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Articles

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Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule

Barbara C. Salken*

As courts administer the criminal law, they face a continuing tension between the police's need to gather criminal evidence and the people's right to privacy. The courts have had particular difficulty striking that balance when defining the circumstances that justify a warrantless search of private premises to prevent destruction of evidence. The Supreme Court has infrequently considered the question and has never provided a clear standard for determining when warrantless action is justified.[1] The courts of appeals have developed conflicting solutions to the problem.[2] The current national preoccupation with drug trafficking[3] suggests that the government may more often seek

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1. *See infra* section I.

2. *See infra* sections II & III.

3. Between 1960 and 1985, for example, arrests for drug abuse violations jumped from .7% of the total number of persons arrested in 1960 to 6.95% in 1985,

to justify warrantless entries into private premises on the basis of threatened destruction of evidence. Unlike most other evidence, drugs can usually be destroyed with the flush of a toilet or the opening of a tap.[4] Public concern about the drug problem encourages the police to intensify their enforcement efforts,[5] which in turn will increase the number of times police are faced with a real or imagined possibility that evidence will be destroyed. Attempts to broaden police power in this area must be expected.

Notwithstanding the legitimate societal interest in crime control, other important values are at stake. The fourth amendment protects individuals from unreasonable searches and seizures.[6] Its principal role is the promotion of freedom by lim-

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an increase of almost 600%. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES (July 1986). Estimates of cocaine importation have increased from 15-18 billion dollars in 1979 to 39 billion in 1984. Busch & Schnoll, *Cocaine—Review of Current Literature and Interface with the Law*, in 3 BEHAVIORAL SCIENCES & THE LAW 283, 285 (1985). In a recent survey of members of the United States House of Representatives conducted by that body's Select Committee on Narcotics Abuse and Control, 96% of the members responding to the survey characterized the drug abuse in their districts as either moderate or severe, with the reports equally divided between those two conditions. As a result of hearings held by the Select Committee, the Committee found that:

> (1) [t]he continuing spread and increasing intensity of the drug abuse problem—in rural as well as in urban areas—with trafficking in a wide variety of drugs increasing at an alarming rate; and 2) [a]lmost all Members of Congress have had constituents express concern about drug abuse and drug trafficking and ask for congressional action to combat both problems.

Kurke, *Congressional Review of National Problems in Drug Abuse and Its Control*, in 3 BEHAVIORAL SCIENCES & THE LAW 241, 244-45 (1985). President and Mrs. Reagan have called for a "national crusade" against this "cancer of drugs." Boyd, *Reagans Advocate 'Crusade' on Drugs*, N.Y. Times, Sept. 15, 1986, at 1, col. 1.

4. "[T]he possibility of destruction of evidence exists in every narcotics investigation." United States v. Moreno, 701 F.2d 815, 818 (9th Cir. 1983), *vacated*, 758 F.2d 425 (9th Cir. 1985).

5. Purdum, *200 Police Officers Being Added to Division to Combat Narcotics*, N.Y. Times, Aug. 6, 1986, at B1, col. 3.

6. U.S. CONST. amend. IV reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

iting governmental interference in the affairs of individuals,[7] although it is frequently discussed in terms of privacy.[8] This role has been described most eloquently by Justice Brandeis in his famous dissent in *Olmstead v. United States*[9] as "the right to be let alone— the most comprehensive of rights and the right most valued by civilized men."[10] Thus, the fourth amendment connotes a reverence for personal liberty that restricts the government from detaining a citizen even briefly without appropriate cause,[11] respect for the sanctity of the home that demands

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7. Freedom, after all, is the ability to do what one wants, which requires, at least, the right to limit the manner and instance of governmental interference with one's thoughts, actions and possessions. Privacy is certainly a value protected by the amendment, but privacy, or the ability to control the personal information the government acquires and the property one possesses, is a sub-value of freedom itself. On freedom and property and their relation to popular sovereignty, see generally R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION 12-22 (1948); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 214-22 (1969); *see also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353-77 (1974).

8. *See, e.g.*, Katz v. United States, 389 U.S. 347, 353 (1967); Warden v. Hayden, 387 U.S. 294, 304 (1967)("We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property . . ."). Professor Weinreb describes the privacy protected by the Fourth Amendment as having two distinct aspects. The first type of privacy protected by the fourth amendment "enables us to do the things that we like to do but do badly, things that we are a bit embarrassed about doing: to meet a friend quietly, to act out love and hate, to do all the things that we should not do in the same way at high noon in Times Square." The second type of privacy

> allows us to extend our personality by stamping it on a place without displaying it publicly. It allows us to leave our pajamas on the floor, the bed unmade and dishes in the sink, pictures of secret heroes on the wall, a stack of comic books or love letters on the shelf; it allows us to be sloppy or compulsively neat, to enjoy what we have without exposing our tastes to the world.

Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 52-53 (1974).

9. 277 U.S. 438 (1928).

10. *Id.* at 478.

11. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. Rail v. Botsford, 141 U.S. 250, 251 (1891)); *see also* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (essential purpose of proscriptions in fourth amendment to impose a standard of reasonableness upon exercise of discretion by governmental officials in order to safeguard privacy and security of individuals against arbitrary invasions); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (fourth

the highest standard before that threshold may be crossed,[12] and regard for possession of property that prohibits the government from seizing it without authorization or emergency.[13]

The requirement that searches and seizures be conducted pursuant to warrants issued only upon probable cause by a neutral and detached magistrate is central to the fourth amendment.[14] The warrant requirement has two effects. First, it protects people against unjustified government interference with their lives by restricting searches to those based on probable cause.[15] Second, it protects against capricious intrusions conducted at the whim of government officials by requiring that neutral magistrates authorize warrants.[16] Searches conducted

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amendment requires reasonable seizure, and reasonableness depends on balance between public interest and individual's right to personal security).

