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Edward G. Mascolo

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EMERGENCY ARREST IN THE HOME

EDWARD G. MASCOLO*

I. INTRODUCTION

In the landmark decision of *Payton v. New York*[1] the United States Supreme Court reversed the New York Court of Appeals and held that warrantless entry into a suspect's home to effect a warrantless felony arrest, when done in the absence of either consent or exigent circumstances,[2] is unreasonable under the fourth amendment.[3] The New York Court of Appeals had held that police officers could effect a warrantless and forcible entry of a suspect's home to arrest him, in the absence of exigent circumstances, upon a showing of probable cause.[4] The court of appeals based its decision on the "substantial difference" between an intrusion which attends a search of the premises[5] and one which attends an entry to arrest a suspect, the latter being less objectionable. Char-

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* Research attorney, Office of Judicial Education, Judicial Department, State of Connecticut; member of the Connecticut and District of Columbia Bars; Editor-in-Chief of the CONNECTICUT BAR JOURNAL, 1969-1973; current member of the CONNECTICUT BAR JOURNAL Editorial Board; B.A., Wesleyan University, 1949; L.L.B., Georgetown University, 1952. The opinions expressed herein are those of the author alone.

1. 445 U.S. 573 (1980).

2. *Id.* at 576, 589-90.

3. 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.

4. People v. Payton, 45 N.Y.2d 300, 310, 380 N.E.2d 224, 228-29, 408 N.Y.S.2d 395, 399 (1980), *rev'd sub nom.* Payton v. New York, 445 U.S. 573 (1980).

5. *Id.* at 310, 380 N.E.2d at 228, 408 N.Y.S.2d at 399.

acterizing a warrantless entry to arrest as "a routine felony arrest,"[6] the Supreme Court reasoned that an arrest and a search both result in entry of a private home: any differences between the two regarding intrusiveness are merely of degree rather than of kind. Thus, the Court concluded that both an arrest and a search for incriminating evidence implicate the same privacy interests under the fourth amendment[7] and require the "same level of constitutional protection."[8] This protection is provided by the warrant requirement of the fourth amendment.

While the *Payton* Court sanctioned warrantless entries under certain circumstances, it failed to address[9] the specific kinds of emergencies that must exist before warrantless entries to arrest suspects are constitutionally valid.[10] This article analyzes the emergency entry issue and evaluates the circumstances when exigent entries are lawful. First, it reviews the general conditions which justify an emergency entry in the absence of a warrant. Second, it analyzes the specific criteria supporting warrantless entries. Third, it reviews the unannounced entry doctrine which requires officers to announce their authority and purpose prior to all entries, even those supported by a warrant. Finally, it concludes that courts should assess warrantless police conduct under the totality of the circumstances approach since that approach best accommodates the competing policies of privacy and efficient law enforcement.

II. CRITERIA FOR EMERGENCY ENTRY

Law is a code of rules governing human conduct in a civilized society. One such rule, the rule of reasonableness, is embodied in the fourth amendment to the United States Constitution. The concept of reasonableness under the fourth amendment does not lend

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6. 445 U.S. at 591.

7. *Id.* at 589-90. Furthermore, arrests and searches are governed by the same constitutional principles and the same standard of reasonableness. *Id. See* Sabbath v. United States, 391 U.S. 585, 588-89 (1968); Miller v. United States, 357 U.S. 301, 306, 308-09 (1958).

8. 445 U.S. at 588. In arriving at this conclusion, the Court reaffirmed the primacy of the warrant requirement in the home. *Id.* at 585-90; *see* United States v. Martinez-Fuerte, 428 U.S. 543, 561, 565 (1976) (dictum); United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

9. Another unresolved issue is whether a law enforcement officer has the authority to enter the home of a third party to arrest a suspect in the absence of exigent circumstances. For an analysis of this issue, *see* Steagald v. United States, 101 S. Ct. 1642 (1981); Mascolo, *Arrest Warrants and Search Warrants: The Seizure of a Suspect in the Home of a Third Party*, 54 CONN. B.J. 299 (1980).

10. 445 U.S. at 583.

itself to "precise definition or mechanical application."[11] It requires a balancing of the need to search or seize against the invasion of privacy that the search or seizure entails. In assessing the reasonableness of search and seizure activity under the fourth amendment, courts have considered the following factors: The justification for initiating an intrusion; the scope and degree of intrusion; the manner of execution; and the locale in which the search or seizure is conducted.[12] Ultimately, the standard of reasonableness for fourth amendment purposes is determined by assessing both the invasion of the individual's privacy interests and the "promotion of legitimate governmental interests" through effective law enforcement.[13] This assessment requires an accommodation between two conflicting interests: The individual's right to be free from arbitrary governmental intrusion and society's need for effective law enforcement.[14]

Because the fourth amendment establishes a standard of reasonableness, it operates as a limitation upon the official exercise of power.[15] By imposing a standard of reasonableness upon the exercise of discretion by law enforcement officers the fourth amendment protects the security and privacy of the individual against arbitrary intrusions.[16] The standard of reasonableness requires that the facts relied upon to justify an intrusion "be capable of measurement against 'an objective standard.' "[17] This ensures that the individual's privacy interests are not subject to the discretionary mercy of law enforcement officials.[18]

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11. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

12. *Id. See also* Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

13. Delaware v. Prouse, 440 U.S. 648, 654 (1979) (footnote omitted); *see* United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976).

14. *See* United States v. United States Dist. Court, 407 U.S. 297, 314-15 (1972) (electronic surveillance improper in absence of warrant despite need to protect domestic security).

15. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 392 (1971); *see* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353, 400 (1974).

16. Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); *see* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

17. Delaware v. Prouse, 440 U.S. 648, 654 (1979) (footnote omitted).

18. *Id.* at 654-55; Camara v. Municipal Court, 387 U.S. 523, 532 (1967); Aguilar v. Texas, 378 U.S. 108, 110-11 (1964); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.S. 10, 13-14 (1948); *see* Boyd v. United States, 116 U.S. 616, 625 (1886); Wilkes v. Wood, 19 Howell St. Tr. 1153, 1167 (C.P. 1763); 2 LEGAL PAPERS OF JOHN ADAMS 141-42 (L. Wroth & H. Zobel eds. 1965); Amsterdam, *supra* note 15, at 396.

A fundamental tenet of fourth amendment jurisprudence is that the individual's " 'legitimate expectations of privacy' "[19] are most pronounced in the home.[20] To ensure fulfillment of these expectations, the authors of the amendment erected certain barriers to forcible and warrantless entries into the home by police officers.[21] The major barrier is the requirement of a warrant.[22] Since the warrant requirement is particularly strong in the home setting,[23] the Supreme Court has held that warrantless arrests within a private residence are "presumptively unreasonable."[24] There are certain "specifically established and well-delineated exceptions"[25] to the Court's general command for a warrant. One such exception is the emergency doctrine, or the concept of exigent circumstances.[26]

A judicial barrier to forcible and warrantless entries into the home by police officers has been established by requiring the prosecution to justify its exemption from the warrant requirement.[27]

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19. Ybarra v. Illinois, 444 U.S. 85, 91 (1979); *accord*, Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980); United States v. Salvucci, 448 U.S. 83, 91-93 (1980); Rakas v. Illinois, 439 U.S. 128, 143, 148-49 (1978).

