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Criminal Procedure—Search and Seizure—Compliance with Announcement Statute Not Required Before Forcible Entry Where Officer's Purpose Is "Investigatory" and Not for Purpose of Arrest

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CRIMINAL PROCEDURE—SEARCH AND SEIZURE—COMPLIANCE WITH ANNOUNCEMENT STATUTE NOT REQUIRED BEFORE FORCIBLE ENTRY WHERE OFFICER'S PURPOSE IS "INVESTIGATORY" AND NOT FOR PURPOSE OF ARREST

In response to a radio report of a disturbance, the police officer on patrol proceeded to a nearby rooming house. Upon arrival at the building, he heard shouting, screaming and clapping of hands. The night manager informed him that a fifth floor tenant was creating the disturbance and that it "had been going on for several evenings."[1] The officer proceeded to the tenant's room and heard "stamping of feet . . . rapid clapping of hands, and a male shouting at the top of his lungs."[2] The policeman remained outside the room for fifteen seconds and then knocked on the door, but did not identify himself or announce his purpose. The noises stopped immediately and a male voice from within stated three times: "Wait a minute. Wait a minute. I'm not dressed."[3] After a minute's wait, the officer, although holding no search or arrest warrant, directed the manager to open the door with his passkey. As the door was opened, the officer observed defendant holding a syringe, an eyedropper with a needle on the end of it. He placed the defendant under arrest and seized the narcotics instruments. Subsequently, defendant moved to suppress this evidence, arguing that there was a violation of section 178 of the New York Code of Criminal Procedure,[4] because the police officer had failed to state his identity and give notice of his purpose before "breaking open"[5] the door to gain entry. The suppression motion was denied and defendant was convicted of the misdemeanor of possession of narcotics instruments in violation of section 1747-e of the New York Penal Law.[6]

1. People v. Gallmon, 19 N.Y.2d 389, 391, 227 N.E.2d 284, 285, 280 N.Y.S.2d 356, 358 (1967) [hereinafter cited as instant case].

2. Brief for Respondent, pp. 2-3, *quoting* Minutes, Suppression Hearing, Criminal Court, City of New York, County of New York, pp. 4-5 (October 6, 1965), instant case.

3. Instant case at 391, 227 N.E.2d at 286, 280 N.Y.S.2d at 358.

4. N.Y. Code Crim. Proc. § 178 provides:

> To make an arrest, as provided in the last section, the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance.

The "last section" referred to in § 178 indicates the cases in which an officer may arrest without a warrant. N.Y. Code Crim. Proc. § 177 provides:

> A peace officer may, without a warrant, arrest a person, 1. For a crime, committed or attempted in his presence, or where a police officer as enumerated in section one hundred fifty-four-a of the code of criminal procedure, has reasonable grounds for believing that an offense is being committed in his presence. 2. When the person arrested has committed a felony, although not in his presence; 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it; 4. When he has reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed, or, if committed, that the person arrested did not commit it; 5. When he has reasonable cause for believing that a person has been legally arrested by a citizen as provided in sections one hundred eighty-five, one hundred eighty-six and one hundred eighty-seven of this code.

5. For a discussion of "breaking" within the meaning of the statute, *see infra* notes 15-19 and accompanying text.

6. N.Y. Pen. Law § 1747-e(3), (4), *now* N.Y. Rev. Pen. Law § 220.45, provided, in part:

> It shall be unlawful for any person or persons, except a duly licensed physi-

The Appellate Term, First Judicial Department, *affirmed*, without opinion.[7] On appeal, the Court of Appeals (4-3) *affirmed* the conviction. *Held*, since the police officer's entry was investigatory and not to effect an arrest or seizure, section 178 of the Code of Criminal Procedure was not applicable and therefore the officer was under no duty to give notice of office or purpose before entering; the officer's entry was privileged pursuant to his general obligation to assist people in distress. *People v. Gallmon*, 19 N.Y.2d 389, 227 N.E.2d 284, 280 N.Y.S.2d 356 (1967).

The fourth amendment to the United States Constitution guarantees to all persons the right to be secure in their houses against unreasonable searches and seizures.[8] This has been interpreted to mean that law enforcement officers may not enter a person's house and secure evidence for a criminal prosecution unless authorized to do so "pursuant to a legal search warrant, by consent, or incident to a lawful arrest,"[9] and that where the search is found unreasonable by these standards, any evidence obtained as a result of the unreasonable search is inadmissible in both federal[10] and state[11] courts. The instant case focuses on two important concepts in the area of warrantless searches and seizures: the statutory announcement requirement, establishing standards for lawful entry, and the privileged entry in an emergency, allowing police, without warrant, to aid persons in distress.

In many jurisdictions, a police officer, in making an arrest or in executing process, may break open a door of a building only if he is refused admittance after having given notice of his office and purpose.[12] Although these statutory requirements of notice of identity and purpose embody principles long a part of the common law,[13] it was 1949 before an American court invalidated an arrest on

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cian, . . . or those engaged in the regular business of dealing in medical, dental and surgical supplies, . . . to have under control or possess, a hypodermic syringe or hypodermic needle, or any other instrument or implement adapted for the administering of narcotic drugs which other instrument or implement is possessed for that purpose, unless such possession be obtained upon a valid written prescription . . . . A violation of any provision of this section shall constitute a misdemeanor.

