The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment

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The fourth amendment provides "a right of personal security against arbitrary intrusions by official power." This right is protected by the basic rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

Involving those situations in which the exigencies make it imperative to proceed without a warrant, the recognized exceptions are: a search incident to an arrest; the stop and frisk exception; the automobile or moving vehicle exception; the doctrine of hot pursuit; the seizure of evidence or contraband that is subject to removal or destruction; and the emergency doctrine exception. In addition a search may be made pursuant to a valid consent. Finally, evidence in plain view may be seized if the officer is otherwise justified in his position.

The case law that has grown out of the fourth amendment to a large extent has concerned search and seizure in its traditional sense—that is, where an

1. U.S. Const. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
13. "The term 'search,' as applied to searches and seizures, is an examination of a man's house or other buildings or premises, or of his person, with a view to the discovery of contraband
agent of the state acts with probable cause to believe that criminal activity has been or is being committed.\textsuperscript{14} For the purposes of this Note, such searches are deemed to be “criminal searches.” A criminal search connotes hostility by the searching officer toward the individual whose privacy is invaded\textsuperscript{15} in that the ultimate goal of the police intrusion is a criminal conviction. One function of the fourth amendment is to protect the individual from such hostile intrusions except “upon probable cause.”\textsuperscript{16} The fourth amendment, however, has been extended beyond the boundaries of the purely criminal search. One example, which can be termed “quasi-criminal,” involves inspections by administrative and regulatory agencies.\textsuperscript{17} These intrusions are “less hostile . . . than the typical policeman’s search for the fruits and instrumentalities of crime”;\textsuperscript{18} they are quasi-criminal because “most regulatory laws . . . are enforced by criminal processes.”\textsuperscript{19} In contrast to criminal and quasi-criminal searches, a noncriminal, or civil search occurs when an official intrusion is unaccompanied by an intention to seek out criminal activity; consequently a civil search connotes no hostility on the part of the searcher. For example, a civil search occurs when there is a custodial search of an impounded automobile\textsuperscript{20} for purely benevolent motives.\textsuperscript{21}

or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged.” 79 C.J.S. Searches and Seizures § 1 (1952) (footnotes omitted). “A seizure contemplates a forcible dispossession of the owner, and it is not a voluntary surrender.” Id.

16. U.S. Const. amend. IV, set out at note 1 supra.
17. United States v. Biswell, 406 U.S. 311 (1972); Camara v. Municipal Court, 387 U.S. 523 (1967); Note, Inspections by Administrative Agencies: Clarification of the Warrant Requirement, 49 Notre Dame Law. 879 (1974). In Camara, the Supreme Court held that regulatory searches are covered by the fourth amendment. 387 U.S. at 534. In Biswell, however, the Court added a qualification: persons subject to regulatory searches have a less justifiable expectation of privacy, since government regulation must be anticipated by one who engages in the business of selling firearms, 406 U.S. at 316, or, by extension, liquor, drugs, etc.
19. Id. at 531. Border area searches are also quasi-criminal in nature since their main purpose is to return to their country immigrants who have entered illegally, and not to prosecute them. See Almeida-Sanchez v. United States, 413 U.S. 266, 278-79 (1973) (Powell, J., concurring).
21. Examples of searches so motivated are found in Lawson v. United States, 487 F.2d 468,
EMERGENCY DOCTRINE

The focus of this Note is on a lesser known type of civil search—the emergency doctrine search. The emergency doctrine is generally applied in those situations in which the police, with benevolent motives, go to the aid of an individual in response to an emergency threatening that person’s life or health. This Note will discuss the extent to which courts have recognized that civil searches and seizures are within the scope of the fourth amendment and the manner in which the fourth amendment has been applied to civil searches. It will then turn to the emergency doctrine and suggest some limits on its application.

II. ARE CIVIL SEARCHES AND SEIZURES WITHIN THE FOURTH AMENDMENT?

A large number of state and federal courts have recognized that emergency doctrine searches, and therefore civil searches in general, are within the scope of the fourth amendment. Despite this widespread acceptance, the position of the Supreme Court is unclear. It has never enunciated an emergency doctrine exception, which raises the question of whether the Court has implicitly recognized it. The answer involves the broader issue of whether any noncriminal search is considered within the scope of the fourth amendment. Camara v. Municipal Court provides a strong basis for an affirmative answer. The Camara Court held that although an administrative inspection is a less hostile intrusion than a criminal search, the Fourth Amendment interests at stake in these inspection cases are [not] merely “peripheral.” 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.

In Terry v. Ohio the Court stated:

469 (8th Cir. 1973) (search made to protect property); Mozzetti v. Superior Court, 4 Cal. 3d 699, 707, 484 P.2d 84, 89, 94 Cal. Rptr. 412, 417 (1971) (same). Both cases held the police intrusion to be unreasonable due to the lack of a search warrant.


23. See note 102 infra and accompanying text.

24. See note 103 infra and accompanying text.


28. 392 U.S. 1 (1968) (police have the right to detain an individual temporarily and conduct a frisk of his person for weapons provided the officer has reasonable grounds to believe that the person is armed and dangerous).
The sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security. This seems preferable to an approach which attributes too much significance to an overly technical definition of "search." 

