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THE EMERGENCY DOCTRINE EXCEPTION TO THE WARRANT REQUIREMENT UNDER THE FOURTH AMENDMENT

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Standing at the "core" of the fourth amendment[1] is the security of the individual's "privacy against arbitrary intrusion by the police."[2] To implement this principle, the Supreme Court has mandated that warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[3] These exceptions have been "jealously and carefully drawn,"[4] and the burden rests with those seeking exemption from the general rule requiring the authority of a warrant to prove that "the exigencies of the situation made that course imperative."[5]

Among these exceptions[6] is the "emergency" doctrine, which encompasses the doctrine of "hot pursuit."[7] Although the emergency

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

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

2. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

3. Katz, v. United States, 389 U.S. 347, 357 (1967); *accord,* United States v. United States District Court, 407 U.S. 297, 317 (1972); United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting).

4. Jones v. United States, 357 U.S. 493, 499 (1958).

5. McDonald v. United States, 335 U.S. 451, 456 (1948); *accord,* Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971); United States v. Jeffers, 342 U.S. 48, 51 (1951); Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971); *see* Vale v. Louisiana, 399 U.S. 30, 34 (1970). It has been expressly recognized that the burden of establishing an emergency exception rests with the prosecution. *E.g.,* Root v. Gauper, *supra;* People v. Smith, 17 Cal. 3d 282, 285, 287, 496 P.2d 1261, 1262, 101 Cal. Rptr. 893, 894, 896 (1972).

6. A summary is contained in Vale v. Louisiana, 399 U.S. 30, 35 (1970), and United States v. Goldenstein, 456 F.2d 1006, 1009 (8th Cir. 1972).

7. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967). For a representative example of "hot pursuit," *see id.*; for a somewhat modified example, see United States v. Holiday, 457 F.2d 912 (3d Cir. 1972).

The doctrine of emergency is not to be confused with the preconditions of identity and announcement of purpose generally required before the police may lawfully enter a residence to conduct a search and seizure. In the latter case, the police usually are not responding to a preexistent emergency but have come upon the premises with a predetermined intent to effect an arrest or to conduct a search. *See* Ker v. California,

exception has never been definitively explained by the Supreme Court, it has been consistently recognized and applied by the lower courts to a myriad of factual situations.[8]

In the context of this study, attention shall be focused primarily upon those situations dealing with a police officer's response to an emergency involving either the elements of saving life and/or preserving property, rendering first aid, or conducting a general inquiry into an unsolved crime,[9] during which he discovers evidence of an incriminating nature. In some instances, the continuing emergency will justify seizure; in others, the *termination* of the emergency will

374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958); United States v. Wylie, 462 F.2d 1178 (D.C. Cir. 1972); Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. U.S. and Ker v. California,* 112 U. PA. L. REV. 499 (1964); Sonnenreich & Ebner, *No-Knock and Nonsense, an Alleged Constitutional Problem,* 44 ST. JOHN'S L. REV. 626 (1970); Note, *Announcement in Police Entries,* 80 YALE L.J. 139 (1970). *But see* United States v. McShane, 462 F.2d 5, 6 (9th Cir. 1972), where the court endorsed an exception to identity and purpose where the announcement would place the officers in a position of "palpable peril." Recent legislation has broadened the application of no-knock entries in the execution of search warrants. *E.g.,* Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 880(b) (1970); District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. CODE ANN. § 23-521 to -522 (1970). The rationale for the requirements of identity and announcement of purpose is to afford the occupants of premises to which entry is sought an opportunity to voluntarily surrender their privacy. This purpose is primary and takes legal precedence over any incidental opportunity to destroy or secrete evidence that may be accorded the occupants. Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972).

Finally, the emergency exception, excluding application to "hot pursuit," is to be distinguished from the right of the police to enter a home to effect a warrantless arrest. The obvious distinction lies in the realm of the officer's intent: in response to an emergency, the officer desires to save life and/or preserve property, to render first aid, to conduct a general inquiry into an unsolved crime. *See* United States v. Goldenstein, 456 F.2d 1006, 1010 (8th Cir. 1972); Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971). To seek an arrest, however, the officer intends to engage in specific search-and-seizure activity under the fourth amendment. Entry to effect a warrantless arrest and the emergency exception will overlap when the latter exists at or before the moment of entry. In this event, the emergency will sanction prompt and immediate access to the home, thereby qualifying the arrest under the emergency exception and not under some general exemption for arrests. *See* Dorman v. United States, 435 F.2d 385, 393-94 (D.C. Cir. 1970). For authorities seriously questioning the right of the police to enter a home to effect a warrantless arrest in the absence of an emergency, see Coolidge v. New Hampshire, 403 U.S. 443, 477-81 (1971); Jones v. United States, 357 U.S. 493, 499-500 (1958); Dorman v. United States, *supra* at 390-91.

8. On occasion, it has been given a limited construction, one strictly tailored to the factual situation to which it was applied. *E.g.,* Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971).

9. This type of inquiry is limited to that period prior to the point that the investigation begins to focus on a particular suspect, who is subsequently arrested. *See* Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964). As an example of such an inquiry apropos the emergency doctrine see United States v. Goldenstein, 456 F.2d 1006, 1010 (8th Cir. 1972).

render the *subsequent* search and seizure unreasonable. Thus, for a seizure to be legitimate under the emergency doctrine, it must be relevant to the officer's presence. Closely allied to this is the inadvertent nature of the discovery, for the requirement of inadvertence has taken on added significance with the recent refinement of the doctrine of intrusive "plain view." In short, at the moment of intrusion the officer must not enter with "an accompanying intent to search unlawfully."[10]

I. *Coolidge v. New Hampshire,* INCIDENTAL SEARCH, AND THE DOCTRINE OF INADVERTENT "PLAIN VIEW"

In *Coolidge v. New Hampshire,*[11] a plurality of the Supreme Court articulated a principle qualifying the application of the plain view doctrine[12] after law enforcement officers intrude upon the individual's constitutionally protected zone of privacy:[13]

> What the "plain view" cases have in common is that the police officer in each of them had a *prior justification* for an *intrusion* in

10. United States v. Goldenstein, 456 F.2d 1006, 1014 (8th Cir. 1972) (Stephenson, J., dissenting).

11. 403 U. S. 443 (1971). The opinion, delivered by Justice Stewart, was joined by three justices. Justice Harlan concurred only in the judgment reversing petitioner's conviction for murder. However, one court has interpreted the position of the plurality as being "constitutionally persuasive." *E.g.,* Brown v. State, 15 Md. App. 584, 586 n.1, 292 A.2d 762, 763 n.1 (1972).