7. People v. Gallmon, N.Y.L.J., June 10, 1966, vol. 155, no. 113, p. 16, col. 5 (Sup. Ct. 1966).

8. U.S. Const. amend. IV guarantees:

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 problable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

See also N.Y. Const. art. I, § 12.

9. People v. Loria, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 466 (1961). *Accord*, Rios v. United States, 364 U.S. 253, 261-62 (1960); Henry v. United States, 361 U.S. 98, 100-02 (1959); People v. Stokes, 15 N.Y.2d 534, 202 N.E.2d 567, 254 N.Y.S.2d 123 (1964); People v. Yarmosh, 11 N.Y.2d 397, 184 N.E.2d 165, 230 N.Y.S.2d 185 (1962); People v. O'Neill, 11 N.Y.2d 148, 182 N.E.2d 95, 227 N.Y.S.2d 416 (1962). *See generally* N. Sobel, Current Problems in the Law of Search and Seizure (1964); Kaplan, *Search and Seizure: A No-Man's Land in Criminal Law*, 49 Calif. L. Rev. 474 (1961).

10. Weeks v. United States, 232 U.S. 383 (1914).

11. Mapp v. Ohio, 367 U.S. 643 (1961).

12. *See, e.g.*, Ala. Code tit. 15, § 155 (1959); Cal. Pen. Code § 844 (Deering 1954); Ind. Ann. Stat. § 9-1009 (Burns 1956); Neb. Rev. Stat. § 29-411 (1943); Ohio Rev. Code Ann. § 2935.12 (Baldwin 1964); Tenn. Code Ann. § 40-807 (1955). *See also* ALI Code Crim. Proc. ch. 1, § 28 (Proposed Final Draft, 1930).

13. Semayne's Case, 5 Coke 91, 11 E.R.C. 629, 77 Eng. Rep. 194 (1603).

the independent ground that an announcement of purpose was not made prior to forcible entry.[14] Moreover, the policy underlying the announcement requirement has been open to question, *i.e.*, whether its purpose is to protect property from invasion resulting in physical damage,[15] or to safeguard the individual's right to privacy as guaranteed by the fourth amendment.[16] Despite historical inferences to the contrary,[17] the requirement that an officer announce his identity and purpose and be refused admittance, before being permitted to break into a private dwelling, is today clearly founded in "the precious interest of privacy summed up in the ancient adage that a man's house is his castle."[18] Thus, any nonconsensual entry constitutes a "breaking," and the absence of a physical or forcible "breaking" to gain entry does not remove the action of the arresting officer from the ambit of the announcement requirement.[19] The statutory language requires compliance by police when their purpose in entering private premises is to effectuate an arrest.[20] Courts, in interpreting such statutes, assume sub silientio that the purpose for seeking entrance was to arrest, and then proceed to determine the legality or illegality of the entry.[21] The instant case takes a novel approach, by first determining the factual question of whether the intended purpose of the police was in fact to make an arrest.[22]

The United States Supreme Court has interpreted announcement statutes in two landmark decisions. In *Miller v. United States*,[23] the Court held that the

14. Accarino v. United States, 179 F.2d 456 (D.C. Cir. 1949). *See generally* Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499, 511-12 (1964).

15. *See* Kaplan, *supra* note 9, at 502-03: "[T]he common-law history and purposes of the statute [are] to protect property from the unnecessary injury of a forcible entry rather than to guard the rights of privacy involved in the fourth amendment."

16. Miller v. United States, 357 U.S. 301 (1958); Munoz v. United States, 325 F.2d 23 (9th Cir. 1963); Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961).

17. In United States v. Bowman, 137 F. Supp. 385, 388 (D.D.C. 1956) the court stated that, "So long as the entry is peaceful and there is no breaking of parts of the house, the execution of the search warrant is legal." *See generally* Kaplan, *supra* note 9.

18. Miller v. United States, 357 U.S. 301, 307 (1958).

19. Keiningham v. United States, 287 F.2d 126, 130 (D.C. Cir. 1960). *See also* Munoz v. United States, 325 F.2d 23, 26 (9th Cir. 1963) (Entry into appellant's room by use of a passkey obtained from the hotel clerk amounts to the same thing as a physical breaking of the door.).

20. *See, e.g.*, Cal. Pen. Code § 844 (Deering 1954) ("To make an arrest . . . a peace officer may . . . ."); N.Y. Code Crim. Proc. § 178 ("To make an arrest . . . the officer may . . . .").

21. Ker v. California, 374 U.S. 23, 35 (1963); Miller v. United States, 357 U.S. 301 (1958); Hair v. United States, 289 F.2d 894, 895 (D.C. Cir. 1961); People v. Goldfarb, 34 Misc. 2d 866, 868, 229 N.Y.S.2d 620, 621 (N.Y. Ct. Gen. Sess. 1962).

22. Instant case at 391-92, 227 N.E.2d at 286, 280 N.Y.S.2d at 359. A related question was raised in Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963). While the court in that case did not specifically discuss whether the District of Columbia announcement statute is applicable only when the *purpose* of the police officer is to arrest or execute process, it did find that to require compliance in case of an emergency would be to apply the statute "to the point of utter absurdity . . . would be a 'useless gesture.'" *Id.* at 210. It also stated that "[C]ompliance with § 3109 [the District of Columbia announcement statute] is not the only source of authority by which police could lawfully enter private quarters . . . evidence of a fire or of escaping gas would warrant public authority to enter by any available means if there was not a prompt response to knocking." *Id.* at 212.

