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The Emergency Exception to the Fourth Amendment

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THE EMERGENCY EXCEPTION TO THE FOURTH AMENDMENT

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Although an emergency or exigent circumstance is frequently cited as one justification for a search without a warrant,[1] "the contours of this exception have not developed and . . . [the Supreme Court] . . . has never pinned it down to a workable and effective meaning."[2] Some of the ambiguity surrounding the emergency exception is attributable to the use of the single term "emergency" to embody several distinct concepts. An emergency can be defined broadly as the basic justification for all warrantless searches,[3] or it may refer to a single type of warrantless search separate and distinct from other recognized warrantless searches.[4] Even the latter concept of "emergency" leads to confusion because it ignores the courts' de facto distinction between emergencies involving a potential loss of life (emergency intrusions), and emergencies involving a potential loss of evidence (emergency searches).[5]

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1. "Although the emergency exception has never been definitively explained by the Supreme Court, it has been consistently recognized and applied by the lower courts to a myriad of factual situations." Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment,* 22 BUFF. L. REV. 419-20 (1973). It is frequently contended that the emergency exception originated in Justice Jackson's dictum in Johnson v. United States, 333 U.S. 10, 14-15 (1948): "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."

2. United States v. Goldenstein, 456 F.2d 1006, 1015 (8th Cir. 1972) (dissenting opinion).

3. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police . . . . The Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. McDonald v. United States, 335 U.S. 451, 455-56 (1948).

4. The generally recognized situations where a warrant is not required are: consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); search incident to arrest, Chimel v. California, 395 U.S. 752 (1969); stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968); automobiles, Cardwell v. Lewis, 414 U.S. 813 (1974); Chambers v. Maroney, 399 U.S. 42 (1970); and plain view, Coolidge v. New Hampshire, 403 U.S. 443 (1971).

5. The term "emergency intrusion" is the author's and has not been used by the courts. The courts use the general term "emergency" to apply to both an emergency search and an

Both an emergency intrusion and an emergency search have in common a concern for the time element, *i.e.*, an immediate intrusion into a constitutionally protected area is required or a given result is likely to occur. What distinguishes an emergency search from an emergency intrusion is the result that will occur if the police fail to take immediate action. Perhaps the most straightforward statement of the distinction was put forth by Justice Jackson:

> If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.[6]

In an emergency search the police are serving their criminal investigation function by conducting a quest for incriminating evidence. In an emergency intrusion the police are discharging their common law function of preserving life or protecting property.[7] Many courts have agreed with Justice Jackson that there is a difference in the quality of the two functions and that it is proper "to strive hard to sustain" an intrusion for the noble purpose of protecting life, while there is less need to uphold an intrusion designed to serve the purpose of criminal investigation.[8] Putting aside subjective reactions to

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emergency intrusion. *But see* Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963), where then Judge Burger used the term "civil emergency."

6. Brinegar v. United States, 338 U.S. 160, 183 (1949) (dissenting opinion).

7. *See* People v. Roberts, 47 Cal. 2d 374, 303 P.2d 721 (1956), where the court held that "[n]ecessity often justifies an action . . . where the act is prompted by the motive of preserving life or property . . . ." 303 P.2d at 723. *See also* United States v. Barone, 330 F.2d 543 (2d Cir. 1964), *cert. denied*, 377 U.S. 1004 (1964): "The right of the police to enter and investigate in an emergency *without the accompanying intent to either search or arrest* is inherent in the very nature of their duties as peace officers, and derives from the common law." *Id.* at 545 (emphasis added).

8. *See, e.g.*, People v. Hyde, ___ Cal. 3d ___, 524 P.2d 830, 840, 115 Cal. Rptr. 358, 368 (1974) (concurring opinion), where, in dealing with airport searches, it was observed that "we deal with a type of official conduct that . . . has objectives qualitatively different from those of the conventional search and seizure in the criminal context . . . ." *See also* Terry v. Ohio,

a search for a kidnapped child versus a search for bootleg liquor, this article will examine whether the purpose behind an intrusion upon the right to privacy should have any effect in judging its constitutionality. The purpose behind the intrusion has possible relevance at three points in analyzing the fourth amendment: 1. Is the purpose of the intrusion relevant in determining the applicability of the fourth amendment? 2. Is the purpose of the intrusion relevant in determining its reasonableness under the fourth amendment? 3. Is the purpose of the intrusion relevant in determining whether the intrusion is an exception to the warrant clause of the fourth amendment?

I. Is the Purpose of the Intrusion Relevant in Determining the Applicability of the Fourth Amendment?

Since an emergency search is defined as a quest for incriminating evidence, any intrusion into a constitutionally protected area in furtherance of the quest clearly meets the traditional definition of a search under the fourth amendment.[9] While the fourth amendment is always applicable to an emergency search, it is possible, by narrowly defining the term search, to characterize an emergency intrusion as being totally outside the coverage of the fourth amendment.[10] The fourth amendment prohibits unreasonable searches and prescribes conditions for issuing a search warrant.[11] If one contends that an emergency intrusion is not a quest for incriminating evidence and therefore not a search at all, then the entire fourth amendment is inapplicable and there is no need to consider the warrant clause, the requirement of probable cause, or the reason-

392 U.S. 1 (1968), where the Court recognized the need to protect the physical safety of police officers and noted: "We are now concerned with *more than the government interest in investigating crime . . . .*" *Id.* at 23 (emphasis added).