12. In Payton v. New York, 445 U.S. 573 (1980), the Court stated:

> The Fourth Amendment protects the individual;'s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Id. at 589-90 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)); *see also* Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) (search or seizure taking place on a suspect's property without a warrant is per se unreasonable, unless police can show it falls within an exception).

13. United States v. Place, 462 U.S. 696, 700-02 (1983); Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens, J., concurring); Weeks v. United States, 232 U.S. 383, 393-95 (1914).

14. In Johnson v. United States, 333 U.S. 10 (1948), for example, the Court stated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14.

15. Amsterdam, *supra* note 7, at 411.

16. *Id.* The exercise of indiscriminate or arbitrary power is central to the concerns of the fourth amendment. "The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976); United States v. Ortiz, 422 U.S. 891, 895 (1975); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Camara v. Municipal Court, 387 U.S. 523, 528 (1967); *see* Loewy, *The*

without a warrant are "*per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well delineated exceptions."[17] "These exceptions are 'jealously and carefully drawn,' and there must be a 'showing by those who seek exemption . . . that the exigencies of the situation made [the search] imperative.' "[18] The burden is on the government to show that the search falls within one of the exceptional situations.[19]

Fourth Amendment as a Device for Protecting the Innocent, 81 MICH. L. REV. 1229, 1239 (1983) ("The single theme running through the entire history of the fourth amendment is arbitrariness."); Amsterdam, *supra* note 7, at 410-12.

17. Katz v. United States, 389 U.S. 347, 357 (1967). It is impossible to identify an individual case in which the Supreme Court took a definitive position making warrantless searches per se unreasonable. *See* Williamson, *The Supreme Court, Warrantless Searches, and Exigent Circumstances*, 31 OKLA. L. REV. 110, 116 (1978). Rather, beginning in the dissents of Justice Frankfurter in the 1940s and 1950s and continuing through the decisions of the 1960s, the Court has slowly adopted the view that searches must be made pursuant to warrants unless urgency and necessity justify other action. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (no discussion of proper relationship between reasonable search and warrant clause); Carroll v. United States, 267 U.S. 132, 153 (1925) (recognizing that it was "reasonable" for Congress to permit warrantless searches of automobiles when it was not "practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."); Agnello v. United States, 269 U.S. 20 (1925) (recognizing right to make warrantless search of house incident to lawful arrest); Harris v. United States, 331 U.S. 145, 155 (1947) (Frankfurter, J., dissenting) (arguing that any search or seizure conducted without a warrant was unreasonable unless the circumstances preclude the obtaining of a warrant); Johnson v. United States, 333 U.S. 10 (1948) (invalidating warrantless entry indicating that only "exceptional circumstances" would suffice to dispense with a warrant, without explanation or authority); McDonald v. United States, 335 U.S. 451, 455 (1948) (reaffirming *Johnson* and adding that there were no facts showing that a delay to get a warrant would have endangered the search); United States v. Rabinowitz, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting)(repeating the argument made in his *Harris* dissent).

18. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (quoting Jones v. United States, 357 U.S. 493, 499 (1958), and McDonald v. United States, 335 U.S. 451, 456 (1948)).

19. Vale v. Louisiana, 399 U.S. 30, 34 (1970). The exceptions to the warrant requirement include the following: automobile searches, Carroll v. United States, 267 U.S. 132 (1925); searches pursuant to consent, Bumper v. North Carolina, 391 U.S. 543 (1968); searches incident to lawful arrest, Chimel v. California, 395 U.S. 752 (1969); seizures in plain view, Coolidge v. New Hampshire, 403 U.S. 443 (1971); limited searches and seizures under the stop and frisk doctrine, Terry v. Ohio, 392 U.S. 1 (1968); searches and seizures in hot pursuit of a fleeing felon, United States v. Santana, 427 U.S. 38 (1976); and searches and seizures in exigent circumstances, Warden v. Hayden, 387 U.S. 294 (1967). Excluding consent, all exceptions to the warrant requirement derive from an emergency. Mascolo, *The*

Cases involving exigent circumstances, which by definition, require immediate police action,[20] fall within one of these exceptions. A warrantless search to prevent destruction of evidence is a sub-category of this exception.[21] The Supreme Court has concluded that the need to prevent destruction of evidence is one type of exigent circumstance that may justify warrantless action but has not defined at what point the fear that evidence might be destroyed becomes sufficient to justify warrantless action. The Court has never approved a warrantless entry into private premises on this basis,[22] although it has suggested that evidence "in the process of destruction"[23] or "threatened with destruction"[24] may justify such action.

Despite the Supreme Court's lack of assistance,[25] the circuit courts frequently consider the question of whether, and at what

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Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 BUFFALO L. REV. 419, 425 (1973). The development of "specifically established and well delineated exceptions" like search incident and automobile searches was merely a recognition that certain circumstances presented emergencies so frequently that the court was willing to accept the presence of an exigency whenever the intrusion occurred in that factual situation without regard to whether there was actually an emergency in the particular case. *See* United States v. Robinson, 414 U.S. 218 (1973); Chambers v. Maroney, 399 U.S. 42 (1970).

20. "Exigent circumstances" is the Supreme Court's category for events not falling into the other specific exceptions but nonetheless requiring immediate action. This exception allows for a warrantless search or seizure where there is a compelling need for immediate official action and time does not permit the procurement of a warrant. The Court considers the facts of each case to determine whether it is a "now or never" situation. *See, e.g.*, McDonald v. United States, 335 U.S. 451, 451-56 (1948).

