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Notes

Armed Standoffs and the Warrant Requirement

EDWARD H. ARENS*

The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house...is an imprisonment.'

I looked out the back window and there was a fellow there kneeling, dressed in black with a shotgun pointed at the house. And I then went to the side window and looked out the side window and saw a man there with a machine gun...'

INTRODUCTION

William Bing had lost his job, broken up with his girlfriend, and gone on a binge of drinking and huffing drugs.3 Adding insult to injury, neighborhood kids would spend hours taunting Bing outside his house.4 By late afternoon on October 12, 2002, Bing had endured enough.5 He took a gun, went outside, and fired shots into the air.6 Neighbors called the police, who soon arrived and ordered Bing, who had since gone back inside, to come out and talk with them.7 Bing, however, refused to leave his house.8

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1. 1 WILLIAM BLACKSTONE, COMMENTARIES *1, *136.
4. Id.
5. Id.
7. Id. at 558-59.
8. Estate of Bing, 373 F. Supp. 2d at 774.
By then police were already drawing a perimeter around the house.\textsuperscript{9} Within the hour a Strategic Weapons and Tactics (SWAT) team arrived to force Bing out.\textsuperscript{10} They began by tossing a tactical phone through Bing's window.\textsuperscript{11} When Bing refused to talk with them, they fired pepper gas into the house.\textsuperscript{12} Bing choked on the fumes but did not surrender.\textsuperscript{13} The SWAT team then broke down the front door with a battering ram, shone a spotlight through the opening, and tossed a flash-bang grenade through the bedroom window.\textsuperscript{14} Still Bing refused to yield.\textsuperscript{15} The SWAT team finally assaulted the house and killed Bing when he resisted.\textsuperscript{16} The flash-bangs from the raid sparked a fire, burning the house to the ground.\textsuperscript{17} There was no warrant to arrest Bing, as nobody had sought one.\textsuperscript{18}

The Supreme Court's decision in \textit{Payton v. New York} forbids police from arresting suspects in their homes without a warrant or compelling excuse.\textsuperscript{19} Applying this principle to people like Bing, however, presents significant Fourth Amendment problems. First, it is not clear when the Fourth Amendment applies to police standoffs. Do police seize barricaded suspects simply by surrounding a house? Or does the suspect remain free until he or she surrenders or is physically subdued? Second, \textit{Payton} excuses a warrantless arrest when exigent circumstances would have made getting a warrant impractical or dangerous.\textsuperscript{20} Barricaded suspects, however, can hold out for days on end. Under these circumstances, at what time does it become untenable for police to not have a warrant? Put another way, can time alone terminate an exigency?

This Note explores these important questions. Part I discusses the origins of \textit{Payton} and examines its result. Part II examines the development of the Court's Fourth Amendment seizure and exigent circumstances doctrines. Part III surveys the causes and characteristics of barricade situations and police procedures for resolving them. Part IV examines how the lower courts have applied \textit{Payton} to home standoffs. Finally, Part V proposes a new Fourth Amendment framework for handling encounters with barricaded suspects. First, a suspect is seized when he is surrounded in his home and no longer free to ignore the police. Second, courts should presume a warrant requirement when the

\textsuperscript{9} Id. at 773.
\textsuperscript{10} Estate of Bing, 456 F.3d at 560.
\textsuperscript{11} Id. at 561.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id. at 562.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 564.
\textsuperscript{19} 445 U.S. 573, 585, 590 (1980).
\textsuperscript{20} Id.
ARMED STANDOFFS AND WARRANTS

police have time to plan for a standoff. When an unanticipated standoff occurs, however, exigent circumstances last for so long as the police are too busy to seek a warrant.

I. PAYTON V. NEW YORK AND THE ORIGINS OF THE WARRANT REQUIREMENT

In principle, the Fourth Amendment reaches "all invasions . . . of the sanctity of a man's home and the privacies of life." Yet before 1980 the government could enter a person's home without a warrant in order to make an arrest. With the states and federal circuits fractured on the constitutionality of this practice, the Supreme Court decided Payton v. New York, holding that the Fourth Amendment prohibits police from entering a suspect's home without a warrant or consent in order to effect his or her arrest. This decision is the basis for all further analysis of armed standoffs.

The Court had approached, but not resolved, the issue of warrantless home arrests prior to Payton. In 1948, the Court held in Johnson v. United States that warrantless searches of private homes are unconstitutional. In Coolidge v. New Hampshire, the Court had suggested in dicta that the same standard applied to arrests. Although the Court had upheld the constitutionality of warrantless seizures in public places in United States v. Watson, it had not decided whether to treat seizures in private places differently. Payton provided that opportunity.

22. See Payton v. New York, 445 U.S. 573, 598-99 (1980). At the time Payton was decided, twenty-three states had authorized warrantless home arrests, while fifteen states had prohibited the practice. Id. at 598 n.46. In addition, state and federal courts within the same jurisdiction had reached conflicting results. Compare People v. Payton, 380 N.E.2d 224, 225 (N.Y. 1978) (finding entry for purpose of making felony arrest, even without exigent circumstances, not a violation of the Constitution), with United States v. Reed, 572 F.2d 412, 423 (2d Cir. 1978) (holding that in the absence of a warrant, or exigent circumstances, federal law enforcement is barred by the Fourth Amendment from entering to make a felony arrest).
24. 333 U.S. 10, 16-17 (1948).
[T]he notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of one of a number of well defined "exigent circumstances."

Id. The Court had, again in dicta, made a similar observation in Jones v. United States. 357 U.S. 493, 499-500 (1958) (stating that warrantless nighttime entry to effect an arrest presents a "grave constitutional question"). Though both Jones and Coolidge had referred to nighttime entries, courts interpreted them loosely to apply equally to daytime entries. See Payton, 445 U.S. at 613 (White, J., dissenting).
27. See id. at 433 (Stewart, J., concurring).
In *Payton*, the Court considered warrantless home arrests made by police acting under a New York law that authorized police to enter private residences to make routine felony arrests.\(^8\) Beginning with the premise that arrest is "quintessentially a seizure"\(^2\) and therefore within the Fourth Amendment's rubric,\(^3\) the Court distinguished seizure on private premises from seizure in public areas,\(^3\) thereby declining to extend *Watson* to home arrests.\(^3\) The Court then addressed whether it should treat warrantless arrests more leniently than warrantless searches.\(^3\) While acknowledging that "the area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant[,]" the Court declined to make a distinction on these grounds.\(^3\) Instead, it laid a blanket prohibition: "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."\(^3\)

**II. Fourth Amendment Seizures and the Doctrine of Exigent Circumstances**

The line *Payton* drew, however, has been anything but firm. Courts applying *Payton* must resolve three important questions left unanswered in the opinion. First, under what circumstances is a person considered seized? Second, when seized, how does one determine on what side of the home's "threshold" the person was? And third, what are the exigent circumstances that excuse warrantless entry?\(^3\)

**A. Identifying the Moment of Seizure: Supreme Court Jurisprudence**

Not every interaction between the police and citizens implicates the Fourth Amendment.\(^37\) Rather, an encounter must rise to the level of a "seizure" to trigger constitutional scrutiny.\(^38\) At common law, seizure of

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29. Id. at 585 (quoting *Watson*, 423 U.S. at 428 (Powell, J., concurring)).
30. See id. at 585.
31. See id. at 586–89.
32. See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 Colum. L. Rev. 1739, 1764 (2000). *Watson's* balance of governmental and individual interests does not translate to private homes. *Payton*, 445 U.S. at 603 (Blackmun, J., concurring). Instead, where "the warrantless arrest is in the suspect's home, that same balancing requires that, absent exigent circumstances, the result be the other way." Id.
33. See *Payton*, 445 U.S. at 589.
34. Id.
35. Id. at 590.
the person was synonymous with arrest. The Court relaxed this standard in *Terry v. Ohio*, which expanded the seizure concept into two categories: arrests requiring probable cause, and stops based upon only reasonable suspicion. A person stopped by police could now be seized without having been arrested. The question then becomes what exactly the police must do to seize someone.

Under *Terry*, police could seize a person in two ways: through physical force or an intimidating show of authority. Seizing a person by physical force is easy to understand. The slightest application of force, such as merely laying a hand on the suspect, is a seizure. The only limitation is that the government must have acted purposely. Seizure, therefore, occurs only "when there is a governmental termination of freedom of movement through means intentionally applied." A fleeing suspect, for example, is seized when he crashes his car into a police roadblock designed to stop him, but is not seized when a pursuing police car accidentally runs into him.

The second way for police to seize a person is through a restraining show of authority. A street encounter with the police is the classic example. A policeman has every right to approach a person on the street to ask a question. But the citizen is similarly free to ignore the policeman and walk away. If the policeman then orders the citizen to stop (or draws his gun), the freedom is lost and the citizen seized. But what happens if the citizen starts running away?