9. *See* notes 12-18 *infra* and accompanying text.

10. "There never has been any doubt that a policeman or fireman is privileged to enter private premises in the discharge of his public duty. [citations omitted]. I see no connection between the law of search warrants and the law permitting a policeman to enter a private dwelling in certain emergencies." State v. Sutton, 454 S.W.2d 481, 494-95 (Mo. 1970) (dissenting opinion).

11. The full text of the fourth amendment states: "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." U.S. Const. amend. IV.

ableness of the intrusion.[12] Before *Camara v. Municipal Court,*[13] it was certainly possible to argue that a search could be narrowly defined as a quest for incriminating evidence. For example, one court stated that a "search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action."[14] Under such a narrow definition, the constitutionality of the intrusion could turn wholly on the factual question of the purpose of the intrusion. If the purpose was to obtain evidence for criminal prosecution then the intrusion was a search and the fourth amendment is applicable. But if the purpose was to protect life or property, then the intrusion was not a search and the fourth amendment is inapplicable. The case of *Root v. Gauper*[15] illustrates how a factual determination of the purpose may decide the applicability of the fourth amendment.

In *Root* the victim telephoned an operator saying that his wife had shot him and that he needed an ambulance. The operator connected the victim with an ambulance driver, who in turn notified the town marshall. The ambulance driver proceeded to the victim's house and radioed the marshall and the sheriff that he had removed the victim and was taking him to the hospital. The marshall arrived at the victim's home and waited outside for several minutes until the sheriff arrived. The two officers then entered, seized a shotgun and shells, and took several photos. All of the items were offered in evidence. After holding that the police intrusion could not be justified on grounds of consent or plain view, the court considered the applicability of the emergency doctrine. The court recognized that "police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance."[16] Aplying

12. *See, e.g.*, United States v. Gravitt, 484 F.2d 375 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974), where the court upheld an inventory/search of an automobile because the purpose of the intrusion was ". . . the police interest in protecting the property of the accused and in protecting themselves. *It was not an interest in gathering evidence*, such as seizing contraband or dangerous weapons. That is usually involved when a search is made on the basis of a warrant or on grounds that there exists probable cause combined with exigent circumstances. Where interests of the former kind are involved, it is, of course, of no consequence whether or not there was probable cause." *Id.* at 380 n.5 (emphasis added).

13. 387 U.S. 523 (1967).

14. Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957).

15. 438 F.2d 361 (8th Cir. 1971).

16. *Id.* at 364.

an "objective standard as to the reasonableness of the officer's belief,"[17] the court found that the knowledge that the victim had been removed, and the fact that the marshall waited for the sheriff rather than entering immediately, were not consistent with a motive to assist an injured person. Instead, the facts suggested "that the purpose of entering the house was to obtain evidence relating to the commission of the crime."[18] Thus, once the court factually ascertained the purpose of the intrusion, the applicability of the fourth amendment was automatically determined.[19]

The view that the fourth amendment affords protection only against a search for incriminating evidence ignores the broader purpose of the fourth amendment and reduces it to an adjunct of the fifth amendment. The fourth amendment has been viewed as serving a dual purpose: (1) to preserve the fifth amendment right against self-incrimination from being compromised through violations of the fourth amendment;[20] and (2) to protect the citizen's right to be free of unwarranted governmental invasion of privacy.[21] In *Frank v. Maryland*[22] the Supreme Court viewed the fourth amendment as primarily concerned with searches for evidence of crime,[23] while the right of privacy was a "less intense" right which could be set aside by general considerations such as the purpose of the intrusion.[24] The *Frank* distinction between searches for incrimi-

17. *Id.*

18. *Id.* at 365.

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

20. *See* Mapp v. Ohio, 367 U.S. 643 (1961), where the Court discussed the intimate relationship between the fourth and fifth amendments. *Cf.* Chief Justice Burger's dissent in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

21. The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common law right of a man to privacy in his home . . . . It was not related to crime or to suspicion of crime . . . . 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. District of Columbia v. Little, 178 F.2d 13, 16-17 (D.C. Cir. 1949), *aff'd*, 339 U.S. 1 (1950).

22. 359 U.S. 360 (1959).

23. In *Frank, id.*, the purpose of the attempted intrusion was to inspect for violations of the health code. The Court held that this was not a search within the meaning of the fourth amendment.