12. Simply stated, the doctrine holds that what is open to view is not an object of search "and therefore not within the purview of the Fourth Amendment." United States v. Drew, 451 F.2d 230, 233 n.3 (5th Cir. 1971). This definition is qualified, however, by the requirement that the observer must be lawfully positioned to have that view. *E.g.,* Harris v. United States, 390 U.S. 234, 236 (1968); United States v. Cecil, 457 F.2d 1178, 1180 (8th Cir. 1972); United States v. Hanahan, 442 F.2d 649, 653 (7th Cir. 1971). Obviously, the doctrine will not extend to hidden or concealed objects. United States v. Goldenstein, 456 F.2d 1006, 1010 (8th Cir. 1972); People v. Conley, 21 Cal. App. 3d 894, 901, 98 Cal. Rptr. 869, 873-74 (4th Dist. 1971).

13. The exceptions to the requirement of a warrant permit access by law enforcement officers to an area in which the individual has a reasonable expectation of freedom from governmental intrusion. In assessing whether a particular expectation of privacy is constitutionally justified, it is proper for a court to consider the individual's proprietary or possessory interest in the area. *See* United States v. Bell, 457 F.2d 1231, 1239 (5th Cir. 1972); Brown v. State, 15 Md. App. 584 611-12, 292 A.2d 762, 778 (1972). This is done not to exalt property over personal rights, for the thrust of the fourth amendment is directed toward the preservation of the individual's privacy. Katz v. United States, 389 U.S. 347, 351, 353 (1967); Brett v. United States, 412 F.2d 401, 406 (5th Cir. 1969). Rather, it is a point of reference in measuring the degree of protection afforded by the amendment. Katz v. United States, *supra* at 361 (Harlan, J., concurring); *see* Combs v. United States, 408 U.S. 224, 226-28 (1972); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection,* 43 N.Y.U. L. REV. 968, 983-84 (1968); 55 MINN. L. REV. 1255, 1263 (1971).

> the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure.[14]

Thus, the plurality limited the doctrine to situations of prior justification for intrusion in the course of which incriminating evidence is inadvertently discovered, and rendered it inapplicable to circumstances "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it."[15] The effect of this qualification, then, was to require the police to obtain a search warrant if, prior to entry, they anticipated discovery and seizure of an object lying beyond the scope of a valid incidental search.[16] To hold otherwise would invite the police to invoke the doctrine to justify a general search, and would permit an initially valid and limited search to degenerate into an exploratory quest for evidence of guilt or of crime.[17]

The supporting thesis for the plurality opinion in *Coolidge* was that plain view should not be invoked to extend the scope of incidental search permitted under *Chimel v. California*.[18] To accomplish

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14. 403 U.S. at 466 (emphasis added).

15. *Id.* at 470. An inadvertent view or observation has been characterized also as "seeing through eyes that are neither accusatory nor criminally investigatory." Marshall v. United States, 422 F.2d 185, 189 (5th Cir. 1970). For example, if a law enforcement officer enters upon private premises solely to execute a search warrant and peers into a home through an opening in partially closed draperies, his viewing will not be considered inadvertent. United States v. Esters, 336 F. Supp. 214, 221 (E.D. Mich. 1972).

16. 403 U.S. at 484. However, this restriction will not pertain to the seizure of anticipated evidence discovered during the course of a properly limited incidental search. *Id.* at 482. The only instance where plain view is permitted to extend the scope of incidental search is when the arresting officer, during the course of "an appropriately limited search" of the arrestee, inadvertently views a piece of evidence lying "outside of the area under the immediate control of the arrestee." *Id.* at 465-66 n.24. The vantage point, however, must lie within the area "of an appropriately limited search." *Id.; accord,* Neam v. State, 14 Md. App. 180, 183, 286 A.2d 540, 543 (1972). *Coolidge* has been interpreted to mean that, absent exigent circumstances, a warrantless search on probable cause, but not incident to a lawful arrest, is unreasonable. State v. Ponce, 16 Ariz. App. 122, 125, 491 P.2d 845, 848 (1971).

17. 403 U.S. at 467, 469-71.

18. 395 U.S. 752 (1969). In *Chimel* the Court restricted the scope of incidental searches to "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. In short, the scope was constricted to the person of the arrestee and the area within his immediate reach.

this, the opinion was obliged to graft upon plain view the additional restriction of "inadvertence."[19] Thus, the *Coolidge* plurality found an intimate link between plain view and the search-incident exception—one that could not be divorced without effectively undermining *Chimel*.[20] Therefore, *Coolidge* and *Chimel* are to be read as limitations upon the exceptions to the warrant requirement.

Although the opinion directed itself to an analysis of the doctrine of plain view, the position adopted by the plurality actually amounted to the forging of a new doctrine—one that more appropriately should be designated as "intrusive plain view," to distinguish it and its preconditions from the more traditional setting in which *internal* evidence is openly viewed from an *external* vantage point—a situation that might be designated accurately as "non-intrusive plain view."[21] The distinguishing, and therefore limiting, characteristics of intrusive plain view are twofold: first, the intrusion, or official presence, must be constitutionally justified; and, second, the discovery must be inadvertent.[22] Thus, while the doctrine of intrusion has no application to

19. 403 U.S. at 465 n.24, 466, 469-71. For endorsement of the inadvertence refinement of plain view, see Landynski, *The Supreme Court's Search for Fourth Amendment Standards: The Extraordinary Case of Coolidge v. New Hampshire,* 45 CONN. B.J. 330, 353 (1971).

20. 403 U.S. at 482. For a penetrating analysis of the historical growth of plain view from an adjunct to the search incident exception to an autonomous exception in its own right, see Brown v. State, 15 Md. App. 584, 587-609, 292 A.2d 762, 764-76 (1972).

21. It has been argued that to treat both situations as plain view will lead to "[n]eedless confusion," because the rule fashioned in *Coolidge* required a vantage point "within a constitutionally protected area," whereas nonintrusive plain view imposed no such requirement. Therefore, it would be more appropriate to refer to the *Coolidge* refinement as "plain view," and to designate external viewing as either " 'clearly visible,' 'readily observable,' [or] 'open to public gaze.' " Scales v. State, 13 Md. App. 474, 478 n.1, 284 A.2d 45, 47 n.1, (1971).