23. 357 U.S. 301 (1958).

District of Columbia announcement statute[24] demands strict compliance in the form of "express announcement" of *both* the officer's identity and purpose.[25] Since federal officers had announced only their identity, the statutory requirements had not been fulfilled. Therefore, the entry was illegal and any evidence obtained as a result of the unlawful entry must be suppressed.[26] The Court went on to state, however, that strict compliance with the announcement requirement may be excused when the officers are "virtually certain" that both their identity and purpose are already known and that, therefore, such an explicit statement would be a "useless gesture."[27] In *Ker v. California*,[28] the Court added another exception to strict compliance with the announcement requirement, by holding that the California-developed doctrine of "exigent circumstances"[29] was constitutional.[30] The doctrine excuses announcement of identity and purpose where the officer believes in good faith that compliance with the statute would increase the possibility of peril to himself or someone within,[31] or that the person to be arrested is fleeing or attempting to destroy evidence which would otherwise be seized,[32] or that the officer's purpose is "reasonably apparent" to the person to be arrested.[33] Conceding that there had not been strict compliance with the California statute,[34] the Court found an exigency justifying non-compliance,[35] and held the entry lawful and the evidence admissible.[36]

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24. 18 U.S.C. § 3109 (1964) provides:
The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance. . . .

25. Miller v. United States, 357 U.S. 301, 309 (1958).

26. *Id.* at 314.

27. *Id.* at 310.

28. 374 U.S. 23, 37 (1963).

29. People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). *See also* People v. Hammond, 54 Cal. 2d 846, 357 P.2d 289, 9 Cal Rptr. 233 (1960).

30. Ker v. California, 374 U.S. 23, 38 (1963).

31. People v. Hammond, 54 Cal. 2d 846, 854, 357 P.2d 289, 294, 9 Cal. Rptr. 233, 238 (1960); People v. Maddox, 46 Cal. 2d 301, 306, 294 P.2d 6, 9, *cert. denied*, 352 U.S. 858 (1956). *See also* Benefield v. State, 160 So. 2d 706 (Fla. 1964).

32. People v. Hammond, 54 Cal. 2d 846, 854, 357 P.2d 289, 294, 9 Cal. Rptr. 233, 238 (1960); People v. Maddox, 46 Cal. 2d 301, 306, 294 P.2d 6, 9, *cert. denied*, 352 U.S. 858 (1956); People v. Arellano, 239 Cal. App. 2d 389, 392, 48 Cal. Rptr. 686, 688 (1966). *See also* United States v. Figueroa, 323 F.2d 729 (2d Cir. 1963); United States v. Sharpe, 322 F.2d 117 (6th Cir. 1963); Masiello v. United States, 317 F.2d 121 (D.C. Cir. 1963); Benefield v. State, 160 So. 2d 706 (Fla. 1964).

33. People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955). *See also* United States v. Nicholas, 319 F.2d 697 (2d Cir. 1963); Benefield v. State, 160 So. 2d 706 (Fla. 1964).

34. Cal. Pen. Code § 844 (Deering 1954) provides:
To make an arrest, a private citizen, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

35. In Ker v. California, 374 U.S. 23, 40-41 (1963), the Court stated that:
In the particular circumstances of this case, the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment.

36. *Id.* at 42-44.

New York development in this area closely parallels the Supreme Court decisions in *Miller* and *Ker*.[37] Similar to the holding in *Miller* is the narrow interpretation given section 178 of the Code of Criminal Procedure[38] in *People v. Griffin*.[39] In *Griffin*, the Appellate Division, Second Department, required suppression of evidence where police officers broke into an apartment after having given notice of identity but not purpose.[40] Parallelling *Ker* is the recent case of *People v. McIlwain*,[41] also decided by the Appellate Division, Second Department. Finding that the record established that vital evidence was about to be destroyed,[42] the Court held that such "exigent circumstances" justified the arresting officers' noncompliance with section 178 of the New York Code of Criminal Procedure.[43] Despite noncompliance, then, the arrest was lawful, the search was valid as incident to that lawful arrest, and the motion to suppress should have been denied.[44]

37. The preceding analysis of *Miller* and *Ker* is intended only to state those rules of law enunciated by the Supreme Court which are relevant to the discussion of the instant case. Admittedly, this examination has been oversimplified. There are conflicts and subtleties presented by those cases which go beyond the scope of the present discussion, *e.g.*, the distinction between the Supreme Court's supervisory and constitutional functions as they relate to rules of suppression of evidence; the question of whether *Miller* involved District of Columbia law or federal law, and the consequences resulting from that determination; and the reasons for the apparent conflict between the rigorous standard that federal officials must meet and the more permissive standards which the Supreme Court may allow the states to establish. For an excellent discussion of these and other problems raised by *Miller* and *Ker*, *see* Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. Pa. L. Rev. 499 (1964). *See also* Note, 11 U.C.L.A.L. Rev. 426 (1963); *The Supreme Court, 1962 Term*, 77 Harv. L. Rev. 62, 113-16 (1963).