20. Payton v. New York, 445 U.S. at 585-90; United States v. Martinez-Fuerte, 428 U.S. 543, 561, 565 (1976) (dictum); Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970) (*en banc*); Mascolo, *The Duration of Emergency Searches: The Investigative Search and the Issue of Re-entry*, 55 N.D. L. REV. 7, 8-9 (1979); *see* Mincey v. Arizona, 437 U.S. 385, 393-94 (1978); United States v. United States Dist. Court, 407 U.S. 297, 313 (1972). *See also* Amsterdam, *supra* note 15, at 363, in which the author noted, "Indisputably, forcible entries by officers into a person's home . . . are the aboriginal subject of the fourth amendment and the prototype of the 'searches' and 'seizures' that it covers."

21. *See* United States v. United States Dist. Court, 407 U.S. 297, 313 (1972); Boyd v. United States, 116 U.S. 616, 624-30 (1886); Amsterdam, *supra* note 15, at 363. For historical background of the amendment, *see* Entick v. Carrington, 19 Howell St. Tr. 1029, 1063-74 (C.P. 1765), which had a pronounced influence upon the evolution and enactment of the fourth amendment. Boyd v. United States, 116 U.S. at 626-27, 630.

22. *See* Payton v. New York, 445 U.S. at 585-90.

23. *Id.*; United States v. Martinez-Fuerte, 428 U.S. 543, 561, 565 (1976) (dictum).

24. Payton v. New York, 445 U.S. at 586 (footnote omitted); *see* Katz v. United States, 389 U.S. 347, 357 (1967); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

25. Katz v. United States, 389 U.S. 347, 357 (1967).

26. *See, e.g.*, Payton v. New York, 445 U.S. at 575-76, 590; Mincey v. Arizona, 437 U.S. 385, 392-93, 394 (1978).

27. United States v. Reed, 572 F.2d 412, 424 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978); State v. Olson, 287 Or. 157, ___, 598 P.2d 670, 674 (1979) (*en banc*); *see* Mincey v. Arizona, 437 U.S. 385, 390-91 (1978); Vale v. Louisiana, 399 U.S. 30, 34 (1970) (applying rule to warrantless searches); Chimel v. California, 395 U.S. 752, 762 (1969) (applying rule to warrantless searches).

Moreover, the prosecution has the burden of demonstrating the existence of exigent circumstances.[28] These barriers protect the heightened privacy interests in the home and prevent the warrant exception from swallowing the general rule. The effect of this burden, however, may vary according to the situs of the court. For example, the court in *Dorman v. United States*[29] contended that a "heavy" burden must be met to excuse a warrant requirement.[30] Conversely, the Second Circuit, in *United States v. Reed*,[31] simply noted that the burden of justifying the exemption must be "reasonable."[32] In view of the strong privacy interests associated with the home,[33] the *Dorman* approach is preferable to the *Reed* standard. It should, therefore, be endorsed by the courts[34] to prevent abuses of the emergency exception to the warrant requirement.

The difficulty in defining an emergency also may serve as a barrier to warrantless entries. In general, the emergency doctrine is a flexible concept which, like the concept of reasonableness, is not subject to a precise definition. An emergency is not a static concept; it may pertain to a myriad of factual situations.[35] Its essence is a compelling sense of urgency that tolerates no delay and

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28. United States v. Kane, 637 F.2d 974, 979 (3d Cir. 1981); United States v. Williams, 612 F.2d 735, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980). *See* United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980) (government acknowledged burden).

29. 435 F.2d 385 (D.C. Cir. 1970) (*en banc*).

30. *Id.* at 392.

31. 572 F.2d 412 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978).

32. *Id.* at 424.

33. *See* United States v. United States Dist. Court, 407 U.S. 297, 313 (1972).

34. In fact, the Seventh Circuit has recently done so. United States v. Acevedo, 627 F.2d 68, 70 (7th Cir. 1980). The Second Circuit apparently has followed the *Dorman* approach. *See* United States v. Vasquez, 638 F.2d 507, 531 (2d Cir. 1980) (relying upon *Payton*). The validity of a warrantless arrest is an important issue since it determines the initial legality of the search conducted incidental to the arrest under the *Chimel* rule. *See* Chimel. v. California, 395 U.S. 752, 762-63 (1969). If the arrest is illegal, then according to *Chimel*, the search conducted incident to the arrest is also invalidated. *See generally* United States v. Rabinowitz, 339 U.S. 56, 60 (1950); United States v. Williams, 604 F.2d 1102, 1123 (8th Cir. 1979); United States v. Reed, 572 F.2d at 425.

35. *See* United States v. Velasquez, 626 F.2d 314, 317 (3d Cir. 1980); Dorman v. United States, 435 F.2d at 392; Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.) (Burger, J., concurring) (dictum), *cert. denied*, 375 U.S. 860 (1963); Mascolo, *supra* note 20, at 12-13. In fact, the exigencies which will justify a warrantless arrest may differ from those which will sanction a warrantless search. Commonwealth v. Forde, 367 Mass. 798, 805-06, 329 N.E.2d 717, 722 (1975); Laasch v. State, 84 Wis. 2d 587, 594-95, 267 N.W.2d 278, 283 (1978). For a summary of the criteria exempting the need for a search warrant, *see* Mascolo, *supra* note 20, at 13-14.

necessitates an immediate response.[36] Courts use the following factors to determine whether exigent circumstances exist: (1) The gravity of the offense involved; (2) whether a reasonable basis exists for believing that the suspect is armed; (3) a clear showing of probable cause, including reasonably trustworthy evidence, to establish that the suspect committed the offense in question; (4) strong reason to believe that the suspect will be located within the premises being entered; (5) a likelihood of escape unless apprehension is quickly effected; and (6) the peaceful circumstances surrounding the officers' entry.[37] The last element bears on the reasonableness of the law enforcement officers' conduct and attitude.[38] These criteria are generally referred to as the *Dorman* standards or analysis since they were first articulated by the United States Court of Appeals for the District of Columbia in *Dorman v. United States*.[39] In fact, *Dorman* requires scrutiny of an additional factor: Whether the entry is made in the daytime or at night. This time element affects the exigent circumstance analysis since it tends to show whether procuring a warrant might have entailed unnecessary delay and whether police conduct was reasonable under the fourth amend-

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36. *See* Michigan v. Tyler, 436 U.S. 499, 509 (1978); United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980); United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978); Rice v. Wolff, 513 F.2d 1280, 1294 (8th Cir. 1975), *rev'd on other grounds sub nom.* Stone v. Powell, 428 U.S. 465 (1976); United States v. Bustamante-Gamez, 488 F.2d 4, 8 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); Dorman v. United States, 435 F.2d at 390-91, 393, 396; 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. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (*en banc*), *cert. denied*, 429 U.S. 929 (1976); State v. Lloyd, 606 P.2d 913, 918 & n.5 (Hawaii 1980) (per curiam); Mascolo, *supra* note 20, at 12-15. *See generally* Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously with an Arrest on or Near Private Premises*, 30 SYRACUSE L. REV. 973 (1979); Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. ILL. L.F. 655; Comment, *Forcible Entry to Effect a Warrantless Arrest—The Eroding Protection of the Castle*, 82 DICK. L. REV. 167 (1977).

37. United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978); United States v. Reed, 572 F.2d at 424; United States v. Shye, 492 F.2d 886, 891 (6th Cir. 1974); Dorman v. United States, 435 F.2d at 392-93; State v. Jones, 274 N.E.2d 273, 275-76 (Iowa 1979); *see* Huotari v. Vanderport, 380 F. Supp. 645, 650 (D. Minn. 1974).

