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Note

Fourth Amendment Protections and the Emergency Exception


I. INTRODUCTION

The United States Supreme Court has recognized that the heart of the fourth amendment\(^1\) concerns the protection of a citizen's right to privacy.\(^2\) The importance of this protection is greatest when the area sought to be protected is the home.\(^3\)

The fourth amendment guarantees are secured through the warrant requirement.\(^4\) Searches conducted without a warrant are

1. U.S. Const. amend. IV. The fourth amendment provides:
   
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. See, e.g., *Katz v. United States*, 389 U.S. 347, 351-52 (1967), in which the Court stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . [whereas] what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." *See also* *Hoffa v. United States*, 385 U.S. 293 (1966). For a discussion of the development of the fourth amendment protection of privacy interests, see *Amsterdam, Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974). For recent cases discussing the standing requirements for asserting a fourth amendment claim relating to violation of a legitimate expectation of privacy, see *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83 (1980).


4. See *Mincey v. United States*, 437 U.S. 385 (1978). The Court in *Mincey* stated: "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the of-
"per se unreasonable."  
However, to allow law enforcement officials to deal practically with various circumstances, the Court has declared that the fourth amendment warrant requirement is "subject . . . to a few specifically established and well-delineated exceptions." The generally recognized exceptions are: search incident to arrest, stop and frisk, automobile, and hot pursuit. In addition, the Court accepts warrantless searches conducted with consent and allows the seizure of evidence discovered in plain view. The exceptions are based upon the premise that the need for immediate police action outweighs the usual warrant requirement.

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5. Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . .").
6. Id.
8. See Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk legal where officers reasonably concluded suspect might be armed and dangerous).
9. See United States v. Ross, 102 S. Ct. 2157 (1982) (under automobile exception, police may search every part of the vehicle they have probable cause to believe may contain the object of their search); Cardwell v. Lewis, 417 U.S. 583 (1974) (warrantless search following impoundment of automobile left in public parking lot upheld); Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of automobile at police station was justified when occupants had been previously arrested on public highway).
11. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches allowed where examination of the totality of the circumstances showed the consent to have been voluntarily given).
12. See Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court explained the rationale for the plain view doctrine as follows: What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure.
13. See id. at 455. See also McDonald v. United States, 335 U.S. 451, 456 (1948), wherein the Court stated:
In addition to the above exceptions, lower federal and state courts have recognized the “emergency exception.” This exception may be summarized as follows:

[T]he 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.

14. The Supreme Court has not adopted the emergency exception.

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... and provided, further, that they do not enter with an accompanying intent to either arrest or search. 16

In a recent case of first impression, State v. Resler, 17 the Nebraska Supreme Court recognized the validity of the emergency exception in a medical assistance context. This Note will examine the emergency exception as adopted and applied by the Nebraska Supreme Court, and discuss the extent to which the exception comports with fourth amendment guarantees.

II. THE RESLER DECISION

On the evening of December 10, 1979, the police responded to a call regarding a prowler at an apartment complex. 18 An officer arrived at the scene and was investigating the complaint when a shot was fired. 19

Apparently, before the police arrived, a different tenant in the apartment complex had observed a prowler outside his window. 20 This tenant obtained his .22 calibre rifle and followed the prowler. After observing the prowler enter an apartment, he waited behind a fence for the prowler to reappear. When the prowler came out, the tenant warned him to stop or be shot. The prowler then started running, and the tenant fired a shot at him. 21 The prowler fell to his knees, but he immediately got back on his feet and continued running. 22

By this time, the officer who had responded to the complaint arrived at the scene of the shooting. He and the tenant were joined

18. Id. at 250, 306 N.W.2d at 920. The apartment complex was a series of 16 free-standing rowhouse style buildings in two parallel lines. Each building contained three or four separate units. At the rear of each apartment was a sliding glass patio door opening onto a patio deck. The complainant had called in regard to noises she had heard in the lower level of her apartment.
20. 209 Neb. at 251, 306 N.W.2d at 920.
22. 209 Neb. at 251, 306 N.W.2d at 921. It was not known whether the prowler fell to his knees because he had been shot or because he was trying to elude gunfire. Id.
by two other civilians in a chase down the street after the prowler until the prowler jumped a picket fence and the pursuers lost sight of him. The tenant who had shot at the prowler identified him as an occupant of another of the apartment units. Although two police cruisers searched the area for a time following the chase, the prowler was not found.