Although the court in *Scales* was correct in reasoning that intrusive and nonintrusive plain view dealt with "two visually similar but legally distinct situations," *id.,* it should be recognized that in both the observer lawfully obtained his vantage point. In short, the requirement of lawful presence will not be restricted to presence within, as distinguished from without, premises searched. For example, no one could question seriously the reasonableness of an observation, inadvertent or planned, made from a public area into a private residence or a motor vehicle through an unsecured window. *E.g.,* United States v. Story, 463 F.2d 326, 328 (8th Cir. 1972); United States v. Drew, 451 F.2d 230, 232 (5th Cir. 1971); Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969); Edwards v. State, 38 Wis. 2d 332, 337-38, 340, 156 N.W.2d 397, 401, 402 (1968). In such a situation, it would be unrealistic to argue that a justifiable expectation of privacy had been violated. *See* Katz v. United States, 389 U.S. 347, 351 (1967). For further discussion of the distinctions between intrusive and nonintrusive plain view, see Brown v. State, 15 Md. App. 584, 606-07, 292 A.2d 762, 774-75, (1972).

22. 403 U.S. at 466, 467, 469; United States v. Broomfield, 336 F. Supp. 179, 183 (E.D. Mich. 1972); Brown v. State, 15 Md. App. 584, 602-09, 292 A.2d 773-76 (1972).

nonintrusive situations where the observations made require no prior constitutional justification for entry and presence, it complements a prior justifiable intrusion by "articulating the rationale of the justification."[23]

Although it is difficult to predict the ultimate influence of *Coolidge* on the law of search and seizure,[24] its impact upon the emer-

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In the case of nonintrusive plain view, neither condition pertains. The only requirement is that the vantage point be legally accessible to the officer. Harris v. United States, 390 U.S. 234, 236 (1968). It is somewhat confusing whether the opinion attached a third condition to the doctrine, for at one point it commented that "plain view does not occur until a search is in progress," 403 U.S. at 467. However, it had previously noted that "the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object." *Id.* at 466. This seeming contradiction is probably explicable in terms of the plurality's desire to forge a doctrine as a barrier to the situation in which an initially limited search expands into a "general exploratory search from one object to another until something incriminating at last emerges." *Id.*

23. Scales v. State, 13 Md. App. 474, 478 n.1, 284 A.2d 45, 47 n.1 (1971).

24. Unfortunately, the plurality's treatment of plain view is not without ambiguity. Although the opinion condemned the planned warrantless seizure of anticipated evidence open to internal view, it is not altogether clear whether the proscription will extend to objects that are either contraband, stolen, or dangerous in themselves. This is because the plurality appeared to emphasize the fact that the evidence seized was neither contraband, stolen, nor dangerous. 403 U.S. at 471-72 n.28. Thus, *Coolidge* has been interpreted as exempting such objects from its ban. *E.g.*, People v. Medina, 26 Cal. App. 3d 809, 818, 103 Cal. Rptr. 337, 343 (1972): Fixel v. State, 256 So. 2d 27, 29 (Fla. Ct. App., 3d Dist. 1971). For an apparently contrary interpretation, at least by implication, see United States v. Esters, 336 F. Supp. 214, 221, 222 (E.D. Mich. 1972).

It is submitted that *Coolidge* should not be given a restrictive interpretation which will rigorously exempt contraband, stolen goods, and dangerous articles from its ban on planned warrantless seizure, and that such exemption should apply only when there is a clear threat of destruction or removal of evidence. In the first place, such a blanket exemption would conflict with the rule announced in Warden v. Hayden, 387 U.S. 294 (1967), explicitly abolishing any fourth amendment distinction between contraband, stolen goods, or dangerous articles, and "mere evidence," a fact which the plurality acknowledged. 403 U.S. at 464. Thus, the quality of evidence seized is not determinative of its suppression. Secondly, in postulating its refinement of plain view, the plurality reaffirmed the Court's repeated condemnation of entry to effect a warrantless seizure of contraband. *Id.* at 468. Furthermore, this rejection has extended even to entry on probable cause. *E.g.*, Agnello v. United States, 269 U.S. 20, 33 (1925). Finally, in articulating a nexus between plain view and the search-incident exception, the plurality was endeavoring to reaffirm the Court's preference for warrants without regard to the quality of evidence seized. It is difficult to see how such a link can be effectively forged by a blanket exemption of the very objects that represent the overwhelming examples of warrantless seizures. In short, the nature of evidence is irrelevant to the rationale of the *Coolidge* limitations upon plain view, which is that "*any* intrusion in the way of search or seizure . . . should be as limited as possible" so as to guard against the dreaded general search. 403 U.S. at 467 (emphasis in original). As one commentator has noted, it is possible that the opinion was not attempting to carve out any exceptions for contraband, stolen goods, or dangerous articles, but rather was suggesting that although all types of evidence are subject to seizure, a higher standard would

gency exception, by severely limiting warrantless seizures under plain view to those objects inadvertently discovered after lawful entry, should prove to be rather substantial. The effect of this will be to restrict the scope of official presence to the immediate area of the emergency and to restrain peace officers from wandering about a home in anticipation of discovering evidence of crime. Thus, *Coolidge* should prove to be a limitation upon the critical element of lawful presence, the existence of which is an indispensable prerequisite of the emergency doctrine exception.

II. The Emergency Doctrine Exception

Excluding the consent situation, which, because it "obviates the need for a warrant, . . . is . . . not a mere 'exception' to the warrant requirement,"[25] and "invariably present[s] no emergency,"[26] every exception to the requirement of a warrant derives from an emergency. Thus, in the search-incident exception, the exigent circumstances justifying prompt action are harm to the arresting officer and destruction of incriminating evidence within reach of the arrestee.[27] Additionally, what lies at the core of the "hot pursuit," destruction-of, and removal-of-evidence exceptions is the element of urgency requiring, and even demanding, immediate responsive action by the police.[28] The focus of this article will be directed to a particular type of emergency situation which has evolved as a specific exception to the warrant requirement, one that is designated as the "emergency" exception.

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apply to mere evidence if the prosecution invoked an exception to the warrant requirement. *The Supreme Court, 1970 Term,* 85 Harv. L. Rev. 3, 243 n.30 (1971).