24. Cases since *Frank* have recognized that the right to privacy has constitutional status independent of the fifth amendment. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy guaranteed by the penumbras of the first, third, fourth, fifth and ninth amendments).

nating evidence and searches for other purposes was overruled in *Camara*,[25] where the Supreme Court stated: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[26] Under *Camara* an intrusion by government authorities not concerned with obtaining incriminating evidence is still a search within the meaning of the fourth amendment. If the *Camara* definition of a search is accepted then there is no need to distinguish an emergency search (intrusion for criminal investigation) from an emergency intrusion (civil intrusion). However, the doctrine of a civil intrusion for non-criminal matters as separate and distinct from a search under the fourth amendment, did not die a final death in *Camara*. The theory that a civil intrusion is beyond the coverage of the fourth amendment has resurfaced from time to time, most recently in the case of *Wyman v. James*.[27]

In *Wyman* a welfare mother (Mrs. James) was notified that pursuant to state law, welfare workers were to visit her home. Mrs. James refused them permission to enter her home and was notified that such refusal would mean that all welfare assistance would be terminated. Mrs. James filed a civil rights suit seeking declaratory and injunctive relief. The first issue before the Court was whether home visits by welfare workers constituted searches under the fourth amendment.[28] The lower court had not distinguished a civil intrusion from a search for incriminating evidence, but rather held that "any unauthorized physical penetration into the premises occupied by plaintiff is a search."[29] The Supreme Court paid homage to the tradition of jealous protection of fourth amendment rights, then declared the tradition irrelevant to the facts of *Wyman* "for the seemingly obvious and simple reason that we are not concerned here with any search . . . in the Fourth Amendment meaning of that

25. 387 U.S. 523 (1967).

26. *Id.* at 530.

27. 400 U.S. 309 (1971).

28. The Court held that the "visits" were not searches under the fourth amendment. However, the Court held in the alternative that if the visits were searches, they were nonetheless reasonable under the fourth amendment. For a discussion of the alternative holding see text accompanying notes 46-48 *infra*.

29. James v. Goldberg, 303 F. Supp. 935, 940 (S.D.N.Y. 1969). The district court went on to state that "like most of the Bill of Rights, the Fourth Amendment was not designed to be a shelter for criminals, but a basic protection for everyone . . . . " *Id.* at 941.

term."[30] Although the Court recognized the possibility that a "visit" by welfare officials could uncover evidence of fraud and lead to a possible criminal prosecution, it felt that the prime purpose of the visit was not investigative in a criminal sense: "It is . . . true that the caseworker's posture . . . is perhaps, in a sense, both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the *traditional criminal law context.*"[31]

A search "in the traditional criminal law context" is a quest for incriminating evidence.[32] Thus, under the holding of *Wyman* a government intrusion for a purpose other than criminal investigation is simply not a search at all and the fourth amendment is totally inapplicable. The purpose behind the intrusion could be a "noble" community interest (*e.g.*, public welfare) as in *Wyman*, or it could be a very narrow interest as in *Harris v. United States*,[33] where the Supreme Court upheld a warrantless "inventory" of an automobile for the purpose of protecting the police from civil liability for the mishandling of private property.[34] *Harris* indicates that it is not necessary to characterize the purpose of the intrusion as noble or as serving a broad community interest. The important factor is to characterize the purpose as other than a quest for incriminating evidence. Once the intrusion is so characterized the fourth amendment is deemed inapplicable.

The reasoning in *Wyman* and *Harris* represents a dramatic step back from the holding in *Camara*. If the Supreme Court still adheres to the *Camara* principle that the fourth amendment protects not merely the fifth amendment right against self-incrimination, but also the right of privacy against government intrusion, then it is inconceivable that the coverage of the fourth amendment should turn upon the subjective motivation of the intruding governmental officials.[35] Indeed, the "right of privacy is not conditioned upon the

30. 400 U.S. 309, 317 (1971).

31. *Id.* (emphasis added).

32. *See* notes 12-18 *supra* and accompanying text.

33. 390 U.S. 234 (1968).

34. In *Harris, id.*, the Supreme Court approved "the precise and detailed findings of the District Court, accepted by the Court of Appeals, . . . to the effect that the discovery of the [seized item] was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances." *Id.* at 236.

35. ". . .[T]he scope of the Fourth Amendment is not determined by the subjective

objective, the prerogative or the stature of the intruding officer . . . . It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite."[36] The purpose of an intrusion, whether it be a quest for evidence (emergency search) or protection of life (emergency intrusion), delineates the proper scope of the search but it should not determine the applicability of the fourth amendment.

The danger of confusing the scope of a search with the applicability of the fourth amendment was illustrated in *Terry v. Ohio*,[37] where the government argued that a frisk was merely a "petty indignity" and not a search within the meaning of the fourth amendment. The *Terry* decision noted how "an overly technical definition of 'search' " had led the lower court to "the position that the Constitution must, in the name of necessity, be held to permit unrestrained rummaging about a person and his effects upon mere suspicion."[38] The Court held that while a frisk is narrow in scope, it is nonetheless a search within the meaning of the fourth amendment. The purpose of a frisk (safety) is very narrow, and accordingly the scope of the frisk (pat-down outer clothing for weapons) is narrow.[39] But the narrow purpose and scope of a frisk does not reduce it to a non-search beyond the coverage of the fourth amendment. *Terry* held that "the sounder course is to recognize that the Fourth Amendment governs *all intrusions* by agents of the public upon personal security."[40] Thus when the police pat-down a suspect for weapons and find none, but then conduct a "full-blown search" for evidence, the latter search is improper not because the change in the police purpose has converted a non-search to a search, but because the police have exceeded the proper scope of what was initially a search under the fourth amendment.

If *Camara* and *Terry* have not been overruled sub silentio then the

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conclusion of the law enforcement officer." United States v. Resnick, 455 F.2d 1127, 1132 (5th Cir. 1972).