After reorganizing outside of the alleged prowler's apartment, the officers placed a call to an investigator in the police department who had asked that he be informed of any incidents relating to the alleged prowler. When the investigator arrived, he was briefed of the events that had occurred. Witnesses stated that they had not noticed any unusual activity around the apartment. No lights were on, although the apartment door was standing open. At this point, the investigator decided to enter the apartment to render 23. Id. 24. Brief of Appellant at 9. 25. 209 Neb at 251, 306 N.W.2d at 921. The neighbor who had fired at the prowler testified that he recognized the prowler as a tenant of the defendant's apartment, although at the time of the chase he did not know him by name. The neighbor's knowledge was based on having seen the defendant coming in and out of the apartment and working on his automobile near the apartment. Id. 26. Brief of Appellant at 10-11. In addition, an officer on foot searched the area for five or six minutes but did not find the prowler. Id. at 10. 27. 209 Neb. at 251, 306 N.W.2d at 921. An investigator called to the scene later testified that he knew the apartment belonged to the defendant. Brief of Appellant at 14. However, the police officers thought that the defendant was living with his mother in the northern part of the city. Brief of Appellee at 8. 28. 209 Neb. at 251, 306 N.W.2d at 921. Investigator Steven Murphy had requested that officers notify him of any incidents involving the defendant because the defendant was a suspect in a series of unsolved offenses in Hastings that Murphy was investigating. Id. at 250, 306 N.W.2d at 920. 29. Brief of Appellant at 13-14. The defendant's apartment was located next to the apartment of the initial complainant. Brief of Appellee at 7. The complainant had dressed and gone outside after the shot was fired. She was outdoors in the vicinity of the apartment during the entire investigation and saw no activity. Brief of Appellant at 11-12. Also, the initial responding officer returned to the area of the apartment after losing sight of the prowler while the police cruisers conducted a search and saw no activity in the defendant's apartment. Id. at 12. 30. Brief of Appellee at 5. Although the decision does not discuss the possibility of justifying the intrusion on the basis of necessity to secure property, such intrusions have been recognized by the lower courts if the facts suggest an emergency threat to property. See United States v. Zurosky, 614 F.2d 779 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980) (warrantless search justified when police observed suspicious activity by person inside a lighted warehouse in early morning hours). But see United States v. Selberg, 630 F.2d 1292 (8th Cir. 1980) (open door without suspicions of criminal activity within did not justify entry to secure property). For a summary of cases involving warrantless entries to protect property, see Note, The Emergency Doctrine, Civil Search and Seizure, and the Fourth Amendment, 43 Fordham L. Rev. 571, 584-588 (1975).
medical aid to the prowler.\textsuperscript{31} No one was present in the apartment; however, the officers observed in plain view, items they knew to be connected with previous crimes.\textsuperscript{32}

Based on the items observed in plain view, the officers obtained a search warrant and seized the items on December 11, 1979.\textsuperscript{33} Following this seizure, an arrest warrant was issued, and Resler was arrested sometime after December 11, 1979.\textsuperscript{34}

The defendant entered a plea of not guilty to charges of burglary, criminal attempt, and first degree forcible sexual assault.\textsuperscript{35} At a jury trial he was found guilty of four counts of burglary and two counts of first degree forcible sexual assault.\textsuperscript{36} The defendant appealed his conviction from the jury verdict to the Nebraska Supreme Court, primarily asserting that the trial court erred in not suppressing evidence seized under a search warrant issued on the basis of items that had been observed in plain view during an illegal entry into his apartment.\textsuperscript{37} This claim was based on the "fruit of the poisonous tree"\textsuperscript{38} doctrine, which provides that evidence must be excluded if it is obtained from, or closely connected with, evidence obtained in an illegal search or seizure.\textsuperscript{39} In a unanimous

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\item \textsuperscript{31} 209 Neb. at 252, 306 N.W.2d at 921. Investigator Murphy believed that the defendant was shot and in need of first aid. \textit{Id.}
\item \textsuperscript{32} \textit{Id.} Testimony revealed that the officers saw a guitar in the kitchen and several pairs of ladies panties in the living room and in one bedroom. Brief of Appellee at 9. These items were linked to previous unsolved burglaries and sexual assaults. 209 Neb. at 252, 306 N.W.2d at 921.
\item \textsuperscript{33} \textit{Id.} A second search warrant was issued and served on December 13, 1979. This warrant was required to seize additional items not covered by the first search warrant. \textit{Id.}
\item \textsuperscript{34} \textit{Id.} at 257, 306 N.W.2d at 920. After the initial search of defendant's apartment pursuant to the warrant, the officers went to the defendant's mother's home to look for the defendant. Brief of Appellant at 15. Defendant was at his mother's home and, although questioned, was not arrested until later. \textit{Id.}
\item \textsuperscript{35} Brief of Appellant at 2.
\item \textsuperscript{36} 209 Neb. at 249, 306 N.W.2d at 920. The trial began on July 14, 1980 and was concluded on July 15, 1980. Appellant was sentenced on October 9, 1980 to the Nebraska Penal and Correctional Complex for a term of not less than 6 years nor more than 10 years on each conviction of burglary, and for a term of not less than 10 years nor more than 15 years for each conviction of first degree sexual assault, each sentence to be served concurrently. \textit{Id.} at 249-50, 306 N.W.2d at 920. None of the burglary convictions were for the prowling incident of December 10-11, 1980. Brief of Appellant at 15-17.
\item \textsuperscript{37} 209 Neb. at 250, 306 N.W.2d at 920. Further assignments of error reviewed on appeal were whether the trial court erred in not granting a motion for directed verdict on the grounds of insufficient evidence and whether the sentences imposed were excessive. The Nebraska Supreme Court found that sufficient evidence existed upon which the jury could convict, and that the trial court had not abused its sentencing discretion. \textit{Id.} at 258-59, 306 N.W.2d at 924-25.
\item \textsuperscript{38} Nardone v. United States, 308 U.S. 338, 341 (1939).
\item \textsuperscript{39} Wong Sun v. United States, 371 U.S. 471 (1963) (a search cannot be justified
decision, the Nebraska Supreme Court upheld the warrantless entry into the defendant's apartment based upon the "emergency exception" and affirmed the defendant's conviction.40