The concern of the Supreme Court itself that it was establishing a double standard for federal and state officials can be seen in an analysis of the justices' votes in *Ker*. As pointed out in B. J. George, Constitutional Limitations on Evidence in Criminal Cases 44-45 (1966),

> On rationale [in Ker] the Court split 4-4-1. Four justices in the majority group felt that lawfulness [of the entry by police] should be determined according to state law. The four dissenters insisted that the standard had to be a federal one, and that under *Miller v. United States*, 357 U.S. 301 (1958), federal officers could not legally have done what California law permitted state officers to do. They concluded, therefore, that the search of Ker's apartment violated Fourteenth Amendment due process. Justice Harlan concurred, but assumed that 'henceforth state searches and seizures are to be judged by the same constitutional standards as apply in the federal system.'

38. *See* quote at *supra* note 4.

39. 22 A.D.2d 957, 256 N.Y.S.2d 115 (2d Dep't 1964).

40. *Id.* at 957, 256 N.Y.S.2d at 116. *See also* People v. Goldfarb, 34 Misc. 2d 866, 229 N.Y.S.2d 620 (N.Y. Ct. Gen. Sess. 1962) (The preemptory command to "open up" does not constitute sufficient compliance with § 178 of the Code of Criminal Procedure.).

41. 28 A.D.2d 711, 281 N.Y.S.2d 218 (2d Dep't 1967).

42. *Id.* at 220.

43. *Id.* at 221.

44. *Id.* The Court in *McIlwain* relies on Ker v. California, 374 U.S. 23 (1963) and People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6, *cert. denied*, 352 U.S. 858 (1956), as judicial recognition of the "exigent circumstances" exception to the statutory announcement requirement, and on N.Y. Code Crim. Proc. § 799 as legislative recognition of the exception. Section 799 provides that if a judge, in issuing a *search* warrant, believes that the evidence sought may be quickly destroyed or that there is peril to the officer or another, he may authorize the officer to break in without notice of office or purpose. It was held constitutional by the state's highest court in People v. DeLago, 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965), *cert. denied*, 383 U.S. 963 (1966). Relying on footnote one of Chief Judge Fuld's dissent in the instant case ("There may, at times, be 'exigent circumstances' requiring unannounced entry by law enforcement officials—e.g., to prevent destruction of

As the statutory requirement of announcement may be excused in "exigent circumstances,"[45] similarly police officers need not comply strictly with the requirements of the fourth amendment when fulfilling their general obligation to assist people in distress.[46] An emergency creates an exception to the rule that a search of private premises must be pursuant to a legally issued warrant.[47] Some courts have described the exception as another form of "exigent circumstance," excusing compliance with both the fourth amendment and the applicable announcement statute,[48] others as a "privilege" to enter to render aid.[49] Where such a privilege is found to exist, it is a limited privilege,[50] justifying an otherwise illegal entry only when the police officer "is prompted by the motive of preserving life or property and [it] reasonably appears to the [officer] to be necessary for the purpose."[51]

> 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. . . . People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process.[52]

This emergency doctrine, conferring on the police officer the privilege of entry without warrant[53] has been held to apply where the police heard several moans

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evidence . . . ." Instant case at 389, 227 N.E.2d at 288, 280 N.Y.S.2d at 362 (dissenting opinion), n.1.) the Court in *McIlwain* holds that N.Y. Code Crim. Proc. § 799 "together with the footnote to Chief Judge Fuld's dissent in *Gallmon* (supra), with its citation of *Ker*, clearly indicates that the doctrine of 'exigent circumstances' applies in New York as well as in California," and permits noncompliance with N.Y. Code Crim. Proc. § 178 where such circumstances are found to exist. People v. McIlwain, 28 A.D.2d 711, 714, 281 N.Y.S.2d 218, 221 (2d Dep't 1967).

45. *See supra*, notes 28-36, 41-44 and accompanying text.

46. People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956); Davis v. State, 236 Md. 389, 204 A.2d 76 (1964), *cert. denied*, 380 U.S. 966 (1965); State v. Lukus, 423 P.2d 49 (Mont. 1967); Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); United States v. Barone, 330 F.2d 543 (2d Cir.), *cert. denied*, 377 U.S. 1004 (1964).

47. Davis v. State, 236 Md. 389, 395, 204 A.2d 76, 80 (1964), *cert. denied*, 380 U.S. 966 (1965).

48. Wayne v. United States, 318 F.2d 205, 210, 212, 213 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); People v. Arellano, 239 Cal. App. 2d 389, 48 Cal. Rptr. 686 (1966).

49. People v. Roberts, 47 Cal. 2d 374, 378, 303 P.2d 721, 723 (1956).

50. State v. Lukus, 423 P.2d 49, 53 (Mont. 1967).

51. People v. Roberts, 47 Cal. 2d 374, 377, 303 P.2d 721, 723 (1956).

52. Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), *cert denied*, 375 U.S. 860 (1963).