36. District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd*, 339 U.S. 1 (1950).

37. 392 U.S. 1 (1968).

38. *Id.* at 18 n.15.

39. Concurring in *Terry*, Justice Harlan noted that the policeman "is entitled, for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of . . . persons in an attempt to discover weapons which might be used to assault him." *Id.* at 30.

40. *Id.* at 18 n.15 (emphasis added).

proper definition of a search is any government intrusion into an area protected by the right to privacy. Under this definition, the purpose of the government intrusion is irrelevant in determining the applicability of the fourth amendment and there is thus no need, in determining whether police actions constitute a search, to distinguish between an emergency search and an emergency intrusion.

II. Is the Purpose of the Intrusion Relevant in Determining its Reasonableness, under the Fourth Amendment?

If it is admitted that an intrusion not designed to uncover incriminating evidence is nonetheless a search, then the question for consideration is, whether the purpose of the intrusion makes the warrantless search reasonable under the fourth amendment?

The fourth amendment consists of two conjunctive clauses: the reasonableness clause, which protects against unreasonable searches and seizures, and the warrant clause, which prescribes conditions for the issuance of a warrant.[41] The proper relationship between these two clauses has been the subject of much debate centering on whether the clauses are dependent or independent of each other. One theory views the clauses as dependent and complementary; thus making warrantless searches unreasonable except in emergency situations when resort to a magistrate is impossible.[42] The second theory views the warrant and reasonableness clauses as independent and severable; thus searches without a warrant are judged solely by the standard of reasonableness, and the failure to obtain a warrant is not relevant.[43] At times the Supreme Court has embraced the theory of dependence,[44] while at other times accepting

41. The full text of the fourth amendment is set out in note 11 *supra*.

42. Mr. Justice Frankfurter, dissenting in United States v. Rabinowitz, 339 U.S. 56 (1950), stated:

> When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. *Id.* at 70.

43. In *Rabinowitz*, the majority rejected Justice Frankfurter's view, and held that: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *Id.* at 66.

44. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Camara v. Municipal Court, 387 U.S. 523 (1967).

the theory of independence.[45] One Justice has remarked that "[t]he several cases on this subject [in the Supreme Court] . . . cannot be satisfactorily reconciled. This problem has, as is well known, provoked strong and fluctuating differences of view on the Court."[46] In order to determine whether it is pertinent to distinguish an emergency intrusion from an emergency search, it must first be determined whether a warrantless search is to be judged under the reasonableness standard or under the warrant clause.

Under the reasonableness standard the distinction between an emergency intrusion and an emergency search could determine the constitutionality of the search. For example, although the primary holding of *Wyman* is that the non-criminal purpose of the intrusion made it a non-search,[47] the Court stated, in the alternative holding, that if the intrusion were considered a search it was not unconstitutional because it "does not descend to the level of unreasonableness."[48] The *Wyman* opinion listed eleven factors which led the Court to conclude that the search was not unreasonable. These factors basically consisted of stating the non-criminal interests the public wished served by such intrusions.[49] Thus, at least in dicta,

45. *See, e.g.*, Cooper v. California, 386 U.S. 58 (1967); United States v. Rabinowitz, 339 U.S. 56 (1950).

46. Abel v. United States, 362 U.S. 217, 235 (1960). It is questionable if the "differences of view" are as great in practice as they appear to be in theory. For even when the Court has stated that reasonableness is the ultimate standard for a search under the fourth amendment, this has not meant that the warrant clause is completely irrelevant in judging the constitutionality of the search. Under the reasonableness standard the failure to comply with the warrant clause is not, in and of itself, *determinative* of the constitutionality of the search. Rather, the existence of the warrant procedure is relevant as *one* factor to consider in determining what is a reasonable search. Thus in Cady v. Dombrowski, 413 U.S. 433 (1973), *quoting*, Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967), the Court could state that, on the one hand: "The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that 'except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.'" *Id.* at 439. On the other hand the Court went on to hold that the warrantless search "was not unreasonable *solely* because a warrant had not been obtained." 413 U.S. at 448 (emphasis added). *But cf.* Coolidge v. New Hampshire, 403 U.S. 443 (1971), where the plurality opinion stated that the warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Id.* at 481.

47. *See* text accompanying notes 30-31 *supra*.

48. 400 U.S. 309, 318 (1971).

49. *E.g.*, "The public's interest in . . . assistance to the unfortunate . . . ." *Id.* at 318; "The visit is not one by police or uniformed authority." *Id.* at 322; ". . . the [welfare]

the *Wyman* decision does recognize the purpose of a search as one factor in determining its reasonableness. More precisely on point is the decision in *Cady v. Dombrowski,*[50] where the Supreme Court upheld a warrantless search on the ground that the purpose of the police was to perform "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[51]

Dombrowski involved the arrest of an off duty policeman for driving while intoxicated. The car he was driving was towed to a garage and the police "inventoried" the auto for the purpose of removing the police revolver the defendant was believed to have been carrying. In the process the police discovered blood-stained objects which led to the defendant's conviction for murder. In oral argument the state put forth the argument addressed in Part I of this article, that the intrusion was not a search and was thus proper under *Wyman* and *Harris.*[52] The Court did not rule upon the definition of a search "[i]nasmuch as we believe that *Harris* and other decisions control this case even if the intrusion is characterized as a search . . . ."[53] The Court took note of the "specific motivation" of the intruding officer which was a "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle,"[54] and held that this purpose justified the search as constitutionally reasonable.[55]