An armed suspect may be included within the type of exigency created when harm to officers or innocent bystanders seems imminent. For recognition of this category, *see* United States v. Velasquez, 626 F.2d 314, 317-18 (3d Cir. 1980).

38. By announcing their identity and mission, the police will afford the suspect an opportunity to surrender without violence, and thus avoid invading the privacy of the home. Dorman v. United States, 435 F.2d at 393; *see* State v. Jones, 274 N.W.2d at 276 (Iowa 1979).

39. 435 F.2d at 385.

ment. Moreover, the time of day may potentially affect the adequacy of probable cause to believe that the suspect will be located in the place entered.[40] Thus, "particular concern over . . . reasonableness [stems from nighttime entries]."[41] A higher degree of probable cause may be needed to establish both the suspect's guilt and his presence in the place entered than that necessary for daytime entries.[42]

Although the *Dorman* criteria generally are endorsed by the courts,[43] they are criticized by some commentators. Professor LaFave, for example, doubts that the *Dorman* criteria are sound.[44] He questions whether law enforcement officers will be able to conduct themselves within constitutional restraints if they are guided by rules which necessitate on-the-scene assessments of imprecise and often competing factors. In short, the preservation of fourth amendment interests will not be served by imposing upon the police a code of conduct that is too sophisticated to be applied properly and in good faith with any reasonable degree of consistency. This argument, however, overlooks the fact that most of the standards will have been satisfied before the police enter the suspect's residence. Surely the first four standards[45] will have been determined prior to the time the police arrive at the residence. Moreover, in a number of instances the fifth standard also will have been met prior to arrival.[46] More fundamentally, Professor LaFave's assessment ignores the realities of the situation. The essence of an emergency, which is the pressing need for quick action, often will arise only after arrival. At that point the situation is in its most fluid, and potentially most dangerous, stage.[47] Therefore, the *Dorman* standards are good, if not perfect, objective criteria by which to judge police conduct, especially since most of the standards can be satisfied by the police before they enter the suspect's residence.

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40. *Id.* at 393.

41. *Id.*

42. *Id.*; *see* United States v. Williams, 604 F.2d 1102, 1122 n.10 (8th Cir. 1979). *See also* Jones v. United States, 357 U.S. 493, 499-500 (1958).

43. *See, e.g.*, Payton v. New York, 445 U.S. at 587; United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978); United States v. Campbell, 581 F.2d 22, 26 (2d Cir. 1978).

44. 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1, at 390 (1978).

45. *See* text accompanying note 37, *supra*.

46. *See, e.g.*, United States v. Williams, 612 F.2d 735, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

47. *See, e.g.*, Dorman v. United States, 435 F.2d at 388, 393-94.

The courts, while recognizing the *Dorman* standards as valid, have refused to adhere to them blindly. Some courts, while willing to consider and even to utilize the *Dorman* approach, have not applied it rigidly to every case. For example, the First Circuit, while acknowledging the value of "the *Dorman* analysis," has refused to apply it "as a pass or fail checklist for determining exigency."[48] Rather, the First Circuit examines all the facts in order to determine whether a compelling need for immediate or prompt action existed. "The ultimate test," in the words of the court, "is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant."[49] Thus, the *Dorman* factors have been viewed as flexible guidelines that are not entitled to "condition precedent" status, and the reasonableness of an emergency entry has been assessed in terms of all the circumstances "bearing upon the exigencies of the situation."[50]

This totality of the circumstances approach is sensible, for it places a premium on the realities of the situations confronting law enforcement officers just prior to and at the moment of entry. Although almost every emergency is unique and must be determined on an ad hoc basis,[51] each has one element in common with all the others: A compelling need for quick action. An emergency is a fluid situation fraught with danger. It does not lend itself to deliberation. Within its framework, time is of the essence. The police often will be required to make snap judgments with no more support for their decisions than their experience and sound instincts. To subject emergency situations to deliberation would heighten the risk of danger to officer and bystander.[52] Although a warrantless and forcible entry represents a serious intrusion into the sanctity of the home, it is necessary when there is reason to believe that

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48. United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980).

49. *Id.*

50. State v. Page, 277 N.W.2d 112, 118 (N.D. 1979). *Accord*, United States v. Jones, 635 F.2d 1357, 1361 (8th Cir. 1980) (gravity of offense not "an absolute test" for presence of exigent circumstances, in that such determination "ultimately depends on the unique facts of each controversy"); United States v. Acevedo, 627 F.2d 68, 70 (7th Cir. 1980); United States v. Boyd, 496 F. Supp. 25, 28-29 (S.D.N.Y. 1980). The *Boyd* court stated that the presence of danger may justify an immediate official response, even though the element of flight has not been satisfied. *Id.*

51. *See* United States v. Morrow, 541 F.2d 1229, 1232 (7th Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 933 (1977); People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (*en banc*), *cert. denied*, 429 U.S. 929 (1976).

52. *See* 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. Solario, 19 Cal. 3d 760, 764, 566 P.2d 627, 629, 139 Cal. Rptr. 725, 727 (1977).

alternative courses of action may result in violence, escape, or destruction of evidence. Thus, the presence of exigent circumstances must be determined on the basis of the facts known to the officers at the time of the entry.[53]

Accordingly, if subsequent events demonstrate that law enforcement officers had sufficient time and opportunity to seek a warrant, that will be strong evidence that an emergency did not exist, but it will not be controlling.[54] What will be determinative of the issue of exigency is the reasonableness of the officers' perception that a situation was fluid and potentially volatile. If a reasonable assessment of the situation dictates the conclusion that swift, responsive action is required, or probably will be required on a moment-to-moment basis, the officers will be justified in acting without a warrant, even though facts subsequently learned indicate that the emergency was more apparent than real.[55]

The fundamental consideration affecting the reasonableness of warrantless entry for arrest is whether the circumstances confronting the officers renders timely resort to the warrant process infeasible.[56] This issue must be resolved on an ad hoc basis since it implicates a myriad of variables.[57] The *Dorman* analysis will con-

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53. United States v. Kane, 637 F.2d 974, 979 (3d Cir. 1981); People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (*en banc*), *cert. denied*, 429 U.S. 929 (1976); People v. Stephens, 18 Ill. App. 3d 812, 821, 310 N.E.2d 755, 759 (1st Dist. 1974) (existence of exigent circumstances justifies exemption from requirement of announcement of authority and purpose prior to forcible entry); State v. Page, 277 N.W.2d 112, 118 (N.D. 1979).

54. *See* People v. Ramey, 16 Cal. 3d 263, 276-77, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (*en banc*), *cert. denied*, 429 U.S. 929 (1976); Commonwealth v. Forde, 367 Mass. 798, 807, 329 N.E.2d 717, 723 (1975).

55. *See* United States v. Williams, 612 F.2d 735, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); United States v. Kulcsar, 586 F.2d 1283, 1286 (8th Cir. 1978). *See also* Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.) (Burger, J., concurring) (dictum), *cert. denied*, 375 U.S. 860 (1963); Patrick v. State, 227 A.2d 486, 489 (Del. 1967); State v. Theodosopoulos, 119 N.H. 573, 580, 409 A.2d 1134, 1139 (1979), *cert. denied*, 446 U.S. 983 (1980) (reasonable basis for belief of emergency is all that is required).

56. *See* Mincey v. Arizona, 437 U.S. 385, 394 (1978); Vale v. Louisiana, 399 U.S. 30, 35 (1970); United States v. Acevedo, 627 F.2d 68, 71 (7th Cir. 1980); United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978); 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. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (*en banc*), *cert. denied*, 429 U.S. 929 (1976); State v. Page, 277 N.W.2d 112, 118 (N.D. 1979).