The Court answered this question in *California v. Hodari D.*, holding that a person is not seized until he or she submits to the officer's show of authority. In *Hodari D.*, a young man had tossed aside some drugs while

40. 499 U.S. at 1.
41. Clancy, supra note 38, at 146-47.
42. *Terry*, 392 U.S. at 16.
43. *Id.* at 14; Clancy, supra note 38, at 161.
44. See Clancy, supra note 38, at 161.
47. *Id.* at 597.
48. *Id.* at 598-99 ("We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.").
52. See *id.* at 32-33 (Harlan, J., concurring).
53. See *id.* at 19 n.16 (demonstrating "a show of authority").
being chased by police officers.\textsuperscript{55} The question before the Court was whether the police had seized the defendant simply by chasing him. Writing for the majority, Justice Scalia began by observing that arrests are the "quintessential 'seizure of the person'" for Fourth Amendment purposes.\textsuperscript{56} He therefore turned to the common law of arrest to define the concept of seizure.\textsuperscript{57}

At common law, an arrest occurred when a police officer purposefully obtained custody over a suspect.\textsuperscript{58} Custody, in turn, entailed either physical touching of the person or submission to the officer's authority.\textsuperscript{59} The same was true for seizure, which at common law "connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control."\textsuperscript{60} From this, Scalia reasoned that no seizure could occur from mere pursuit: "An arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority."\textsuperscript{61} When a person does not submit to the show of authority, "there is at most an attempted seizure, so far as the Fourth Amendment is concerned."\textsuperscript{62} Therefore, police do not seize a resisting suspect unless they use physical force.\textsuperscript{63}

The problem with this seizure test is that it does not consider those times "when an individual's submission to a show of governmental authority takes the form of passive acquiescence."\textsuperscript{64} Submission can look a lot like consent. For example, a driver who pulls over during a traffic stop has interrupted her freedom of movement because of the flashing lights of a police car.\textsuperscript{65} This is clearly submission. But has the officer also seized the driver's passengers? They could not submit to the flashing lights because they were not driving. If they then stay in the car during the stop, did they consent to it, or submit to it?\textsuperscript{66}

\begin{thebibliography}{99}
\item 55. Id. at 623.
\item 56. Id. at 624.
\item 57. See id.
\item 58. Clancy, supra note 38, at 141.
\item 59. Id.
\item 60. Hodari D., 499 U.S. at 624.
\item 61. Id. at 626 (arguing that seizure "does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee.").
\item 63. See State v. Young, 717 N.W.2d 729, 742 (Wis. 2006).
Because Mendenhall and its progeny did not confront the situation where a person refuses to yield to a show of authority, the Hodari D. court found the Mendenhall test insufficient . . . [t]he Mendenhall test applies when the subject of police attention is either subdued by force or submits to a show of authority. Where, however, a person flees in response to a show of authority, Hodari D. governs when the seizure occurs.
\item 64. Id.
\item 65. Brendlin, 127 S. Ct. at 2405.
\item 67. The Court's (unanimous) answer is that a police officer seizes both the driver and her
\end{thebibliography}
The Court developed an objective seizure test in *United States v. Mendenhall* and *Florida v. Royer* to "tell[] when a seizure occurs in response to authority, and when it does not." Under this test, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." This "imprecise" standard assesses the coercive effect of police conduct, looking to both police actions and surrounding circumstances to decide whether an individual would reasonably feel restrained. Police seize a person when their conduct causes that person to reasonably believe "that he [is] not free to disregard the police presence and go about his business."

Even with this test, however, drawing the line between an innocent encounter and an impermissible seizure is often difficult. For instance, an airline passenger stopped by Drug Enforcement Agency (DEA) agents is "free to leave" even after the agents ask for her ticket and driver's license. If the agents keep her ticket, however, and ask her to accompany them to a police office, the passenger is seized.

The objective test also applies when the person's location makes dealing with the police oppressive. In considering the search of a bus passenger, the Court refused to say that the suspect had been "free to leave" because the suspect's "movement [had been] restricted by a factor independent of police conduct"—in other words, he was stuck on a bus. The Court likened the freedom to leave to the freedom to stay put: "[W]hen the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." Accordingly, "[i]n such a situation, the appropriate inquiry

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69. *Brendlin*, 127 S. Ct. at 2405.
72. Id. at 576.
73. See, e.g., *Mendenhall*, 446 U.S. at 560 n.1 (Powell, J., concurring) ("For me, the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two Government agents for her driver's license and ticket is extremely close.").
74. Id. at 555.
75. See *Royer*, 460 U.S. at 502-03; see also *Mendenhall*, 446 U.S. at 570 n.3 (White, J., dissenting) ("It is doubtful that any reasonable person about to board a plane would feel free to leave when law enforcement officers have her plane ticket.").
77. Id. at 435-36.
is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter."\(^\text{78}\)

Having defined a seizure, a second issue is to define the role of a seizure within the context of an arrest. “A seizure is a single act, and not a continuous fact.”\(^\text{79}\) Seizure caused by physical contact with a suspect, therefore, does not effect a continuing seizure if the suspect subsequently escapes.\(^\text{80}\) Once the suspect is free, the Fourth Amendment no longer applies to him.\(^\text{81}\) Where the suspect remains in custody, however, he or she remains seized. While seizure may be “a single act, and not a continuous fact[,] [p]ossession, which follows seizure, is continuous.”\(^\text{82}\)

B. THE LOCATION OF THE SUSPECT AT THE MOMENT OF SEIZURE GOVERNS WHETHER THE PAYTON WARRANT REQUIREMENT APPLIES

For Payton to apply to a given case, the arrestee must have been seized inside the threshold of his or her home. While the facts in Payton were clear enough for the Court to draw a “firm line” at the home’s threshold, different scenarios have led courts to adopt a more malleable standard. On the one hand, police may arrest suspects who stand in full view at the threshold of an open door and then retreat into the home.\(^\text{83}\) On the other hand, police need a warrant to arrest suspects who expose themselves involuntarily or under coercion.\(^\text{84}\) In United States v. Johnson, for example, Secret Service agents knocked on the suspect’s door and identified themselves with fictitious names.\(^\text{85}\) Once the suspect opened the door, the agents, with weapons drawn, revealed their true identities and arrested him.\(^\text{86}\) In addressing whether the arrest was made inside the home,\(^\text{87}\) the Ninth Circuit held that it is “the location of the arrested person, and not of the arresting agents, that determines whether an arrest occurs within [the] home.”\(^\text{88}\) To hold otherwise, the court observed, would allow the police to “avoid illegal ‘entry’ into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the

\(^{78}\) Id. at 436.
\(^{80}\) Id.
\(^{81}\) Id. (noting that had the youth been grabbed by the officer, broken free, and then thrown away the drugs, he would not have tossed the drugs in the course of an arrest).
\(^{82}\) Thompson, 85 U.S. (18 Wall.) at 471.
\(^{84}\) United States v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980).
\(^{85}\) Id. at 755.
\(^{86}\) Id.
\(^{87}\) The suspect was arrested when he “was first confronted by the agents with their guns drawn.” Id. The court reached this conclusion by determining if the suspect reasonably would have felt himself free to leave under the circumstances. Id. (citing Sibron v. New York, 392 U.S. 40, 67 (1968)).
\(^{88}\) Id. at 757.
'reach' of the arresting officers. Similarly, the Sixth Circuit has held that a suspect who emerges from his home in response to coercive police conduct has been arrested within the home. Therefore, the warrant requirement applies both when police enter a home without a warrant and when police force a suspect to leave his home under coercive circumstances. Because hostage/barricade incidents normally involve either police entry or forced surrender, Payton applies to nearly every instance. The inquiry, therefore, becomes not so much where the arrest took place, but when the arrest took place.

C. The Development of the Exigent Circumstances Exception to the Payton Warrant Requirement

The Court has "almost invariably accord[ed] deep respect" for privacy in the home, even in the presence of "weighty countervailing interests." The only interests important enough to be exceptions to the Payton warrant requirement are those based on exigent circumstances. Exigent circumstances are situations where the police must take immediate action without a warrant to effectively make an arrest. This section will discuss the formulation and scope of modern exigency doctrine, focusing on the two factors relevant to finding any exigency: danger and the need for immediate action.

1. Circumstances That Create an Exigency

In theory, exigency exceptions to the general warrant rule are few in number, specifically established, and carefully delineated. The central exception is when delaying an arrest would put lives in danger. "The Fourth Amendment," the Court has stated, "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." While this allowance is the most important for purposes of this Note, there are several others that are relevant to analyzing armed standoffs.

89. Id.
90. United States v. Morgan, 743 F.2d 1158, 1166 (6th Cir. 1984) (finding that the suspect who appeared in doorway only because of coercive police activity was arrested "while he was present inside a private home"); see also United States v. Al-Azzawy, 784 F.2d 890, 893 (9th Cir. 1985) (holding suspect who emerged from home under police coercion was arrested within the home).
92. See Payton v. New York, 445 U.S. 573, 590 (1980); Estate of Bing v. City of Whitehall, 456 F.3d 555, 564 (6th Cir. 2006) ("A person may not be arrested at home without a warrant, regardless of the existence of probable cause, absent exigent circumstances.");" (quoting United States v. Bradley, 922 F.2d 1290, 1293 (6th Cir. 1991)).
93. BLACK'S LAW DICTIONARY 260 (8th ed. 2004) (defining exigent circumstances); see also Fisher v. City of San Jose, 509 F.3d 952, 960 (9th Cir. 2007) ("The exigency exception can excuse a warrant for an in-home arrest when probable cause exists and there is a compelling reason for not obtaining a warrant . . . .").
Dorman v. United States provides a widely adopted framework for identifying an exigency.\(^6\) The test balances the following factors: (1) the gravity and violence of the offense; (2) whether the suspect is reasonably believed to be armed, so that delay may increase the danger to the community or to officers at the time of arrest; (3) whether there was "beyond a clear showing of probable cause" that the suspect committed the offense; (4) whether there was "strong reason to believe" the suspect was on the premises; (5) the likelihood that the suspect would escape if not swiftly apprehended; and (6) whether the entry was peaceful.\(^7\) The government has the "heavy burden" of proving these factors created exigent circumstances to such an extent that they "could not brook the delay incident to obtaining a warrant."\(^8\) Each of the Dorman factors applies to barricade situations, and it is beyond the range of this Note to examine every one of them. Instead, this section will quickly survey several factors relevant to barricaded suspects.

The first Dorman factor is the degree of the crime.\(^9\) The gravity of the underlying offense for which the arrest is being made is important enough that exigent circumstances will rarely apply when police believe the suspect committed only a minor crime.\(^10\) Having said that, the gravity of the crime alone is not enough to justify warrantless entry.\(^11\) Therefore, while police are less likely to need a warrant when the crime is serious, the circumstances of the case may nonetheless make a warrant necessary.