In reaching its decision, the court adopted emergency exception guidelines expressed in the two leading cases of Root v. Gauper41 and People v. Mitchell.42 The Gauper case articulates the recognized procedural guidelines for the application of the emergency exception. These are as follows: (1) since the doctrine is an exception to the ordinary fourth amendment requirement of obtaining a warrant before entry into a home, the state has the burden of proving that the warrantless entry fell within the exception; and (2) the police officer's belief that an emergency situation existed, giving rise to the warrantless entry, should be tested by an objective standard.43

The court in Mitchell enunciated the following three substantive elements to be applied in determining if the situation justified a warrantless emergency entrance:

1. The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest or seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.44

The Nebraska Supreme Court found that the facts in Resler sat-

40. 209 Neb. at 258, 306 N.W.2d at 924.
41. 438 F.2d 361 (8th Cir. 1971). In Gauper, the court held that the officers did not have reason to believe an emergency existed at the time of entry where the sheriff and town marshal knew prior to entering the house that the shooting victim had been removed to the hospital, and no evidence suggested any other persons were in need of aid.
42. 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246, cert. denied, 426 U.S. 953 (1976). The Mitchell court held that the emergency doctrine justified entry into the defendant's hotel room to look for a hotel maid who disappeared shortly after reporting to work.
43. Root v. Gauper, 438 F.2d 361, 364 (8th Cir. 1971). Accord, Terry v. Ohio, 392 U.S. 1, 21-22, 27 (1968) (stop and frisk legal as officers reasonably concluded person frisked might be armed and dangerous); United States v. Jeffers, 342 U.S. 48, 51 (1951) (seizure of narcotics was illegal where access to rooms was gained in absence of defendant and occupants); McDonald v. United States, 335 U.S. 451, 456 (1948) (conviction for operating illegal lottery reversed as a result of evidence obtained in illegal search).
satisfied the Mitchell and Gauper principles. In determining that the officers had a reasonable belief that an emergency existed, the court relied on the facts that the defendant had fallen to the ground when the shot was fired and that the defendant's apartment door was open without explanation. According to the court, these facts supported the investigator's conclusion that the defendant was wounded and had returned to the apartment too weak to either close the door or turn on any lights.

The court also determined that police behavior while in the apartment made it clear that the officers entertained no intent to arrest the defendant or search his apartment. The police stayed only long enough to determine whether the defendant was present and made no effort to seize any incriminating evidence, including that located in plain view. In addition, the court pointed to the fact that the defendant was not arrested the following morning when located at his mother's house. The court found that these facts supported the officers' claim to have entered to render medical assistance.

Finally, the court concluded that a reasonable basis existed connecting the apartment with the emergency since it was reasonable to believe that a person shot in the area of his own apartment would seek cover there. Thus the court held that the entrance into the defendant's apartment was based upon one interest: "providing Resler with emergency aid, if necessary."