21. Vale v. Louisiana, 399 U.S. 30 (1970); Johnson v. United States, 333 U.S. 10 (1948). Other approved purposes are (1) to discover the cause of a recent unexplained fire, Michigan v. Tyler, 436 U.S. 499 (1978); (2) to retrieve a possibly loaded gun vulnerable to discovery by vandals, Cady v. Dombrowski, 413 U.S. 433 (1973); and (3) to enter without a warrant when officers reasonably believe someone is inside premises in need of immediate aid, Mincey v. Arizona, 437 U.S. 385 (1978).

22. In only one instance has the Court permitted a warrantless intrusion to prevent the destruction of evidence. Schmerber v. California, 384 U.S. 757 (1966). That case, however, was unique; it involved the alcohol content in the arrestee's blood, evidence that was ineluctably being destroyed by the defendant's metabolic process. No police action could have prevented its destruction, nor could the need for a search warrant have been foreseen. Few other circumstances can provide such urgency or inevitability.

23. Vale v. Louisiana, 399 U.S. 30, 34 (1970).

24. Johnson v. United States, 333 U.S. 10 (1948).

25. The Court's lack of guidance may be the result of a conflict among its members about the proper resolution of the problem. Opinions both in support of

point, possible destruction of evidence justifies warrantless action and have developed different approaches.[26] All of the circuits agree that destruction of evidence is an exigent circumstance that may justify warrantless action,[27] but they do not evaluate claims of exigency in the same manner. Numerous approaches have emerged, but they can be grouped into three categories: (1) the "examine-avoid" approach, exemplified by courts that critically evaluate the police officer's assertion that an emergency exists and also require that officers avoid warrantless action when possible; (2) the "uncritical" approach, illustrated by courts that accept at face value the police officer's assertion that an emergency exists and do not affirmatively require that police avoid warrantless action although possible; and (3) the "examine-only" approach employed by courts that critically evaluate the police officer's assertion that an emergency exists, but do not require that officers avoid the need for warrantless action although possible.

The divergent approaches in this area present two major problems. First, inconsistent standards produce inconsistent results, so that searches that are upheld in one circuit would be condemned in another. A federal system, based on a single constitution, cannot tolerate such a result. The constitution does not guarantee greater or lesser degrees of freedom from governmental intrusion based on geography. Every person has the right to the same fourth amendment protections, whether he resides in Montana or Mississippi. Second, and more dangerous, the lack of firm guidance in this area permits some circuits to view too generously the circumstances that justify warrantless

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and dissenting from the denial of certiorari in United States v. Vasquez, 454 U.S. 975 (1981) (Stevens, J., concurring in the denial of certiorari) and 454 U.S. 983 (1981) (Brennan, J., with whom Justices White and Marshall joined, dissenting from the denial of certiorari), show that at least four members of the Court disagree about the meaning of the Court's cases in the area and the status of the law as enforced in the circuits. In any event, despite the frequency with which the Court is presented with the question, it has repeatedly refused to consider it. *See, e.g.*, United States v. Webster, 750 F.2d 307 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985); United States v. Knobeloch, 746 F.2d 1366 (8th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985); United States v. Palumbo, 742 F.2d 656 (1st Cir. 1984), *cert. denied*, 469 U.S. 1114 (1985); United States v. Palumbo, 735 F.2d 1095 (8th Cir.), *cert. denied*, 469 U.S. 934 (1984).

26. *See infra* section II.

27. *See infra* note 76.

action. This may presage development of a broad new exception to the warrant requirement, seriously threatening traditional fourth amendment values.

This Article examines the problem of preventing the destruction of evidence in the context of the fourth amendment's warrant requirement. Section I examines the Supreme Court decisions dealing with warrantless action to prevent the destruction of evidence. Section II discusses the circuits' discordant approach to this issue. Section III illustrates the divergent results produced by application of the three different approaches developed in section II to a hypothetical case problem. Section IV discusses the need for a uniform rule for evaluating official action in this area. Finally, in section V, this Article proposes the following rule: Police may make a warrantless entry into private premises when: (1) they have probable cause to believe that evidence of criminal activity is located within; (2) they can articulate facts that create reasonable suspicion that evidence would be destroyed before a warrant could be obtained; (3) the circumstances giving rise to the threat of destruction must be neither avoidable by reasonably prudent officers nor created by them; and (4) the invasion of fourth amendment interests should be no greater than the circumstances require to maintain the status quo until a warrant can be obtained.[28] This rule encourages police officers to use warrants but permits them to make informed decisions before making warrantless entries. The standard authorizes warrantless intrusions in specific, limited circumstances without undermining vital fourth amendment values.

I. The Supreme Court's Treatment of Warrantless Searches to Prevent Destruction of Evidence

There are few United States Supreme Court decisions involving threatened destruction of evidence, the Court having considered the subject only six times.[29] In none of these cases has the Court permitted a warrantless entry into premises

28. There are a few extraordinary circumstances where maintaining the status quo will not protect the evidence. Police may be excused from alternative action when the evidence is actually in the process of destruction.

29. *See* Welsh v. Wisconsin, 466 U.S. 740 (1984); Vale v. Louisiana, 399 U.S. 30 (1970); Schmerber v. California, 384 U.S. 757 (1966); United States v. Jeffers,

based merely on the *possibility* that evidence might be destroyed.[30] Furthermore, none of the cases mentioning threatened destruction of evidence contains extensive discussion of the subject.