53. The privileged entry in emergency situations finds a striking parallel in the administrative search commonly conducted by health inspectors, where the fourth amendment guarantee of individual privacy has been balanced against important health and safety concerns of the state—the balance until recently tipping in favor of the latter. *See* Comment, *Administrative Searches and the Fourth Amendment*, 30 Mo. L. Rev. 612 (1965); Comment, *Administrative Inspections and the Fourth Amendment—A Rationale*, 65 Colum. L. Rev. 288 (1965). The Supreme Court in the landmark case of Frank v. Maryland, 359 U.S. 360 (1959), upheld the conviction of an individual who refused to permit a warrantless inspection of private premises for the purpose of locating and abating a public nuisance, thus apparently carving out an additional exception to the rule that warrantless searches are unreasonable under the fourth amendment. It was not until June of 1967, in Camara v. Municipal Court,

or groans coming from an apartment but received no response to their knock,[54] where they heard loud screams in the dead of night coming from a room,[55] and where they received reports of an unconscious or dying woman locked in an apartment.[56] It has been found applicable where the investigating officers found a body brutally beaten at the rear of a house and saw, through a window, the feet of another person, but were unable to determine, without entry, whether such feet were those of a person in distress.[57] The doctrine has also been held to justify a privileged entry where police, answering the apartment manager's complaint of a cursing, raging man, received no reply from within when they knocked and asked that the door be opened.[58] Two factors are present in nearly all of these cases, and are apparently prerequisite to invocation of the emergency entry doctrine as justification for privileged entry: there is reasonable ground to believe that someone is in distress *and* there is no response from within to the officers' knocking on the door.[59] Although the privilege to enter to aid one in distress does not justify a search of the premises for some other purpose,[60] once lawfully inside the police are further privileged to seize any evidence of crime exposed to their view.[61] Since a search is "good or bad when it starts and does not change character from its success,"[62] such evidence is admissible in a subsequent criminal prosecution.[63]

In the instant case, Judge Breitel, for the majority, concluded that the

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387 U.S. 523 (1967), that the Court overruled *Frank*, holding that such administrative searches are "significant instrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual. . . ." *Id.* at 534. The Court in *Camara* added that its decision is not intended to foreclose prompt inspections, "even without a warrant, that the law has traditionally upheld in emergency situations," *Id.* at 539. It is submitted, however, that *Camara*, and its companion case, See v. Seattle, 387 U.S. 541 (1967), tends, if not to weaken the conceptual foundation of the doctrine of privileged entry in emergency situations, at least to indicate that a stronger presumption in favor of the search warrant is demanded in such cases.

54. People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956).

55. United States v. Barone, 330 F.2d 543 (2d Cir.), *cert. denied*, 377 U.S. 1004 (1964).

56. Wayne v. United States, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

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

58. State v. Lukus, 423 P.2d 49 (Mont. 1967). The facts in *Lukus* are very similar to those in the instant case. In both instances, the manager of a rooming house called the police to investigate a disturbance in defendant's apartment. The police in both cases proceeded to the rooming house without an arrest or search warrant and, after knocking on the door, entered defendant's room with a passkey provided by the manager. The only major factual distinction between the two cases is that in *Lukus* there was no response to the knocking of police, while in *Gallmon* defendant did answer the knock on his door.

59. *See, e.g.*, Wayne v. United States, 318 F.2d 205, 212-13 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); People v. Roberts, 47 Cal. 2d 374, 376-78, 303 P.2d 721, 722-23 (1956); State v. Lukus, 423 P.2d 49, 53 (Mont. 1967).

60. People v. Roberts, 47 Cal. 2d 374, 378, 303 P.2d 721, 723 (1956).

61. Ker v. California, 374 U.S. 23, 41-43 (1963).

62. United States v. Di Re, 332 U.S. 581, 595 (1948). For a discussion of the principles enunciated in *Di Re*, in terms of trespass and lawful entry, *see* N. Sobel, Current Problems in the Law of Search and Seizure 47 (1964).

63. People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956); Davis v. State, 236 Md. 389, 204 A.2d 76 (1964), *cert. denied*, 380 U.S. 966 (1965); *cf.* People v. Capra, 17 N.Y.2d 670, 216 N.E.2d 610, 269 N.Y.S.2d 451 (1966).

New York announcement statute[64] requires notice of identity and purpose only where the intended purpose of the police, in making the entry, is to effectuate an arrest.[65] The Court found that the officer did not enter defendant's apartment to arrest, but rather to investigate a disturbance.[66] Therefore, he was under no obligation to comply with section 178 of the New York Code of Criminal Procedure.[67] The Court then inquired whether entry by the police in the instant case was "privileged," since no person may forcibly enter private premises without a privilege to do so.[68] Judge Breitel noted that such a privilege has traditionally been recognized in the case of an innkeeper or landlord going to the aid of one of his tenants.[69] Finding it "critically significant" that a rooming house was involved[70] and that the night manager had summoned the police, the Court invoked this traditional privilege given the landlord in case of emergency.[71] It also found a second related privilege to be involved: a police officer's privilege to enter an apartment for the purpose of aiding one in distress, "a purpose often independent of considerations affecting the criminal law."[72] Recognizing the potential danger of a rule of privileged entry by police, without warrant, in the case of emergency,[73] the Court enunciated a standard to be applied to determine the necessity of such an entry: the privileged entry "requires a stronger basis where the purpose of the entry is not to make an arrest or execute process."[74] Reinforcing the standard, the Court stated that there is "a strong factual inference that an entry which results in an arrest or seizure of evidence was for the purpose of effecting an arrest or seizure. That inference should prevail unless the police establish a different purpose justified by objective evidence of a

64. N.Y. Code Crim. Proc. § 178. *See* quote at *supra* note 4.

65. Instant case at 392, 227 N.E.2d at 286, 280 N.Y.S.2d at 359.

66. This finding by the Court runs directly contrary to the position maintained by the People. The District Attorney's entire argument was based on the fact that the police officer had probable cause to arrest for the crime of disorderly conduct. N.Y. Pen. Law §§ 722(2), 722(5) *now* N.Y. Rev. Pen. Law § 240.20. He maintained, however, that N.Y. Code Crim. Proc. § 178 was not violated since there was no "breaking" within the meaning of the statute, relying on the theory that the statute requires a physical breaking. *But see supra* notes 15-18 and accompanying text. In the alternative, he argued that even if section 178 were held to apply to every nonconsensual entry, noncompliance with the statute need not be enforced by the exclusionary rule, since the requirement of announcement is imposed by statute and is not of constitutional dimension. *But see*, Ker v. California, 374 U.S. 23 (1963). *See* Brief for Respondent, pp. 3-7 instant case, 19 N.Y.2d 389, 227 N.E.2d 284, 280 N.Y.S.2d 356 (1967).