57. *See* United States v. Acevedo, 627 F.2d 68, 70 (7th Cir. 1980); United States v. Morrow, 541 F.2d 1229, 1232 (7th Cir. 1976) (*en banc*) (per curiam), *cert. denied*, 430 U.S. 933 (1977); Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.) (Burger,

tribute to this determination, but it should not be viewed as a condition precedent to a finding of exigency under the fourth amendment. Ultimately, the courts should approach this issue with an understanding of the particular circumstances confronting the officers in light of their experience and their assessment of the situation. It is difficult to convey to an impartial judicial officer the sense of urgency that pervades an emergency. The *Dorman* approach is a useful tool in bridging this gap, but it should not be used as a substitute for a critical examination of the circumstances surrounding a warrantless entry in light of the officers' experience and instinctive knowledge.[58]

J., concurring) (dictum), *cert. denied*, 375 U.S. 860 (1963); People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (*en banc*), *cert. denied*, 429 U.S. 939 (1976). For example, a law enforcement officer, in "hot pursuit" of a fleeing suspect, may effect a warrantless arrest in the home of the suspect. United States v. Santana, 427 U.S. 38, 42-43 (1976); Warden v. Hayden, 387 U.S. 294, 298-99 (1967). An officer may also take into custody a dangerous, or escaping, suspect, on the basis of probable cause to believe that the suspect is within the premises when time is of the essence and recourse to a warrant is impracticable. United States v. Reed, 572 F.2d at 424; Dorman v. United States, 435 F.2d at 392-93; Mascolo, *supra* note 20, at 13; *see* Mincey v. Arizona, 437 U.S. 385, 393-94 (1978); Rice v. Wolff, 513 F.2d 1280, 1294, 1296 (8th Cir. 1975), *rev'd on other grounds sub nom.* Stone v. Powell, 428 U.S. 465 (1976). Additionally, officers will be permitted to take prompt action to protect life and property, to apprehend a suspect in the process of committing an offense, to prevent the suspect's flight, and to preserve evidence from actual or imminent destruction or loss. *See* Mincey v. Arizona, 437 U.S. at 392-93, 394; G.M. Leasing, Corp. v. United States, 429 U.S. 338, 361-62 (1977) (Burger, C.J., concurring) (dictum); Vale v. Louisiana, 399 U.S. 30, 35 (1970); United States v. Jabara, 618 F.2d 1319, 1324 (9th Cir. 1980); United States v. Williams, 612 F.2d 735, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); United States v. Estese, 479 F.2d 1273, 1274 (6th Cir. 1973) (per curiam); People v. Solario, 19 Cal. 3d 760, 763-64, 566 P.2d 627, 629, 139 Cal. Rptr. 725, 727 (1977). Although the hot-pursuit, fleeing-suspect, and destruction-of-evidence cases are the "most common examples of exigent circumstances," United States v. Williams, 612 F.2d at 739, this list is by no means exhaustive. For further examples, *see* Mascolo, *supra* note 20, at 13-14.

58. *See* United States v. Williams, 612 F.2d 735, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980) (the court stated that if a reasonable assessment of the situation dictates a conclusion that swift responsive action is required, or will be required on a moment-to-moment basis, the police may act without a warrant, even though it is subsequently learned that the emergency was more apparent that real); United Sates v. Kulcsar, 586 F.2d 1283, 1286 (8th Cir. 1978); United States v. Bustamante-Gamez, 488 F.2d 4, 10 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); 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. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (*en banc*), *cert. denied*, 429 U.S. 929 (1976); State v. Page, 277 N.W.2d 112, 118 (N.D. 1979). *See also* United States v. Manning, 448 F.2d 992 (2d Cir.), *rev'd on rehearing* (*en banc*), 448 F.2d 997, 1000-02 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971).

III. ANALYSIS OF SPECIFIC CRITERIA

Certain circumstances are considered to provide law enforcement officers with sufficient facts to support a warrantless search or arrest. These include the potential for flight, the presence of weapons, the destruction or loss of evidence, and the belief, based upon probable cause, that a suspect is present in his home. Once again, however, the existence of an exigency may vary according to factors within these broad categories.

A. *The Element of Flight*

An officer's perception that flight or escape is likely should constitute adequate probable cause to justify a warrantless search or arrest. In other words, the police should have reason to believe that an imminent escape is likely before they may act without a warrant.[59] The mere possibility that an individual in his home might "make a break" or otherwise attempt an escape, however, is insufficient to give rise to exigent circumstances. If less than probable cause were required, a warrantless entry to arrest would be justified any time law enforcement officers announced their presence and a suspect did not promptly come out of his home. This would vitiate the fourth amendment barriers since "The practical effect of this would be to all but eliminate the requirement that there be exigent circumstances in order to justify a warrantless entry to arrest."[60] Therefore, in the absence of probable cause that an

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For a critical assessment of the *Dorman* approach, *see* Donnino & Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 ALBANY L. REV. 90, 104-06, 112-13 (1980).

59. United States v. Acevedo, 627 F.2d 68, 71 (7th Cir. 1980) (imminent flight, coupled with lack of time to secure all possible exits from apartment building); United States v. Williams, 612 F.2d 735, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); State v. Rudolph, 369 So. 2d 1320, 1326 (La. 1979), State v. Page, 277 N.W.2d 112, 118-19 (N.D. 1979); State v. Peller, 287 Or. 255, ___, 598 P.2d 684, 689 (1979); *see* Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., concurring & dissenting); Miller v. United States, 357 U.S. 301, 309 (1958) (dictum); United States v. Flickinger, 573 F.2d 1349, 1355 (9th Cir.), *cert. denied*, 439 U.S. 836 (1978); United States v. Easter, 552 F.2d 230, 234 (8th Cir.), *cert. denied*, 434 U.S. 844 (1977); United States v. Bustamante-Gamez, 488 F.2d 4, 8-9, 11 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); Dorman v. United States, 435 F.2d at 393.

60. State v. Peller, 287 Or. 255, ___, 598 P.2d 684, 689 (1979) (a suspect who remains in his house and does not respond to the police has not demonstrated an intent to escape that will justify an emergency response); *see* United States v. Velasquez, 626 F.2d 314, 317 (3d Cir. 1980) (mere failure to respond promptly to an announcement of identity, coupled with presence of undercover agent in home, negates an assumption of imminent flight).

escape is imminent, the police should set up surveillance of the premises and should seek a warrant.[61] For example, the mere sound of running feet coming from within a residence after police demand entry is insufficient by itself to establish exigent circumstances when there is no indication that escape is likely, or that the suspect knows of the presence of the police, or when there is no reasonable basis for believing that the suspect is armed and thus "presents a danger to the safety of the investigating officers."[62] Conversely, the sound of someone running inside in response to both a police announcement of authority and demand for entry is sufficient to warrant a reasonable belief that the suspect is attempting to escape.[63] Moreover, a warrantless entry may be upheld simply by a knock and an announcement of identity when those within the premises already know of the officers' authority and purpose and sounds of running and scuffling are coming from the residence.[64]

Finally, an exigency may arise from a combination of the time of entry and the accessibility of a rapid means of escape. For example, when a suspect's home is visited at night, his automobile is parked in the yard, and access to the automobile from the residence is facilitated by the darkness of night, forcible entry after the announcement of authority and purpose is justified.[65] Thus, the time of entry may affect not only the suspect's reaction to the entry but also the reasonableness of the officers' actions.