The most important Dorman factor for standoffs is whether the barricaded suspect is armed and a danger to people inside and/or outside of the home. Knowledge that a suspect is armed or has a propensity for violence may create an exigency.\(^12\) Accordingly, police do not have to

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\(^6\) Dorman, 435 F.2d at 392-93; MacDonald, 916 F.2d at 769-70.
\(^9\) This and the following factors, i.e., 2 through 6, have been enunciated in many cases. For example, in MacDonald, the court found exigent circumstances to exist where the police were faced with a dangerous and volatile situation involving drug sales, loaded weapons, and drug abuse. See also Welsh, 466 U.S. at 752 (noting that "courts have permitted warrantless home arrests for major felonies if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest").
\(^10\) Field v. United States, 113 F.3d 313, 323 (2d Cir. 1997) (finding exigency under the totality of the circumstances where suspect "had a reputation for violence and was in fact apprehended with a loaded automatic weapon within his reach"); MacDonald, 916 F.2d at 770 ("[T]he volatile mix of drug sales, loaded weapons and likely drug abuse presented a clear and immediate danger to the law enforcement agents and the public at large."). But see State v. Olson, 436 N.W.2d 92, 97 (Minn. 1989), aff'd, Minnesota v. Olson, 495 U.S. 91, 100-01 (1990) (finding no danger exigency because "the suspect was known not to be the murderer but thought to be the driver of the getaway car" and "[t]he police had already recovered the murder weapon").
secure a warrant when a suspect has threatened to kill an informer,\textsuperscript{103} or where police know the suspect is armed and had been using his gun "to intimidate or injure."\textsuperscript{104} This exigency also applies where the suspect is an immediate threat to others in the house, such as hostages or family members.\textsuperscript{105} On the other hand, knowledge that a suspect is armed does not always create an exigency, and commentators have argued for explicit proof that delay would present an immediate threat to life.\textsuperscript{106} Regardless, police knowledge that a suspect is armed is an important factor towards a finding of exigent circumstances.

The possibility of escape also justifies warrantless entry. Police may force entry when there is a clear likelihood of escape or when they notice signs of impending flight.\textsuperscript{107} In conspiracy cases, the arrest of one conspirator often requires the police to arrest the others lest they become suspicious of the arrestee's absence and flee.\textsuperscript{108} Police also have grounds to make a warrantless arrest when delay would risk the suspect's attempting a violent escape.\textsuperscript{109} But courts refuse to find exigent circumstances when the police have surrounded a house so that the suspect had no legitimate chance of escaping.\textsuperscript{110}

The last exigency factor, not discussed in \textit{Dorman}, is hot pursuit. Police do not need a warrant to enter a home when they are in hot pursuit of a fleeing suspect.\textsuperscript{111} This exception only covers "immediate or continuous pursuit . . . from the scene of a crime."\textsuperscript{112} It does not apply, for instance, when a drunk driving suspect has abandoned his car at the scene of an accident, walked home, and gotten into bed by the time the

\begin{footnotesize}
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\item[103.] See United States v. Padilla, 869 F.2d 372, 380 (8th Cir. 1989).
\item[104.] See United States v. McNeal, 77 F.3d 936, 946 (7th Cir. 1996).
\item[105.] See Ewolski v. City of Brunswick, 287 F.3d 492, 502 (6th Cir. 2002) (holding that police knowledge that suspect "was armed and volatile and that his wife and child were in the house with him" justified warrantless entry because officers could reasonably conclude the suspect was "an immediate threat" to his wife and son).
\item[107.] See \textit{MacDonald}, 916 F.2d at 770-71.
\item[108.] See, e.g., United States v. Wibbey, 75 F.3d 761, 768 (1st Cir. 1996) (rejecting the argument that police could have allayed exigency by staging a phone call from an arrested co-conspirator); see also Padilla, 869 F.2d at 379-80.
\item[109.] \textit{Padilla}, 869 F.2d at 380 (finding an exigency where police reasonably believed the suspect "might have attempted a violent escape if more time had passed without word from his co-conspirators"); see also United States v. Standridge, 810 F.2d 1034, 1037 (11th Cir. 1987) ("It was safer to arrest Standridge immediately by surprise in his motel room, than to wait for a warrant, and to risk a gun battle erupting in the halls, stairs, lobby or other public areas of the fully occupied hotel should Standridge try to escape.").
\item[110.] See State v. Olson, 436 N.W.2d 92, 97 (Minn. 1989) (noting that because three or four police squads surrounded the house, "[i]t was evident the suspect was going nowhere. If he came out of the house he would have been promptly apprehended.").
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police arrive." Under such circumstances, the police need a warrant before they may enter the home to arrest the suspect.  

2. The Role of Time in Exigency Analysis

The ubiquitous factor underlying exigency cases is time. Exigencies only exist when police are so preoccupied with investigating the crime and pursuing the perpetrator that they have no time left to obtain a warrant without risking destruction of evidence, escape, or danger to the public. The task of the courts is to "balance the significance of the risk of the purported compelling need for official action, against the time necessary to secure a warrant."  

It is hard for courts to judge police preoccupation ex ante. They may look for guidance, however, in two cases involving warrantless property seizures. In United States v. Place, the Court recognized the right of police to briefly detain and investigate luggage based on reasonable suspicion. It explained, however, that the brevity of the intrusion is important to its legitimacy, and that "in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation." The Court held that detaining a suspect's luggage for ninety minutes to check for drugs was unreasonable, in part because the police could have arranged for a drug-sniffing dog in advance and thus shortened the length of the investigation. The Court used the same analysis in United States v. Sharpe when considering the twenty-minute detention of a truck. Drawing on Place, the Court stated:

In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

The Court strongly cautioned against judicial second guessing, stating that "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." Because the police in Sharpe had spent twenty minutes investigating the truck in a "diligent and reasonable

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113. See id.
114. Id.
115. Donnino & Girese, supra note 106, at 95–96.
116. Id. at 96.
118. Id. at 709.
119. Id. at 709–10.
121. Id.
122. Id. at 687.
manner," taking no more time than was necessary, the detention was reasonable.133

The reasoning behind these cases often applies to exigency analysis. Using the Place and Sharpe analysis, exigent circumstances would apply for so long as the police respond reasonably, diligently, and quickly to prevent the destruction of evidence, escape, or danger to the public. But when a diligent response lapses into simple waiting, the police must use that time to secure a warrant.

A second way to balance the time needed to get a warrant against the need to make the arrest is to distinguish “planned” arrests from arrests made in the course of an ongoing investigation.134 Under this approach, police make a “planned” arrest when their investigation is complete before they set out to arrest a suspect.135 Such circumstances will rarely justify a warrantless arrest.136 On the other hand, the presumption shifts towards warrantless arrest when the occasion for arrest arises while the police are out “in the field” investigating the crime.137 In these cases, “the probabilities are high that it is not feasible for the police to delay the arrest while one of their number leaves the area, finds a magistrate and obtains a warrant, and then returns with it.”138 By eliminating the preference for warrants, moreover, courts would not speculate ex ante whether police could have staked out the suspect or otherwise delayed until they had obtained a warrant.139 Giving police the benefit of the doubt would thus free them to choose the best time to arrest, not the time required by an exigency or a warrant.

III. BARRICADED SUSPECTS

It is impossible to know how courts should apply the Fourth Amendment to standoffs without understanding what causes standoffs and what resolves them safely. Hostage and barricade situations are very common. Unlike the famous sieges from the 1990s involving religious and political extremists at Waco, Texas and Ruby Ridge, Idaho, most standoffs involve individual suspects whose motivation is influenced by psychological illness, substance abuse, or extreme emotional stress.130

123. Id.
125. Id.
126. Id. (stating that the exigency must have arisen prior to the police setting out to make the arrest, such as when the police learn a suspect plans to flee the area).
127. Id.
128. Id.
129. Id. (“[T]he question of whether a stakeout is or is not feasible is itself a complicated one, and is unlikely to be seen by hindsight in precisely the same way it was perceived by the police on the scene.”).
130. Theodore B. Feldmann, The Role of Mental Health Consultants on Hostage Negotiation
Police categorize all standoffs, regardless of cause, as either hostage or nonhostage situations. Understanding the difference between the two types of situations is paramount to a peaceful resolution.

A hostage situation occurs when a suspect holds one or more persons against their will, conditioning their release on the fulfillment of certain conditions. Hostage takers are goal-oriented and purposeful, using their captives as leverage to achieve their goals. They take hostages to facilitate escape from a crime scene, draw attention to their political beliefs, or seek a change in government policy. Keeping hostages alive is in their interest, and therefore they avoid actions that might trigger a violent response from police.