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Taken together, the language of these two cases would seem to indicate that the Supreme Court has rejected the thesis that only criminal searches are within the scope of the fourth amendment. Therefore, it could be said that "[t]he Fourth Amendment . . . has a much wider frame of reference than mere criminal prosecutions." Instead, "[i]t is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the 'intent' of the invading officers." 32

The problem is that neither Terry nor Camara involved a purely civil search. Terry concerned a police investigation of suspected criminal activity; Camara, as the Court recognized, involved regulatory laws, most of which "are enforced by criminal processes." Consequently, neither case shows conclusively that the Court considers civil searches and seizures to be encompassed by the fourth amendment. In two decisions involving civil searches, the Supreme Court did not clearly indicate whether such searches are within the scope of the fourth amendment.

29. Id. at 18 n.15. For an example of an overly technical definition of "search" see note 13 supra. The lower courts are in conflict as to whether civil searches are within the scope of the fourth amendment. Compare United States v. Haden, 397 F.2d 460, 465 (7th Cir. 1968), cert. denied, 396 U.S. 1027 (1970) (civil searches not within fourth amendment) with United States v. Lawson, 487 F.2d 468, 472 (8th Cir. 1973) (civil searches are within fourth amendment). The question arises whether courts that quote or adopt the language of Corpus Juris Secundum (see note 13 supra) are aligned with courts that preclude fourth amendment regulation of civil searches. It would seem, however, that the use of the Corpus Juris definition of search or seizure is not necessarily an indication that a court will hold that the fourth amendment does not apply to noncriminal searches. Compare Weltz v. State, 431 P.2d 502 (Alas. 1967) and Day v. State, 61 Wis. 2d 236, 247-52, 212 N.W.2d 489, 495-97, (1973) with Stevens v. State, 443 P.2d 600 (Alas. 1968), cert. denied, 393 U.S. 1039 (1969) and State v. Pires, 55 Wis. 2d 597, 201 N.W.2d 153 (1972).


33. 392 U.S. at 5-7.

34. 387 U.S. at 531. In addition, one writer recently has expressed doubt as to the continued validity of Camara. "In all likelihood the result in Biswell would have been the same in the absence of Camara. The Court merely would have reasoned . . . that the fourth amendment did not operate against noncriminal searches." Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See, 61 Calif. L. Rev. 1011, 1047 (1973). United States v. Biswell, 406 U.S. 311 (1972) is discussed in note 17 supra.
In *Harris v. United States*, the police impounded an automobile and took safekeeping precautions that necessitated a police intrusion into the automobile, but the Court appears to have held that this intrusion was not a search:

The admissibility of evidence found as a result of a search... is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the [evidence] 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.

In the second case, *Cady v. Dombrowski*, the police had exercised a form of custody over a disabled automobile by making arrangements to have it towed to a private garage. The accident victim was a police officer from another jurisdiction. Believing that the service revolver of the injured police officer was in the disabled automobile, the investigating officers, pursuant to standard procedures, searched the vehicle and discovered evidence of a homicide. A constitutionally reasonable basis for the intrusion was found in the officers' "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." Since the Court found that the police search of the automobile was for the sole purpose of forestalling a threat to human life, it would appear that the rationale of the decision closely approximates that of the emergency doctrine.

36. Id. at 236.
38. Id. at 442-43.
39. Id. at 447.
40. Cady can be analogized to those cases which invoke the emergency doctrine when the possibility of future criminal activity poses a continuing threat to life. See discussion of State v. Hardin, 518 P.2d 151 (Nev. 1974) in text accompanying notes 93-95 infra. Other cases have indicated a willingness by the Supreme Court to accept some sort of emergency doctrine. See Terry v. Ohio, 392 U.S. 1, 27 (1968); Camara v. Municipal Court, 387 U.S. 523, 539 (1967); Warden v. Hayden, 387 U.S. 294, 298-99 (1967); Wong Sun v. United States, 371 U.S. 471, 483-84 (1963); McDonald v. United States, 335 U.S. 451, 454-55 (1948).

In *Cady* the Court relied heavily on *Harris v. United States*, 390 U.S. 234 (1968), and *Cooper v. California*, 386 U.S. 58 (1967), both involving an impounded automobile. Cady emphasized the fact that the police had exercised a form of custody over the automobile. 413 U.S. at 442-43. Therefore, Cady may in the future be categorized as an impounded automobile case. See United States v. Lawson, 487 F.2d 468, 471-72 (5th Cir. 1973). On the other hand, the primary justification for the police intrusion in *Cady* was concern for the public safety; this, it would seem, is the central holding of the case. See United States v. Isham, 501 F.2d 989 (6th Cir. 1974); State v. Lund, 10 Wash. App. 709, 519 P.2d 1325 (1974); Note, *Cady v. Dombrowski: The Demise of Coolidge*, 35 U. Pittsburgh L. Rev. 712, 722 (1974).

Finally, since four Justices dissented in *Cady*, it is suggested that the decision be confined to its facts—that is, situations in which there is a threat to life or health. Compare United States v. Isham, 501 F.2d 989 (6th Cir. 1974) (life endangered) and State v. Lund, 10 Wash. App. 709, 519 P.2d 1325 (1974) (life endangered) with State v. Tully, 35 Conn. L.J., Mar. 5, 1974, at 1 (Conn.
But for one factor, *Cady* would demonstrate that the Supreme Court considers civil searches to be within the scope of the fourth amendment. That factor is that the Court did not decide whether or not the police intrusion into the automobile was a search.

Petitioner argued before this Court that unlocking the trunk of the Ford did not constitute a “search” within the meaning of the Fourth Amendment. The thesis is that only an intrusion, into an area in which an individual has a reasonable expectation of privacy, with the specific intent of discovering evidence of a crime constitutes a search. . . .