B. *The Presence of Weapons*

The threat of being confronted with an armed suspect is uppermost in the law officer's mind every time he enters a home to make an arrest. Therefore, the potential for violence is present in every case and must be assessed on an ad hoc basis. While there is no hard-and-fast rule governing police entries into homes, certain standards can be applied to accommodate both the individual's privacy rights and the safety of the police and innocent bystanders.

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61. State v. Peller, 287 Or. 255, ___, 598 P.2d 684, 689 (1979).

62. United States v. Williams, 604 F.2d 1102, 1123 (8th Cir. 1979); *see* Wong Sun v. United States, 371 U.S. 471, 482-84 (1963); Miller v. United States, 357 U.S. 301, 309-13 (1958).

63. State v. Rudolph, 369 So. 2d 1320, 1326 (La. 1979).

64. United States v. Manning, 448 F.2d 992 (2d Cir.), *rev'd on rehearing (en banc)*, 448 F.2d 997, 1002 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971); *see* United States v. Kulcsar, 586 F.2d 1283, 1286 (8th Cir. 1978).

65. United States v. Williams, 573 F.2d 348, 350 (5th Cir. 1978).

Safety is not threatened simply because a suspect owns a weapon. Ownership of a gun does not mean that it will be used against police officers seeking entry into a home. Mere ownership or legal possession of a firearm will not create an exigency in the absence of a reasoned belief by the officers, supported by specific facts, that the weapon will be used against them.[66] For example, the fact that a residence contains both weapons and an elaborate system of security devices will not justify an emergency entry when there is no prior history of violence on the part of the occupant and when the occupant indicates to the police his willingness to leave the premises and to submit peacefully to arrest.[67]

Unless there is evidence that the suspect has used a firearm recently in the commission of a crime,[68] possession or ownership of a dangerous weapon, without more, will not reasonably support the belief that a suspect poses a threat to the arresting officers or that he is armed at the time of apprehension.[69] In essence, unless the police have probable cause to believe that the suspect is armed,[70] the suspect's ownership or possession of a firearm will not legitimize an emergency entry supposedly based on an urgent need to disarm the subject and to protect the arresting officers.[71]

Apparently, courts have distinguished between mere posses-

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66. People v. Dumas, 9 Cal. 3d 871, 878-79, 512 P.2d 1208, 1213, 109 Cal. Rptr. 304, 309 (1973) (*en banc*); People v. Vollheim, 87 Cal. App. 3d 538, 541, 151 Cal. Rptr. 837, 839 (5th Dist. 1978).

67. People v. Vollheim, 87 Cal. App. 3d 538, 543, 151 Cal. Rptr. 837, 839-40 (5th Dist. 1978).

68. *See, e.g.*, United States v. Jones, 635 F.2d 1357, 1360-61 (8th Cir. 1980); Gilbert v. United States, 366 F.2d 923, 931-32 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967).

69. United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976).

70. *See* United States v. Kane, 637 F.2d 974, 979-80 (3d Cir. 1981); United States v. Jones, 635 F.2d 1357, 1360-61 (8th Cir. 1980); Gilbert v. United States, 366 F.2d 923, 931-32 (9th Cir, 1966), *cert. denied*, 388 U.S. 922 (1967). One court had contended that in the absence of recent criminal use of a firearm, probable cause to believe that a suspect is armed is insufficient to constitute an emergency. State v. Olson, 287 Or. 157, ____, 598 P.2d 670, 674 (1979) (*en banc*); *see* People v. Ramey, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (*en banc*), *cert. denied*, 429 U.S. 929 (1976). This approach, however, clearly is erroneous since an armed suspect is a dangerous suspect, and his presence should be sufficient to justify immediate action. *See* United States v. Whitney, 633 F.2d 902, 910 (9th Cir. 1980); Dorman v. United States, 435 F.2d 385, 393 (D.C. Cir. 1970) (*en banc*); Gilbert v. United States, 366 F.2d 923, 931-32 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967). The recent use of a firearm should reinforce the compelling need for urgent action, and not be the *sine qua non* of such action. *See* Warden v. Hayden, 387 U.S. 294, 298-99 (1967); Dorman v. United States, 435 F.2d at 393.

71. United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976).

sion or ownership, on the one hand, and prior use of a weapon, on the other hand, in assessing exigent circumstances. Thus, the possession of a firearm coupled with its recent use in the commission of a crime of violence[72] will qualify as an emergency justifying warrantless entry.[73] This approach is valid for two reasons. First, it accommodates the privacy rights of individuals who merely possess weapons. Second, it recognizes the need to protect police and innocent bystanders by allowing emergency action when a suspect has demonstrated a history of using a weapon.

C. *The Destruction or Loss of Evidence*

The destruction or loss of evidence, not discussed in the *Dorman* analysis of emergency, is clearly a critical circumstance to be considered in determining the existence of an exigency. As with other exigent circumstances, this standard should be governed by the officer's belief, based upon probable cause, that evidence will be lost or destroyed unless immediate action is taken. Once again, analysis often will hinge on events arising subsequent to the arrival of the officer at the suspect's home. Satisfaction of this standard therefore should require a reasoned belief by the police, in light of their knowledge and experience, and in particular in light of their assessment of the situation immediately prior to entry, that destruction of evidence is likely to occur if they delay their entry. For example, the sound of someone running inside the residence in response to a police announcement of authority and demand for entry is sufficient to warrant a reasonable belief that a suspect, whom the officer is investigating on the basis of probable cause, is attempting to destroy evidence.[74] Prompt action is also justified

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72. Warden v. Hayden, 387 U.S. 294, 298-99 (1967); State v. Olson, 287 Or. 157, ___, 598 P.2d 670, 674 (1979) (*en banc*); *see* Gilbert v. United States, 366 F.2d 923, 931-32 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967). The same possession and use analysis pertains to explosives. *See, e.g.*, United States v. Picariello, 568 F.2d 222, 226 (1st Cir. 1978) (permitting agents to gain entry to secure premises pending arrival of search warrant when there was probable cause to believe that dynamite bombs, some of which had been used recently, might explode, injuring innocent persons).

73. In this setting, the presence of weapons will be germane to the gravity of the offense involved under the *Dorman* analysis. *See* notes 35-42 *supra*.

74. State v. Mariano, 152 Conn. 85, 97-98, 203 A.2d 305, 312 (1964), *cert. denied*, 380 U.S. 943 (1965); State v. Gallo, 20 Wash. App. 717, 723-24, 582 P.2d 558, 563, (1978); *see* Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., concurring & dissenting); Miller v. United States, 357 U.S. 301, 309 (1958) (dictum); United States v. Gomez, 633 F.2d 999, 1008 (2d Cir. 1980), *cert, denied*, 101 S. Ct. 1695 (1981) (scurrying of feet, water running through pipes, and flushing toilet are sufficient to

under the emergency exception when officers observe that evidence is being removed.[75]

The fact that particular kinds of evidence readily lend themselves to destruction is not sufficient in itself to establish an exigent circumstance.[76] Other factors, however, when combined with the readily disposable nature of the evidence, may justify warrantless entry.[77] Not only must the evidence sought be easy to destroy or conceal, but reasonable cause to believe that the evidence will be destroyed is needed.[78] Thus, when the evidence "consists of relatively small amounts of contraband and where a nearby bathroom or kitchen provides for easy disposal," law enforcement officers may gain lawful entry without a warrant.[79] Additionally, when the police have probable cause to believe that the suspect is expecting their arrival, the readily disposable nature of the evidence will sustain an emergency entry.[80]

A further circumstance for warrantless entry exists when a

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establish exigent circumstances); United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976). The courts must be vigilant, however, against any attempts by law-enforcement officers to circumvent the warrant requirement by inducing reactive exigent circumstances through the systematic terrorization of the occupants of a residence "in the hope of hearing telltale signs of commotion." United States v. Gomez, 633 F.2d at 1006.