On the other hand, suspects sometimes hold others captive to retaliate for a perceived personal wrong, such as infidelity or a spouse's threatening to leave. Because the suspect is using the captive to express anger, and not as leverage, such events are not hostage situations. Suspects in nonhostage situations are isolated, angry, and uninterested in demands because they "neither need nor want anything from the police." They act out because they cannot cope:

Unable to control their emotions in response to life's many stressors, they are motivated by anger, rage, frustration, hurt, confusion, or depression. They have no clear goals and often exhibit purposeless, self-defeating behavior. Such individuals have either no substantive or escape demands or totally unrealistic demands for which they would have no reasonable expectation of fulfillment. Disgruntled employees, jilted lovers, rejected spouses, aggrieved individuals, idealistic fanatics, individuals with mental illness, and others with unfulfilled aspirations who feel that they have been wronged by others or events fall into this broad category... [a]ngry, confused, and frustrated, they may express...
their anger and vent their frustrations by undertaking actions that bring them into conflict with law enforcement. 140

Mental illness plays a particularly important role in nonhostage standoffs, accounting for up to 50% of all barricaded suspects. 141 Of those diagnosed with psychiatric abnormalities, personality disorders, mood disorders, and substance abuse are the most common conditions. 142 The most common precipitating factors for a nonhostage situation are interpersonal disputes or grievances, followed by criminal acts and mental illness. 143 Because barricaded suspects are so emotionally unstable, the likelihood of violence is much greater in nonhostage situations than in hostage situations. 144 The most frequent location for nonhostage situations, accounting for over 40% of all incidents, is the home. 145

At the outset of any crisis, police and negotiators must establish whether they are confronting a hostage or nonhostage situation. 146 The first step is to make contact with the suspect and then to learn about the suspect’s background, motivations, and whether the suspect is holding anyone captive. 147 Once the police know what type of crisis they are dealing with, they may choose an appropriate strategy. For hostage events, police should bargain with the hostage takers, all the while using “highly visible containment strategies to demonstrate to the subject that the police are willing and able to use force if necessary” to bring the standoff to a halt. 148 In contrast, “police should handle nonhostage incidents using a low-profile containment scheme that is less confrontative and demonstrates peaceful intentions.” 149 Calming the suspect is crucial. Police should keep the suspect engaged, and should not wait for tactical teams to deploy before allowing negotiators to contact the suspect. 150 Because barricaded individuals are frequently disturbed and emotional, continuous conversation lessens tension, decreases the suspect's paranoia, and thereby decreases his or her propensity to act

140. Noesner, supra note 131, at 8.
141. Feldmann, supra note 130.
142. Id.
143. Id. Feldmann, in a study of 120 hostage/barricade incidents, divided standoff episodes into six categories: personal and domestic disputes (30.83%), criminal acts (25.83%), mental illness (19.17%), workplace violence (11.67%), alcohol and drugs (7.50%), and students (5.00%). See id. at 26 fig.1.
144. See Noesner, supra note 131, at 8 (stating that the potential for murder followed by suicide is “very high” where a barricaded suspect is holding captives).
145. Feldmann, supra note 130. Nonhostage situations occur most frequently in private residences (42.50%), followed by restaurants and bars (10.83%), and convenience stores (7.50%).
146. See Noesner, supra note 131, at 10.
147. Feldmann, supra note 130.
148. Noesner, supra note 131.
149. Id. at 8.
150. Id. at 9.
Police should avoid manipulating a suspect's anxiety by breaking windows, tossing rocks on the roof, or playing loud music, because doing so “only serves to reinforce the suspect’s suspicions about law enforcement’s intentions.”5 Above all else, police should recognize and avoid pressures to move the confrontation along. For barricaded suspects, the best policy is often to talk and to wait.5

Officers should use force only when lack of progress reasonably poses an increased risk to the suspect or his or her captives.54 Intervention is a last resort because it is so risky.55 Others advance more assertive approaches, however. For instance, SWAT team protocols entail: “1. Contain and isolate the suspect; then attempt to negotiate a surrender. 2. If unsuccessful, demand that the suspect surrender. 3. If unsuccessful, use chemical weapons to force the suspect to surrender. 4. If unsuccessful, use snipers to neutralize the suspect. 5. If unsuccessful, order a SWAT assault.”55 While this approach is certain to end standoffs, it is not certain to end them peacefully. Indeed, some criticize SWAT teams for escalating the high-risk situations they are supposed to resolve.57

The consensus is that police should tread warily when dealing with volatile, barricaded suspects.58 They should engage the suspect in dialogue, displaying patience and understanding.59 They must be willing to make concessions.60 Above all, they must calm the suspect down to minimize the chance for violence.61 Hostage and barricade situations are “fluid events influenced by variables both internal and external to the event.”62 Securing a peaceful resolution requires a continuous, delicate, and error-free effort.63 In these circumstances, time is not a factor.64 Negotiating a peaceful result takes as long as it takes.

151. Id.
152. Id.
153. Id.
154. See id. at 10.
155. Id.
158. The FBI has encapsulated this idea by requiring agents to ask the following before every action: “1) is the contemplated action necessary? 2) is the contemplated action risk-effective? and 3) is the contemplated action acceptable?” Noesner, supra note 131, at 10.
159. Id.
160. Id.
161. Id.
162. Feldmann, supra note 130.
163. For example, negotiators must work seamlessly with tactical teams to coordinate deliveries, releases of captives, and surrenders from barricaded suspects. Every step in the process must be properly executed. Suspects feel misled when they do not receive things the government has promised. Such simple misunderstandings can lead to violence. See Noesner, supra note 131, at 12.
164. Id. (“It is nearly impossible to predict with certainty the duration of an incident.”) That police should exercise patience in handling dangerous events is hardly limited to barricade situations.
These principles are often at odds with the judicial framework for seizure and exigency. Instead of looking to the appropriateness of police actions, courts applying Payton focus on the temporal aspects of a standoff. Standoffs, however, are dynamic and ill suited to an analysis that only asks when the seizure occurred and whether it was made during an exigency. This Note will now examine how courts have applied the Payton framework to home standoffs.

IV. APPLYING PAYTON PRINCIPLES TO STANDOFFS WITH ARMED AND BARRICADED SUSPECTS

Applying the Payton warrant requirement to barricade situations is hard in many ways. Pinpointing when a seizure occurs is difficult, for instance, when police use extremely coercive measures but the suspect refuses to surrender. Even when courts have found the suspect was seized, they struggle to find an exigency when hours passed between the establishment of probable cause and the moment of arrest. For both issues, the result often depends on the complicated circumstances of each individual case.

The facts of standoff cases are complex and dynamic, as exemplified by the Ninth Circuit’s decision in Fisher v. City of San Jose. Steven Fisher had been drinking beer in his apartment while watching the World Series and cleaning his large collection of antique rifles. Around midnight, a security guard arrived to talk to Fisher about a noise complaint. Fisher quickly unnerved him, however, with his guns, visible drunkenness, and enthusiasm for the Second Amendment. Police were soon on the way. Upon arriving outside Fisher’s apartment, an officer tried to get Fisher’s attention by tossing pebbles at a sliding glass door. Fisher approached the door but did not exit the apartment. The officer, however, noticed he was drunk. By that time, Fisher was the only person in the apartment. More and more police came upon the scene, including a hostage negotiator who arrived between three and four o’clock in the morning. When she contacted Fisher, he invited her into
his apartment but threatened to shoot her if she came in. Allegedly, he pointed a gun in her direction. Based on these threatening acts, a police tactical team arrived and set about forcing Fisher from his apartment. After evacuating the neighborhood, they cut Fisher's power at 8:48 a.m. and tossed a throw phone through the sliding glass door. At 10:52 a.m., they used flash-bang devices to stun Fisher. Two hours later, they threw in tear gas. Finally, after two o'clock in the afternoon, Fisher contacted police using the throw phone and surrendered. No one had seen Fisher carrying a weapon since 6:30 a.m. All told, over sixty officers had been involved in the standoff, including some early responders who returned to the station house in the morning to write police reports. The police had used sirens, bullhorns, snipers, water cannons, armored vehicles, and tear gas to drive Fisher out. No one had sought a warrant, or told Fisher he was under arrest.

A. IDENTIFYING THE POINT OF SEIZURE: DO POLICE SEIZE THE SURROUNDED OCCUPANTS OF A HOUSE?

The simplest type of seizure possible in a police standoff is when the suspect surrenders to police. Some standoffs, however, do not end in surrender. Even for the majority that do, the suspect has almost always been seized before he or she chose to give in. Accordingly, the Fourth Amendment usually becomes an issue at some point during the standoff. This section examines how the courts have applied Fourth Amendment seizure analysis to standoff situations.

1. The Inapplicability of the "Free to Leave" Test to Extended Standoffs

The first category of seizure analysis for armed standoffs involves suspects who surrender soon after being surrounded. For example, in United States v. Morgan, nine police officers surrounded the defendant's home and summoned the occupants with a bullhorn. The defendant

175. Id.
176. Id.
177. Id. at 956.
178. Id.
179. Id.
180. Id.
181. Id.
182. Id. at 966.
183. Id. at 967.
184. Brief of Appellee at 6, Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir. 2001) (No. 04-16095).
185. Fisher, 509 F.3d at 956.
186. See infra Part IV.A.-B. In no case cited therein was a suspect first seized at the time they surrendered to the police.
187. See United States v. Morgan, 743 F.2d 1158, 1161 (6th Cir. 1984).
quickly appeared at the front door, and surrendered shortly thereafter. To determine the moment of seizure, the court applied the objective "free to leave" test and found that, because of the police show of authority, the defendant "was placed under arrest . . . at the moment the police encircled the residence." This seemingly would establish that surrounding a house seizes its occupants.

But that statement is too broad. The "free to leave" test applied in *Morgan* because the defendant had left his home, and the only question was whether his acquiescence was voluntary or compelled. The test's sole purpose is to look to the defendant's acts and ask whether or not they were consensual. In *Morgan*, the court concluded that the defendant had left the house only because the police ordered him to. This meant he was seized inside the house, and that the warrant requirement applied to him.

The problem is that the "free to leave" test depends on the suspect's quick surrender. The test is based on the causal link between the police action and the suspect's behavior. When the police ordered Morgan out of his house and he complied, the police order reasonably caused Morgan to leave. This can be a seizure, and it occurred inside the home because that was where Morgan was when he decided to comply. But the causal chain weakens when the person does not leave when the police order him to. If Morgan had taken six hours to leave the house, it is unlikely that his decision to leave was reasonably caused by the police order six hours earlier. It is even less likely then that the initial encirclement of the house seized Morgan, because the encirclement did not cause him to submit. This shows us two things: that the police do not always seize the occupants of a home by surrounding it, and that the objective "free to leave" test should not apply to long standoffs.