Another issue left open in *Coolidge* was the right of law enforcement officers to intrude for the purpose of warrantless arrest. 403 U.S. at 481. In Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), the court ruled that absent compelling circumstances, an arrest warrant was required before the police could enter a dwelling to effect an arrest. *Id.* at 390-91. Although the court did recognize a number of circumstances which would permit entry without a warrant, interestingly, only one of them dealt with the nature of evidence that might be subject to seizure, namely, a weapon, and no reference was made by the court to either contraband or stolen property. *Id.* at 392-93.

25. Landynski, *supra* note 19, at 353.

26. Mascolo, *Inter-Spousal Consent to Unreasonable Searches and Seizures: A Constitutional Approach,* 40 Conn. B.J. 351, 374 (1966).

27. Coolidge v. New Hampshire, 403 U.S. 443, 478 (1971); Chimel v. California, 395 U.S. 752, 763 (1969).

28. *See* Vale v. Louisiana, 399 U.S. 30, 35 (1970); Warden v. Hayden, 387 U.S. 294, 298-99 (1967); Carroll v. United States, 267 U.S. 132, 153 (1925).

Although it has been claimed[29] that the exception derives from a dictum postulated by Justice Jackson in *Johnson v. United States,*[30] it has been more accurately recognized that "[t]he right of the police to enter and investigate in an emergency *without the accompanying intent to either search or arrest* is *inherent* in the very nature of their duties as peace officers, and derives from the common law."[31]

The doctrine of emergency in the law of search and seizure has never been defined in terms of its overall concept. The usual practice has been for a court to tailor its definition to the circumstances of each case.[32] Within the context of this study, the doctrine may be defined as follows: Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance

29. Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971).

30. 333 U.S. 10 (1948):

> There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with.

Id. at 14-15.

31. United States v. Barone, 330 F.2d 543, 545 (2d Cir.), *cert. denied,* 377 U.S. 1004 (1964) (emphasis added); *see* Read v. Case, 4 Conn. 166, 170 (1822); 1 J. CHITTY, CRIMINAL LAW 18, 20 (3d Am. ed. 1836); *see also* Wilgus, *Arrest Without a Warrant,* 22 MICH. L. REV. 541, 802-03 (1924). Thus, they would not be entering as trespassers. *See* People v. Roberts, 47 Cal. 2d 374, 378-79, 303 P.2d 721, 723 (1956). Although Katz v. United States, 389 U.S. 347, 353 (1967), overruled the trespass doctrine announced in Olmstead v. United States, 277 U.S. 438, 464-66 (1928), this does not mean that the presence of a trespass is without relevance to the issue of reasonableness under the fourth amendment. *See* Brown v. State, 3 Md. App. 90, 95 n.3, 238 A.2d 147, 149, 150 n.3 (1968), where the court interpreted *Katz* as not overruling the rule of suppression where evidence is obtained as the result of an unwarranted physical intrusion into an area where the individual harbors a reasonable expectation of privacy. This interpretation would appear to be correct because *Katz,* in exalting privacy over property interests, emphasized that the *absence* of a physical intrusion would not be determinative of the issue of reasonableness. 389 U.S. at 353; *see* United States v. United States District Court, 407 U.S. 297, 312-13 (1972). It never argued that the *presence* of such intrusion would be irrelevant.

32. *E.g.,* Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971); Patrick v. State, 227 A.2d 486, 489 (Del. 1967).

to the initial purpose for their entry, they may lawfully seize it without a warrant.[33] Thus, to qualify as an emergency exception, there must reasonably appear to exist an exigency in the course of which a discovery related to the purpose of the entry is made. The exigent circumstances legitimate the presence, and the relevance of the discovery to the justification for the entry sanctions the seizure.

Since the doctrine permits warrantless access by the police to an area in which the individual has a reasonable expectation of freedom from governmental intrusion, it must be strictly construed so as to keep such intrusion as limited as possible.[34] Therefore, in assessing the reasonableness of the intrusion, a court should be guided by the ad-

33. *See* United States v. Goldenstein, 456 F.2d 1006, 1010-11 (8th Cir. 1972); United States v. Barone, 330 F.2d 543, 545 (2d Cir.), *cert. denied,* 377 U.S. 1004 (1964); Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.) (Burger, J., concurring) (dictum), *cert. denied,* 375 U.S. 860 (1963); People v. Roberts, 47 Cal. 2d 374, 378-79, 303 P.2d 721, 723 (1956); Patrick v. State, 227 A.2d 486, 489 (Del. 1967); Davis v. State, 236 Md. 389, 395-98, 204 A.2d 76, 80-81 (1964), *cert. denied,* 380 U.S. 966 (1965); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 260.5 (Official Draft No. 1, 1972); *see also* Wilgus, *Arrest Without a Warrant,* 22 MICH. L. REV. 541, 802-03 (1924). As long as there is a reasonable basis for the belief, the entry will be sustained, even if it develops that no emergency did exist. Wayne v. United States, *supra* (Burger, J., concurring) (dictum); Patrick v. State, *supra.* Typical examples of its application are a shout or cry for help, related or unrelated to crime, McDonald v. United States, 335 U.S. 451, 454 (1948); People v. Clark, 262 Cal. App. 2d 471, 473, 68 Cal. Rptr. 713, 717 (4th Dist. 1968); screams, United States v. Barone, *supra;* violence, United States v. Jeffers, 342 U.S. 48, 52 (1951); an "emergency" call that an unconscious or semiconscious person is in need of aid, Wayne v. United States, *supra* at 212-14; People v. Roberts, *supra;* Davis v. State, *supra;* the reporting of a crime of violence promptly after its commission requiring the officer's presence to interview a possible victim or bystander, United States v. Goldenstein, 456 F.2d 1006, 1010-11 (8th Cir. 1972).