Conversely, no exigency exists when prior to entry the officer does not have a substantial basis for believing that incriminating evidence is actually present, when sounds indicating the destruction of evidence are absent, and when a fellow officer, acting in the capacity of an undercover agent and present within the residence, gives no signal or cry that evidence is being destroyed. United States v. Velasquez, 626 F.2d 314, 317 (3d Cir. 1980). And, a mere "fear or apprehension that evidence will be destroyed" is insufficient to demonstrate an exigency. United States v. Levine, 500 F. Supp. 777, 780-81 (W.D.N.Y. 1980).

75. G.M. Leasing Corp. v. United States, 429 U.S. 338, 361-62 (1977) (Burger, C.J., concurring). The Court held, however, that observing the removal of evidence more than one day prior to entry is too distant in time to qualify as an exigent circumstance. *Id.* at 358-59.

76. *See* People v. Ouellette, 78 Ill. 2d 511, 519-20, 401 N.E.2d 507, 510-11 (1979); People v. Stephens, 18 Ill. App. 3d 817, 823, 310 N.E.2d 755, 760 (1st Dist. 1974); Commonwealth v. Newman, 429 Pa. 441, 448, 240 A.2d 795, 798 (1968); Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1494 (1971). *But see* Ker v. California, 374 U.S. 23, 40 (1963) (plurality opinion).

77. *See* United States v. Blank, 251 F. Supp. 166, 174-75 (N.D. Ohio 1966); State v. Mendoza, 104 Ariz. 395, 399-400, 454 P.2d 140, 144-45 (1969) (*en banc*); People v. Conner, 78 Ill. 2d 525, 532-33, 401 N.E.2d 513, 517 (1979).

78. People v. Ouellette, 78 Ill. 2d 511, 520, 401 N.E.2d 507, 511 (1979); 2 W. LAFAVE, *supra* note 44, § 4.8, at 134-35.

79. State v. Clarke, 242 So. 2d 791, 795 (Fla. Dist. Ct. App., 4th Dist. 1970).

80. Ker v. California, 374 U.S. 23, 40-41 (1963) (plurality opinion).

magistrate is not readily available to issue a warrant. For example, a warrant is not required when the premises are situated in a remote locale and the officers have reason to believe that the substantial delay required to obtain a warrant will result in the removal or loss of evidence.[81]

It is also relevant that certain evidence, by its very nature, will be lost or destroyed if not submitted to immediate examination. Blood stains typify this kind of evidence that generally is forensic in nature. Forensic evidence is to be distinguished from other forms of evidence, such as narcotics, which, though small in size and easy to discard, are difficult to destroy. Therefore, when the police are confronted with a situation involving evidence of the forensic kind, they may be permitted to effect an emergency entry.[82]

D. *Probable Cause that Suspect is Present*

Probable cause to believe that a suspect is present in his home is a standard that deserves special consideration because of its potential for abuse. Belief that a suspect is present is always a prerequisite for emergency entry[83] and is crucial to the concept of reasonableness under the exigent circumstances exception to the warrant requirement. Moreover, it may be required when the suspect is expected to flee, such as when a suspect returns home after committing an offense "to get his affairs together" before attempting an escape.[84]

The *Dorman* standard does not require probable cause per se; rather, it dictates a "strong reason to believe that the suspect is in the premises being entered."[85] It does not establish criteria for such belief. In the usual arrest situation, however, the home is the most likely place to look for a suspect, at least initially.[86] The initial likelihood of presence probably does not satisfy the "strong rea-

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81. United States v. Gray, 626 F.2d 102, 105 (9th Cir. 1980). In *Gray*, the agents were unable to locate the federal magistrate, and the nearest state judge resided approximately 55 miles away. Icy and hazardous roads caused by a continuing snowstorm made travel impracticable. *Id.* at 104.

82. *See* Mincey v. Arizona, 437 U.S. 385, 406 (1978) (Rehnquist, J., concurring & dissenting) (by implication) (blood on floor).

83. Probable cause to believe that the suspect is in his home is also a prerequisite for entry to execute an arrest warrant. Payton v. New York, 445 U.S. at 603.

84. *See* United States v. Williams, 612 F.2d 735, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

85. Dorman v. United States, 435 F.2d at 393 (footnote omitted).

86. *See id.* at 400 (Wright, J., concurring & dissenting).

son to believe" test of whether an individual will be found. The likelihood of presence, in this setting, amounts to nothing more than a groundless assumption. In a modern and increasingly mobile society, and particularly in large urban areas where so much violent crime is committed, it simply cannot be assumed with a "strong" degree of reliability that an individual will be at home at any particular hour of the day or night. Accordingly, "strong reason to believe" should require more than a belief based upon an unsubstantiated assumption. The standard should be based on articulable and reasonably trustworthy information.

Nevertheless, the home is a good place to initiate a search for a suspect. In the likely event that someone other than the suspect opens the door in response to a police knock, an inquiry should be conducted at the entrance to learn of the suspect's whereabouts. Probable or strong cause is lacking if the police receive a negative response and nothing else transpires at the entrance that points to a reasonable likelihood of the suspect's presence. The officers then should not be permitted to cross the threshold without a warrant. The *Dorman* model of probable cause is satisfied, however, if events develop establishing a trustworthy basis for believing that the suspect is within the premises.[87] For example, a noise or sound of running from within, indicating an attempted concealment or flight in progress, may constitute such an event.[88] Thus, the right to be secure in the home against unreasonable police conduct is not violated since police action is based upon specific facts constituting probable cause.

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87. *Id.* at 392-93.

88. *See, e.g.*, United States v. Manning, 448 F.2d 992 (2d Cir.), *rev'd on rehearing en banc*, 448 F.2d 997, 1002 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971); Dorman v. United States, 435 F.2d at 394; State v. Rudolph, 369 So. 2d 1320, 1326 (La. 1979). *See also* United States v. Kulcsar, 586 F.2d 1283, 1286 (8th Cir. 1978) (applying standard when agents had reasonable belief that defendant was present in home). Moreover, information from a reliable informant, supported by the presence of an individual of the suspect's race and gender, who opens the front door and then quickly ducks back inside in response to the approach of the police, also may qualify as an event supporting probable cause to enter. *See* United States v. Williams, 612 F.2d 735, 737, 739 (3d Cir. 1979), *cert. denied*, 445 U.S. 934 (1980) (applying standard to the presence of a suspect in the home of a third party).

The *Dorman* court would have been on firm ground in finding probable cause for presence, if it had relied on the belief of the officers that a noise from within, after a negative response at the door to the residence, pointed to concealment. Instead, the court relied on a *prima facie* assumption that "a man [most likely will be] at home after 10 p.m." 435 F.2d at 393; *see id.* at 388. In fact, the court implicitly conceded that it was not on firm footing because the police had "no special knowledge" that the suspect was at home. *Id.* at 393.