2. Seizure Without Force or Submission

Long, violent sieges are a constitutional paradox: the police may confine a resisting suspect within the four walls of his home, menace the

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188. *Id.*
189. *Id.* at 1164.
190. *Id.* at 1166.
191. The court's holding was that, in the absence of an actual entry, warrantless arrest of a suspect who emerges from the home in response to coercive police activity violates the Fourth Amendment. *Id.* ("Although there was no direct police entry into the Morgan home prior to Morgan's arrest, the constructive entry accomplished the same thing, namely, the arrest of Morgan."); see also United States v. Al-Azzawy, 784 F.2d 890, 893 (9th Cir. 1985).

In the case at bar, the police had completely surrounded appellee's trailer with their weapons drawn and ordered him through a bullhorn to leave the trailer and drop to his knees. Appellee was not free to leave, his freedom of movement was totally restricted, and the officers' show of force and authority was overwhelming. Any reasonable person would have believed he was under arrest in these circumstances . . . [w]e affirm the district court's ruling that appellee was arrested inside his residence without a warrant.

*Id.*
suspect with floodlights and tanks, and yet not seize the suspect until he surrenders or is forcibly subdued. To avoid this result, courts have stretched Fourth Amendment seizure doctrine to its limits. This section examines the theories under which courts have found that police can seize a resisting and barricaded suspect.

a. Ewolski v. City of Brunswick

One of the most notable and troubling standoff cases is the Sixth Circuit’s decision in Ewolski v. City of Brunswick.\(^9\) In Ewolski, health services called police about the suspect, a paranoid schizophrenic who was allegedly holding his wife and son captive in their home.\(^9\) The police knew the suspect was armed and would shoot at them if confronted.\(^9\) Nonetheless, two officers went to the suspect’s house, dressed in civilian clothes to conceal their identities.\(^9\) When the suspect refused to let them in, the officers kicked down the door.\(^9\) The suspect shot at the officers, hitting one.\(^9\) The officers retreated and an Emergency Response Team (ERT) arrived to surround the home and evacuate neighbors.\(^9\) Despite reservations by two health professionals, police stormed the house around seven o’clock in the evening, but were repulsed in a shootout that left two more officers wounded.\(^9\) The police continued to speak with the suspect, who refused to surrender and became increasingly incoherent as the standoff went on.\(^9\) At three o’clock the next morning the suspect asked to speak to a priest, indicating he was contemplating suicide.\(^9\) Amazingly, the police decided to increase the pressure by driving an armored truck onto the lawn to illuminate the house, and then ramming it into the house to dispense tear gas.\(^9\) In response, the suspect shot his son and himself.\(^9\)

It fell to the court to decide whether encirclement of the suspect’s home was a Fourth Amendment seizure. The court held that though the police had never taken the suspect into custody, the intrusiveness of the standoff qualified “as an intentional application of physical force and

\(^{192}\) 287 F.3d 492 (6th Cir. 2002).
\(^{193}\) See id. at 497.
\(^{194}\) Id. at 497–98. From the outset, police had told home health services that the suspect presented “a potential stand-off situation.” Id. at 497.
\(^{195}\) Id. at 498.
\(^{196}\) Id.
\(^{197}\) Id.
\(^{198}\) Id.
\(^{199}\) Id. at 499 (“Pursuant to the assault plan, the ERT team threw incendiary devices into the house while using a battering ram to break open the front door. Tear gas was also used during the assault.”).
\(^{200}\) Id. at 498–99.
\(^{201}\) Id. at 499.
\(^{202}\) Id.
\(^{203}\) Id.
show of authority made with the intent of acquiring physical control. Implicit in this holding are two distinct rationales: that intrusive encirclement of the home is the same as applying physical force to its inhabitants, and that surrounding a home with intent to arrest seizes the intended arrestee.

The first question is whether home confinement can really equate to physical force. The *Ewolski* court applied *Brower v. County of Inyo*, a case where police seized a fleeing motorcyclist through physical force by intentionally causing him to crash into a blockade. But invoking *Brower* is a stretch because police seized that suspect by causing his body to collide—fatally—into a roadblock. By contrast, the police in *Ewolski* never physically touched the suspect. To illustrate this concept, suppose the fleeing teenager from *Hodari D.* had run into a dead-end alley, giving him no chance of escape. Trapped in the alley, he is caught for all practical purposes, even though he hasn’t surrendered or been touched. If *Ewolski* is right, then the teenager is seized at this moment. But merely curbing the liberty of a resisting suspect is not a seizure. The problem is that the Sixth Circuit has conflated physical force and physical control. As both *Brower* and *Hodari D.* show, these terms are not synonymous. Formalistic as it may seem, physical force seizure requires touching, and that never happened in *Ewolski*.

The second interesting issue is how the *Ewolski* court interpreted show of authority seizures. Under *Hodari D.*, a show of authority intended to seize does not constitute a seizure until the target subjectively submits. In *Ewolski*, however, the suspect shot himself rather than give in to the police. It is surprising, therefore, that the court found that the suspect had submitted to the police show of authority, and that the police had not seized the suspect’s wife and

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204. *Id.* at 506. The district court found that police had not seized the suspect because he had never submitted to official authority. *Id.*


206. *Brower*, 489 U.S. at 599.


208. See California v. *Hodari D.*, 499 U.S. 621, 628 (1991) (stating that the “free to leave” test is “a necessary, but not sufficient, condition for seizure . . . effected through a show of authority”).

209. See Estate of *Bing* v. City of Whitehall, 456 F.3d 555, 564 (6th Cir. 2006) (“In *Ewolski* this court held that the use of police coercion to exercise physical control over an armed, barricaded suspect while he is inside his home amounts to a Fourth Amendment seizure . . . .” (emphasis added)). The question of physical control is indicative of a wider confusion in the courts over the proper seizure standard. For example, one court held that “a clear show of physical force and assertion of authority” seized a resisting suspect, even though a “show of physical force” is no different than the “show of authority” rejected in *Hodari D.* See *Sharrar v. Felsing*, 128 F.3d 810, 819 (3d Cir. 1997).


211. *Ewolski*, 287 F.3d at 499.

212. *Id.* at 506; see also *Fisher* v. City of San Jose, 475 F.3d 1049, 1076 (9th Cir. 2007) (Callahan, J., dissenting) (citing *Ewolski*, 287 F.3d at 506) (“In my view, the better, more reasonable, interpretation of submission for the purposes of barricaded or surrounded suspects is that the person submits by
child even though they were in the house with the suspect, because they had been "free to walk away." The Ewolski rule, therefore, is that police seize a barricaded suspect by surrounding the house with intent to make a seizure. Encirclement must be coercive to effect a seizure: "[b]y laying siege to [the] house, breaking [a] door and windows, and employing pepper gas, the police accomplished a de facto house arrest." The problem with the court finding a show of authority seizure is that under Hodari D. restricting the suspect's freedom does not implicate the Fourth Amendment unless the suspect is subdued by physical force, or gives up. Because neither of these events applied in Ewolski, the court was not correct to apply the objective "free to leave" test.

b. Fisher v. City of San Jose

The second notable case is Fisher v. City of San Jose, which to date has produced two published Ninth Circuit opinions and has been ordered for rehearing en banc. The first opinion, though no longer good law, contains an important analysis of seizure in the home that differs markedly from Ewolski. In Fisher I, the court held that even if encirclement equates with physical force, the suspect becomes "unseized" when he refuses to give up. The court began by assuming that police encirclement was a "show of force" equivalent to "application of physical force" seizure—the same approach the Sixth Circuit had taken in Ewolski. The court then added a twist. Because Fisher had remained free in the home, the show of force had not completely controlled him.

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213. See Ewolski, 287 F.3d at 507. Writing in dissent, Judge Hull faulted the majority's logic: "[I]t is obvious that all members of the Lekan family were affected by the actions of the police . . . consequently I believe the Lekans were in the custody of the defendant officers in the sense that the officers had affirmatively acted to deprive all of them of their liberty." Id. at 518 (Hull, J., dissenting); see also Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1187 (10th Cir. 2001) ("One need not be the target of a search or be the person named in an arrest warrant to be 'seized' within the meaning of the Fourth Amendment."). In any event, the majority's reasoning probably does not survive Brendlin v. California. 127 S. Ct. 2400, 2405 (2007) (holding that both driver and passengers are seized during a traffic stop).

214. Estate of Bing, 456 F.3d at 564 (citing Ewolski, 287 F.3d at 506-07) (identifying a seizure from "use of police coercion to exercise control over an armed, barricaded suspect while he is inside his home").


216. Fisher v. City of San Jose, 509 F.3d 952, 965 (9th Cir. 2007) (Judge Kozinski's order).

217. See, Fisher, 475 F.3d at 1057-68. The second Fisher opinion accepted the defendant's stipulation that Fisher was seized when the police surrounded the house. See Fisher, 509 F.3d at 965. By doing so it avoided the seizure issue entirely.

218. Fisher, 475 F.3d at 1060.

219. Id. at 1064.

220. Id.
Applying *Hodari D.*, the court found that Fisher had "escaped" the police and could be seized again.  

This approach, while novel, made little sense. If police could seize Fisher by confining him in his house, he should remain seized for as long as he stays there and the police stay outside. Because the police never restrained Fisher's freedom to move within his home, his moving from room to room can hardly be an escape. Only two positions matter: that of the police surrounding the home and that of the suspect inside the home. If this dynamic remains unchanged, the suspect should remain seized.  