Obviously, "hot pursuit," the observance of a crime from a lawful vantage point, and the fact that evidence is being destroyed or removed, are examples of exigent circumstances that usually will require prompt response from law enforcement officers. *E.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971); Vale v. Louisiana, 399 U.S. 30, 35 (1970); Warden v. Hayden, 387 U.S. 294, 298-99 (1967); Johnson v. United States, 333 U.S. 10, 15 (1948); Ponce v. Craven, 409 F.2d 621, 625 (9th Cir. 1969), *cert. denied sub nom.* Ponce v. California, 397 U.S. 1012 (1970); United States v. Brewer, 343 F. Supp. 468, 472-73 (D. Hawaii 1972); State v. Krause, No. 6901 (Conn. Sup. Ct., May 11, 1972); Edwards v. State, 38 Wis. 2d 332, 337-38, 156 N.W.2d 397, 401-02 (1968). In these situations, however, the presence of the officer is motivated solely by a desire to effect either a specific arrest or seizure. He is not altruistically responding to an emergency that at most may have only tangential relevance to the individual's reasonable expectation of privacy under the fourth amendment. Furthermore, it is highly questionable whether the observation of a possessory crime, where there are no compelling circumstances requiring prompt action, is *per se* sufficient to justify entry to effect a warrantless arrest. In short, external observation alone should not qualify under the emergency exception. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 260.5 (Official Draft No. 1, 1972).

34. *See* United States v. Goldenstein, 456 F.2d 1006, 1010 (8th Cir. 1972).

monition that "the scope of the Fourth Amendment is not determined by the *subjective* conclusion of the law enforcement officer."[35] Since a search warrant confers only a limited privilege upon police officers to gain access to private premises,[36] the courts must be vigilant to any attempt to circumvent the requirement of a warrant by invoking one of the exceptions so as to expand what otherwise would be only a particularly conferred authority. Thus, mere inconvenience and delay attendant upon the procurement of a warrant will not qualify as an exigent circumstance under the emergency exception;[37] nor will law enforcement officers be permitted to invoke the doctrine capriciously to circumvent the warrant requirement so as to seize evidence they anticipate discovering.[38] In short, the privilege to enter to render aid and assistance, or in response to some other exigency, will not justify a search for an unrelated purpose.[39]

These caveats aside, it must be recognized that the emergency doctrine serves an exceedingly useful purpose. Without it, the police would be helpless to save life and property, and could lose valuable time especially during the initial phase of a criminal investigation. The effect would be a severe loss to society without any resultant increase in protection to the individual. Chief Justice Burger has made a cogent argument for the doctrine:

> [A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in response to reports of "dead bodies," the police may find the "bodies" to be common drunks, diabetics in shock, or

35. United States v. Resnick, 455 F.2d 1127, 1132 (5th Cir. 1972) (emphasis added).

36. Commonwealth v. Soychak, 221 Pa. Super. 458, 289 A.2d 119 (1972).

37. McDonald v. United States, 335 U.S. 451, 455 (1948); Johnson v. United States, 333 U.S. 10, 15 (1948); *see* United States v. Brewer, 343 F. Supp. 468, 472-73 (D. Hawaii 1972).

38. *See* Coolidge v. New Hampshire, 403 U.S. 443, 469 n.26, 471 n.27 (1971); *see also* Agnello v. United States, 269 U.S. 20, 33 (1925). This will be especially so where a court attempts to justify the seizure of objects in plain view after an emergency entry. *E.g.*, Patrick v State, 227 A.2d 486, 489-90 (Del. 1967).

39. People v. Roberts, 47 Cal. 2d 374, 378, 303 P.2d 721, 723 (1956); *see* Root v. Gauper, 438 F.2d 361, 365 (8th Cir. 1971); *see also* Harris v. United States, 331 U.S. 145, 153 (1947). This is but a corollary of the rule that precludes law enforcement officers from resorting to an illegal arrest as a pretext for a general search. *E.g.*, United States v. Lefkowitz, 285 U.S. 452, 467 (1932).

> distressed cardiac patients. But the business of policemen and firemen is *to act,* not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response. A myriad of circumstances could fall within the terms "exigent circumstances" . . ., e.g., smoke coming out a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.
>
> . . . That such an entry would be an intrusion is undoubted but here we reach the balancing of interests and needs. When policemen, firemen or other public officers are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life or property, they are authorized to act [without a warrant] on that information, even if ultimately found erroneous.[40]

III. Application of the Doctrine

A frequent application of the doctrine has involved a situation where peace officers are prompted to enter private premises for humanitarian reasons that initially are of only peripheral relevance to a criminal investigation. In this type of situation, time is usually of the essence. An example of this was presented in *Davis v. State,*[41] where the court held that a search warrant was not required when police officers, called to investigate a death, discovered a brutally beaten corpse at the rear of a house and observed inside the house the feet of another person, but were unable without entry to determine whether the latter was still alive.[42] As the court reasoned:

> Basic humanity required that the officers offer aid to the person within the house on the very distinct possibility that this person had suffered at the hands of the perpetrator of the homicide discovered in the back yard. The delay which would necessarily have resulted from an application for a search warrant might have been the difference between

40. Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.) (Burger, J., concurring) (dictum) (emphasis in original), *cert. denied,* 375 U.S. 860 (1963); *accord,* People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956):

> Necessity often justifies an action . . . where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose.

Id. at 377, 303 P.2d at 723.

41. 236 Md. 389, 204 A.2d 76 (1964), *cert. denied,* 380 U.S. 966 (1965).

42. *Id.* at 395-96, 204 A.2d at 80-81.

> life and death for the person seen exhibiting no signs of life within the house. The preservation of human life has been considered paramount to the constitutional demand of a search warrant as a condition precedent to the invasion of the privacy of a dwelling house.[43]

Another example of the doctrine arises where the police respond to an urgent call reporting violence and they enter both to investigate a possible crime and to prevent further injury or to determine the extent of such injury.[44] Here, the critical factors dispensing with the need for a warrant are the preservation of human life, which takes precedence over the right of privacy, and the lack of an intent at the moment of entry to engage in a search or seizure.[45]

Occasionally, the emergency doctrine will sanction the initial entry but not subsequent activity.[46] Thus, in *United States v. Goldenstein*,[47] the majority ruled that while the initial entry into defendant's hotel room was justified under the doctrine, the officer's ensuing search-and-seizure actions (after he had satisfied himself that defendant was not present, thereby obviating the need for a prompt response to thwart either an attack upon the officer or the destruction of evidence), which uncovered hidden evidence of a crime unrelated to the one which the officer was investigating[48] at the time of entry, could not be justified under the doctrine.[49] The opinion noted that the emergency doctrine sanctioned warrantless entry and search for defendant, as well as discovery of a bloody shirt in plain view, but once the officer has satisfied himself that defendant was not present, the doctrine could not support any further search activity. Furthermore, since the proceeds of the robbery were concealed in a closed suitcase, plain view did not

43. *Id.* at 395, 204 A.2d at 80; *accord,* People v. Roberts, 47 Cal. 2d 374, 377, 303 P.2d 721, 723 (1956); People v. Brooks, 4 Ill. App. 3d 835, 841, 289 N.E. 2d 207, 213, (1972). The same result will apply to "loud screams in the dead of night." United States v. Barone, 330 F.2d 543, 544 (2d Cir.), *cert. denied,* 377 U.S. 1004 (1964).