IV. UNANNOUNCED ENTRY

In addition to the requirement of probable cause, the unannounced entry doctrine is a major constraint on the unlimited intrusion into the home by law enforcement officers. From earliest times, the common law has required that, before a law enforcement officer may break open the door of a house to make an arrest, he must first state his authority and purpose for demanding admission.[89] When the occupant assents, the officer is permitted to gain entry "with reasonable dispatch" after announcement.[90] If there is no response to the announcement after a reasonable period, permission to enter will be deemed constructively denied.[91] The rule appears to have been announced first in *Semayne's Case*[92] and has been codified by statute.[93] Furthermore, the Supreme Court, in *Ker v. California*,[94] apparently has incorporated the doctrine into

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89. Miller v. United States, 357 U.S. 301, 306-08 (1957); State v. Rauch, 99 Idaho 586, 592, 586 P.2d 671, 677 (1978).

Many cases hold that the rule does not mandate any set form of expression. Ker v. California, 374 U.S. 23, 48 (1963) (Brennan, J., concurring & dissenting); United States v. Manning, 448 F.2d 992 (2d Cir.), *rev'd on rehearing en banc*, 448 F.2d 997, 1001 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971); Curtis' Case, Fost. 135, 137, 168 Eng. Rep. 67, 68 (1756). The rule, however, does "require notice in the form of an *express* announcement by the officers of their purpose for demanding admission." Miller v. United States, 357 U.S. at 309 (emphasis added). This means that the homeowner or occupant must be given notice that the officers are acting " 'under a proper authority.' " Ker v. California, 374 U.S. at 48 (Brennan, J., concurring & dissenting) (quoting Curtis' Case, Fost. 135, 137, 168 Eng. Rep. at 68); United States v. Manning, 448 F.2d at 1001.

The announcement will not be required at every place of entry; one proper announcement will be sufficient. United States v. Bustamante-Gamez, 488 F.2d 4, 10 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); United States v. Tirinkian, 502 F. Supp. 620, 629 (D.N.D. 1980).

90. *See* United States v. Easter, 552 F.2d 230, 234 (8th Cir.), *cert. denied*, 434 U.S. 844 (1977); United States v. Bustamante-Gamez, 488 F.2d 4, 12 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); United States v. Woodring, 444 F.2d 749, 751 (9th Cir. 1971) (one-minute interval sufficient when officers had reasonable cause to believe someone was within).

91. *See* United States v. Bustamante-Gamez, 488 F.2d 4, 11 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). The reasonableness of a wait after announcement cannot be mechanically determined and must be assessed in light of the circumstances of each particular case. State v. Mariano, 152 Conn. 85, 94, 203 A.2d 305, 311 (1964), *cert. denied*, 380 U.S. 943 (1965).

92. 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195-96 (K.B. 1603); *see* Miller v. United States, 357 U.S. 301, 308 (1957).

93. *See, e.g.*, 18 U.S.C. § 3109 (1976) (applying principle to execution of search warrants).

94. 374 U.S. 23 (1963).

the fourth amendment to protect "the security of a householder [against police invasions]."[95]

Although the announcement requirement was initially motivated by a desire to prevent damage and inconvenience to the homeowner,[96] it is now perceived as a means of protecting the privacy and sanctity of the home[97] and as a means of reducing violence and harm to both officer and homeowner.[98] Thus, the rule is "deeply rooted in our heritage and should not be given grudging application,"[99] especially since it expresses "the reverence of the law for the individual's right of privacy in his house."[100]

The announcement requirement promotes two privacy interests. First, it protects the homeowner from the outrage of having his residence suddenly and violently broken into without either no-

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95. *Id.* at 53 (Brennan, J., concurring & dissenting); *see* United States v. Murrie, 534 F.2d 695, 698 (6th Cir. 1976); United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); United States v. Manning, 448 F.2d 992, *rev'd on rehearing en banc*, 448 F.2d 997, 1001-02 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971); State v. Rauch, 99 Idaho 586, 592, 586 P.2d 671, 677 (1978); Note, *Announcement in Police Entries*, 80 YALE L.J. 139, 146 (1970); *see* Ker v. California, 374 U.S. at 37-41 (plurality opinion) (by implication). *See also* Sabbath v. United States, 391 U.S. 585, 591 n.8 (1968). *Contra*, People v. Wolgemuth, 69 Ill. 2d 154, 164-66, 370 N.E.2d 1067, 1072 (1977), *cert. denied*, 436 U.S. 908 (1978).

96. *See* Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195-96 (K.B. 1603). This concern is still pertinent. *See, e.g.*, United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

97. *See* Miller v. United States, 357 U.S. 301, 307, 313 (1958), in which the Court pithily summarized the rationale behind the warrant requirement in the adage that "a man's house is his castle." *Id.* at 307; United States v. Bustamante-Gamez, 488 F.2d 4, 11-12 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); State v. Rauch, 99 Idaho 586, 592-93, 586 P.2d 671, 677-78 (1978).

98. Sabbath v. United States, 391 U.S. 585, 589 (1968); Miller v. United States, 357 U.S. 301, 313 n.12 (1958); McDonald v. United States, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring); United States v. Bustamante-Gamez, 488 F.2d 4, 9 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); People v. Dumas, 9 Cal. 3d 871, 878, 512 P.2d 1208, 1213, 109 Cal. Rptr. 304, 309 (1973) (*en banc*); 2. W. LAFAVE, *supra* note 44, § 6.2, at 397; Note, *supra* note 76, at 1492-93; Note, *supra* note 95, at 140-41.

99. Miller v. United States, 357 U.S. 301, 313 (1957). For example, breaking and entering will extend to breaking down a door, forcing open a chain lock on a partially open door, opening a locked door by means of a pass key, and opening a closed but unlocked door. *See* Sabbath v. United States, 391 U.S. 585, 590 (1968) (dictum in part). Thus, the use of force is not indispensable to breaking open a dwelling to effect a search or an arrest, and the concept of breaking and entering will be construed broadly to implement constitutional values. *Id.* at 589. It has not been applied, however, to a law officer following immediately after a suspect through an open door. People v. Hyter, 61 App. Div. 2d 990, 991, 402 N.Y.S.2d 602, 603-04 (2d Dept. 1978).

100. Miller v. United States, 357 U.S. 301, 313 (1957) (footnote omitted).

tice or an opportunity to consent. Second, it serves to reduce the possibility of embarrassing situations resulting from the unexpected exposure of intimate or otherwise private activities.[101] Therefore, in the absence of exigent circumstances, the fourth amendment prohibits "an unannounced police intrusion into a private home, with or without an arrest warrant,"[102] even if there is probable cause to support the arrest of a suspect.[103] Waiving the rule of announcement in the presence of an exigency is logical. Among the exigent circumstances that will justify a waiver of the announcement rule are the presence of an armed suspect, a suspect who "might resist arrest," or one who poses a danger to others within the premises.[104] The requirement is inapplicable when the authority and purpose of the officers are already known to the person or persons within;[105] when the officers reasonably believe that those

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101. United States v. Bustamante-Gamez, 488 F.2d 4, 11-12 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974); *see* Ker v. California, 374 U.S. at 51-52 (Brennan, J., concurring & dissenting); Note, *supra* note 76, at 1493-94.

It has been contended that the rule reinforces the dignity of the individual by guaranteeing him a reasonable degree of control over his own home. Note, *supra* note 95, at 153. But, as the Ninth Circuit has pointed out, a homeowner has no right to deny entry to law officers armed with a warrant or with valid grounds to make a warrantless entry. Under the rule of announcement, he has, at most, only a relatively short period of time in which to decide whether he will open his door. United States v. Bustamante-Gamez, 488 F.2d at 11.