It is possible to argue that *Dombrowski* and the alternative holding of *Wyman* are reincarnations of the overruled doctrine of *Frank v. Maryland*[56]—that warrantless civil intrusions are constitutional, while warrantless intrusions for criminal investigation are unconstitutional.[57] The analysis in *Frank* differs from the analysis in *Dombrowski,* but the result is the same. Under *Frank* an intrusion

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program concerns dependent children and the needy families of those children. It does not deal with crime or with the actual or suspected perpetrators of crime." *Id.* at 323; "The home visit is not a criminal investigation . . . ." *Id.* at 323.

50. 413 U.S. 433 (1973).

51. *Id.* at 441.

52. Wyman v. James, 400 U.S. 309 (1971); Harris v. United States, 390 U.S. 234 (1968).

53. 413 U.S. 433, 442 (1973).

54. *Id.* at 447.

55. *Id.*

56. 359 U.S. 360 (1959). *See* text accompanying notes 22-25 *supra.*

57. One commentator has interpreted the holding in *Dombrowski* to be "that warrants are not required for searches conducted with a benign purpose. This holding is equivalent to the

for a purpose other than criminal investigation is labelled a non-search and thus constitutional; while under *Dombrowski* such an intrusion is labelled a search, but reasonable and thus constitutional. It is uncertain whether *Dombrowski* resurrects the previously overruled *Frank* decision, because the reasonableness standard is nebulous, and because the *Dombrowski* holding does not identify the non-criminal purpose of the search as the controlling factor. Both *Dombrowski* and the alternative holding of *Wyman* note the absence of criminal investigation, but they also consider the general public interest in the intrusion. The Supreme Court has not dealt with a situation where the warrantless intrusion was designed to serve both a broad public interest and the purpose of criminal investigation.

Such a situation confronted the Supreme Court of California in the case of *People v. Sirhan*.[58] In *Sirhan*, the facts showed that Senator Robert Kennedy, a candidate for the Democratic Presidential nomination, was shot on the evening of June 4, 1968. The assassin was captured but refused to reveal any information, including his identity. On the morning of June 5, 1968, defendant's brothers, Adel and Munir, contacted the police after seeing a newspaper photograph of the defendant in connection with the Kennedy assassination. Adel Sirhan advised the police of the defendant's identity and stated that he (Adel) and his two brothers, Sirhan and Munir, lived with their mother at a specified address. When asked to consent to a search of the home, Adel replied that " 'as far as he was concerned [the police] could, however it was his mother's house.' "[59] At 10:30 a.m. the police entered the Sirhan house, without a warrant, to search for " 'evidence of possible conspiracy in that there might be other people that were not yet in custody.' "[60] In the defendant's bedroom the police found a diary which was introduced in evidence at the trial.[61] The court held that the search was not a

statement that the warrant requirement contained in the second clause of the fourth amendment applies only to criminal investigations." Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 850-51 (1974).

58. 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

59. *Id.* at 735, 497 P.2d at 1137, 102 Cal. Rptr. at 401. Mrs. Sirhan was the sole owner of the house.

60. *Id.* at 736, 497 P.2d at 1138, 102 Cal. Rptr. at 402. At trial the police testified that there was nothing that indicated that the defendant was part of a conspiracy, but there was also no evidence that "there was not a conspiracy." *Id.*

61. At trial the defense did not object to the introduction of the diary on grounds that it

valid consent search because the person consenting did not have authority over the area searched. The government then argued that the warrantless search was justified because it fell within the emergency exception.[62] Although admittedly conducted for the purpose of obtaining incriminating evidence, the court held the search to be reasonable because it also served the community interest in dispelling any potential panic that could follow a political assassination:

> The crime was one of enormous gravity, and the "gravity of the offense" is an appropriate factor to take into consideration. [citations omitted]. The victim was a major presidential candidate, and a crime of violence had already been committed against him. The crime thus involved far more than idle threats. Although the officers did not have reasonable cause to believe that the house contained evidence of a conspiracy to assassinate prominent political leaders, we believe that the mere possibility that there might be such evidence in the house fully warranted the officers' actions. It is not difficult to envisage what would have been the effect on this nation if several more political assassinations had followed that of Senator Kennedy.[63]

Thus the California court in *Sirhan* upheld a search without a warrant and without probable cause, solely on the basis that the community interest made the search reasonable.

Sirhan is similar to *Dombrowski* in that the police were serving a broad public interest (*i.e.*, attempting to thwart a possible conspiracy to assassinate prominent political leaders). However, unlike *Dombrowski*, the police in *Sirhan* were also concerned with obtaining incriminating evidence on a particular suspect. The applicability of *Dombrowski* to *Sirhan* can only be determined if one can

was "communicative" or "testimonial" in nature, so that its very nature might preclude it from being the object of a reasonable search and seizure. *See* Warden v. Hayden, 387 U.S. 294, 302-03 (1967). Thus the issue was waived and not considered on appeal. People v. Sirhan, 7 Cal. 3d at 740, 497 P.2d at 1141, 102 Cal. Rptr. at 405 (1972).