44. *E.g.,* Patrick v. State, 227 A.2d 486, 489 (Del. 1967); Maxey v. State, 251 Ind. 645, 650, 244 N.E.2d 650, 653-54 (1969), *cert. denied,* 397 U.S. 949 (1970).

45. Patrick v. State, 227 A.2d 486, 489 (Del. 1967).

46. It is in this area that the *Coolidge* doctrine of intrusive plain view will have the greatest impact upon the emergency exception.

47. 456 F.2d 1006 (8th Cir. 1972).

48. While looking for defendant in a hotel room in Portland, Oregon, to investigate a gun battle in the hotel lobby, the officer uncovered part of the proceeds of a bank robbery that had taken place in St. Peters, Missouri. The officer had been informed that defendant appeared to have been wounded in the fight, and that he had gone to his room carrying a weapon. Upon arrival at the hotel, the officer found a victim of the shooting lying on the floor.

49. *Id.* at 1010.

apply.[50] Therefore, under the circumstances presented, the right to search under the emergency doctrine could not extend beyond the permissible scope of incidental search, and the room could have been sealed off or posted to deny access to defendant while a warrant was sought.[51] Finally, since the officer did not possess, at the time of entry, probable cause to believe that defendant had committed a crime, the hot pursuit exception could not be invoked.[52]

The dissent argued that this was a classic example of the emergency doctrine; that to have required the officer to vacate the room after learning of defendant's absence for the purpose of seeking a warrant at 2 A.M. on Saturday, thereby giving defendant ample time to flee, further conceal his identity, and possibly shoot someone, would be unrealistic; and that it was reasonable for the officer to have entered the room, without an accompanying intent to search unlawfully, to search for defendant and, after determining his absence, to have conducted a thorough investigation of the room and its contents for the sole purpose of learning defendant's identity, his current whereabouts, and the presence of any weapons.[53]

The dissent took strongest exception to the majority's limiting the scope of the emergency doctrine right to search to that permissible under the search-incident exception, arguing that these two exceptions are "separate and distinct."[54] Although conceding that the "contours" of the emergency exception have not been refined and that the Supreme Court "has never pinned it down to a workable and effective meaning," the dissent nevertheless felt that if the doctrine did not pertain in the circumstances of this case, "it is difficult indeed to think of a case in which it ever could be applied."[55]

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50. *Id.*
51. *Id.*
52. *Id.* at 1011.
53. *Id.* at 1014 (dissenting opinion).
54. *Id.* For the proposition that the *Chimel* strictures apply only to incidental searches, see State v. Toliver, 5 Wash. App. 321, 323, 487 P.2d 264, 267 (1971). Although an attempt has been made to distinguish between "emergency" and "routine" incidental searches, and to limit *Chimel* to the latter, *e.g.*, Simpson v. State, 486 S.W. 2d 807, 810 (Tex. Ct. Crim. App. 1972), this position is untenable. There are no types of incidental searches, and the Supreme Court has never expounded, let alone hinted at, their existence. Regardless of the factual context of an arrest, the permissible scope of incidental search is governed by the *Chimel* restrictions. This does not mean that law enforcement officers may never extend the scope of their search activities beyond the area of incidental searches. To do so, however, they must invoke some other exception to the warrant requirement, most typically, "hot pursuit" or one of its offshoots.
55. 456 F.2d at 1015 (dissenting opinion).

As thus presented, the majority in *Goldenstein* had premised its ruling on the postulate that under the peculiar circumstances of the case, the emergency doctrine exception could not be invoked to sanction a warrantless search beyond the permissible limits of the search-incident exception. The dissent, however, had objected to this, arguing that the Supreme Court had never attempted to equate the two exceptions, and that under the edict of the majority, the search of the suitcase could have been sustained only if it had been located within arm's reach of the defendant.[56]

Another situation to which the emergency exception pertains is where peace officers enter in response to an urgent situation fraught with imminent danger of violence and discover evidence of an unrelated crime. Here, the reasonableness of the seizure will hinge on the relevance of the discovery to the purpose for the entry. Thus, if the evidence is detected as a result of a search connected with the purpose of the entry, and while the officers are responding to an emergency

56. The majority position in *Goldenstein* is sound, for the search and seizure could not be sustained under the emergency doctrine. In the first place, the discovery and seizure were effected after the emergency had terminated and after the officer had satisfied himself that defendant was not present. Secondly, as the majority recognized, the officer did not have probable cause to believe that defendant had committed a crime. At most, he had a basis for interrogating defendant concerning the shooting of the victim who had been in a fight with persons other than defendant. 456 F.2d at 1010-11. Therefore, there was no justification, as had existed in Warden v. Hayden, 387 U.S. 294 (1967), for an extensive search for weapons and evidence of crime. 456 F.2d at 1011. Finally, the evidence was not in plain view, and was not discovered in furtherance of the purpose justifying the initial entry. *Id* at 1010.

The majority was also correct in equating, "under the circumstances of this case," the emergency and search-incident exceptions. The restrictions placed on the latter by *Chimel* were done to guard against the dreaded general search. To the same effect was the Court's refinement of plain view in *Coolidge*. Since the officer in *Goldenstein* had entered the room to render first aid and to conduct a possible interview concerning an unsolved crime, he certainly had the right to conduct, as he in fact did, a thorough search of the room, closet, and adjacent bathroom for defendant; and, if he had discovered him and had obtained probable cause for an arrest, he would have been permitted to conduct a limited incidental search under *Chimel* for weapons and evidence of guilt. Furthermore, if this appropriately restricted search had uncovered evidence of another unrelated crime, it would have been reasonable for him to effect its immediate seizure. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). But if a search that is supported by a valid arrest of a present accused is not permitted to extend beyond his person and the area within his immediate reach, Chimel v. California, 395 U.S. 752, 763 (1969), it is difficult to see how a warrantless search beyond such limits can be sanctioned when the accused is not present and there are no circumstances qualifying under one of the exceptions to the warrant requirement.