67. Instant case at 392, 227 N.E.2d at 286, 280 N.Y.S.2d at 359.

68. *Id.*

69. *Id.* at 392-93, 227 N.E.2d at 286-87, 280 N.Y.S.2d at 359-60, *quoting* de Wolf v. Ford, 193 N.Y. 397, 403, 86 N.E. 527, 530 (1908):

> If, for instance, there should be an outbreak of fire, a leakage of water or gas, or any other emergency calling for immediate action in a room assigned to a guest, the innkeeper and his servants must necessarily have the right to enter without regard to the time of day or night and without consulting the wish or convenience of the guest.

70. *Id.* at 392, 227 N.E.2d at 286, 280 N.Y.S.2d at 359.

71. *Id.* at 392-93, 227 N.E.2d at 286-87, 280 N.Y.S.2d at 359-60.

72. *Id.* at 394, 227 N.E.2d at 287, 280 N.Y.S.2d at 361.

73. *Id.* at 394, 227 N.E.2d at 288, 280 N.Y.S.2d at 361.

74. *Id.* at 392, 227 N.E.2d at 286, 280 N.Y.S.2d at 359.

privileged basis for making the entry."[75] The Court found the evidence in the instant case sufficient to overcome that inference, and also sufficient to characterize the entry by police as privileged.[76] The entry having been found lawful, any evidence of crime exposed to the view of police could lawfully be seized.[77]

Chief Judge Fuld, dissenting, was of the opinion that the entry by police was unlawful, whether a violation of a statutory requirement or of a constitutional right.[78] "If the police had probable cause to arrest the defendant for disorderly conduct,[79] their entry into the defendant's room was illegal because it was not preceded by 'notice of [their] office and purpose.' "[80] If, on the other hand, the police did not have probable cause to arrest and did not enter defendant's room for the purpose of arresting him, "there was a flagrant violation of the Fourth Amendment of the Federal Constitution."[81] Chief Judge Fuld noted that the fourth amendment requires that all entries into private premises for the purpose of securing evidence of crime be either pursuant to a legal search warrant, incident to a lawful arrest, or by consent.[82] In the instant case, he stated, there was admittedly no search warrant nor, according to the majority, were the police seeking to effectuate an arrest.[83] Thus, the Chief Judge reasoned, only if there were consent to search could the entry by police be upheld as constitutional.[84] Since consent must be given by the "occupant" of the premises to be searched,[85] the night manager of the rooming house could not lawfully consent to the entry and search of defendant's room.[86] Although the night manager may be permitted to enter a room in case of emergency, without consent or with the implied consent of the occupant, Chief Judge Fuld could find no support in the record for the claim that there was a "reasonable basis . . . for believing . . . an emergency existed."[87] The manager was concerned about "noise," not about an emergency. The fact that the "noise" stopped after the police knocked and "that the defendant responded to the knock on the door with his 'Wait a minute. I'm not dressed' thoroughly negates the idea that he was in

75. *Id.* at 395, 227 N.E.2d at 288, 280 N.Y.S.2d at 361-62.
76. *Id.* at 395, 227 N.E.2d at 288, 280 N.Y.S.2d at 362.
77. *Id.* at 394, 227 N.E.2d at 287, 280 N.Y.S.2d at 361.
78. *Id.* at 398, 227 N.E.2d at 290, 280 N.Y.S.2d at 364.
79. The contention that the police had probable cause to arrest for disorderly conduct, the Chief Judge noted, was "the position stoutly maintained by the People." He asserted that the view of the majority of the Court, that the entrance was for an "investigatory" purpose, was "at odds with the record." Instant case at 396 n.2, 227 N.E.2d at 289 n.2, 280 N.Y.S.2d at 362 n.2 (dissenting opinion).
80. *Id.* at 398, 227 N.E.2d at 290, 280 N.Y.S.2d at 364, *citing* N.Y. Code Crim. Proc. § 178, and Miller v. United States, 357 U.S. 301 (1958).
81. *Id.* at 396, 227 N.E.2d at 289, 280 N.Y.S.2d at 363.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id., citing* Lewis v. United States, 385 U.S. 206, 211 (1966); Chapman v. United States, 365 U.S. 610, 617 (1961); Jones v. United States, 362 U.S. 257 (1960); Johnson v. United States, 333 U.S. 10, 14 (1948).
86. Instant case at 396-97, 227 N.E.2d at 289, 280 N.Y.S.2d at 363, *citing* Stoner v. California, 376 U.S. 483, 489-90 (1964).
87. *Id.* at 397, 227 N.E.2d at 289, 280 N.Y.S.2d at 363.