III. ANALYSIS

The generally recognized exceptions to the warrant requirement are utilized in the context of criminal investigation and law enforcement. In contrast, the emergency exception is employed

45. 209 Neb. at 257, 306 N.W.2d at 923. See supra note 22 and accompanying text.
46. 209 Neb. at 257, 306 N.W.2d at 923. See supra note 30 and accompanying text.
47. 209 Neb. at 257, 306 N.W.2d at 923-24.
48. Id. at 257, 306 N.W.2d at 924.
49. Id. See supra note 32 and accompanying text. It is not clear why the officers did not seize the items located in plain view since they apparently would have been justified in doing so, assuming the entry was lawful. See Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971); supra note 12.
50. 209 Neb. at 257, 306 N.W.2d at 924. See supra notes 27, 34 and accompanying text.
51. 209 Neb. at 258, 306 N.W.2d at 924.
52. Id.
53. Id.
54. See supra notes 6-12 and accompanying text.
in both criminal and noncriminal contexts. It is couched in terms of paternalism and benevolence and is used to effect the protection of human life. Perhaps the unique, noncriminal aspect of the exception has furthered its seemingly unqualified acceptance by lower federal and state courts, including the Nebraska Supreme Court. However, reluctance by the courts to question the use of the emergency exception because of its relationship to the preservation of human life renders the exception a source of potential and possible loss or destruction of evidence); Warden v. Hayden, 387 U.S. 293, 298-99 (1967) (doctrine of hot pursuit allows warrantless searches when to delay an investigation would endanger the lives of officers or others).


57. See Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963) (alternative holding) ("The need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal . . . ."); Davis v. State, 236 Md. 389, 396, 204 A.2d 76, 80 (1964), cert. denied, 380 U.S. 988 (1965) ("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.").

58. See supra note 15.

59. In Wayne v. United States, 318 F.2d 205 (D.C. Cir. 1963), Chief Justice Burger, then sitting on the bench of the Court of Appeals for the District of Columbia, discussed the necessity for swift action when police are confronted with a possible emergency situation:

[A] warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person. The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. Fires or dead bodies are reported to police by cranks where no fires or bodies are to be found. Acting in response to reports of 'dead bodies,' the police may find the 'bodies' to be common drunks, diabetics in shock, or distressed cardiac patients. But the business of policemen and firemen is to act, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process. Even the apparently dead often are saved by swift police response. A myriad of circumstances could fall within the terms "exigent circum-
abuse of established fourth amendment guarantees.

One author has suggested that any exception to the warrant requirement "should be defined so precisely that police officers are unlikely to believe the exception applies to a situation when it does not."60 Such specificity would facilitate the successful prosecution of valid complaints and protect citizens' demands that their privacy not be unlawfully invaded by public officials.61 As stated and applied in State v. Resler, however, the emergency exception is imprecise and vague, and therefore does not protect either state or private interests. Specifically, the exception is problematic in two major respects: (1) the broad scope of the requirement that a reasonable belief of an emergency exists,62 and (2) the focusing upon benevolent police intent to determine the legality of a warrantless search.63

A. Reasonable Belief an Emergency Exists

The first element of the emergency exception requires that the police have valid reasons for the belief that an emergency exists.64 Although this element further requires that the police must believe there is an immediate need for their assistance to protect life or property,65 this aspect is frequently ignored by the courts in applying the exception.66

The Resler opinion exemplifies this deficiency in analysis. The court did not address whether the officers were confronted with the type of factual situation demanding immediate entry, nor did

stances', e.g., smoke coming out a window or under a door, the sound of gunfire in a house, threats from the inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.

... That such an entry would be an intrusion is undoubted but here we reach the balancing of interests and needs. When policemen, firemen or other public officers are confronted with evidence which would lead a prudent and reasonable official to see a need to act to protect life or property, they are authorized to act on that information, even if ultimately found erroneous.

Id. at 212 (citation omitted).


61. Id. at 1472-73. Cf. Williamson, The Supreme Court, Warrantless Searches, and Exigent Circumstances, 31 Okla. L. Rev. 110 (1978), in which the author discussed the difficulty in arriving at a solution to the various problems facing courts and law enforcement officials in the application of the fourth amendment warrant requirement exceptions.

62. See infra notes 64-66 and accompanying text.

63. See infra notes 87-100 and accompanying text.

64. See supra note 44 and accompanying text.

65. Id.

the court critically examine the important fact that the defendant was a prime suspect for several unsolved crimes. These types of omissions may lead to the following problems in the application of the emergency exception: (1) there may be directly conflicting results with respect to the facts which legally constitute an emergency,\(^6\) (2) warrantless entries may be upheld based on facts suggesting trivial medical problems, which are nevertheless categorized as emergencies,\(^6\) (3) the exception may become an alternative to law enforcement officials to use as an investigative device to gain entry into a suspect's home without a showing of probable cause or possession of a warrant.\(^6\)

An examination of the facts in Resler reveals the flexibility in the determination of an emergency. Although the court upheld the entry, the focus on different or additional facts could have easily resulted in a contrary outcome. In summarizing the facts supporting the reasonable belief that an emergency existed, the court focused on the facts that the defendant may have been shot, that he had fallen to the ground when the gun was fired at him, and that his apartment door was open without apparent explanation.\(^7\) Relying only upon these facts, the investigator's belief of an emergency may not have been unreasonable. However, there were additional relevant facts surrounding the shooting which the court apparently ignored in determining the reasonable belief of an emergency. Specifically, the only evidence that the defendant may have been shot was that he fell to his knees. Significantly, the defendant immediately regained his balance, ran several blocks, and