Vale v. Louisiana[31] addresses the issue most directly. The Court's language, however, suggests a standard that lower courts have been reluctant to adopt. This language in *Vale* has probably been the source of much of the existing confusion among the circuit courts.[32] Yet, the disagreement after *Vale* has not been limited to lower courts; recent opinions by members of

342 U.S. 48 (1951); McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948).

30. Since 1966, the Court has frequently mentioned destruction of evidence in cases involving other issues but in no case has evidence actually been admitted on that basis. *See* Tennessee v. Garner, 471 U.S. 1, 8 (1985) (police use of deadly force to prevent escape of unarmed felon); Segura v. United States, 468 U.S. 796, 810 (1984) (evidence seized from private residence pursuant to valid search warrant after illegal entry); Michigan v. Long, 463 U.S. 1032, 1049 n.14 (1983) (limits of protective search); Illinois v. Andreas, 463 U.S. 765, 780 (1983) (search of a previously lawfully searched container); Illinois v. Lafayette, 462 U.S. 640, 649 (1983) (Marshall, J., concurring) (inventory search); Florida v. Royer, 460 U.S. 491, 500 (1983) (seizure of defendant at airport); New York v. Belton, 453 U.S. 454, 457 (1981) (automobile search incident to arrest); Arkansas v. Sanders, 442 U.S. 753, 759 (1979) (warrantless search of suitcase seized from trunk of taxicab); Mincey v. Arizona, 437 U.S. 385, 394 (1978) (warrantless search of murder scene); Zurcher v. Stanford Daily, 436 U.S. 547, 563 (1978) (issuance of search warrant as to party not suspected of crime); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (warrantless search of fire scene); United States v. Santana, 427 U.S. 38, 43 (1976) (retreat into private place by defendant following arrest in public place); United States v. Watson, 423 U.S. 411, 435 (1976) (Marshall, J., dissenting) (warrantless arrest in public place); Cardwell v. Lewis, 417 U.S. 583, 592 n.7 (1974) (search of exterior of defendant's automobile); United States v. Edwards, 415 U.S. 800, 811 (1974) (Stewart, J., dissenting) (search and seizure of clothing of defendant in custody); United States v. Robinson, 414 U.S. 218, 230 (1973) (full search of person incident to lawful custodial arrest); Coolidge v. New Hampshire, 403 U.S. 443, 478 (1971) (warrantless seizure of defendant's car from his driveway); United States v. White, 401 U.S. 745, 783 (1971) (Harlan, J., dissenting) (use of testimony of government agents who monitored by radio transmitter conversations between defendant and government informant); Chimel v. California, 395 U.S. 752, 763 (1969) (search incident to arrest); Sibron v. New York, 392 U.S. 40, 46 (1968) (extent of intrusion permissible pursuant to *Terry* stop); Terry v. Ohio, 392 U.S. 1, 29 (1968) (reasonable search for weapons following "stop"). In the one case in which the Court has upheld the seizure of evidence to prevent its destruction, the evidence (alcohol in the blood) was being destroyed by the metabolism, a situation of limited applicability. Schmerber v. California, 384 U.S. 757 (1966). See *infra* notes 43-48 and accompanying text for a discussion of *Schmerber*.

31. 399 U.S. 30 (1970).

32. *See infra* notes 49-67 and accompanying text.

the Supreme Court suggest a marked divergence of views among the Justices.[33]

A. *The Exigency First Considered*

The earliest references to potential destruction of evidence as an independent justification for warrantless intrusions came in the late 1940s in *Johnson v. United States*[34] and *McDonald v. United States*.[35] In both cases, the Court disapproved the search, but implied that a warrantless search could be upheld in an appropriate case.

In *Johnson*, the police had probable cause to believe opium was being smoked in a hotel room, but they lacked a search warrant. They knocked on the door and, after it was opened by the occupant, announced their intention to search the premises.[36] Affirming the suppression of the narcotics evidence discovered during the search, Justice Jackson stated that:

> [t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right or privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction. . . .[37]

In *McDonald*, the Court again rejected the government's claim that a warrantless search was justified by possible de-

33. *See infra* notes 68-75 and accompanying text.

34. 333 U.S. 10 (1948).

35. 335 U.S. 451 (1948).

36. *Johnson*, 333 U.S. at 12.

37. *Id.* at 15. The Court's conclusion that no evidence was threatened with destruction is puzzling. The police could smell the odor of burning opium emanating from the hotel room. There is no indication in the opinion that they had reason to believe the amount of opium in the room exceeded the amount actually being smoked, presumably in the bowl of one or more pipes. Therefore, there was a reasonable basis to believe that the evidence in the room was literally going up in smoke. The Court seemed to be saying that the officers' testimony that they smelled opium would be as useful as the opium itself.

struction of evidence. Police entered a rooming house upon hearing the sounds of an adding machine, under circumstances that gave them probable cause to believe the defendant was engaged in illegal gambling. They arrested the defendant and seized evidence used to convict him of running an illegal lottery. The Court, in reversing the conviction, observed: "[T]he defendant was not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave. Nor was the property in the process of destruction nor was it likely to be destroyed as the opium paraphernalia in the *Johnson* case."[38]

Thus, destruction of evidence was not the deciding issue in either *Johnson* or *McDonald*. In neither case were the suspects aware of the police surveillance, nor were there other reasons to think that the evidence would be destroyed or removed. In both cases, the government also argued that the searches were valid as incident to a lawful arrest,[39] but the Court held that the underlying arrests were unlawful and could not, therefore, support the subsequent warrantless searches.[40] The Court mentioned exigency only to note that there was no reason for the officers not to have obtained a warrant before entering the premises.[41] These statements, however, have furnished lower courts with an implied basis for viewing prevention of destruction of evidence as an exception to the warrant requirement.[42]

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38. *McDonald*, 335 U.S. at 455. Despite the language to the contrary in *Johnson*, the Court's language in *McDonald* referring to *Johnson* implies that it recognized *some* danger to the evidence there.