We need not decide this issue. Petitioner conceded in the Court of Appeals that this intrusion was a search.\(^4\)

Although recognizing that *Camara* suggested a proposition contrary to that proposed by the petitioner in *Cady*, the Court did not find it dispositive.\(^4\) Thus the only clarity to be derived from *Harris* and *Cady* is that the Court has not yet definitively determined whether civil searches are within the scope of the fourth amendment.\(^4\)

Strong arguments can be made to support the view that civil searches and seizures should be regulated by the fourth amendment. As evidenced by the extensive case law, the courts have had ample opportunity to regulate police activities in the area of criminal searches. Since a criminal search is based upon probable cause to believe that criminal activity has been or is being committed, the probabilities are that a criminal search will disclose evidence of criminal activity. Such evidence often leads to an indictment and trial. At trial the criminal search will be subjected to judicial scrutiny in order to determine its reasonableness.

A similar synopsis of civil searches is impossible. They “are rarely if ever seen by courts except in cases where criminal activity has been uncovered by the challenged police actions.”\(^4\) Since a civil search will uncover evidence of criminal activity only by sheer coincidence, the comparative paucity of cases

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1974). In Tully, Cady was relied upon to justify a police entry into an unlocked automobile to safeguard a guitar; the Supreme Court of Connecticut seemed unaware of the distinction that in Cady the intrusion was not justified for the purpose of protecting the revolver but rather to protect the public at large from the revolver if it should fall into the wrong hands. The distinction, it would seem, is crucial; in Cady there was a threat to life whereas in Tully only a property interest was endangered. See notes 113 & 115 infra.

41. 413 U.S. at 442 n.

42. The status of the police intrusion in *Harris* was also thrown into doubt by *Cady*. The majority, on the premise that *Cady* did involve a search, id., relied heavily on *Harris*. This would imply that *Harris*, too, involved a search. But see text accompanying notes 35 & 36 supra. The dissenting Justices in *Cady* believed that the intrusion in *Harris* was not a search; they argued, however, that the intrusion in *Cady* was a search. Id. at 452 (dissenting opinion); see United States v. Lawson, 487 F.2d 468, 472 (8th Cir. 1973).

43. See note 34 supra. The lack of resolution as to the status of noncriminal searches has been recognized by the lower courts, and has caused, as must be expected, conflicting results. Compare United States v. Lawson, 487 F.2d 468, 472 (8th Cir. 1973) with State v. Tully, 35 Conn. L.J., Mar. 5, 1974, at 2 (Conn. 1974).

is not surprising. Therefore, the cases that do reach the courts represent only a small fraction of civil searches. This means that the courts are given very few opportunities to regulate a type of police activity which, in the main, affects noncriminal individuals. For the courts to abdicate the limited control that they are now able to exercise over civil searches and seizures would endanger the rights protected by the fourth amendment. Not only is there the probability of well-intentioned, but unnecessary intrusions in response to trivial or nonexistent emergencies, but there is also the possibility that police assertions of benevolent motives will be only a pretense.

In the end, however, it would seem inevitable that the Supreme Court will recognize fourth amendment applicability to civil searches and seizures. A multiplicity of federal and state cases have recognized that the fourth amendment protects the individual's interest in privacy and that, as in the case of combating crime, police enthusiasm in the performance of civil searches can result in unreasonable intrusions into the privacy of the individual. Therefore, the manner in which fourth amendment standards thus far have been applied to civil searches and seizures shall be examined.

III. Fourth Amendment Standards Applied to Civil Searches and Seizures

The regulation of criminal searches is based upon two fundamental rules of reasonableness. First, probable cause is the sine qua non of criminal searches; second, the existence of exigent circumstances is a prerequisite to a warrantless criminal search. These rules have been applied so regularly to criminal searches that conceptual difficulties may arise when they are used in the civil search context. Courts that have recognized the problem, however, have held the dictates of the fourth amendment to be no less applicable to noncriminal searches.

45. See text accompanying note 27 supra.
46. E.g., United States v. Goldenstein, 456 F.2d 1006 (8th Cir. 1972), cert. denied, 416 U.S. 943 (1974); Root v. Gauper, 438 F.2d 361 (8th Cir. 1971); People v. Smith, 7 Cal. 3d 282, 496 P.2d 1261, 101 Cal. Rptr. 893 (1972).
48. See notes 102 & 103 infra.
49. See text accompanying note 32 supra.
50. See note 46 supra and accompanying text.
51. Both concepts (probable cause and exigent circumstances) are essential ingredients to a warrantless criminal search. “[N]o amount of probable cause can justify a warrantless search or seizure absent ‘exigent circumstances.’ ” Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971). The corollary principle is that, with or without exigent circumstances, “there must be probable cause for the search.” Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973); see Rice v. Wolff, No. 74-1682, at 27-28 & n.10 (8th Cir., Jan. 28, 1975).
The clearest exposition of this principle is found in State v. Richards. 54 If no penological [i.e. criminal] police power interest of government is being invoked, there is some other legitimate police power governmental interest being asserted by the State which purports to authorize the class of governmental intrusions upon private property in terms of which a neutral and detached magistrate might find the existence of probable cause for the search in the present particular circumstances . . . 55 If such probable cause does exist[,] were there, additionally, exigent circumstances making procurement of a warrant incompatible with effective fulfillment of the governmental interest establishing necessity for the search? 55