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67. An examination of what might be classified as the "dead body" cases reveals the extent to which contrary decisions result due to the flexibility in the element of emergency. These cases involve situations in which police were alerted to an "emergency" due to the odor of decomposing flesh. In People v. Brooks, 7 Ill. App. 3d 767, 289 N.E.2d 207 (1972), police were dispatched to defendant's residence after reports that defendant's mother was missing, that an unusual odor existed in the hallway, and that the odor appeared to be emanating from defendant's apartment. Upon arrival, the officers identified the odor as that which usually accompanies a dead body. The court deemed these facts sufficient to create a reasonable belief that an emergency existed and thereby justified a warrantless entry. Id. at 775, 289 N.E.2d at 213. See also People v. Lovitz, 39 Ill. App. 3d 624, 350 N.E.2d 276 (1976) (odor of decaying flesh justified an emergency entrance). But see Condon v. People, 176 Colo. 212, 489 P.2d 1297 (1971), where the court held that the odor of a decomposing body did not justify an emergency entrance. The court found that the officers had no reason, based only upon belief of an odor of a decomposing body, to effect a warrantless entry. As the court stated: "To put the matter sharply, if there had been a decomposing body, there would be no hope of revival at any rate." Id. at 219, 489 P.2d at 1300.

68. See infra notes 72-76 and accompanying text.

69. See infra notes 77-80 and accompanying text.

70. See supra notes 45-47 and accompanying text.
jumped a picket fence, effectively eluding the four persons chasing him. Based upon these facts, the court could have determined that no "emergency" existed.

This potentially conflicting determination of the existence of an emergency is not the result of differing factual interpretations, but rather the result of employing a different set of facts to reach that determination. The Resler court's focus on one set of facts, to the exclusion of other, significant facts, provides no guidance for future decisions regarding the kinds of facts which are relevant to the issue of a reasonable belief of an emergency. Furthermore, to fully protect fourth amendment values, the court should have focused upon the facts suggesting that an emergency did not exist. By failing to examine facts contradicting the existence of an emergency, the "reasonableness" of the investigator's belief is not wholly determined.

In determining the existence of an emergency, courts should also exclude trivial "emergencies" in order to fully protect fourth amendment guarantees and to avoid possible abuses of warrantless entries. Although persons who are not suspects in ongoing criminal investigations may be subject to the possible abuse of a warrantless entry based upon facts suggesting a trivial emergency, the real danger is in the realm of criminal investigation. In the noncriminal context, law enforcement officials presumably have less incentive to enter a household in the absence of facts suggesting that a serious emergency may exist. However, in the criminal context, entry based upon trivial emergency allows police to effectively avoid the requirement of a judicial determination of probable cause in situations where the facts do not demonstrate exigent circumstances.

71. See supra notes 21-24 and accompanying text.

72. For cases in which the courts found that the facts did not justify an emergency entrance because of a trivial emergency, see People v. Smith, 7 Cal. 3d 282, 496 P.2d 1261, 101 Cal. Rptr. 893 (1972) (entry effected to determine mother's presence and to see if she would require help in caring for her child not justified); Brewer v. State, 129 Ga. App. 118, 199 S.E.2d 109 (1973) (complaint of loud noise and music did not create emergency). Cf. State v. Rodgers, 573 S.W.2d 710 (Mo. Ct. App. 1978) (emergency entry into home in response to report of dead body where search did not begin until premises were known to be clear not justified).

73. The following cases illustrate police entrances based on the emergency doctrine in which the courts found exigent circumstances did not exist: Root v. Gauper, 438 F.2d 361 (8th Cir. 1971) (warrantless entry of home by law enforcement officials who knew shooting victim had been removed to hospital not justified); United States v. Davis, 423 F.2d 974 (5th Cir.), cert. denied, 400 U.S. 836 (1970) (entry and search of premises three and one half hours after defendant arrested not justified); Nelson v. State, 96 Nev. 363, 609 P.2d 717 (1980) (when sole reason child was unattended was that police had arrested mother and created need to enter home, no emergency existed); State v.
For example, in *People v. Roberts,*\(^7^4\) the police were summoned to investigate the burglary of a music store. The night of the burglary, a suspicious vehicle was seen in the area, and the vehicle and its owner were identified by a witness. When police arrived at the suspect's apartment, they were informed by neighbors that the occupant had been ill. The police received no answer after knocking on the door, but testified that they heard moaning coming from within the apartment. Their subsequent entry was justified as one necessary to render medical assistance to the occupant/suspect.\(^7^5\) Thus a trivial emergency, such as illness, was accepted by the court as a valid justification for avoiding the warrant requirement. The fact that the occupant was a suspect was not given extra attention by the court.