39. *Johnson*, 333 U.S. at 15; *McDonald*, 335 U.S. at 453. Search incident to a lawful arrest is an exception to the warrant requirement that permits a warrantless search of an arrestee's person and the area within his immediate control at the time of custodial arrest. Chimel v. California, 395 U.S. 752 (1969). Such searches are lawful if the arrest is lawful and the search is conducted close to the time of the arrestee's arrest and does not exceed the permissible area. Reason to believe evidence of criminal activity is present is not necessary. United States v. Robinson, 414 U.S. 218, 235 (1973). The search is permitted to prevent the arrestee from using any weapons he may have and to prevent him from destroying any evidence within his reach. *Chimel*, 395 U.S. at 763.

40. *Johnson*, 333 U.S. at 16-17; *McDonald*, 335 U.S. at 453-54.

41. *Johnson*, 333 U.S. at 15; *McDonald*, 335 U.S. at 454-55.

42. At least 40 state and federal courts have relied on that language. *See, e.g.*, United States v. Driver, 776 F.2d 807, 810 (9th Cir. 1985); United States v. Dart, 747 F.2d 263, 267 (4th Cir. 1984); United States v. Palumbo, 742 F.2d 656, 658-59 (1st Cir. 1984), *cert. denied*, 469 U.S. 1114 (1985); United States v. Thompson, 700 F.2d 944, 947-48 (5th Cir. 1983); United States v. Vasquez, 638 F.2d 507, 530 (2d Cir. 1980), *cert. denied*, 454 U.S. 975 (1981); United States v. Guidry, 534 F.2d

B. *Imminent Destruction of Evidence as Justification for Warrantless Action*

Schmerber v. California[43] is the only case in which the Supreme Court has approved the admission of evidence seized without a search warrant on the ground that otherwise the evidence would have been destroyed.[44] Schmerber was convicted of driving under the influence of alcohol based upon a blood sample taken by a doctor on instruction from the police, without a warrant and over the defendant's objection.[45] The Court held that the imminent destruction of evidence constituted an emergency that justified the warrantless action. The Court reasoned that because the percentage of alcohol in blood diminishes shortly after one stops consuming alcohol, such "special facts" justified the search as an "appropriate incident to [Schmerber's] arrest."[46]

The rationale for the decision, however, is not entirely clear. Was the evanescent nature of the evidence the key fact permitting seizure without a warrant? Or does the word "incident" suggest that the search was justified under the more traditional search-incident-to-arrest exception, with the Court's

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1220, 1223 (6th Cir. 1976); Guzman v. Estelle, 493 F.2d 532, 536-37 (5th Cir. 1974); United States v. Rubin, 474 F.2d 262, 268 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973); Leahy v. United States, 272 F.2d 487, 491 n.5 (9th Cir. 1960); Fluker v. State, 171 Ga. App. 415, 416-17, 319 S.E.2d 884, 866 (1984); Sayre v. State, 471 N.E.2d 708, 714 (Ind. App. 1984), *cert. denied*, 106 S. Ct. 1226 (1986); Stackhouse v. State, 298 Md. 203, 209, 468 A.2d 333, 342 (1983); Commonwealth v. Skea, 18 Mass. App. 685, 700, 470 N.E.2d 385, 391 (1984); State v. Peters, 695 S.W.2d 140, 147 (Mo. App. 1985); State v. Welker, 37 Wash. App. 628, 632-34, 683 P.2d 1110, 1114-15 (1984).

43. 384 U.S. 757 (1966).

44. A similar result was reached by the Court three years prior to *Schmerber* in Ker v. California, 374 U.S. 23 (1963). In *Ker*, however, the Court's focus was on the failure of police to comply with Cal. Penal Code § 844, which permitted peace officers to enter a dwelling to make an arrest on reasonable cause following a demand for admittance and an explanation of the purpose for which admittance was desired. Although Payton v. New York, 445 U.S. 573 (1980) subsequently determined that warrantless, nonconsensual entry into a suspect's home to make a routine felony arrest was violative of the fourth amendment, at the time *Ker* was decided, police only needed probable cause to arrest, and thus when the officers in *Ker* entered the defendant's apartment without a warrant and unannounced in order to prevent the destruction of evidence, there was arguably a lesser fourth amendment intrusion than in *Schmerber*.

45. *Schmerber*, 384 U.S. at 758.

46. *Id.* at 770-71.

recognition of the ephemeral nature of the evidence merely warranting the particularly intrusive search of the suspect's body? Although the answer to this question is not clear, the Court later cites *Schmerber* as an exigent circumstance case rather than one involving a search incident to an arrest.[47] *Schmerber* was unique, however; the special nature of the intrusion into Schmerber's body was noted by the Court when it refused to rely on prior decisions that involved state interference with property relationships.[48] Moreover, in *Schmerber*, the evidence was actually being destroyed, a process that could not have been interrupted by the police. Finally, the officers could not have foreseen the emergency and obtained a warrant. Thus, *Schmerber* may have limited application to a warrantless search of premises.

C. *The Prototypical Case: Vale v. Louisiana*

Vale v. Louisiana[49] is the case most often cited both for and against the admissibility of evidence seized from a residence without a warrant in order to prevent destruction of the evidence. In *Vale*, police with warrants for Vale's arrest staked out his residence. After observing an apparent drug transaction, the police arrested Vale in front of the house and informed him of their intention to search it. When they entered the house with Vale, one of the officers made a cursory inspection of the premises and ascertained that no one else was present. Min-

47. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 759 (1985) (compelled surgical procedure to remove bullet from suspect's chest held to constitute unreasonable search under fourth amendment); Welsh v. Wisconsin, 466 U.S. 740, 750 (1984) (absent exigent circumstances, warrantless nighttime entry into individual's home to make arrest for civil, nonjailable traffic offense held prohibited by fourth amendment); Vasquez v. United States, 454 U.S. 975, 988 (1981) (warrantless entry into individual's apartment to make cursory inspection of premises held justified to guarantee evidence was not being destroyed); Mincey v. Arizona, 437 U.S. 385, 394 (1978) (state statute permitting warrantless search of individual's apartment simply because a homicide had occurred there held inconsistent with fourth and fourteenth amendments); United States v. Dionisio, 410 U.S. 1, 4 (1973) (compelling witness to furnish voice exemplar held not to violate fourth amendment).