102. Ker v. California, 374 U.S. at 47 (Brennan, J., concurring & dissenting).

103. *Id.*; United States v. Murrie, 534 F.2d 695, 698 & n.1 (6th Cir. 1976); *see* Sabbath v. United States, 391 U.S. 585, 588-91 (1968); Miller v. United States, 357 U.S. 301, 308-09, 313 (1958); United States v. Montano, 613 F.2d 147, 152 (6th Cir. 1980) (Edwards, C.J., concurring); United States v. Kulcsar, 586 F.2d 1283, 1285-86 n.2 (8th Cir. 1978); 18 U.S.C. § 3109 (1976) (applying same rule to execution of search warrants, as interpreted in Sabbath v. United States, 391 U.S. at 588-89, Wong Sun v. United States, 371 U.S. 471, 482 (1963), and Miller v. United States, 357 U.S. at 306).

104. *See* Sabbath v. United States, 391 U.S. 585, 591 (1968); United States v. Whitney, 633 F.2d 902, 910 (9th Cir. 1980); United States v. Bustamante-Gamez, 488 F.2d 4, 12 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). Among the recognized dangers is "imminent peril of bodily harm. . . ." Ker v. California, 374 U.S. at 47 (Brennan, J., concurring & dissenting); *accord*, United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976); State v. Mariano, 152 Conn. 85, 95, 203 A.2d 305, 311 (1964), *cert. denied*, 380 U.S. 943 (1965); Benefield v. State, 160 So. 2d 706, 710 (Fla. 1964); *see* Sabbath v. United States, 391 U.S. at 591 n.8; Miller v. United States, 357 U.S. 301, 309 (1958) ("peril of bodily harm" sufficient to invoke exemption from requirement).

105. Ker v. California, 374 U.S. at 47 (Brennan, J., concurring & dissenting); United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976); Benefield v. State, 160 So. 2d 706, 710 (Fla. 1964); *see* Sabbath v. United States, 391 U.S. 585, 591 n.8 (1968). In this setting, the police will not be required to make an announcement since it would be "a useless gesture." United States v. Nicholas, 319 F.2d 697, 698 (2d Cir.), *cert.*

within, as a result of learning of the presence of someone outside, are attempting to escape or to destroy evidence;[106] and when the officers have reasonable grounds to believe that compliance will frustrate the arrest, increase their peril, or permit the destruction of evidence.[107] These exceptions do not abrogate the general rule requiring announcement, since the prosecutor still has the burden of proving an exigency.[108]

The rule of announcement affords the homeowner a reasonable opportunity to comply peaceably with the official demand for entry. The rule does not, however, provide a complete shield against lawful official entries. If the homeowner refuses to admit the police, the police are permitted to enter without further delay anyway. Moreover, the need for such refusal is obviated in emergency situations, even if the situation involves only some indication of exigent circumstances.[109] In all these situations, the need for quick

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denied, 375 U.S. 933 (1963) (before narcotics agents could knock and make announcement, occupant opened door and, on learning their identity, threw herself on one of the agents, screaming "police, police").

106. Ker v. California, 374 U.S. at 47 (Brennan, J., concurring & dissenting); Miller v. United States, 357 U.S. 301, 309 (1958) (dictum); United States v. Fluker, 543 F.2d 709, 717 (9th Cir. 1976); Benefield v. State, 160 So. 2d 706, 710 (Fla. 1964); *see* Sabbath v. United States, 391 U.S. 585, 591 n.8 (1968); United States v. Bustamante-Gamez, 488 F.2d 4, 12 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

107. United States v. Chesher, 640 F.2d 1069, 1073 (9th Cir. 1981) (fear for safety must be both sincere and justified); United States v. Kane, 637 F.2d 974, 978-79 (3d Cir. 1981) (noncompliance justified if an officer reasonably believes his life will be placed in danger); People v. Tribble, 4 Cal. 3d 826, 833, 484 P.2d 589, 593, 94 Cal. Rptr. 613, 617 (1971) (*en banc*); *see* State v. Mariano, 152 Conn. 85, 95, 203 A.2d 305, 311 (1964), *cert. denied*, 380 U.S. 943 (1965); Benefield v. State, 160 So. 2d 706, 710 (Fla. 1964); State v. Rauch, 99 Idaho 586, 590, 586 P.2d 671, 675 (1978).

The Ninth Circuit has argued that entry will be permissible simultaneously with or shortly after announcement if there is "a likelihood" of attempted resistance, escape, destruction of evidence, or harm to someone within the premises, "*and* if a nonforcible entry is possible. . . ." United States v. Bustamante-Gamez, 488 F.2d 4, 12 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). More "specific inferences of exigency" will be necessary if forcible entry is required. *Id.* This would appear to place an undue burden on law enforcement officers for it would hamper them in their efforts to protect lives, preserve evidence, or prevent flight in the event that nonforcible entry is not readily open to them. Moreover, there is no automatic correlation between exigency and forcible entry. To the contrary, forcible entry is permissible in the absence of exigent circumstances, which the court in *Bustamante-Gamez* itself appeared to recognize. *See id.* In short, forcible entry involving the physical destruction of property should not be governed exclusively by the degree of exigency involved.

108. *See* notes 27-34 and accompanying text.

109. United States v. Bustamante-Gamez, 488 F.2d 4, 12 (9th Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). This relatively low standard has been qualified to require a substantial showing of exigency. United States v. Chesher, 640 F.2d 1069, 1075 (9th Cir. 1981). For example, probable cause to believe that the suspect is armed and dan-

police action outweighs the intrusion upon the suspect's privacy rights.

V. CONCLUSION

The *Payton* Court acknowledged that the privacy of the individual in his home is the cornerstone of fourth amendment values. To foster respect for the individual's dignity and inner worth, the Supreme Court has classified warrantless arrests within a private residence as "presumptively unreasonable" under the fourth amendment.[110] The warrant requirement, however, is not inviolate in the home setting. Certain exceptions to the warrant requirement pertain to arrests on private premises, including that of exigent circumstances. Urgency and the need for immediate action are central to the existence of an exigent or emergency situation. Thus, in the face of an exigency, the need to act promptly will take precedence over the warrant requirement.

In determining whether law enforcement officers have acted reasonably when confronted with an alleged emergency, courts must conduct a realistic assessment of the situation. The courts should take into consideration all the surrounding circumstances and the officers' perceptions of those events in the light of their knowledge and experience. Probable cause should be the common denominator by which courts judge police activity in an alleged exigency. While imprecise conceptually, both the courts and the police are familiar with the concept. Therefore, if upon careful analysis a reviewing court concludes that the officers had substantial reason to believe that they were confronted with a fluid situation dominated by an atmosphere of urgent necessity, the court should sustain the officers' decision to act promptly without an arrest warrant. Conversely, if the court concludes that no substantial basis for such action existed, then the court should condemn the failure to obtain a warrant as violative of the suspect's rights under the fourth amendment. This careful analysis should include an examination of both the *Dorman* standards and the totality of the circumstances surrounding the exigency.

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gerous will be sufficient to excuse the need for refusal of admittance. United States v. Whitney, 633 F.2d 902, 910 (9th Cir. 1980). Conversely, neither status as a convicted felon nor membership in the Hell's Angels Motorcycle Club is sufficient, absent a showing of propensity by the homeowner for violence or the use of weapons, to justify noncompliance with the refusal-of-admittance requirement. United States v. Chesher, 640 F.2d at 1073-74 & nn. 3-4.

110. Payton v. New York, 445 U.S. at 586 (footnote omitted).