More concisely, "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." 56 The advantage of this approach is that it "neither endangers time-honored doctrines applicable to criminal investigations nor makes a nullity of the probable cause requirement in this area." 57 Thus, in the case of civil searches the probable cause test differs from that applied to criminal searches, but a civil search must still be justified by a "functional equivalent of probable cause." 58

In Camara v. Municipal Court, 59 the Supreme Court recognized that, in determining the constitutionality of a search, "reasonableness is . . . the ultimate standard," 60 but applied the tests of probable cause and exigent circumstances to determine whether the search was reasonable. Finding probable cause but no exigent circumstances, the Court held the search to be unreasonable for lack of a search warrant. 61 The formula, then, was that probable cause plus exigent circumstances equals a reasonable warrantless search. Despite the Court's recognition in Camara that a warrantless search is reasonable only if it meets these requirements, recent Court decisions have indicated a tendency to dispense with this two-pronged test and to replace it with a more flexible, but amorphous reasonableness test. 62 In decisions involving essentially noncriminal searches, the Court has dispensed with the probable cause test apparently on the theory that traditional probable cause is inapplicable. 63 To an extent this view is correct since traditional probable

and Camara involve a quasi-criminal search. See note 19 supra and accompanying text. Both opinions, however, recognize the problems inherent in the application of fourth amendment standards to what are essentially noncriminal searches.

54. 296 A.2d 129 (Me. 1972).
55. Id. at 136-37.
56. Camara v. Municipal Court, 387 U.S. 523, 539 (1967). A warrantless search must be additionally justified by an emergency (i.e. exigent circumstances) or by consent. Id. at 539-40.
57. Id. at 539.
58. 413 U.S. at 277 (Powell, J., concurring).
60. Id. at 539.
61. Id. at 538-40.
cause is inextricably linked to criminal searches. This traditional application of probable cause does not mean, however, that the concept of probable cause cannot be reformulated to fit the requirements of civil searches. For example, in *Almeida-Sanchez v. United States*, the Court stated:

In *Camara* . . . , the Court held that administrative inspections to enforce community health and welfare regulations could be made on less than probable cause to believe that particular dwellings were the sites of particular violations.

Instead, the *Camara* Court, recognizing that this criminal (i.e., traditional) formulation of probable cause was inapplicable to an essentially noncriminal search, derived probable cause from the existence of a “valid public interest.” It is submitted that this “valid public interest” test represents the correct approach to the problem of probable cause as it relates to noncriminal searches. Unfortunately, as is illustrated by *Almeida-Sanchez*, the present members of the Court do not appear to have adopted the reasoning of *Camara*. *Almeida-Sanchez* involved a roving automobile search for aliens in a border region; the search, however, was not a “border search.” Roving automobile searches of border regions are conducted primarily for the purpose of locating and deporting aliens. Since prosecution of aliens is rare, these searches, like the administrative inspections dealt with in *Camara*, are essentially noncriminal. Despite the similarity between *Almeida-Sanchez* and *Camara*, the members of the Court adopted three different views concerning the application of the probable cause test to roving automobile searches. Four Justices, applying a “traditional” probable cause test, held the search to be unreasonable since there was no probable cause to believe that the particular automobile in question was carrying contraband or aliens. The four dissenting Justices, recognizing that this “traditional” probable cause test was applied a reasonableness test to a stop-and-frisk, stating that the warrant requirement is traditionally inapplicable to police activities of this nature. Id. at 20-21. The rationale would seem to be that the probable cause test relates only to the warrant clause of the fourth amendment; therefore, “the probable cause test is prospective only, while the reasonableness test is capable of only retrospective application.” Comment, United States v. Bailey: Probable Cause and Reasonableness Tests Under the Fourth Amendment—A Distinction Without a Difference?, 45 Temp. L.Q. 610, 615-16 (1972). It is suggested, however, that in *Terry* there were merely exigent circumstances and that they should not be the basis for dispensing with the requirement of probable cause, as measured by the presence or absence of a valid public interest. Cf. id. at 617-18. See also note 51 supra.

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64. 413 U.S. 266 (1973).
65. Id. at 270.
66. See text accompanying note 56 supra.
67. 413 U.S. at 278 (Powell, J., concurring).
68. Id. at 268.
69. Id. at 278 (Powell, J., concurring). The government asserted that “only 3% of aliens apprehended in this country are prosecuted.” Id.
70. See note 19 supra and accompanying text.
72. 413 U.S. at 274-75.
inapplicable, dispensed with a probable cause test altogether and adopted a reasonableness standard "sufficiently flexible to authorize the search involved . . . ."74 Only Justice Powell, in a concurring opinion following the reasoning of Camara,75 recognized that "there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas."76 However, he did not express an opinion as to whether there was probable cause to search in this case, but rather based his opinion on the failure to obtain a search warrant (i.e. lack of exigent circumstances).77

The problems presented by the three opinions in Almeida-Sanchez were enhanced by Cady v. Dombrowski78 (decided on the same day), in which Justice Powell joined the dissenters of Almeida-Sanchez, making the reasonableness test an element of the Cady majority opinion.79 The majority held that where "the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, . . . the search was not 'unreasonable' . . . ."80 The dissenting Justices, adopting the language of Camara, conceded that a valid public interest of this nature "may establish probable cause to search . . . ."81 In Cady, therefore, the application of the reasonableness test and the probable cause test, measured by a valid public interest, did not result in different determinations by the majority and the dissenters as to the validity of the search. Instead the dissenting Justices focused on the lack of exigent circumstances sufficient to justify a warrantless search.82 The majority, applying the reasonableness test, held that the search "was not unreasonable solely because a warrant had not been obtained."83