62. The only discussion of whether there was time to obtain a search warrant consists of the following footnote by the court: "Brandt [the searching officer] testified that he conferred with his superior officer regarding a search of the home and was advised 'to search the home if we had consent of . . . Adel.' The foregoing, however, does not show that the officers did not believe there was an emergency. Rather they appear to have been acting with abundant caution." 7 Cal. 3d 710, 739 n.17, 497 P.2d 1121, 1140 n.17, 102 Cal. Rptr. 385, 404 n.17 (1972).

63. 7 Cal. 3d 710, 739, 497 P.2d 1121, 1140, 102 Cal. Rptr. 385, 404 (1972).

identify what specifically made the warrantless search in *Dombrowski* reasonable. Was it the presence of concern for the general community (which was present in both *Dombrowski* and *Sirhan*), or was it the absence of a concern for incriminating a specific suspect (which was present in *Sirhan* but absent in *Dombrowski*)? The *Dombrowski* opinion provides no guidance as to what specific factors made the warrantless search reasonable. In defining the reasonableness standard, Justice Rehnquist merely stated that:

> The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions [citations omitted] . . . and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this.[64]

Because the reasonableness standard is so vague, the courts are free to consider and weigh, in some unspecified manner, any number of factors. Such factors could include the purpose of the search, thereby necessitating the distinction between an emergency intrusion and an emergency search. In a given situation a court applying the reasonableness standard would be free to conclude that the purpose behind an emergency intrusion was sufficiently in the community interest so as to make a warrantless search reasonable, but the purpose of an emergency search was not sufficiently in the community interest to justify the absence of a warrant. The problem with such an approach is that there are no standards upon which a court can decide that a certain purpose is or is not sufficiently in the community interest to make the search reasonable without a warrant. As the *Wyman* dissent noted: "in determining whether a search is reasonable, this Court is not free merely to balance, in a totally ad hoc fashion, any number of subjective factors."[65] On a practical level the government can always contend that the search served some community interest, other than merely obtaining incriminating evidence.[66] For example, the police may admit that they

64. Cady v. Dombrowski, 413 U.S. 433, 448 (1973).

65. Wyman v. James, 400 U.S. 309, 341 (1971) (dissenting opinion).

66. One Justice has recognized this tendency: "We must remember that the extent of any

seized heroin as evidence for a criminal prosecution but they may contend that their purpose was also to keep the heroin from falling into the hands of school children. It would be a very rare situation where it could be factually established that the police had absolutely no motive other than to obtain incriminating evidence on a suspect. Even then, the police could always argue that the community interest was served by obtaining incriminating evidence, thereby increasing the chances of conviction and imprisonment, thus removing a criminal from society. Of course the courts do not have to accept such tenuous reasoning, but under the reasonableness test there is no standard to separate a tenuous community interest from a valid community interest.

The suggested way to eliminate the vagueness of the reasonableness test is to recognize the primacy of the warrant clause. Such an approach would recognize that although the purpose of the search (*e.g.*, community interest) may prevail over the right to privacy by establishing probable cause to search, it is an entirely separate question as to whether the purpose of the search can prevail over the warrant requirement. The language of *Camara* is appropriate in correctly framing the issue:

> [A]n argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these [intrusions] may be made, but whether they may be made without a warrant.[67]

If the government contends that the purpose of an emergency intrusion was to provide assistance to an injured person, this does no more than establish that the public interest justifies the issuance of a search warrant.[68] To concede that there is a public interest in the purpose of the search concedes that there is probable cause to conduct the search, but it does not concede that the search may be conducted without a warrant.[69] The bypassing of the warrant proce-

privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

67. 387 U.S. 523, 533 (1967).

68. "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539.

69. "Belief, however well founded, that an article sought is concealed in a dwelling house

dure is a totally separate question that does not require an inquiry into the purpose of the search.

When the warrant clause is applicable, a warrantless search is constitutional only if the government can meet two separate tests. First, was there a legitimate government interest in searching, sufficient to prevail over the right to privacy? There is no need to distinguish an emergency search from an emergency intrusion, because the government's interest in criminal investigation and the interest in protecting life are both legitimate interests, and, if based on a reasonable belief, probable cause to search exists. At this point the government interest must be identified as legitimate and reasonable, but there is no need to further categorize the interest as civil or criminal investigation. The second test the government must meet is whether there were grounds for bypassing the warrant procedure. Under *Camara* the only ground for bypassing the warrant procedure is when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[70] There is no need to distinguish an emergency search from an emergency intrusion because the likelihood of frustrating the search does not turn upon the nature of the government's purpose. Whether the purpose of the search is to obtain incriminating evidence or to preserve life, the purpose is frustrated only when the delay to obtain a warrant would make a subsequent search meaningless. That is, in the time required to obtain a search warrant, some event (*e.g.*, destruction of sought after evidence, or loss of an imperiled life) will occur which will make the search fruitless. Thus the only proper justification for bypassing the warrant procedure is when the government can establish that the *sole* way to have accomplished its purpose (be it criminal investigation or some other legitimate interest) was to have acted immediately, and that obtaining a warrant precluded immediate action.[71]

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furnishes no justification for a search of that place without a warrant." Agnello v. United States, 269 U.S. 20, 33 (1925). *Accord,* United States v. McCormick, 15 CRIM. L. REP. 2433 (9th Cir. July 17, 1974), where the court observed that the government must establish exigent circumstances and "probable cause alone does not justify a warrantless seizure." *Id.* at 2433.