48. *Schmerber*, 384 U.S. at 768-69. The Court stated, "[b]ecause we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—houses, papers, and effects—we write on a clean slate. Limitations on [searches of property] are not instructive in this context." *Id.* at 767-68.

49. 399 U.S. 30 (1970).

utes later, Vale's mother and brother arrived. The officers then searched the house and discovered narcotics in a rear bedroom.[50]

The Louisiana Supreme Court upheld the search, noting the ready destructibility of narcotics and the possibility that other persons may have been on the premises who could have destroyed the evidence.[51] The United States Supreme Court reversed, concluding that no exigent circumstances justified the warrantless action.

The decision in *Vale* is confusing for two reasons. First, in rejecting the contention that an emergency existed, the Court observed in a single sentence that "[t]he goods ultimately seized were not in the process of destruction."[52] This language suggests that warrantless action would be permitted only when the evidence is actually being destroyed. It is the Court's most widely cited statement governing warrantless action to preserve evidence,[53] but the standard is so restrictive it can rarely be met. Testimony that the police heard toilets being flushed or saw suspects burning evidence could meet the standard, but it seems unlikely that such a showing could be made in many instances. The circuit courts have assumed that the Supreme Court did not intend that its language be taken literally,[54] and

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50. *Id.* at 33.

51. The Louisiana Supreme Court had also upheld the search on the ground, not relevant to this discussion, that the search was sustainable as a permissible search incident to Vale's arrest although the arrest occurred outside the house. The United States Supreme Court quickly rejected this branch of the holding, citing traditional limits to the search incident to arrest doctrine. *Id.* at 33-34.

52. *Id.* at 35.

53. Harbaugh & Faust, *"Knock on Any Door"—Home Arrests After* Payton *and* Steagald, 86 DICK. L. REV. 191, 223 n.208 (1982); *see, e.g.*, United States v. Kunkler, 679 F.2d 187 (9th Cir. 1982); People v. Medina, 7 Cal. 3d 30, 38, 496 P.2d 433, 438, 101 Cal. Rptr. 521, 526 (1972); People v. Larry A., 154 Cal. App. 3d 929, 936 n.5, 201 Cal. Rptr. 696, 701 n.5 (1984); People v. Davis, 86 Ill. App. 3d 557, 562, 407 N.E.2d 1109, 1114 (1980); State v. Nine, 315 So. 2d 667, 673 (La. 1975); State v. Wiley, 522 S.W.2d 281, 290 (Mo. 1975); State v. Weible, 211 Neb. 174, 180, 317 N.W.2d 920, 924 (1982); State v. Seiss, 168 N.J. Super. 269, 277, 402 A.2d 972, 976 (1979); Lugar v. Commonwealth, 214 Va. 609, 629, 202 S.E.2d 894, 909 (1974).

54. In United States v. Rubin, 474 F.2d 262 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973), for example, the Third Circuit panel noted:

> Although the court had always spoken of "threatened" destruction or removal of evidence in previous cases involving the emergency exception, in *Vale*, it spoke for the first time of goods "in the process of destruction." Although the language might suggest that the emergency exception must be

have refused to restrict warrantless intrusions to situations involving actual and ongoing destruction of evidence.[55] The principal result of this ambiguity has been the formulation of alternative and varying standards by the circuit courts, which will be discussed in section II.[56]

Second, the Court's failure specifically to address the propriety of the police entry into Vale's house has contributed to the confusion.[57] The police activity in *Vale* had two distinct components. One, the police entered the house without a search warrant and passed through the rooms to ascertain whether other persons were present.[58] Two, the police conducted a search only after Vale's family returned home.[59] Rejecting the

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construed to require knowledge that the evidence is actually being removed or destroyed, the omission of a single word should not be given such significance, especially in light of the facts in *Vale*.

Id. at 267 (citations omitted); *see also* United States v. Turner, 650 F.2d 526, 529 (4th Cir. 1981) (where officers reasonably believed that evidence might be destroyed before search warrant can be acquired, *Vale* does not require suppression of evidence); United States v. Rosselli, 506 F.2d 647, 630 (7th Cir. 1974) (government's burden does not require proof of actual knowledge that evidence is being destroyed); United States v. Blake, 484 F.2d 50, 54-55 (8th Cir. 1973) (explaining how *Vale* does not alter the rule that evidence threatened with imminent removal or destruction provides exceptional circumstances justifying warrantless search), *cert. denied*, 417 U.S. 949 (1974). Commentators have taken the view that the language should be accepted literally and have viewed *Vale* as an example of the traditional special protection afforded dwellings. *See* White, *The Fourth Amendment As a Way of Talking About People; A Study of* Robinson *and* Matlock, 1974 SUP. CT. REV. 165, 183 n.41; Note, *Police Practices and the Threatened Destruction of Tangible Evidence*, 84 HARV. L. REV. 1465, 1473 (1971).

55. *See* cases cited *infra* note 77.

56. *See infra* notes 76-194 and accompanying text.

57. Since there was no evidence discovered during the initial search through the premises and the evidence suppressed was discovered during a later and more intensive search, it is possible that the Court approved the initial entry. It is unclear whether the Court considered the propriety of the entry in deciding the case. 2 W. LAFAVE, SEARCH AND SEIZURE 654 (1987); Dressler, *A Lesson In Caution, Overwork, and Fatigue: The Judicial Miscraftsmanship of* Segura v. United States, 26 WM. & MARY L. REV. 375, 393 n.88 (1985).

58. *Vale*, 399 U.S. at 33.