Because of the possibility that the defendant in *Resler* had sustained a gunshot wound, the case is not as clearly indicative as *Roberts* of the way in which a trivial emergency can prompt and justify avoiding the warrant requirement. However, *Resler* does create a question as to the significance which should be attached to the alleged victim's deliberate avoidance of assistance.\(^7^6\) In determining whether a warrantless entry was truly the result of a reasonable belief in the existence of an emergency, courts should be wary of a police entry into a dwelling for a supposed medical emergency, when the victim has made clear that assistance is not wanted.

The failure of the Nebraska Supreme Court to deal with the issue that the defendant was a suspect in other crimes\(^7^7\) enhances the possibility for abuse in using the emergency exception to justify warrantless entries. In cases involving known criminal suspects, the courts need to carefully scrutinize the existence of an emergency. Fourth amendment values are protected by requiring that probable cause be determined by a "neutral and detached magistrate... [and not] by the officer engaged in the often competitive enterprise of ferreting out crime."\(^7^8\) If exigent circum-

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\(^7^4\) *Beede,* 119 N.H. 620, 406 A.2d 125 (1979) (delay of five hours suggested lack of exigent circumstances).

\(^7^5\) *47 Cal. 2d* 374, 303 P.2d 721 (1956).

\(^7^6\) Having determined that the entry was lawful to render aid, the court upheld the officers' actions in entering each room to look for the occupant. The occupant was not in the apartment; however, officers located a radio, in plain view, which matched the description of property stolen in the burglary. *Id.* at 376, 303 P.2d at 722. The court stated: "The fact that abuses sometimes occur during the course of criminal investigations should not give a sinister coloration to procedures which are basically reasonable." *Id.* at 380, 303 P.2d at 724.

\(^7^7\) *See supra* text accompanying notes 22-24.

\(^7^8\) *See supra* note 28 and accompanying text.

\(^7^9\) *Johnson v. United States,* 333 U.S. 10, 14 (1948). In *Johnson,* the Court found that the officers had probable cause to believe that the defendants were vio-
stances demand, a search can be conducted without the detached determination of probable cause, providing, however, that probable cause exists. When the emergency exception, is employed to search the home of a criminal suspect, the government is given an easy opportunity to avoid the probable cause requirement and the warrant rule. As "[t]he right of officers to thrust themselves into a home is . . . [of] grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance," the courts must protect citizens from the use of the emergency entrance to avoid compliance with fourth amendment requirements. This protection can be ensured by imposing a greater burden of proof on the government when a criminal suspect is involved. Other constitutional guarantees have been deemed important enough to require greater burdens of proof by the government in order to assure that the rights are maintained. For example, in the context of the fifth amendment guarantee against self-incrimination, the United States Supreme Court has recognized a presumption against waiver. Although

79. See Carroll v. United States, 267 U.S. 132, 156 (1925). ("In such cases where the seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause."). See supra notes 6-13 and accompanying text.


81. U.S. CONST. amend. V provides in pertinent part: 

82. Miranda v. Arizona, 384 U.S. 436 (1966). In Miranda the Court stated: "This Court has always set high standards of proof for the waiver of constitutional rights . . . and we re-assert these standards as applied to in-custody interrogation." Id. at 475. Quoting from Carnley v. Cochran, 369 U.S. 506, 516 (1962), the Court went on to state: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Id. Miranda established protective devices to safeguard against the potential for unlawful compulsory self-incrimination during custodial interrogation. Id. at 467. For earlier cases addressing the waiver of constitutional rights, see Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) ("To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand."); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 307 (1937)) ("Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . we do not presume acquiescence in the loss of fundamental rights.").
warrantless searches or seizures do not require a waiver of one's rights, case law suggests that when the government is in a position to subvert constitutional rights, as with the fifth amendment rights, the government has a greater burden of proof to establish that an infraction of those rights did not occur.\textsuperscript{83} The ease with which the emergency exception allows police entries by subterfuge justifies placing a presumption against the government and exacting a greater burden of proof as to the officer's reasonable belief in the existence of an emergency when the case involves a criminal suspect.

A second area in which constitutional rights are afforded greater protection in certain circumstances is in the standards of review used in due process analysis. The Supreme Court applies strict scrutiny in examining legislation affecting fundamental constitutional rights.\textsuperscript{84} Also, in equal protection analysis, the Court applies strict scrutiny to legislation which discriminates against certain individuals or groups, i.e., suspect classifications.\textsuperscript{85} Strict scrutiny entails a determination that the classification is "necessary to promote a 'compelling' or 'overriding' interest of government."\textsuperscript{86} Clearly there is ample authority for stricter analysis than is generally accorded constitutional rights when those rights arise in situations in which government action can readily subvert the constitutional protections.