70. 387 U.S. 523, 533 (1967).

71. The requirement of either a warrant or impending failure of purpose before a search is conducted has been stated as follows: "We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty

Under the warrant clause, a court has a much narrower question before it than would be the case if warrantless searches were to be judged solely by the standard of reasonableness. Under the reasonableness test a court is free to consider and weigh a multitude of factors, including the purpose of a search. The court would be free to attach greater weight to a search to protect life than to a search for evidence. The question of how much weight to attach to the various factors is uncertain and apparently arbitrary. Under the warrant clause the court does not have this broad discretion, but must address the narrower question of whether there was time to obtain a warrant before the government officials acted. Thus if the primacy of the warrant clause is accepted, there is no need to distinguish an emergency search from an emergency intrusion. The purpose of the search is not relevant, but rather the relevant issue for every type of warrantless search is the effect of a time delay to obtain a warrant.

III. Is the Purpose of the Intrusion Relevant in Determining Whether the Intrusion is an Exception to the Warrant Clause of the Fourth Amendment?

Accepting the view that the warrant clause applies to all intrusions upon privacy does not mean that a warrantless search is never constitutional. It only means that when it is practical to do so the police must obtain a warrant before conducting a search.[72] There are "a few specifically established and well-delineated" situations where it is not practical to obtain a warrant.[73] In addition to these established exceptions, there is the general exception of emergency, which states that it is not practical to obtain a warrant when the warrant procedure would frustrate the purpose of the search.[74] As discussed earlier the only way to frustrate the purpose of a search is if in the time required to obtain a search warrant, some event

affords neither time nor opportunity to apply to a magistrate." District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd*, 339 U.S. 1 (1950).

72. "In cases where the securing of a warrant is reasonably practicable, it must be used . . . ." Carroll v. United States, 267 U.S. 132, 156 (1925). "The police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . ." Terry v. Ohio, 392 U.S. 1, 20 (1968).

73. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). These exceptions, which are "jealously and carefully drawn," are listed *supra* note 4.

74. See text accompanying notes 67-71 *supra*.

(*e.g.*, destruction of sought after evidence, or loss of an imperiled life) will occur which will make the search fruitless.[75] If the police can establish that there is a legitimate reason for searching, *and* can also establish that the reason will be eliminated before a warrant can be obtained, they have shown a true emergency and may act without a warrant.

In determining whether the delay to obtain a warrant will frustrate the purpose of the search, the courts have traditionally considered three factors: (1) the time required to obtain a warrant; (2) the time required to frustrate the search by destroying or altering the object of the search; and (3) the likelihood that the destruction or alteration will take place.[76] These three factors must be identified and evaluated in terms of probabilities, since there are only rare situations where one or more of the factors can be established to any degree of certainty. One such situation arose in *Schmerber v. California*,[77] where the police sought a blood sample to test the alcohol content of the suspect's blood. Since alcohol is absorbed by the blood system, there was no need for an affirmative act to destroy the desired evidence. The police knew that the evidence was presently being destroyed through the mere passage of time, and the only uncertainty was how much time remained before the destruction would be complete. In most situations, however, the object of

75. This exception was recognized in Terry v. Ohio, 392 U.S. 1 (1968), where the Court noted that: "We deal here with an entire rubric of police conduct—*necessarily swift action* predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.* at 20 (emphasis added). Of course, it is possible to frustrate the purpose of a search by having the magistrate deny the issuance of a search warrant, *i.e.*, make a determination that there is not probable cause to search. In such a situation, however, an *unconstitutional search* has been frustrated, and this is one of the proper functions of the fourth amendment. "In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court [he has] probable cause." Carroll v. United States, 267 U.S. 132, 156 (1925).

76. *See* Guzman v. Estelle, 493 F.2d 532 (5th Cir. 1974), where the court stated:

> The Supreme Court has identified several factors that it considers exigent: (1) an alerted criminal fleeing or likely to take flight; (2) contraband, stolen goods, or weapons as the objects of the search; (3) lack of a prior opportunity for the defendant to destroy incriminating evidence; (4) objects of the search that may be quickly and easily removed or destroyed; (5) easy access of the criminal to the objects of the search; (6) availability of confederates to aid the criminal in fleeing or in the destruction of the objects of the search; and (7) lack of time in which the search warrant could have been secured.

Id. at 536-37 (citations omitted).

77. 384 U.S. 757 (1966).

the search is not self-destructing, and thus frustration of the result is not inevitable. The usual situation is where an affirmative act is required by some party to bring about the result (*e.g.*, someone must flush the heroin down the commode). In the usual situation where the result is not inevitable, it is necessary to deal with probabilities and not certainties. It cannot be known that if the police had sought a warrant it would (versus could) have taken three hours, and the purpose of the search would (versus could) have been frustrated in two hours. In evaluating these probabilities, it is not clear what standard of proof the government must meet.[78] There have been many suggestions as to the proper standard for establishing a true emergency,[79] and it is beyond the scope of this article to explore these proposals. The concern here is whether there is a need to distinguish an emergency intrusion from an emergency search so that a lesser standard of proof can be applied to emergency intrusions where frustrating the purpose of the search means a possible loss of life rather than a possible loss of incriminating evidence.