If one strips away the assumption that the police seized Fisher by surrounding his home, *Fisher I* is a strict application of *Hodari D.* to home standoffs. The court found that Fisher had submitted to the police show of authority only "at the end of the standoff, when he ultimately submitted... by agreeing while still in his house to be placed under arrest."  This finding is in line with *Hodari D.*, which requires subjective submission. The consequence, however, is that exhibitions of authority will never seize a barricaded suspect until the standoff has ended. In that case, police can seize a barricaded suspect only by applying physical force. Because physical force can arrest a suspect without bringing him into custody, police can seize a barricaded suspect each time they try to subdue him, so long as they do not succeed in taking him into custody. Therefore, the court held that the police seized Fisher when they tossed a throw-phone into the house and shot tear gas canisters through his windows.  

The greatest practical difference between the *Ewolski* and *Fisher I* analyses is that the former will consider suspects seized at an earlier stage of the standoff. While this recognizes that police sieges are highly coercive and thus worthy of Fourth Amendment scrutiny, its doctrinal

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221. See id. ("[F]isher remained subject to seizure or arrest—and related entries into his home—after the arrival of the MERGE [Mobile Emergency Response Group and Equipment] team even if he had been seized earlier, just as would an individual shot by the police who continued to flee thereafter."). The district court provided a good account of Fisher's daring escape:  
Mr. Fisher states that although the message to come outside was repeated over and over, and although he did not believe the police would go away, he simply continued about his business in the apartment. He watched television and finished drinking the twelve-pack of beer that he had purchased earlier in the day.  

222. See LAFAVE, supra note 124, at § 9.4(d) (declaring the *Hodari D.* test unhelpful when there is no movement at all by the suspect).  
223. Fisher, 475 F.3d at 1064.  
226. See id. at 1065-64.  
227. Id. at 1064. Presumably, the police also seized Fisher when they threw in flash-bangs, which are designed to disorient victims and can cause severe injuries. See, e.g., United States v. Ankeny, 358 F. Supp. 2d 998, 1002 (D. Or. 2005) (flash-bang severely burned defendant).
underpinnings are tenuous. Moreover, section 1983 plaintiffs in constructive seizure standoffs seem to lose despite their continuous seizure. The reason for this counterintuitive result is that courts that apply a generous test for seizure also apply a generous test for exigent circumstances.

B. THE EXISTENCE AND DURATION OF EXIGENT CIRCUMSTANCES IN ARMED STANDOFFS

Exigent circumstances are difficult to apply to home standoffs. Many, if not most home standoffs have trivial beginnings, such as the towing of a pickup truck, a health code inspection, or a noise complaint. Other standoffs begin more ominously, with shots fired or the commission of a crime. Even when the initial encounter is serious enough to justify an exigency, however, the danger may pass over the course of a protracted siege. Case law suggests that exigent circumstances will only excuse a warrantless arrest when there is danger and not enough time to feasibly get a warrant. For police to understand when exigent circumstances apply during a standoff, they must know the factors that create an exigency, and the factors that perpetuate an exigency.

1. Exigent Circumstances in Armed Standoffs

The first prong of the exigency test is whether an event is dangerous enough to create exigent circumstances. This question focuses on the suspect’s actions and the circumstances surrounding the event. Because courts weigh exigent circumstances under the totality of the circumstances, to provide an answer we must look to the specific facts courts have used to decide armed standoff exigency cases.

228. See, e.g., Estate of Bing v. City of Whitehall, 456 F.3d 555, 572 (6th Cir. 2006); Ewolski v. City of Brunswick, 287 F.3d 492, 496 (6th Cir. 2002).
229. See infra notes 282–90 and accompanying text (describing the Sixth Circuit’s approach to analyzing exigencies during armed standoffs).
231. See Alexander v. City of San Francisco, 29 F.3d 1355, 1358 (9th Cir. 1994).
232. See Fisher v. City of San Jose, 509 F.3d 952, 954 (9th Cir. 2007).
233. See Estate of Bing, 456 F.3d at 559 (suspect had “fired his gun into the ground and into the air to frighten away from his property a group of minors who had been taunting him”).
237. See cases cited supra note 236.
238. See, e.g., United States v. Atchley, 474 F.3d 840, 850 (6th Cir. 2007) (“One such exception [to the warrant requirement] arises when, considering the totality of the circumstances, an officer reasonably finds that sufficient exigent circumstances exist, such as a risk of danger to police or others.”) (citation omitted).
2. *The Suspect Has a Weapon*

   The touchstone question during a standoff is whether the suspect's being armed creates exigent circumstances.\(^\text{239}\) The mere presence of a gun does not itself create an exigency.\(^\text{40}\) When the suspect *brandishes* a gun, however, the scales tip towards exigency.\(^\text{241}\) Therefore, there are no exigent circumstances when a suspect appears in his doorway holding a rifle on his shoulder and shouts "Get out of here!"\(^\text{42}\) because he has neither pointed his gun at anyone nor threatened to use it.\(^\text{43}\) On the other hand, when the suspect points his or her gun at police—even inadvertently—or the police reasonably think he or she has, the line towards exigency has been crossed.\(^\text{44}\) For instance, a suspect who shines a red dot towards police officers creates exigent circumstances when they reasonably believe he has pointed a laser-sighted weapon at them.\(^\text{25}\) Stronger yet are cases where police respond to shots fired. Police may, for example, enter without a warrant when the suspect has fired shots to scare his neighbors.\(^\text{46}\) But even shooting will not create an exigency by itself. To justify warrantless search the police must have additional information that the suspect was dangerous.\(^\text{247}\) For instance, shooting a gun into the ground in the presence of minors is sufficiently threatening,\(^\text{248}\) while shooting a gun into the air to celebrate New Year’s is not.\(^\text{49}\) The clearest example, of course, is when police know the suspect has just shot another person.\(^\text{260}\) The suspect’s past history is also relevant to weighing danger. When police know they have been called to the suspect’s house in the past for shooting guns, they infer a greater propensity for violence.\(^\text{251}\)

\(^{239}\) See, e.g., United States v. Gooch, 6 F.3d 673, 671–80 (9th Cir. 1993).

\(^{240}\) See id. (finding exigent circumstances did not cover officers’ search of unoccupied tent to recover firearm inside); see also United States v. Morgan, 743 F.2d 1158, 1167 (6th Cir. 1984) (plain view does not create exigency).

\(^{241}\) See Fisher v. City of San Jose, 475 F.3d 1049, 1068 (9th Cir. 2007).

\(^{242}\) O’Brien v. City of Grand Rapids, 23 F.3d 990, 993 (6th Cir. 1994).

\(^{243}\) Id. at 997–98.

\(^{244}\) See Fisher, 475 F.3d at 1068 (noting that Fisher was an immediate threat when he pointed a rifle at officers while “intoxicated, rambling about his Second Amendment rights, ... tinkering repeatedly with seventeen more rifles, and making threatening comments”).

\(^{245}\) Estate of Smith v. Marasco, 318 F.3d 497, 502, 518 (3d Cir. 2003).

\(^{246}\) See Estate of Bing v. City of Whitehall, 456 F.3d 555, 565 (6th Cir. 2006).

\(^{247}\) Causey v. City of Bay City, 442 F.3d 524, 533 (6th Cir. 2006); Hancock v. Dodson, 958 F.2d 1367, 1369, 1375 (6th Cir. 1992) (holding exigent circumstances existed where gunman was suicidal and possibly homicidal, threatening to kill police officers, and had fired shots).

\(^{248}\) See Estate of Bing, 456 F.3d at 565.

\(^{249}\) See Causey, 442 F.3d at 533 (“[T]he gunshots heard by the neighbor did not present an immediate threat. Instead, the plaintiffs were simply celebrating another holiday in their idiosyncratic way.”).

\(^{250}\) See United States v. Hicks, 389 F.3d 514, 527–28 (5th Cir. 2004) (holding exigent circumstances existed during the standoff because police reasonably believed the suspect had just shot and killed a fellow police officer).

\(^{251}\) See Estate of Bing, 456 F.3d at 560.
police must sense danger, to themselves or to others, no matter what the suspect has done with a weapon.

3. The Suspect Has Threatened Others

Making threats is one way to establish danger. The strongest cases are when the suspect directly threatens to kill police officers. Comments carry less weight when a third party reports a threat, or when the suspect makes a veiled threat that merely suggests violence. While they surely factor into the equation, they do not convey the same degree of danger as a direct threat made when the suspect could reasonably follow through. Suspects can also create exigent circumstances if they threaten to harm themselves.

4. The Suspect May Have Hostages

External factors are critical in weighing exigencies. The most important question is whether the suspect has hostages or victims trapped in the house. Even when police know an armed suspect is most likely alone, an exigency is probable when they do not “know for certain whether there were any other persons inside.” In one example, police responding to a call entered the home of a suspect who had been screaming at someone and firing shots. Because the officers reasonably believed the suspect was threatening someone inside the house, exigent circumstances justified their entry, even though the suspect was in fact alone and shouting into a telephone. When the police know an armed and dangerous suspect has captives, an exigency exists almost as a matter of law. However, this presumption only lasts while the victims are in danger. Once police have freed the victims, the exigency ends unless there is another cause of danger.

252. See, e.g., Fisher v. City of San Jose, 509 F.3d 952, 955 (9th Cir. 2007) (suspect threatened to kill negotiator if she entered home); Alexander v. City of San Francisco, 29 F.3d 1355, 1358 (9th Cir. 1994) (suspect shouted from inside house “I'm going to get my gun and use it”); Hancock, 958 F.2d at 1369 (suspect told police dispatcher “if you send any cops over here, I'll kill them”).

253. United States v. Morgan, 743 F.2d 1158, 1160 (6th Cir. 1984) (informant warned police that “[i]f you get out of the car and attempt to arrest these people they will shoot you. They have made the comment that they will kill any law that tries to arrest them.”).

254. See Ewolski v. City of Brunswick, 287 F.3d 492, 502 (6th Cir. 2002) (suspect “told his brother the night before that his guns were 'loaded and ready'”).