59. *Id.* This knowledge may be more important in *Vale* than the presence of a suspect's innocent relatives might be in a different case. According to some commentators, James Vale was not only the defendant's brother, but also was thought to be a confederate in the drug enterprise. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 359 (1973); Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously With an Arrest On or Near Private Premises*, 30 SYRACUSE L. REV. 973, 997 n.67 (1979).

Louisiana court's argument that a confederate capable of destroying evidence could have been in the house, the Court noted that the police knew that no one else was present when they completed their initial sweep.[60] This statement suggests that the illegal conduct occurred only after they completed their initial pass through the house. Thus, the Court may have tacitly viewed the initial entry and limited search as justified in the circumstances.[61] *Vale* can thus be cited for two different pro-

60. *Vale*, 399 U.S. at 34.

61. At least two commentators have so read *Vale*. *See* Dressler, *supra* note 57, at 375, 393 n.88; Kelder and Statman, *supra* note 59, at 973, 997 n.68. Without specifically relying on *Vale*, the circuit courts do permit a limited search, often called a "protective sweep" or "security check" to search for confederates who might endanger the officers or destroy evidence. The distinctive feature of such a search is that it is designed to discover persons, not evidence, even though evidence is often discovered in plain view during such a search. *See, e.g.*, United States v. Picariello, 568 F.2d 222 (1st Cir. 1978) (agents justified in securing defendant's apartment in view of evidence that defendant was involved in bombings and that stolen explosives were stored in defendant's apartment); United States v. Artierio, 491 F.2d 440 (2d Cir.) (agents entering defendant's home complied with spirit of statute authorizing officer to break open door to execute search warrant and did not violate fourth amendment or statute) (dictum), *cert. denied*, 419 U.S. 878 (1974); United States v. Christophe, 470 F.2d 865, 869 (2d Cir. 1972) (agents securing premises after arresting defendant entitled to conduct cursory examination of premises), *cert. denied*, 411 U.S. 964 (1973).

Occasionally the search may occur, as in *Vale*, after an arrest outside of a residence and involve subsequent entry into a residence. *See, e.g.*, United States v. Baker, 577 F.2d 1147 (4th Cir.) (search of house in front of which defendant was arrested not invalid where officers reasonably feared they would be fired on by accomplice inside the house), *cert. denied*, 439 U.S. 850 (1978); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977) (following shoot-out between defendant and police, officers had right to conduct quick and cursory check of residence when they had reasonable grounds to believe that there were others present who might endanger safety of themselves and others); United States v. James, 528 F.2d 999 (5th Cir.) (officers' entry after shoot-out with occupants and seizure of evidence in plain view not an unreasonable search and seizure), *cert. denied*, 429 U.S. 959 (1976). In such an instance, the search, if undertaken to protect evidence, is an example of a warrantless search of a residence to protect evidence from destruction. No separate categorization is appropriate, nor should there be a reduced justification for entry. Yet a number of courts do permit an entry based on no showing at all for what they call a "protective sweep." *See, e.g.*, United States v. Miller, 449 F.2d 974 (D.C. Cir. 1970) (officers' entry in hot pursuit of armed felon justified search and seizure to assure no dangerous persons were hiding); United States v. Briddle, 436 F.2d 4 (8th Cir. 1970) (evidence in plain view during officers' quick search of apartment in which defendant was arrested was not fruit of unlawful search and seizure), *cert. denied*, 401 U.S. 921 (1971); United States v. Cognato, 408 F. Supp. 1000 (D. Conn.) (once officers gained lawful entry into apartment, they had right to arrest defendant, seize evidence from his person, inspect prem-

positions: (1) *Vale* may prohibit a warrantless search of a dwelling even when it is known that persons who might destroy evidence are present, unless the evidence is known to be in the process of destruction; or (2) *Vale* may permit a warrantless entry into premises after a lawful arrest outside the premises, on no showing at all, in order to check for confederates or persons who might destroy evidence.

The first proposition is so restrictive that officers can virtually never make a warrantless entry to prevent the loss of evidence. Normally, they will be unable to determine from the outside what is actually happening on the inside. The second proposition may be unduly permissive, because the mere arrest of a resident would authorize a warrantless entry to discover persons who might destroy evidence. Such conflicting interpretations have been responsible for much of the confusion in this area. *Vale* can be cited in virtually every case in which one wishes to argue that threatened destruction of evidence justifies a warrantless entry, and its ambiguities frequently allow it to be cited by both sides.

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ises, and seize other evidence in plain view), *aff'd*, 539 F.2d 703 (2d Cir. 1976), *cert. denied*, 430 U.S. 956 (1977).

More frequently, a protective sweep is a search through the rooms of a residence after an otherwise lawful entry to assure the officers that they are not in danger from others. *See e.g.*, United States v. Mabry, 809 F.2d 671 (10th Cir. 1987) (limited protective sweep to secure premises and ascertain whether there were persons other than defendants on premises who might pose danger to officers was justified by exigent circumstances); United States v. Escobar, 805 F.2d 68 (2d Cir. 1986) (officers may conduct security check without warrant when making arrest on private premises when they reasonably fear that there are other persons within who may pose threat or are likely to destroy evidence); United States v. Newton, 788 F.2d 1392 (8th Cir. 1986) (officers justified in conducting protective search for a man they thought was inside house and who might have been cause of another's death); United States v. Gardner, 627 F.2d 906 (9th Cir. 1980) (9th Cir. 1980) (where officers had a reasonable apprehension concerning unknown and possibly dangerous occupants of residence, warrantless protective sweep did not violate fourth amendment); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976) (officers who entered premises of third party to execute arrest warrants and who, after arresting defendants, heard scuffling sounds coming from bathroom were justified in making a cursory search to secure immediate area), *cert. denied*, 430 U.S. 983 (1977). A search undertaken after the officers are already inside is more accurately considered as a search-incident rubric and is outside the scope of this Article. For a more complete examination of the protective sweep doctrine, see Kelder & Statman, supra note 59.