As thus correlated, *Chimel, Coolidge,* and *Goldenstein* are effective limitation upon exceptions to the warrant requirement, for they serve to restrict the area of permissible warrantless search and to limit subsequent police activity to that which is relevant to the purpose justifying initial instrusion.

that has not, or does not reasonably appear to have, terminated, seizure will be permitted.

An example of this application arose in *United States v. Barone*,[57] where police officers, responding to screams "in the dead of night," discovered counterfeit money. A male voice, responding to their demand for entry, inquired as to who was knocking, and was advised that it was the police. The door was then opened by a woman. After securing entry, the officers were advised by two female occupants that they knew nothing of the screams, one of them suggesting that she might have had a nightmare. At this time, the officers heard the flushing of a toilet in the bathroom, out of which emerged a man in his undershorts. One of the officers then entered the bathroom and observed pieces of currency floating in the commode.

The Second Circuit sustained the seizure under the emergency exception, noting that the discovery had been made while the police were completing their view of the premises in furtherance of the purpose for their entry.[58] As the court reasoned:

> Having found nothing amiss in the main room of the apartment, it was the duty of the police to enter the bathroom and complete their view of the premises. They knew that a man must be in the bathroom as they had been answered by a male voice when they sought admission. Their investigation of the cause of the screaming would have been incomplete without finding out who might be in the bathroom and whether anyone there might be in need of aid. The fact that the appellant had just left the bathroom as they were on the point of entering did not render it unnecessary for them to view the bathroom. At this point the sound of the water directed Patrolman Cottle's attention to the commode where paper money was floating in plain view. As it is unusual for anyone to flush away good paper money, it was in the line of the officer's duty to take the money from the commode to ascertain its nature. His presence at the place was lawful. The performance of his duty required him to act as he did.[59]

IV. Inapplicability of the Doctrine

Since the *raison d'être* of the emergency exception is the compelling need for immediate action by peace officers, the doctrine may not be

57. 330 F.2d 543 (2d Cir.), *cert. denied*, 377 U.S. 1004 (1964).
58. *Id.* at 545.
59. *Id.; see* People v. Clark, 262 Cal. App. 2d 471, 476, 68 Cal. Rptr. 713, 717 (4th Dist. 1968).

invoked in the absence of "true necessity—that is, an imminent and substantial threat to life, health, or property . . . ."[60] In addition, the doctrine may not be relied upon where entry is secured after the emergency has terminated.[61]

In *People v. Smith*,[62] a Mrs. Kirsch, the owner of a building containing two apartments, one of which was rented by defendant, discovered defendant's young daughter crying outside defendant's flat. The child told her that she was lonesome and did not want to stay alone in her mother's apartment. Mrs. Kirsch thereupon took the child into her own apartment, where she consoled her and gave her some food. Although the child had told her that she had hurt her knee, no injury could be detected. After about an hour, Mrs. Kirsch called the police.

An Officer Brown was dispatched to the scene and questioned the child. From this, he learned that she had been left alone in her mother's apartment, had apparently fallen down, and had been taken in by Mrs. Kirsch. He then decided to ascertain whether the girl's mother had returned home in the interim, and proceeded to the upstairs flat where he knocked on the door, announcing his identification. Receiving no response, he directed Mrs. Kirsch to unlock the door with her key. After entering the flat, Officer Brown called defendant's name, but again received no response. He then proceeded through the apartment and entered each room. On a nightstand in

60. People v. Smith, 7 Cal. 3d 282, 286, 496 P.2d, 1261, 1263, 101 Cal. Rptr. 893, 895 (1972); *see* Horack v. Superior Court, 3 Cal. 3d 720, 726, 478 P.2d 1, 4, 91 Cal. Rptr. 569, 572 (1970); Read v. Case, 4 Conn. 166, 170 (1822). For example, the mere threat of destruction of evidence will not qualify. To justify entry on this ground, the destruction must actually be in progress at the time of entry. Vale v. Louisiana, 399 U.S. 30, 35 (1970). In spite of the surface logic of this argument, it is submitted that the requirement of destruction "in progress" is excessive. Johnson v. United States, 333 U.S. 10 (1948), required only that destruction or removal be "threatened." *Id.* at 15; Vale v. Louisiana, 399 U.S. 30, 39 (1970) (Black, J., dissenting). If the officer has reasonable grounds to believe that the evidence will be destroyed or removed while a warrant is sought, or is in imminent danger of such destruction or removal, this should be sufficient to justify prompt action. *See* United States v. Jeffers, 342 U.S. 48, 52 (1951); United States v. Brewer, 343 F. Supp. 468, 472-73 (D. Hawaii 1972). It should be apparent that merely posting the premises will not suffice, for while it might effectively obstruct removal, it will not prevent destruction. Since time is of the essence in any emergency, whose *probable* existence is the only prerequisite for warrantless entry, it would unduly thwart an effective response to insist upon the additional requirement of *actual* destruction.

61. Closely allied to this is the situation where an emergency exists *at* the time of entry but terminates *prior* to the search or seizure. *E.g.*, United States v. Goldenstein, 456 F.2d 1006, 1010 (8th Cir. 1972).

62. 7 Cal. 3d 282, 496 P.2d 1261, 101 Cal. Rptr. 893 (Sup. Ct. 1972).

the bedroom he found a jar of marijuana, and additional marijuana on a newspaper lying on the dresser.

In affirming the lower court's suppression of the evidence seized, the California Supreme Court, noting that the burden rested with the prosecution to justify the seizure under the emergency doctrine,[63] which had been invoked to sustain the seizure, held that the burden imposed had not been sustained. Although the court found commendable the officer's concern for the child's safety and welfare, it recognized that the police must have a corresponding concern for the interest of the parent in the security and privacy of her home. The issue, therefore, could not be determined solely by reference to whether the officer's conduct might have been reasonable under the circumstances; rather, it would have to be resolved on the basis of whether the entry could be justified under one of the exceptions to the warrant requirement.[64]