distress."[88] The Chief Judge concluded, "Absent a specific intent, based on some reasonable ground, to go into a room for the sole purpose of coping with a suspected emergency, the manager's power to enter the premises for that limited purpose may not be used to validate this unauthorized entry into the defendant's room."[89]

The Court in the instant case held that compliance with the New York announcement statute is only required where the *purpose* of the police is to arrest or execute process.[90] While a literal reading of section 178 may lead to this conclusion,[91] an examination of the policy underlying the statute casts some doubt on this interpretation. The purpose of the statute is to further the fourth amendment guarantee of privacy by protecting the individual from unwarranted forcible entry into his home.[92] Thus, he should be given the opportunity to know who seeks entry into his private premises and for what purpose, and then to determine for himself whether to permit peaceable entry. The Court's holding grants these rights where the individual is suspected of having committed a crime, *i.e.*, when entry is sought to effectuate an arrest.[93] However, when the police are entering only for some investigatory purpose, these rights are denied the individual.[94] It is difficult to understand why the Court recognizes the right of privacy in the arrest situation, but not when the purpose for entry is only "investigatory." The United States Supreme Court recently resolved a similar contradiction in an analogous area of the law, by holding that administrative searches by health inspectors when conducted without a warrant lack the traditional safeguards of the fourth amendment.[95] The Court there noted, "It is surely anomolous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal activity."[96] The anomoly is equally striking in the case of the "investigatory" entry authorized by the Court of Appeals in the instant case. "To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection is a *fantastic absurdity*."[97] The right to individual privacy must

88. *Id.* at 397-98, 227 N.E.2d at 290, 280 N.Y.S.2d at 364.
89. *Id.* at 397, 227 N.E.2d at 289, 280 N.Y.S.2d at 364.
90. *Id.* at 392, 227 N.E.2d at 286, 280 N.Y.S.2d at 359.
91. N.Y. Code Crim. Proc. § 178 provides: "*To make an arrest*, . . . the officer may break open an outer or inner door or window of a building, if, after notice of his office and purpose, he be refused admittance." (Emphasis added.)
92. *See supra* notes 8-22 and accompanying text.
93. Instant case at 392, 227 N.E.2d at 286, 280 N.Y.S.2d at 359.
94. *Id.*
95. Camara v. United States, 387 U.S. 523 (1967). *See supra* note 53.
96. *Id.* at 530. *See also* District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950): "The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. . . . It was not related to crime or suspicion of crime. It belonged to all men, not merely to criminals, real or suspected."
97. District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950). (Emphasis added.)

necessarily be balanced against other societal values.[98] Surely that balance should tip more strongly in favor of privacy when there is merely an investigatory purpose than when the purpose is to protect society from suspected criminals by arresting them and seizing evidence of their alleged crimes. The Court in the instant case initially seems to recognize this notion by requiring a "stronger basis" for entry in the former situation.[99] It is submitted that since a stronger basis for lawful entry is required when there is only a desire to investigate, the procedures which police should be required to follow in such cases should necessarily be more protective of individual privacy than those employed when the entry is for purposes of arrest. On policy grounds, it would seem that the minimal requirements of section 178 (to knock and announce identity and purpose) should be required regardless of the purpose for which entry is sought, except where there are legitimate exigent[100] or emergency circumstances.[101]

The major portion of the Court's opinion deals with the doctrine of privileged entry in emergency situations, an exception to the fourth amendment search warrant requirement. Balancing the interest of individual privacy against the value of preserving human life, the Court enunciates the rule that in emergencies a police officer is privileged to enter private quarters without a warrant and without announcing his identity and purpose.[102] The doctrine recognizes that to require a police officer to obtain a search warrant before responding to the screams of an apparently injured person, or groans coming from a locked apartment, would be an absurd overemphasis on privacy at the expense of human life.[103] While the Court makes a wise policy choice in so holding, it also recognizes the danger inherent in its ruling.[104] Therefore, to protect against the possibility that police may take advantage of the emergency entry doctrine to justify illegal entries, it requires a "stronger basis" for entry where the purpose is not to arrest or to excute process.[105] The legal basis or justification in the arrest situation is probable cause,[106] which has been defined as that situation "where 'the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the

98. *See, e.g.*, Camara v. United States, 387 U.S. 523, 529 (1967); McDonald v. United States, 335 U.S. 451, 455 (1948); Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

99. Instant case at 392, 227 N.E.2d at 286, 280 N.Y.S.2d at 359.

100. *See supra* notes 28-36, 41-44 and accompanying text.

101. *See supra* notes 45-63 and accompanying text.

102. Instant case at 392-94, 227 N.E.2d at 286-87, 280 N.Y.S.2d at 359-61.

103. *See, e.g.*, United States v. Barone, 330 F.2d 543 (2d Cir.), *cert. denied*, 377 U.S. 1004 (1964) (Policemen upon hearing loud screams in the dead of night, properly demanded entrance to the room, even though they had no warrant in their possession.); People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956) (Where officers entered apartment without search warrant after having heard several moans or groans that sounded as if someone were in distress, their entry was lawful and evidence was properly seized.).

104. Instant case at 394-95, 227 N.E.2d at 288, 280 N.Y.S.2d at 361.

105. *Id.* at 392, 227 N.E.2d at 286, 280 N.Y.S.2d at 359.