It would appear, therefore, that in Cady the application of the reasonableness test dispensed with the exigent circumstances test, whereas, in Almeida-Sanches, the dissenting Justices would have used the reasonableness test to dispense with the requirement of probable cause. It is submitted that the substitution of the singular reasonableness test for the dual requirements of probable cause plus exigent circumstances is inappropriate since it tends to obliterate the distinction between the justification for the search and the justification for searching without a warrant. Instead, as recognized in Camara, although the ultimate test is reasonableness,84 the reasonableness of

74. 413 U.S. at 289 (dissenting opinion).
75. Id. at 277-79 (Powell, J., concurring).
76. Id. at 279.
77. Id. at 285.
78. 413 U.S. 433 (1973), discussed in text beginning at note 37 supra.
79. 413 U.S. at 439.
80. Id. at 448.
81. Id. at 454 (dissenting opinion).
82. Id.
83. Id. at 448. It has been suggested that Cady "implies a revival of the 'Rabinowitz' rule, thought to have been permanently interred." Note, Cady v. Dombrowski: The Demise of Coolidge, 35 U. Pitt. L. Rev. 712, 723 (1974). The Rabinowitz rule was that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." United States v. Rabinowitz, 339 U.S. 56, 66 (1950), overruled, Chimel v. California, 395 U.S. 752 (1969).
84. 387 U.S. at 539.
a search should be measured by probable cause and the reasonableness of a warrantless search should be measured by probable cause plus exigent circumstances. On this assumption, an examination of the emergency doctrine search follows.

IV. THE EMERGENCY DOCTRINE

A. The Emergency Doctrine Defined

Since the emergency doctrine's application and civil searches in general are seen infrequently in the case law, the doctrine is not widely known or generally employed. Moreover, some cases that appear to have applied it have not used the term "emergency doctrine." The Eighth Circuit, however, has formulated the following definition: "[P]olice officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance." This definition, although developed to fit a particular set of facts, is adequate to fit the needs of many emergency situations. Recognizing, however, that the doctrine has been applied to a multiplicity of fact patterns, one author has extracted from a number of these cases an exhaustive definition:

Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search.

B. The Application of the Emergency Doctrine to Protection of Persons

Since the great majority of cases invoking the emergency doctrine involve a threat to human life or health, the rationale of the doctrine has been stated

85. Id. at 238-40. The predilections of the present members of the Court are such that, even when the members agree on the test to be applied, they often disagree as to the result. See Cardwell v. Lewis, 417 U.S. 583 (1974) (four Justices found exigent circumstances; four Justices did not).

86. An attempt has been made in notes 102 & 103 infra to list cases from all the courts that have recognized the emergency doctrine. Some of those listed seem to have employed the rationale of the doctrine without referring to it by name. In note 106 infra the origin of the doctrine is traced.


90. See notes 102 & 103 infra and accompanying text.
as: "The preservation of human life is paramount to the right of privacy protected by search and seizure laws and constitutional guarant[e]es . . . ."91 Generally it is not difficult to determine when the emergency doctrine is being applied. The police usually are acting to help a person in distress,92 not to find evidence of criminal acts. There are cases, however, in which the emergency doctrine is related to criminal activity, making it difficult to determine whether the emergency doctrine is being applied or whether the case is a typical criminal search. Yet, a clear distinction can be made. The justification for a criminal search is the state's interest in apprehending the perpetrator of a crime that has already occurred, whereas the justification for an emergency doctrine search is the state's interest in protecting persons from the threat posed by the possibility of future criminal activity. If the police do not have probable cause to attribute a criminal act to a specific individual and cannot, therefore, undertake a criminal search, they may still be able to initiate an emergency doctrine search on the theory that the unknown criminal at large poses a continuing threat to human life.

A good example of the doctrine's application to a threat of future criminal activity is State v. Hardin.93 There a violent homicide had occurred in a hotel room and the police interviewed the occupants of neighboring rooms, seeking information about the crime. In the process, the police entered one of the rooms without the consent of the occupant and there found evidence of the homicide in plain view.94 Since there was no suspect, the police intrusion into the room could not be justified by probable cause to believe the killer was in the room—in other words, there was no basis for a criminal search. However, the court found that the violent nature of the homicide "justified fears that its perpetrator constituted 'a substantial threat of imminent danger' to life."95 This threat justified the police intrusion for the purpose of obtaining more information concerning the crime—that is, the threat to life provided probable cause for the police intrusion. Furthermore, the fact that the threat was imminent was a sufficient exigent circumstance to justify a warrantless intrusion.

The threat of future criminal activity is derived almost invariably from a recent criminal act, such as the violent homicide in Hardin. Therefore, there are cases in which the police will undertake a criminal search for the person suspected of this past act and, simultaneously, will undertake an emergency doctrine search to forestall further criminal acts.

93. 518 P.2d 151 (Nev. 1974).
94. Id. at 152.
95. Id. at 154.
The leading example is *Warden v. Hayden*. Within minutes of learning of the commission of a crime, the police searched the house where the suspect was believed to be hiding. The Court held:

The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. . . . The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.

In this case the police had two independent bases for searching the house (i.e. two indications of probable cause) and two independent bases for searching without a warrant (i.e. two exigent circumstances). The police had probable cause to believe that the perpetrator of a crime was in the house; the exigent circumstance justifying a warrantless (criminal) search was the hot pursuit by the police of the suspect and the possibility of his escape. In addition, the police had probable cause to believe that the suspect posed a continuing threat to human life; the exigent circumstance justifying the warrantless (civil) search was the imminence of the threat.