The argument for a lesser standard of proof for an emergency intrusion urges that to the traditional relevant factors—(1) time to obtain a warrant; (2) time to frustrate the search; and (3) likelihood of frustration—must be added a fourth factor: (4) the nature of the interest that will be frustrated by delay. Thus the argument proceeds: any delay to obtain a warrant causes some risk of frustrating the search, and the risk society is willing to run is colored by the purpose of the search. In order to protect the right to privacy, society is willing to run a fairly high risk of frustrating the search when the purpose is merely to obtain incriminating evidence. But society is willing to run very little risk of frustrating a search when the purpose is the preservation of life.[80] In dealing with an emergency situation, where the purpose was to obtain incriminating evidence, the

78. It is clear that the burden of proof rests on the government. "The burden is on those seeking the exemption [from the warrant clause of the fourth amendment] to show the need for it . . . . " United States v. Jeffers, 342 U.S. 48, 51 (1951).

79. For an analysis of the various proposals, see Comment, 1971 U. ILL. L.F., 111.

80. This view was expounded in Davis v. State, 236 Md. 389, 204 A.2d 76 (1964), where the court stated: "The delay which would necessarily have resulted from an application for a search warrant might have been the difference between life and death . . . . The preservation of human life has been considered paramount to the constitutional demand of a search warrant as a condition precedent to the invasion of the privacy of a dwelling house." 204 A.2d at 80. *Accord*, Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963) (dictum).

Supreme Court set the strict standard that an emergency exists only when the actual destruction of the evidence is imminent.[81] In dealing with an emergency intrusion, then Judge Burger set a lower standard for establishing an emergency: "When policemen, firemen or other public officers are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life or property, they are authorized to act on that information, even if ultimately found erroneous."[82] Thus in an emergency search, the strict standard of imminent destruction was applied, but in an emergency intrusion the lesser standard of the reasonably prudent man was applied.

The argument that a lower standard of proof is required to bypass the warrant procedure in an emergency intrusion assumes that the government interest in obtaining incriminating evidence is legitimate, but somehow less legitimate or entitled to less weight, than the government interest in protecting life. While there is a certain emotional appeal in this approach, it is submitted that the difference in these two legitimate interests (protecting life and obtaining evidence) is relevant only when determining the existence of probable cause to search. The probable cause standard is flexible enough to take account of the difference between an emergency search and an emergency intrusion because although the right to privacy is constitutionally protected, it is not an absolute right. The right to privacy must be balanced against other legitimate interests, and the balance can be struck at different points depending on whether the right of privacy is weighed against the interest in obtaining incriminating evidence, or the interest in saving life. However, there is no need for the same flexibility in the warrant requirement because its function is not to balance conflicting interests, but to serve as a limitation of police power by providing a procedure which assures that the balancing of interests is performed by the judiciary. When the police bypass the warrent clause and conduct a warrantless search they thereby usurp the judicial function of determining when the right of privacy can be set aside. The courts should be jealous

81. Vale v. Louisiana, 399 U.S. 30 (1970). *See also* State v. Patterson, 220 N.W.2d 235 (Neb. 1974), where the court held that the police must establish that "there is great likelihood that the evidence will be destroyed or removed before a warrant can be obtained . . . ." *Id.* at 240.

82. Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963) (dictum).

of this power and skeptical of the need of police to exercise the power. Thus the standard of proof required to bypass the warrant requirement should remain a strict standard and should not be lowered because of the alleged benevolent purpose of the police in conducting an emergency intrusion. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."[83]

CONCLUSION

The sole distinction between an emergency search and an emergency intrusion is the government's purpose in breaching the right of privacy. A benevolent government purpose (*e.g.*, protection of life) is said to justify intrusions upon the right of privacy that would not be justified when the government's purpose is less benevolent (*e.g.*, quest for incriminating evidence). The justification may take the form of urging that: (1) the benevolent purpose reduces what would otherwise be a search to a non-search beyond the coverage of the fourth amendment; (2) the benevolent purpose makes "reasonable" an intrusion that might be unreasonable if the benevolent purpose were absent; or (3) the benevolent purpose justifies a less strict application of the warrant clause.

Although each justification must be analyzed in terms of the aforementioned fourth amendment considerations, the basic question underlying all three justifications is whether the motivation of the intruding officer is a relevant factor when interpreting the fourth amendment. While "improper" motivation has been recognized as a factor in declaring a search unconstitutional,[84] there seems to be little justification for applying the other side of the coin and rewarding a "noble" motive by lessening the protection of the fourth amendment. "A paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation's philosophy."[85]

83. Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

84. *See* Coolidge v. New Hampshire, 403 U.S. 443, 469-70 n.26 (1971), where the Court discusses the constitutionality of a "planned warrantless search."

85. Wyman v. James, 400 U.S. 309, 343 (1971) (Marshall, J., dissenting).