B. The Required Intent

The Nebraska Supreme Court has limited the use of the emergency exception to the extent that the state must prove that the warrantless entry was induced by benevolent motives rather than to further criminal investigation.\textsuperscript{87} This requirement is the court's

\textsuperscript{83} See cases cited supra notes 78-80, 82.

\textsuperscript{84} See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (right to marital freedom); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy). Fundamental rights are given greater protection because "[t]hese are rights which the Court recognizes as having a value so essential to individual liberty" that they justify an intrusive standard of review. J. Nowak, R. Rotunda, J. Young, \textit{Constitutional Law} 416, 418, 524 (1978).


\textsuperscript{86} J. Nowak, R. Rotunda, J. Young, supra note 84, at 535. Strict scrutiny is applied because "[b]urdening someone because of his national origin or status as a member of a racial minority runs counter to the most fundamental concept of equal protection." \textit{Id.}

\textsuperscript{87} See supra notes 44, 48-51 and accompanying text. An opposite result was reached in State v. Hardin, 90 Nev. 10, 518 P.2d 151 (1974), in which the Nevada Supreme Court sanctioned use of the emergency exception to justify
attempt to ensure that the exception complies with the United States Supreme Court mandate that an exception to the warrant requirement must be justified by more than a public interest in stopping or regulating criminal activity. The problems in requiring the state to justify a warrantless entry by proving that the officers entertained the requisite intent are twofold: first, the interrelationship between the element of emergency and the element of intent renders the element of intent useless as a limitation on abuse; second, reliance on the element of police intent directs the court’s focus away from factors traditionally utilized in the determination of the validity of fourth amendment exceptions.

The benevolent intent element does not serve to protect against police entries by subterfuge because of the close connection between determining whether an emergency existed and whether the officer entertained the requisite intent. The Resler opinion demonstrates this problem. In Resler, the elements of emergency and intent were stated and analyzed separately by the court.

entry into a locked hotel room during an investigation of a murder that took place in the hotel. The court suggested that the officers were confronted with a type of situation in which they reasonably feared the perpetrator was a substantial threat to life and might kill again if not apprehended. The officers knocked on a hotel room door which was located next to the room in which the murder took place. The occupant did not respond to the officer's knocking. The court accepted the officers' testimony that they had obtained a passkey from the hotel manager and entered the room because they thought it essential to interview the person whose room was located next to the murder scene and they did not know if the occupant was “asleep, drunk, or merely attempting to avoid visitors.” Thus, the emergency exception justified entry into a private area to protect persons from the possibility of future criminal activity.

See Mincey v. Arizona, 437 U.S. 385 (1978), where the Supreme Court refused to recognize Arizona's proposed “murder scene exception.” Arizona argued that the scene of a murder could be justifiably searched without warrant because a murder investigation requires immediate action and the crime of murder is extremely serious. The Court rejected these arguments, stating:

"The mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."

See infra notes 91-96 and accompanying text.

See infra notes 97-102 and accompanying text.

“The subterfuge characterization may result from the finding that the purported reason for entry ... was in fact only an excuse to gain access for the dominant purpose of finding evidence.” 2 W. LaFAve, SEARCH AND SEIZURE § 617(d), at 491 (1978).

See supra text accompanying notes 44-51.
The facts relevant to the intent issue were that the officers at the scene did not immediately enter the defendant's apartment; rather, they notified an investigator of the evening's events in accordance with the investigator's previous request. These facts suggest that the police decision to enter the defendant's apartment may have been influenced by their previous suspicions regarding the defendant. The Nebraska court did not discuss this possibility in its analysis of the intent element. Rather, the court emphasized that the police activity after entering the apartment supported their claimed motive for entering. The court found that because the police did nothing illegal after entering the defendant's apartment and postponed arresting the defendant until after conducting a search pursuant to a warrant, they harbored the proper noninvestigative motive. It is not readily apparent why police conduct after entering the apartment was deemed more significant than police conduct and knowledge before making the decision to enter. A more logical approach to determining police intent in making the entry would be to focus on police behavior prior to the entrance. Behavior such as a delay in entry would seem significant in determining whether the police entered with the intent to render emergency medical aid or to investigate.

Despite the Resler court's formal separation of the emergency and intent elements, its analysis suggests that once the determination has been made that an emergency existed, the determination of intent is easily disposed of, regardless of the facts surrounding the entry. This approach has the undesirable result of broadening the availability of the emergency doctrine to effect warrantless entries for criminal investigation.