Although *Warden v. Hayden* is most often cited in support of the doctrine of hot pursuit, at least one court has interpreted the case as relating solely to the emergency doctrine because “the majority conspicuously avoided the ‘hot pursuit’ formulation put forward by the concurring judges, and instead focused on the danger of an armed robber at large . . . .” A better view, it would seem, is that the *Warden* fact pattern merits the application of both doctrines and that the existence of neither affects the validity of the other.

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96. 387 U.S. 294 (1967).
97. Id. at 298-99.
98. The doctrine of hot pursuit is an exception to the warrant requirement of the fourth amendment. Thus hot pursuit is an exigent circumstance; it cannot fulfill the requirement of probable cause to search. The doctrine comes into play only after the police have determined that they have probable cause to believe a person has committed a criminal act. They may then seize or search for such person without a warrant if to procure a warrant would create the risk that the person would escape (i.e. if the police are in hot pursuit). Thus the doctrine of hot pursuit involves a true criminal search; it is invoked only when the police have probable cause to believe that criminal activity has already occurred. See, e.g., United States v. Holiday, 457 F.2d 912 (3d Cir.), cert. denied, 409 U.S. 913 (1972); Fellows v. State, 13 Md. App. 206, 283 A.2d 1 (1971). The doctrine is analogous to those cases in which a warrantless seizure of contraband or incriminating evidence is permitted in order to prevent its destruction or removal. See note 9 supra and accompanying text.
99. The emergency created by the threat of continuing criminal activity forms the basis for a civil search since the purpose of the search is to protect human life. However, this purpose is to be accomplished by apprehending a criminal; therefore, the search does have a quasi-criminal nature. See, e.g., Durham v. United States, 237 A.2d 830 (D.C. Ct. App. 1968) (violence of crime made apprehension so imperative that entry into apartment was justified); State v. Hardin, 518 P.2d 151 (Nev. 1974), discussed in text beginning at note 93 supra.
C. The Application of the Emergency Doctrine to Protection of Property

The great majority of both state and federal cases invoking the emergency doctrine involve a life or death situation and are, therefore, an application of the basic rationale that the preservation of human life is paramount to the right of privacy protected by the fourth amendment. Property, too, is subject to destruction, damage, and theft, but it seems...
inappropriate to formulate a general rule that the preservation of property interests is paramount to the fourth amendment right to privacy. Consequently the courts must determine on a case-by-case basis whether protection of the threatened property was sufficiently important to justify the invasion of an individual's expectation of privacy. To formulate some general guidelines, however, an analysis of cases applying the emergency doctrine to the preservation of property should be helpful.

Although often defined in terms that include the protection of property, the emergency doctrine has in only a few instances been so applied. Two

105. The problem can be illustrated by a comparison of two cases, one involving a threat to life, the other a threat to property. In Root v. Gauper, 438 F.2d 361 (8th Cir. 1971), the court stated the general rule that police may enter a dwelling without a warrant to render assistance to a person in distress. Thus the only question to be determined by the court was the reasonableness of the officer's belief that a person was actually in need of assistance. The court decided that the officer would not reasonably have had such a belief. Id. at 364-65 In State v. Tully, 35 Conn. L.J., Mar. 5, 1974, at 1 (Conn. 1974), the property in jeopardy was a guitar in an unlocked automobile. Here the court was required to make two determinations: Does the protection of a guitar justify an official intrusion into an automobile? If so, did the officer have a reasonable belief that the guitar was in jeopardy? The court would appear to have answered both questions in the affirmative since the officer's entry into the automobile was held to be reasonable.

106. E.g., Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.) (Burger, J.), cert. denied, 375 U.S. 860 (1963); People v. Roberts, 47 Cal. 2d 374, 377, 303 P.2d 721, 723 (1956); People v. Gallmon, 19 N.Y.2d 389, 393-94, 227 N.E.2d 284, 287, 280 N.Y.S.2d 356, 360-61 (1967), cert. denied, 390 U.S. 911 (1968). It is interesting that in these cases life, not property, was at stake. Why, therefore, was the emergency doctrine formulated in terms broad enough to encompass the protection of property? The answer can be found in People v. Roberts, supra. The case was decided in 1956, at a time when the emergency doctrine was practically nonexistent. The court looked elsewhere for authority; it chose the tort doctrine of necessity and made it applicable to official intrusions that are within the scope of the fourth amendment. "Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose." 47 Cal. 2d at 377, 303 P.2d at 723. However, an individual's rights under tort law differ substantially from an individual's rights under constitutional law. "To analogize the deprivation of such significant civil [fourth amendment] rights to a mere trespass unjustifiably enlarges the scope of a mere common law trespass and correspondingly diminishes the significance of protecting basic rights secured and protected by the Constitution of the United States."

Laverne v. Corning, 316 F. Supp. 629, 635 (S.D.N.Y. 1970). It is submitted that the application of the tort doctrine of necessity, in toto, to the fourth amendment was not entirely proper; the need to preserve property will not in every case justify an official intrusion.