106. *See* U.S. Const. amend. IV; Aguilar v. Texas, 378 U.S. 180 (1965); Giordenello v. United States, 357 U.S. 480, 485-86 (1958); Albrecht v. United States, 273 U.S. 1, 5 (1927).

belief that' an offense has been or is being committed."[107] The Court's holding in the instant case, then, requires a "stronger basis" than this probable cause standard to find that an emergency justifies a privileged entry. While the Court fails to define that basis with precision, the least that is required is a reasonable ground for belief by the police, based on all the circumstances, that a person is in distress.[108] Enunciation of such a standard by the Court would seem to indicate that the emergency entry doctrine is intended to be limited in scope and application. However, the Court, in applying the doctrine to the facts, appears to have ignored its own limiting standard.

The facts indicate that while there was a "disturbance" in the rooming house, there was no "emergency" requiring immediate action to aid a person in distress. Nor were there reasonable grounds to believe that there was an emergency or that someone was in need of immediate assistance. Several factors lead to this conclusion. No one was calling for help or emitting sounds of pain. The disturbance had existed for several evenings before the manager decided to call the police,[109] an indication that he did not view the situation as an emergency. Moreover, it appears that the officer found no emergency requiring immediate action, for he waited a full minute and fifteen seconds before breaking into defendant's apartment.[110] Probably the most important indication that there was no emergency is that defendant immediately responded to the officer's knock and asked that he wait a minute.[111] A man in distress would not have reacted in such a manner. Indeed, other jurisdictions have recognized that only if a person believed to be in distress fails to respond to a knock on the door by police is there reason to believe that there is an emergency granting a privilege to enter private premises.[112] It is submitted that defendant's prompt response to the knock in the instant case negates any reasonable grounds for believing that he was in distress, and thus fails to meet the standard of a basis for entry stronger than probable cause. The fact that the emergency entry doctrine was found to apply, despite the limiting standard enunciated by the Court, may lead to further misapplication of the rule, which was intended to be a narrow exception to the constitutional guarantee of privacy. If the Court could find, on these facts, that the entry was not being made to effect an arrest, then it can be expected

107. Draper v. United States, 358 U.S. 307, 313 (1959), *quoting in part* Carroll v. United States, 267 U.S. 132, 162 (1925). For discussions of probable cause, *see generally* Rothblatt, *The Arrest: Probable Cause and Search Without a Search Warrant*, 35 Miss. L.J. 252 (1964); Foote, *Safeguards in the Law of Arrest*, 52 Nw. U.L. Rev. 16 (1957); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. U.L. Rev. 65 (1957).

108. *See, e.g.*, Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); Davis v. State, 236 Md. 389, 395-96, 204 A.2d 76, 80 (1964), *cert. denied*, 380 U.S. 966 (1965); State v. Lukus, 423 P.2d 49, 53 (Mont. 1967).

109. Instant case at 391, 227 N.E.2d at 285, 280 N.Y.S.2d at 358.

110. Brief for Defendant-Appellant, p. 3, *citing*, Minutes, Suppression Hearing, Criminal Court, City of New York, County of New York, p. 9 (October 6, 1965), instant case, 19 N.Y.2d 389, 227 N.E.2d 284, 280 N.Y.S.2d 356.

111. Instant case at 391, 227 N.E.2d at 286, 280 N.Y.S.2d at 358.

112. *See, e.g.*, Wayne v. United States, 318 F.2d 205, 212, 213 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); People v. Roberts, 47 Cal. 2d 374, 378, 303 P.2d 721, 722 (1956); State v. Lukus, 423 P.2d 49, 51, 53 (Mont. 1967).

that the emergency entry doctrine will be employed by police to justify other improper entries and seizures which appear to be violations of section 178. Courts may be tempted to accept the argument that the entry was for an investigatory purpose rather than for arrest, and in that way to circumvent the intent of *Mapp v. Ohio*[113] that evidence obtained as a result of an illegal arrest, search or seizure is inadmissible in state courts.[114] The "investigatory" purpose rationale may be employed to sustain unlawful entries only because they result in seizure of evidence of crime, a procedure contrary to the doctrine that a search is "good or bad when it starts and does not change character from its success."[115] As in the instant case, courts may lose sight of the policy reasons for severely limiting the emergency entry doctrine to true emergencies. It must be remembered that the doctrine is only a limited exception to the fundamental guarantees of the fourth amendment against invasion of individual privacy. It constitutes judicial recognition that on balance the right of privacy is more vital to society than virtually all other values save one, the preservation of human life. The Court's application of the doctrine in the instant case dilutes the basic right of privacy by making the preservation of human life a ready excuse to justify unwarranted entries into private premises.[116]

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113. 367 U.S. 643 (1961).
114. *Id.*
115. United States v. Di Re, 332 U.S. 581, 595 (1948).
116. Is there an analogy between the emergency entry doctrine as applied in the instant case and the "stop-and-frisk" law, N.Y. Code Crim. Proc. § 180-a? In both cases, is not a search conducted "in practice (though not in theory) at the officer's whim"? May it not become "a pretext for the general search . . . without probable cause, which the Fourteenth Amendment was designed to prevent"? People v. Sibron, 18 N.Y.2d 603, 606, 219 N.E.2d 196, 198, 272 N.Y.S.2d 374, 375 (1966) (Van Voorhis, J., dissenting). *See also* People v. Peters, 18 N.Y.2d 239, 248, 219 N.E.2d 595, 601, 273 N.Y.S.2d 217, 225 (1966) (Fuld, J., dissenting).