Although a separate examination of the two elements could facilitate the recognition of situations in which the emergency entrance was not justified, this alternative does not totally satisfy concerns for government abuses of fourth amendment protections. Cross-examination of a police officer to determine his intent in effecting a warrantless entry is unlikely to result in a confession of an attempt to avoid the probable cause requirement. A more suitable approach would be to recognize that benevolent intent is irrelevant for purposes of justifying use of this exception to the fourth amendment.

93. See supra note 28 and accompanying text.
94. See 209 Neb. at 257, 306 N.W.2d at 924; supra notes 48-51 and accompanying text. It would seem that the delay in arrest was necessary in order to conclude the search upon which the arrest warrant was issued.
95. While this result may be questionable in the criminal context, in the noncriminal context it would be unusual for a court to ever determine improper intent after determining an emergency existed. In the noncriminal context, nothing in the record could suggest any motive other than to render emergency aid.
One commentator has suggested that "[w]hile 'improper' motivation has been recognized as a factor in declaring a search unconstitutional, 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."97 Rather, "[i]t is the individual's interest in privacy which the [Fourth] Amendment protects, and that would not appear to fluctuate with the 'intent' of the invading officers."98 An examination of the established exceptions to the warrant requirement99 suggests that two factors are important in determining whether searches are within the boundaries of an exception. These two factors are: (1) the officers must be presented with a situation in which there is a legitimate need to search, and (2) the situation must be one in which obtaining a warrant would frustrate the purpose of the search.100

97. Id. at 269 (citing Coolidge v. New Hampshire, 403 U.S. 443, 469-70 n.26 (1971)). In Coolidge, the Supreme Court rejected the argument that evidence obtained as a result of a warrantless search of an impounded vehicle was admissible under the plain view doctrine. One requirement of the doctrine of plain view, as enunciated in a plurality opinion by Justice Stewart, is that the discovery be inadvertent. Id. at 469-71. Thus, if police have an improper motive such as knowing in advance the location of evidence and intending to seize it, the evidence seized, although in plain view, will be inadmissible. Id.

The limitation may have some significance to an emergency entrance arguably effected to avoid the requirement of probable cause. The importance of the doctrine of inadvertent plain view in that context would ultimately depend upon the degree of expectation permitted in order for the discovery to be inadvertent. For a general discussion of the divergent views on possible degrees required, see Comment, "Plain View"—Anything But Plain: Coolidge Divides the Lower Courts, 7 Loy. L.A.L. Rev. 493, 510 (1974).

99. See supra notes 7-12 and accompanying text.
100. See United States v. Santana, 427 U.S. 38 (1976), wherein the Court stated: In Warden v. Hayden . . . we recognized the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons . . . . Once Santana saw the police, there was likewise a realistic expectation that any delay would result in the destruction of evidence. Id. at 42-43 (citation omitted) (emphasis added). See also Chambers v. Maroney, 339 U.S. 42, 50-51 (1970) (emphasis added) ("[T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable."); Terry v. Ohio, 392 U.S. 1, 20 (1968) (emphasis added) ("[W]e 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."); Carroll v. United States, 267 U.S.
FOURTH AMENDMENT PROTECTIONS

The state's interest underlying the emergency exception is the necessity to preserve human life. Admittedly, this is a legitimate interest. Therefore, if a reasonable belief exists that this interest can be protected, the state will have met its burden of establishing a legitimate need to search. In addition, however, the state must prove that this interest would be frustrated if the officers were to delay rather than make immediate entry. This requirement further tightens the element of emergency. If a criminal suspect is involved, the court should apply even stricter scrutiny. Applying these factors would rid the court of the necessity of deciding the legality of an entrance based only upon the ambiguity of emergency and the subjective intent of a police officer.

IV. CONCLUSION

The recent Supreme Court case of Mincey v. Arizona reaffirmed the necessity of the warrant requirement. To preserve the policy of the warrant requirement that the decision whether to search is best made by a neutral magistrate, exceptions to the warrant requirement need to be carefully and narrowly stated and applied.

The Nebraska Supreme Court recognized that fourth amendment protections were at stake in Resler, but the circumstances under which it adopted the emergency exception to the warrant requirement revealed a willingness to weaken the protections in favor of a broadly defined emergency, with benevolent police intent. Additionally, the court failed to address the possibility of exploitation of the exception in the criminal investigation context. "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." Whether the circumstances surrounding the warrantless entrance are criminal or noncriminal, the court must carefully guard fourth amendment protections.

Gail V. Perry '83

102. See supra notes 77-86 and accompanying text.
104. Id. at 390. See supra note 88.
105. See supra note 4.
106. 209 Neb. at 253, 306 N.W.2d at 921; see supra text accompanying notes 37-44.