107. People v. Parra, 30 Cal. App. 3d 729, 106 Cal. Rptr. 531 (4th Dist.), cert. denied, 414 U.S. 1116 (1973) (police entered unlocked shop for purpose of securing it); Horack v Superior Court, 3 Cal. 3d 720, 478 P.2d 1, 91 Cal. Rptr. 569 (1970) (stereo in unlocked house held not to constitute an emergency); see State v. Tully, 35 Conn. L.J., Mar. 5, 1974, at 1 (Conn. 1974), People v. Manzi, 21 App. Div. 2d 57, 248 N.Y.S.2d 306 (1st Dep't 1964). It should be noted that an entirely different situation exists when police remove property for safekeeping from a legally impounded automobile. E.g., United States v. Mitchell, 458 F.2d 960 (9th Cir. 1972); note 20 supra. Often the police are legally responsible for property that is in an impounded automobile. E.g., People v. Sullivan, 29 N.Y.2d 69, 272 N.E.2d 464, 323 N.Y.S.2d 945 (1971). However, custodial searches of impounded automobiles should not necessarily be
illuminative cases are People v. Parra\textsuperscript{108} and People v. Manzi.\textsuperscript{109} In Parra the police discovered that the front door of an unattended florist shop was open, but they were unable to lock it. The police entered the shop to secure it and to ascertain the identity of the owner so that he could be contacted. Their search for identification disclosed narcotics. The court held the entry into the shop to be reasonable under the emergency doctrine.\textsuperscript{110} In Manzi the police observed a person break into defendant's automobile, but the car window was broken before they could intercede. After arresting the perpetrator the police were faced with the problem of protecting the now vulnerable property inside. Unable to secure the car,\textsuperscript{111} the police took the property to headquarters for safekeeping. The police noticed that the items they had taken from the car (television sets, liquor, etc.) were the property of a hotel. It was determined that the items had been stolen. The court held the entry into the automobile to be reasonable, stating that the police would have been derelict in their duty not to have taken protective measures.\textsuperscript{112}

These two cases have distinctive factors in common. In both the property owner apparently was unaware of the endangered status of his property. Therefore, it was reasonable for the police to assume that protective measures were required. Also, in both cases the police knew neither the identity nor the whereabouts of the owner, making it impossible to have the owner take protective measures, and leaving only the police to safeguard the property. It is suggested that these two factors—the owner's ignorance of the risk and unavailability—are indicative of situations in which the emergency doctrine is properly applicable to the protection of property.\textsuperscript{113}

\textsuperscript{110} 30 Cal. App. 3d at 731-34, 106 Cal. Rptr. at 532-34.
\textsuperscript{111} Generally an automobile can be secured simply by closing the windows and locking the doors. The advantage of this procedure is that it involves a minimal police intrusion and the safekeeping measures are those most likely to have been performed by the owner of the automobile if he had had the opportunity. See United States v. Lawson, 487 F.2d 468, 476 (8th Cir. 1973); Mozzetti v. Superior Court, 4 Cal. 3d 699, 707, 484 P.2d 84, 89, 94 Cal. Rptr. 412, 417 (1971). See also Harris v. United States, 390 U.S. 234 (1968); United States v. Prazak, 500 F.2d 1216 (9th Cir. 1974).
\textsuperscript{112} 21 App. Div. 2d at 59, 248 N.Y.S.2d at 308. The Manzi court did not make specific reference to the emergency doctrine. Undoubtedly this was partly due to the fact that the case was decided at a time when the emergency doctrine was not generally known. Clearly, however, the rationale of the decision is such that the case falls within the doctrine.
\textsuperscript{113} It would seem that if an owner of property has knowingly exposed it to some danger (e.g., packages left in an unlocked car) then the police should not take protective measures, unless of course the property is in the process of being stolen or damaged. Based on the two criteria discussed in the text, it would seem that a recent case, State v. Tully, 35 Conn. L.J., Mar. 5, 1974, at 1 (Conn. 1974), was wrongly decided. In this case a police officer removed a guitar from an unlocked car in order to prevent its possible theft. There was, however, no proof of immediate threat of theft, the officer knew that the owner of the car was aware of its condition, and the officer knew that the owner was only a five-minute drive away.
Another factor of importance is the value of the property and the extent to which it is threatened versus the individual's expectation of privacy. For instance, in *Parra* and in *Manzi* it would appear that the courts felt that the property interests at stake were sufficiently great to justify the invasion of the individual's expectation of privacy. Nevertheless, in all such cases a property interest is weighed against a personal right to privacy. The danger is that an overextension of the emergency doctrine, as it relates to the protection of property, will render valueless the fourth amendment right to privacy by subordinating it to insignificant property rights. Therefore, absent an imminent threat to property of substantial value, the right to privacy should be preserved.

That the fourth amendment could be rendered valueless by subordination to property rights is not the only danger presented by the application of the emergency doctrine to the preservation of property. There is, in addition, the more ominous possibility that police assertions of Good Samaritan motives could be only a pretense. Such dubious assertions of good faith will be facilitated to the extent that the emergency doctrine is held to encompass the protection of property of insignificant value. In a time of rising crime rates an emergency situation can be found in almost any context. Therefore, the possibility exists that unscrupulous or overzealous police officers, suspecting criminal activity but lacking probable cause to search, will fabricate an emergency to justify their search under the emergency doctrine. In recognition of this danger, the New York Court of Appeals has formulated the following rule:

The lack of an emergency situation was so obvious that the court was compelled to justify the police intrusion as being within the community caretaking function. This term originated in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). However, as the dissent in *Tully* pointed out, "[t]he Supreme Court did not suggest in *Cady* that any search engaged in by a policeman as part of his community caretaking duties automatically complies with the standards of the fourth amendment." 35 Conn. L.J., Mar. 5, 1974, at 7 (dissenting opinion). In fact the Supreme Court appears to have used the term to describe police activities that do not necessarily involve searches (e.g., investigation of traffic accidents). 413 U.S. at 441. The Court justified an actual search with a more specific rationale, "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Cady* at 447. This rationale would appear to approximate closely the emergency doctrine.