Proceeding to an evaluation of the facts in terms of the emergency doctrine, the opinion cautioned that "the exception must not be permitted to swallow the rule: in the absence of a showing of *true necessity*—that is, an imminent and substantial threat to life, health, or property—the constitutionally guaranteed right to privacy must prevail."[65] The court rejected the argument that a showing of "true necessity" had been made, observing that by the time Officer Brown had arrived on the scene, the child had been consoled and fed, and did not appear injured or upset. Furthermore, Officer Brown had sought entry to determine the mother's presence and to see if she would require help in caring for her child. This justification had to be rejected because the child had told Officer Brown that her mother was not at home, which was verified by the lack of response to his knocking on the apartment door and calling out for the mother after entry had been gained. Therefore, by the time entry to the bedroom had been secured, there was no compelling need for his presence.[66]

Even "more implausible" was Officer Brown's speculation, after entering the apartment and receiving no response to his calls, that the mother "was somehow indisposed and, by that token, in need of 'help' "; for there was not a "scintilla of evidence" to support the assumption that the mother had returned and had become so incapacitated as to

63. *Id.* at 285, 287, 496 P.2d at 1262, 1264, 101 Cal. Rptr. at 894, 896.
64. *Id.* at 286, 496 P.2d at 1263, 101 Cal. Rptr. at 895.
65. *Id.* (emphasis added).
66. *Id.*

require police assistance. Therefore, Officer Brown had acted upon a belief which was "the product not of facts known to or observed by him, but of his fanciful attempt to rationalize silence into a justification for his warrantless entry."[67] Accordingly, the prosecution had failed to make a showing of "true necessity," and Officer Brown's entry into and search of the apartment were unlawful.[68]

Although law enforcement officers frequently are required to react swiftly to emergency situations, thereby being subjected to severe pressures, they must be careful not to overreact. That is to say, they must remain alert to the quickly changing aspects of an emergency, so as not to continue their response after the exigency has ceased to exist. An interesting example of this aspect of the emergency doctrine exception arose in the case of *Root v. Gauper*,[69] a federal habeas corpus arising out of a state conviction for involuntary manslaughter.

The victim, Lonnie Sutton, telephoned an operator saying that his wife had shot him and requesting that an ambulance be called, as he was dying.[70] The operator connected him with an ambulance driver, Collier, who in turn called the town marshal, Lindsay. Collier and two assistants then proceeded to the Sutton home. Meanwhile, Lindsay called the county sheriff, Marshall, and recounted his conversation with Collier. Lindsay and Marshall then proceeded separately to the Sutton home. Collier was the first to arrive at the home, entered with his assistants and found Sutton unconscious from a shotgun wound in the abdomen. They removed the victim to the ambulance and proceeded to the hospital. On the way, Collier passed Lindsay and Marshall on their way to the Sutton home and informed them by radio communication that he had removed Sutton from the house and was taking him to the hospital.[71]

Lindsay and Marshall continued on their way to the Sutton home, with Lindsay arriving first. He did not enter but waited for several minutes until Marshall arrived. The two officers then entered by way of an unlocked door, proceeded through the living room to the kitchen,

67. *Id.* at 287, 496 P.2d at 1264, 101 Cal. Rptr. at 896. The court also rejected the argument that entry to secure a jacket for the child, which Officer Brown had testified was one of the reasons for his entry, would qualify under the emergency doctrine, commenting that "[m]anifestly it does not rise to the level of 'necessity' as defined in the decisions." *Id.* at 287 n.3, 496 P.2d 1264 n.3, 101 Cal. Rptr. 896 n.3.

68. *Id.* at 286, 287, 496 P.2d 1263, 1264, 101 Cal. Rptr. 895, 896.

69. 438 F.2d 361 (8th Cir. 1971).

70. By the time habeas corpus was brought, Mrs. Sutton had remarried.

71. Sutton was dead on arrival at the hospital.

where they found a shotgun and shells and took some pictures.[72] At the time of entry, the officers had no warrant, there was no one in the home, and defendant was not arrested until sometime later.

In affirming the grant of habeas corpus, the Eighth Circuit first rejected the claim that the evidence seized had been in plain view, noting that the objects were not open to the view of the officers from outside the house. Thus, plain view alone would not be sufficient to sustain the seizure.[73]

The court next proceeded to consider whether the entry qualified under one of the exceptions to the warrant requirement. It rejected the claim that Sutton had consented to the entry, observing that he did not call the police, never spoke to them, and probably never knew they were on the way to his residence. Furthermore, any waiver of rights guaranteed under the fourth amendment "must be freely and intelligently given," a conclusion which could not be warranted by the facts of this case.[74] This brought the court to the question of the applicability of the emergency doctrine.

For purposes of the instant case, the court defined the doctrine in these terms:

> [P]olice officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance.[75]

In assessing the doctrine, the court cautioned that two principles must be kept in mind. First, since the doctrine represents an exception to the requirement of a warrant, the burden rests with the prosecution to justify its application. And, second, an "objective standard as to the reasonableness of the officer's belief must be applied."[76]

Applying these principles to the instant case, the court conceded that with the benefit of hindsight, it knew that no emergency in fact existed at the time of entry. In judging the lawfulness of the entry, however, the court was required to consider whether the officers had a reasonable basis for their belief that an emergency did exist, and did acknowledge the "salutary and empirical doctrine of an emergency or exigency making reasonable a warrantless entry and possibly search

72. All of these items were admitted into evidence over the objection of defendant.
73. 438 F.2d at 364.
74. *Id.*
75. *Id.*
76. *Id.*

of a home . . . ."[77] Still, the record failed to support the application of the doctrine, and, accordingly, the officers' entry without a warrant was unjustified under the circumstances.[78]

The court reasoned that the testimony in the record suggested that the officers did not believe, and had no reasonable cause to believe, that an emergency existed at the time of entry, specifically noting that Marshal Lindsay's waiting several minutes until Sheriff Marshall arrived before effecting entry was "not consistent with [the action] of a man who believes that wounded persons might be lying inside the house awaiting attention."[79] In addition, both officers knew prior to entering the house that the victim had already been removed from the residence and was being taken to the hospital. The ambulance operator and his assistants had not discovered any other wounded victims, and Sutton had not suggested in his call for assistance that there were any others wounded. Thus, there was nothing "that would even slightly suggest that the officers had any reason for believing that there were any other persons in need of aid."[80] Furthermore, since one of the officers arrived at the scene equipped with a camera which he used upon entering the residence, it did not appear that the primary purpose for entry was to render aid and assistance to any victims. Rather, this suggested that the purpose "was to obtain evidence relating to the commission of the crime."[81]

77. *Id.* at 365.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id. But cf.* United States v. Keeble, 459 F.2d 757, 762 (8th Cir. 1972).