256. See United States v. Hicks, 389 F.3d 514, 528 (5th Cir. 1994) (detailing various external factors that were important to determining whether the police’s warrantless behavior was justified).

257. Id.

258. Dickerson v. McClellan, 101 F.3d 1151, 1160 (6th Cir. 1998).

259. Id.


261. See Fisher v. City of San Jose, 509 F.3d 952, 955 (9th Cir. 2007) (suspect’s wife left the house at the beginning of the siege); United States v. Johnson, 22 F.3d 674, 680 (6th Cir. 1994) (holding that...
5. The Surrounding Community Is in Danger

In addition to police and hostages, barricade situations can also threaten the surrounding community because of the extreme violence they can cause. The sides may exchange barrages of gunfire, and the police may destroy the suspect’s house by setting it on fire or even by dropping an aerial bomb onto it. The safety of neighbors, therefore, is an important factor in deciding whether exigent circumstances excuse a warrantless entry, especially when the standoff attracts a crowd of bystanders to the dangerous area. Only when the police have evacuated neighboring residents can there be no threat to the public.

6. Remoteness and the Potential for Escape

Finally, geographic location and the potential for escape can determine whether there is an exigency. Exigent circumstances may exist where the suspect’s home is too remote to call for backup. Similarly, the police may make a warrantless entry when poor surrounding cover makes it dangerous for them to wait out an armed suspect or to retreat. When there are too few police to prevent a suspect from escaping, courts are likely to find an exigency. If the suspect threatens to escape violently, the exigency can last for hours.

The police were justified in making a limited warrantless entry to free a kidnap victim, but were not justified in continuing to search the apartment because the exigency had ended when the police freed the captive.

263. See, e.g., Estate of Bing v. City of Whitehall, 456 F.3d 555, 562 (6th Cir. 2006).
264. See In re City of Phila. Litig., 49 F.3d 945, 951 (3d Cir. 1995).
265. See Estate of Bing, 456 F.3d at 564 ("[B]ing had shown a willingness to fire weapons in his neighborhood and could have harm[ed] others in an instant with little effort.").
266. See United States v. Salvador, 740 F.2d 752, 758 (9th Cir. 1984).
267. For an example where police thoroughly prepared for standoff contingencies, see Sharrar v. Felsing, 128 F.3d 810, 815 (3d Cir. 1997).

The police created an inner and outer perimeter around Brigden’s residence. Capt. McClory ordered the evacuation of all residents in the inner perimeter. He dispatched someone to contact the schools in the area to divert their normal bus routes and keep at school all children who lived in the immediate vicinity of Brigden’s residence. The fire station was ordered to accept evacuees, fire trucks and ambulances were told to come to the scene without lights and sirens; the City marina was closed so that no boats could leave the harbor; and the bridge which provided the sole vehicular access to the City was blocked.

Id. (citations omitted).
268. See Hegarty v. Somerset County, 53 F.3d 1367, 1377 (1st Cir. 1995).
269. Id.

[O]nce their ... strategy had positioned several officers in unexpectedly vulnerable positions against the thin cabin walls, they could neither remain in their positions indefinitely nor safely terminate the impasse by attempting to retreat across the moonlit cabin clearing without directly exposing themselves to potential gunfire. Thus, safe and indefinite containment ... no longer remained a practicable alternative.

Id. (citation omitted).
271. United States v. Williams, 612 F.2d 735, 739 (3d Cir. 1979).
Therefore, exigent circumstances generally exist when the suspect is 
aimed, has shown or is showing a propensity for violence, and has the 
immediate ability to hurt people inside the house or outside the home.

7. The Duration of Exigent Circumstances During a Standoff

There is a circuit split over how long exigent circumstances last 
during armed standoffs. Under the Ninth Circuit approach, danger alone 
cannot justify a warrantless entry.\(^\text{72}\) Instead, exigency analysis has two 
prongs: immediate danger and sufficient time.\(^\text{73}\) The first prong is 
focused on the suspect, while the second—time—focuses on police 
resources. Police may enter without a warrant only when the delay 
needed to obtain a warrant would increase the danger to the police or 
the public.\(^\text{74}\) "The initial exigency can dissipate either because the danger 
posed by the targeted individual decreases or because, with the passage 
of time, resources become available that allow the police both to 
maintain safety and to obtain a warrant."\(^\text{75}\) In \textit{Fisher}, the suspect was 
seized when the police surrounded the house in the early morning.\(^\text{76}\) 
Over the next several hours, the suspect was neither heard from nor seen 
with a weapon, and the other occupants of the house and surrounding 
neighbors were evacuated.\(^\text{77}\) During the same time period, dozens of 
officers responded to the standoff, including several who returned to the 
police station before it ended.\(^\text{78}\) If those officers could file police reports, 
why couldn't they seek a warrant? The Third Circuit considered similar 
facts in \textit{Sharrar v. Felsing}:

The police have not satisfactorily explained why, when the 
house was completely surrounded by an armed SWAT team, 
they could not secure the premises while they went to procure 
an arrest warrant, especially in light of the fact that Municipal 
Court Judge Calloway was sitting on the bench at the police 
station during this entire episode.\(^\text{79}\)

Therefore, under the facts of the case, the \textit{Fisher II} court held that the 
exigency had dissipated over the course of the standoff.\(^\text{80}\) By the time in 
the afternoon when the police shot tear gas into the suspect's home, the 
intrusion was not excused by exigent circumstances.\(^\text{81}\)

\(^{272}\) \textit{See Fisher v. City of San Jose}, 509 F.3d 952, 962–63 (9th Cir. 2007).
\(^{273}\) \textit{Id.}
\(^{274}\) \textit{See id.}
\(^{275}\) \textit{Id.}
\(^{276}\) \textit{Id.} at 962.
\(^{277}\) \textit{Id.} at 966.
\(^{278}\) \textit{Id.} at 967.
\(^{279}\) 128 F.3d 810, 820 (3d Cir. 1997).
\(^{280}\) \textit{Fisher}, 509 F.3d at 968.
\(^{281}\) \textit{Id.}
By contrast, the Sixth Circuit has taken the view that an exigency only terminates when the factors creating the exigency are terminated. In *Estate of Bing v. City of Whitehall*, two and a half hours elapsed between the time the police surrounded the house and the time police shot tear gas through the windows, thereby seizing him. The court held the exigency did not terminate during this time. The passage of time did not terminate the exigency because the ticking of the clock did nothing to cut off Bing's access to the gun, or cure him of his willingness to fire it, or move to safety the people who refused to evacuate. In short, time cannot negate exigency factors beyond the police's control.

As for factors within police control, the court held that neither the on-scene investigation nor the execution of police strategy had negated the exigency. To reach this result, the court had to distinguish its prior holding in *O'Brien v. City of Grand Rapids*. In *O'Brien*, an exigency had dissipated when the police waited four and a half hours to execute a warrantless search, during which period the suspect had done nothing threatening. The *Estate of Bing* majority labeled this "procrastination" materially distinguishable to their facts, in which the police had waited one hour for backup and then spent one and a half hours putting together a plan. Therefore, under the Sixth Circuit test, so long as the suspect remains dangerous and the police remain reasonably busy, there are exigent circumstances.
The Ninth Circuit test in Fisher suffers one overarching flaw. The court did not say what would happen when exigent circumstances dissipate but the police “during the standoff [make] no further intrusions into the home for purposes of effecting the arrest.” This avoided the tricky question of when exigent circumstances dissipate during an armed standoff. The court concluded that police do not violate the Fourth Amendment until they make some new “entry” without the protection of an exigency. The problem is that this creates a new, second warrant requirement. The police do not need a warrant to keep the suspect seized inside the house. But to enter the house to arrest an already seized suspect the police need an arrest warrant. This does not fit with our understanding of the Fourth Amendment. If the police seize a suspect inside his home, they need either an arrest warrant or exigent circumstances. If the police have neither a warrant nor an exigency, the seizure is unconstitutional. Therefore, the result the Fisher court should have reached is that the seizure became unconstitutional at some discernible moment during the siege when exigent circumstances no longer existed.

V. TOWARDS A COHERENT APPROACH TOWARDS STANDOFF PROCEDURE AND RESOLUTION

In applying Payton v. New York to confrontations with barricaded suspects, lower courts have failed to develop a workable standard for when police must obtain a warrant. As a result, the police are forced to juggle facts in guessing whether they have seized the suspect, and if so whether exigent circumstances protect their actions. What makes this especially bothersome is that the main purpose of Payton is to draw a bright constitutional line for police. When police encounter “a rule which cannot be applied correctly with a fair degree of consistency by well-intentioned police officers,” the entire exercise becomes futile.

The manner in which we identify seizures will determine the rights we afford barricaded suspects, and thus we must base our choice on solid social underpinnings. Adopting the Sixth Circuit’s approach, for example, will cause police to seize suspects the moment they surround a house. This means courts will examine subsequent police behavior for
objective reasonableness, rather than under the more forgiving "shocks the conscience" substantive due process test. Lowering this threshold would give legal recourse to the victims of unreasonable police actions, and the resulting litigation would encourage police departments to develop nonconfrontational standoff protocols, and to better train their officers on how to handle mentally ill suspects. Social policy therefore favors a lenient seizure test.

The problem is that Fourth Amendment seizure doctrine is not lenient. The objective "free to leave" seizure test from Mendenhall does not apply to suspects who are resisting the police. That leaves Hodari D., which requires the barricaded suspect to actually submit to police authority or be physically subdued in order to be seized. This is not an attractive option. First, the physical force or submission test ignores intrusions on a suspect's privacy within his home so long as police stay outside. While we tolerate coercive shows of authority on public sidewalks, it is harder to forgive such coercion when the target is at home. This principle reflects Payton's edict that privacy reaches its apex "when bounded by the unambiguous physical dimensions on an individual's home." It is hard to believe that the Fourth Amendment condones police driving tanks onto front yards, demanding surrender through bullhorns, shining floodlights through windows, and monitoring residents with snipers. Nevertheless, every court to consider the issue has concluded that the Fourth Amendment does apply to home standoffs, though their reasoning has been questionable.