115. See State v. *Tully*, 35 Conn. L.J., Mar. 5, 1974, at 1 (Conn. 1974). It is suggested that a guitar under a blanket on the back seat of an automobile was not a sufficiently valuable object to justify a police intrusion into the automobile.

116. See Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835, 853 (1974). An element to be considered is that "property loss is an insurable harm, whereas a violation of privacy is not." *Id.*


118. For example, the justification given for entering an automobile to remove a guitar was the fact that there had been "recent vandalism in the area." State v. *Tully*, 35 Conn. L.J., Mar. 5, 1974, at 2 (Conn. 1974). See note 113 supra. However, the Ninth Circuit held that a high rate of crime in a particular area cannot justify a relaxed application of the fourth amendment in that area. *Schulz v. Lamb*, 504 F.2d 1009, 1011 (9th Cir. 1974).
There is a strong factual inference that an entry which results in an arrest or seizure of evidence was for the purpose of effecting an arrest or seizure. That inference should prevail unless the police establish a different purpose justified by objective evidence of a privileged basis for making the entry.\textsuperscript{119}

It is submitted that such a rule, particularly in cases where the emergency doctrine is applied to protection of property, is necessary to preserve the value of the fourth amendment and to prevent circumvention of its dictates.

V. Conclusion

To summarize, the fact that police intrusions in response to emergencies are not accompanied by an intent to seek out criminal activity does not render the fourth amendment inapplicable. The fourth amendment has a wider frame of reference than criminal law. It protects the individual's interest in privacy, and this interest does not fluctuate with the intent of the invading officers.\textsuperscript{120}

Therefore, all civil searches, including those under the emergency doctrine, are within the scope of the fourth amendment. Furthermore, the reasonableness of a civil search should be determined by the same principles used to determine the reasonableness of a criminal search; all civil searches must be based upon probable cause and a warrantless civil search must be justified additionally by exigent circumstances.\textsuperscript{121}

The emergency doctrine, although generally applied to the preservation of human life or health, occasionally has been used to justify police efforts to protect property.\textsuperscript{122} As has been shown, even when applied to the preservation of life, the emergency doctrine can be abused;\textsuperscript{123} but, when applied to the protection of property, the doctrine presents a special danger. There is the possibility that the fourth amendment right to privacy will be subordinated to the protection of insignificant property interests. It is necessary, therefore, to balance the value of the property and the extent of the threat to the property against the individual's expectation of privacy to determine whether an official intrusion is reasonable under the circumstances.\textsuperscript{124}

Finally, it is submitted that judicial scrutiny of all official intrusions, whether civil or criminal in nature, is essential to preserve the individual's right to privacy and to ensure relatively uniform standards of police conduct. The inclusion of civil searches within the fourth amendment will place only a small burden on the courts' time, since it is the exceptional civil search that discloses evidence of criminal activity.\textsuperscript{125} The real problem is that so few

\textsuperscript{119.} People v. Gallmon, 19 N.Y.2d 389, 395, 227 N.E.2d 284, 288, 280 N.Y.S.2d 356, 361-62 (1967), cert. denied, 390 U.S. 911 (1968) (emphasis added); see note 47 supra and accompanying text. Other courts have held that the state has the burden of proving that the warrantless entry fell within the emergency doctrine exception. Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971); accord, United States v. Dunavan, 485 F.2d 201, 204 (6th Cir. 1973).

\textsuperscript{120.} See notes 27, 31 & 32 supra and accompanying text.

\textsuperscript{121.} See Part III supra.

\textsuperscript{122.} See note 107 supra and accompanying text.

\textsuperscript{123.} See notes 46 & 47 supra and accompanying text.

\textsuperscript{124.} See notes 113-16 supra and accompanying text.

\textsuperscript{125.} See note 44 supra and accompanying text. Civil searches may possibly come before the
cases concerning civil searches will reach the courts that it will be difficult to establish uniform standards of "benevolent" police conduct. It is hoped that the problem will not be enlarged by judicial abdication in the realm of civil searches and seizures.

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courts in civil damage actions. "A city policeman who violates an individual's fourth amendment rights can be sued by the victim in federal court under 42 U.S.C. section 1983, and its jurisdictional counterpart, 28 U.S.C. section 1343(3). Supreme Court rulings, however, have firmly established that section[s] 1983 and 1343(3) are unavailable to the plaintiff who seeks recovery against the municipality which employs the police officer." Note, A Federal Cause of Action Against a Municipality for Fourth Amendment Violations by its Agents, 42 Geo. Wash. L. Rev. 850 (1974) (footnotes omitted). See generally Laverie v. Corning, 316 F. Supp. 629 (S.D.N.Y. 1970). The insulation of municipalities from responsibility for the unconstitutional acts of their agents has been criticized since "[t]he federal policy of ensuring effective relief where constitutional rights have been infringed dictates that the municipality be available to satisfy a money judgment." Note, supra, at 868. The individual, however, may be able to pursue successfully a cause of action in state court. Herman v. State, 78 Misc. 2d 1025, 357 N.Y.S.2d 811 (Ct. Cl. 1974) (New York State held liable under the doctrine of respondeat superior for damages caused by improper "no-knock" entry into house by New York State Police).