes 112-120 (analysis of warrantless seizures of homes).

violate the Fourth Amendment unless exigent circumstances were present, the second question involves the admissibility of evidence lawfully seized from a dwelling following a prior unlawful seizure of the dwelling.[122] The *Allard II* test required the government to demonstrate that the police would have both independently discovered and successfully obtained the disputed evidence in order to permit admission at trial.[123] Since the *Allard II* court restricted application of the court's test to unlawful seizures,[124] the *Allard II* court did not reject application of the independent source doctrine with respect to unlawful searches.[125] Application of the independent source doctrine to unlawful searches ensures that police obtain probable cause to justify issuance of a subsequent search warrant from means independent of the prior illegal search.[126] The police, however, do not obtain probable cause from an unlawful seizure of a home since the unlawful seizure constitutes an attempt by police to maintain the status quo pending application for a search warrant.[127] Courts, therefore, should not apply the independent source doctrine to evidence obtained pursuant to an unlawful seizure of a home.[128]

To ensure that police do not profit from an unlawful seizure of a home,[129] courts should not admit evidence obtained from a subsequent lawful seizure unless the government can show that discovery of the evidence was inevitable notwithstanding the prior unlawful seizure.[130] Requiring the government to demonstrate that the prior unlawful seizure did not make a difference guarantees that police do not benefit from unreasonable conduct.[131] Accordingly, the *Allard II* test requires the government to demonstrate that a prior unlawful seizure did not make a difference because the government must prove that the police inevitably would have obtained the evidence despite the prior illegal seizure.[132] Application of the *Allard II* test, therefore, furthers the ex-

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122. *See supra* note 11 and accompanying text (courts which have refused to apply independent source doctrine to illegally seized evidence); *Lomas*, 706 F.2d at 893 (court considered when evidence obtained pursuant to a warrant is admissible despite prior unlawful seizure).

123. *See Allard II*, 634 F.2d at 1187; *supra* note 41 and acccompanying text (similarity between *Allard II* court's test for determining admissibility of unlawfully seized evidence and inevitable discovery doctrine).

124. *See Allard II*, 634 F.2d at 1182 (application of *Allard II* test contingent on defendant demonstrating that government illegally secured evidence).

125. *See id.*

126. *See supra* notes 9, 10 and accompanying text (evidence lawfully obtained not admissible if affidavit supporting warrant contains information gathered from prior illegal conduct).

127. *See* United States v. Lomas, 706 F.2d 886, 890 (9th Cir. 1983) (agents secured hotel room to prevent destruction or removal of evidence).

128. *See supra* notes 126-27 and accompanying text (application of independent source doctrine).

129. *See supra* note 7 and accompanying text (primary goal of exclusionary rule is deterrence of unlawful police conduct).

130. *See supra* notes 127, 129 and accompanying text (requiring police to show that discovery of evidence was inevitable prohibits police from benefitting from unlawfully maintaining status quo over dwelling).

131. *Id.*

132. *See Allard II*, 634 F.2d at 1187 n.6 (9th Cir. 1980) (government must prove seizure made no practical difference in order to permit admission of illegally seized evidence); *see also*

clusionary rule's goal of deterrence of unlawful police conduct since evidence which police obtained pursuant to an unlawful seizure of a home is inadmissible at trial.[133] Consequently, courts should apply the *Allard II* test to unlawful seizures since the *Allard II* test furthers the goals of the exclusionary rule with respect to unreasonable seizures as the independent source doctrine does with respect to unreasonable searches.[134]

The Fourth Amendment does not distinguish between searches and seizures of a home.[135] Accordingly, both searches and seizures of a home should require a warrant unless exigent circumstances are present.[136] Absent exigent circumstances, warrantless seizures of homes are unreasonable under the Fourth Amendment.[137] Since the warrantless securing of a home is an attempt to maintain the status quo over the owner's premises until a warrant arrives, the warrantless securing of a home constitutes a seizure of the home and the home's contents.[138] By requiring the government to show that the discovery of the evidence was inevitable, the *Allard II* test ensures that police do not profit from an illegal seizure of a home, thereby furthering the purposes of the exclusionary rule.[139] Consequently, courts should concur with the *Allard II* and *Lomas* rationale that a warrantless securing of a dwelling constitutes an unreasonable seizure and should adopt the *Allard II* test for permitting the admission of evidence seized pursuant to an unlawful seizure of a home.[140]

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United States v. Lee, 699 F.2d 466, 469 (9th Cir. 1982) (evidence obtained because of prior illegal seizure of defendant held admissible because logical course of investigation would have led police to evidence).

133. *See supra* note 7 and accompanying text (exclusion of illegally seized evidence guarantees police do not profit from unlawful conduct).

134. *Id.*

135. *See* U.S. CONST. amend. IV (Fourth Amendment prohibits both unreasonable searches and seizures).

136. *See supra* note 54 and accompanying text (both searches and seizures require search warrant); *see also* United States v. Kunkler, 679 F.2d 187, 191 (9th Cir. 1981) (no Fourth Amendment distinction between searches and seizures).

137. *See supra* notes 32-37 and 53-57 and accompanying text (warrantless seizures of home impermissible under Fourth Amendment absent exigent circumstances).

138. *See supra* notes 33, 62, 127 and accompanying text (securing of dwelling constitutes seizure of dwelling and contents).

139. *See supra* notes 7, 41 and accompanying text (illegally seized evidence requires suppression unless government can show seizure did not make practical difference).

140. *See supra* notes 38-43 and 58-61 and accompanying text (*Allard II* and *Lomas* courts properly rejected application of independent source doctrine for warrantless seizures).