There are some policy arguments in favor of not applying the Fourth Amendment to surrounded suspects, however. Police would not need to worry about an arrest warrant requirement when waiting out a barricaded suspect. This would deter officers from attempting to enter the home rather than worry about the constitutional implications of surrounding the house. Although this makes sense, it is wrong to use the warrant requirement as a sword of Damocles for the police to avoid. Rather, making the warrant requirement rule easy for police to apply encourages them to pursue warrants whenever possible. This both encourages restraint and introduces the neutral eye of a magistrate into the process.

A second argument against requiring arrest warrants for armed standoffs is that they serve no purpose. The job of a magistrate is to decide whether or not the police have probable cause to arrest the

299. See supra notes 62-63 and accompanying text.
302. See supra notes 204-21 and accompanying text.
suspect. Under normal circumstances, they have no say in how the police conduct the arrest. This means that the presence or absence of an arrest warrant has no effect on what courts are most concerned about—unreasonably overbearing and violent police activity.

Two responses can be made to this argument. First, the existence of probable cause is particularly important in home standoffs because many standoffs develop from minor crimes. The magistrate is best suited to decide whether the suspect truly needs to be apprehended or not.

Second, some courts have held that certain police tactics must be approved in advance by the magistrate tasked with signing the arrest warrant. In Langford v. Superior Court, the California Supreme Court decided that the use of a mechanized battering ram to gain entry to drug houses was "so destructive that its use against residences generally infringes on occupants' and owners' rights to be secure against unreasonable searches and seizures." To cabin its use, therefore, the court held that "deployment of the ram to enter dwellings must be considered presumptively unreasonable unless authorized in advance by a neutral magistrate, and unless exigent circumstances develop at the time of entry." The magistrate therefore can play an important role in armed standoffs.

Barricaded suspects occupy a gap in Fourth Amendment jurisprudence that the courts must close. The only true way for courts to do this is to extend the objective "free to ignore the police” seizure test to resisting suspects. Doing so will require them to change the concept of submission. The best way to accomplish this was articulated by Judge Callahan in her Fisher v. City of San Jose (Fisher I) dissent. Under her approach, the “better, more reasonable, interpretation of submission for the purposes of barricaded or surrounded suspects is that the person submits by remaining barricaded or remaining in the home.” The suspect is subjectively submitting to the encirclement by staying put. It does not matter that the suspect has not surrendered.

The problem with Callahan’s position is that some suspects who remain barricaded have not “accepted that there is . . . only one peaceful outcome—his or her eventual surrender.” The obvious example is a

305. See supra notes 230–32 and accompanying text.
306. See supra notes 165–85 and accompanying text (describing how a serious standoff can have paltry beginnings).
308. Id.
309. Id. at 826.
310. See 475 F.3d 1049, 1070 (9th Cir. 2007) (Callahan, J., dissenting).
311. Id. at 1076.
312. Id.
surrounded suspect who exchanges gunfire with police. Such a suspect has not submitted in any form, even if he is confined within the walls of his home. But by staying inside, even this unbowed suspect has given up his freedom to go about his business. The Sixth Circuit made this argument persuasively in *Ewolski*:

> Mr. Lekan clearly would have been seized for the purposes of the Fourth Amendment had the police nailed shut the doors and windows of his house with him inside. The actions of the police in the instant case were no less effective in restraining Mr. Lekan’s movements and, therefore, should be considered a seizure.\(^3\)

This is a fine line, and perhaps it is untenable. Its validity depends entirely on the belief that there is a big difference between fleeing from police on public streets and refusing to leave the privacy of the home. It is the same belief that precipitated *Payton v. New York*\(^3\).

If a court accepts that barricaded suspects have submitted to the police show of authority, it must then apply the *Bostick* “free to ignore the police” test to decide whether or not a seizure has occurred.\(^3\) In this respect, a home standoff is analogous to a bus search because, like a passenger on a bus, the barricaded suspect has voluntarily confined himself to the four corners of his home.\(^3\) Under these circumstances, the Court in *United States v. Drayton* suggested factors that would constitute a seizure: “application of force, . . . intimidating movement, . . . overwhelming show of force, . . . brandishing of weapons, . . . blocking of exits, . . . threat[s], . . . [and] command[s].”\(^3\) Each of these factors exists to some extent during a standoff. Police encircle and isolate the suspect to establish control and prevent escape, issue commands and threats, and frequently brandish weapons as part of an overwhelming display of force. Following *Drayton* to its logical end, such conduct would seize the barricaded suspect.

Exigent circumstances doctrine under *Dorman* suggests a multitude of factors to police that, taken together, can create an exigency.\(^3\) When applied to barricade situations, however, courts struggle to find consistency in exigency analysis. First, courts ignore factors beyond immediate danger and the chance of escape.\(^3\) Second, courts take opposing positions when weighing the need to protect against the continuous threat of a barricaded gunman against the ability of police to

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316. *United States v. Jerez*, 108 F.3d 684, 690 (7th Cir. 1997). For an examination of bus seizure cases, see *supra* notes 76–78 and accompanying text.
318. *See supra* Part II.C.
get a warrant during a protracted standoff.\textsuperscript{320} The best approach to this second question, I propose, lies somewhere in between.

While immediate danger and escape are undoubtedly common exigencies in a standoff, other factors are also important and often overlooked. One such factor is whether police entered the home peaceably. Although some courts have considered peaceable entry, they have not given it special weight.\textsuperscript{321} They should. Police should be discouraged from using excessive amounts of force, both in entering the home and in surrounding the home. Even if they never enter the home, police conduct during a standoff is frequently militaristic, overbearing, and intimidating. Such conduct is unwise in nonhostage situations. In gauging exigent circumstances, therefore, courts should consider the peacefulness of the police both during entry and the standoff.

A second factor that deserves greater attention is the gravity of the underlying offense. Barricades usually involve great danger at some point. But that does not mean that they always begin violently. Normal encounters often become dangerous when the suspect decides to resist. What begins with routine policing or an administrative act can quickly turn into something exponentially more serious. This presents few issues when the suspect is at fault. The problem is that suspects frequently do not cause standoffs. Cases such as Fisher show how police can manufacture danger.\textsuperscript{322} Other cases, like O'Brien, show how crude police tactics can provoke otherwise benign suspects towards violent retaliation.\textsuperscript{323} Indeed, by tossing rocks at windows and breaking glass, the police in Fisher and O'Brien did more to worsen the standoff than to resolve it.\textsuperscript{324} The result is that police can create their own exigencies.

Courts should recognize exigency factors that encourage good police work. As we have seen, police should contain barricaded suspects while keeping a low profile and open channels for communication. When police stray from this model, courts should not bail them out through exigent circumstances. Therefore, the gravity of the offense the police were responding to deserves great respect. Courts should hesitate, though, to give weight to the gravity of offenses committed after police seized the suspect by surrounding the home. By doing so, police would not have a Fourth Amendment incentive to behave badly.

Exigent circumstances doctrine should be as dynamic as the situations it interprets. To this end, I propose the following test. First, courts should distinguish between “planned” and “unplanned” standoffs.

\textsuperscript{320} See supra Part III.
\textsuperscript{321} See generally Fisher v. City of San Jose, 509 F.3d 952 (9th Cir. 2007).
\textsuperscript{322} See Fisher, 509 F.3d at 955–56.
\textsuperscript{323} See O'Brien v. City of Grand Rapids, 23 F.3d 990, 994 (6th Cir. 1994) (police broke window during standoff with emotionally disturbed man, causing him to fire ten shots at police).
\textsuperscript{324} Fisher, 509 F.3d at 956; O'Brien, 23 F.3d at 994.
Police should automatically seek a warrant when they expect a standoff in advance. They know the suspect is barricaded at home and going nowhere, and accordingly must anticipate making a home arrest. Furthermore, given the time to make plans, the police have the resources to call for help. Courts should therefore presume the need for a warrant. By contrast, the initial presumption should be against warrants when police inadvertently enter into a standoff. Responding to a barricaded suspect requires police to set a perimeter, call for reinforcements and negotiators, and evacuate residents, all while keeping tabs on a dangerous suspect. Procuring a warrant under these circumstances would cause more harm than good.

The presumption should end, however, the moment police preoccupation lapses into delay or waiting. Unlike the ad hoc Sixth Circuit approach, courts should look to Place and Sharpe for guidance. During protracted police standoffs, therefore, exigent circumstances should last so long as police work diligently and expeditiously towards resolving the crisis. But when spare resources make it reasonable for police to get a warrant, they must do so. The clearest such circumstance is when police call for SWAT team assistance. At that moment, the police know the suspect is barricaded in his or her house. They intend to make the arrest in the home. Furthermore, they have the wherewithal to call in reinforcements. Barring unforeseen events, courts should presume that SWAT teams are capable of arriving with warrant in hand, or at least with a warrant application under way.

CONCLUSION

The barricaded suspect occupies an uncertain place in Fourth Amendment jurisprudence. Having retreated into their homes, such suspects fall within the strict warrant protection of Payton v. New York. But Payton and lower court precedent provide few answers when police cannot enter the house or force the suspect out. This is unacceptable because the rights of suspects and municipalities all depend on the clarity of guidance given to police officers. Therefore, courts should simplify the test. First, a suspect should be seized for Fourth Amendment purposes when he is surrounded in his home and no longer free to ignore the police. Second, courts should presume a warrant requirement when police have time to plan a standoff. When standoffs are beyond anticipation, however, exigent circumstances should last only so long as the police are too busy to seek a warrant.