D. *A New Factor Emerges: Gravity of the Offense*

Since *Vale*, the Court has offered further guidance for determining the appropriateness of a warrantless intrusion in only one case. In *Welsh v. Wisconsin*,[62] the Court reversed a conviction for driving while intoxicated. After driving his car off the road and abandoning it, Welsh walked to his home and went to bed. Police, on information from a witness who had seen Welsh driving his car erratically, went to his home, entered without a warrant, and arrested him. The prosecution argued that the warrantless entry to arrest was necessary to prevent the destruction of evidence.[63] Here, as in *Schmerber*, the evidence in danger of destruction was the level of alcohol in the blood. The Court rejected that argument and reaffirmed the special protections afforded the home, noting that it had never actually permitted a warrantless entry of a home except in hot pursuit.[64] Notwithstanding the fact that the alcohol in the defendant's blood was being destroyed, the Court held that exigent circumstances did not justify the warrantless entry.[65] The Court noted that hesitancy "in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor."[66]

The gravity of the offense as a determinant of an emergency is a new consideration in exigent circumstances analysis. Although the Court does not reject the notion that exigent circumstances may justify a warrantless entry into the home, *Welsh* offers more support for a limited reading of that proposition than for the expansive view accepted by many of the circuits.[67]

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62. 466 U.S. 740 (1984).

63. In *Welsh*, the Court also addressed the government's other contentions that "hot pursuit" of the suspect and prevention of physical harm to the suspect and the public justified the warrantless entry into the suspect's home, *id.* at 753, but the Court found the government's "hot pursuit" claim "unconvincing" based on the lack of "immediate or continuous pursuit" of the suspect from the crime scene. *Id.* Similarly, it rejected the government's public safety claim because the suspect had already abandoned his car and was in his home. *Id.*

64. *Id.* at 750.

65. *Id.* at 754.

66. *Id.* at 750.

67. See *infra* notes 134-44 and accompanying text for a discussion of the approaches adopted by the District of Columbia, Sixth, and Eighth Circuits.

E. *The Justices' Diverging Views*

The Court's denial of certiorari in *Vasquez v. United States*[68] produced supporting and dissenting opinions discussing destruction of evidence as an exception to the warrant requirement.[69] *Vasquez* arose out of the investigation of a cocaine distribution ring, some of whose members were arrested outside an apartment building believed to contain drugs. One of the arrestees told the police that they had come from an apartment on the second floor. The police went to a second-floor apartment, were admitted, and after the occupant of the apartment created a commotion that could have been heard by anyone remaining in the building, were informed that the persons arrested outside the building had been in and out of a fourth-floor apartment throughout the day.

The officers decided to enter the fourth-floor apartment, fearing that confederates might be in the apartment destroying evidence. Their belief was based on the fact that one of the arrestees was lightly clad and keyless, from which the officers inferred that someone remained in the apartment to readmit him, and that the arrests outside the building and the disturbance following the investigation at the second-floor apartment probably would have alerted any remaining confederates to the presence of police. After entry, the police seized items in plain view and items discovered after a more extensive search, although no one else was in the apartment.[70] The circuit court affirmed the district court's decision to admit only the plain-view evidence.[71]

The Supreme Court denied certiorari. Justices Brennan, Marshall, and White dissented because they believed the circuit court had applied a "security check" exception to the warrant requirement, an exception not yet recognized by the Court.[72]

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68. 454 U.S. 975 (1981).

69. The opinion in support of the denial of certiorari was authored by Justice Stevens, *id.*, and the opinion in opposition to the denial of certiorari was authored by Justice Brennan and joined by Justices Marshall and White. *Id.* at 983.

70. *Id.* at 979.

71. *Id.* at 980-82.

72. In his dissent, Justice Brennan stated:

> [T]he Court of Appeals purported to identify and apply a "security check" exception to the warrant requirement which . . . would allow warrantless entry into a home following an arrest outside, if the arresting officers possess a reasonable belief that third persons are inside and aware of the

Justice Brennan argued that the Court's decisions do not support such an exception:

> [T]he Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person *outside* his home and then take him inside for the purpose of conducting a warrantless search . . . . Indeed, our precedents can more reasonably be read as interpreting the Fourth Amendment to bar the warrantless entry of a residence predicated solely on the belief that persons on the premises, knowing of the arrest, might destroy evidence.[73]

Justice Stevens, who supported denial of certiorari, did not dispute the dissenting Justices' view that a security check exception to prevent the destruction of evidence had never been sanctioned by the Court, but denied certiorari on other grounds, including the possibility that the circuit courts agreed on the issue.[74] As will be seen in section II, any agreement among the circuits is only superficial. If a majority of the Court shares this opinion it may explain the Court's reluctance to consider the question.[75] Although the Supreme Court traditionally has viewed destruction of evidence as an exigent circumstance that may justify warrantless action, it has thus failed to provide a principled basis for determining when, or under what circum-

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> arrest, "so that they might destroy evidence. . . ." The exception thus stated not only authorizes the police to enter a home without a warrant in circumstances far less compelling than we have recognized, but permits law officers, in determining the time and manner of executing an arrest, to contrive their own exigency and thereby avoid the necessity of procuring a warrant before entering the home.

Id. at 983. "Despite the currency of the doctrine in the lower courts, no decision of this Court supports the existence of a general 'security check' exception to the warrant requirement." *Id.* at 987.

73. *Id.* at 987-88 (quoting Shipley v. California, 395 U.S. 818, 820 (1969) and citing Vale v. Louisiana, 399 U.S. 30 (1970)).

74. Justice Stevens notes that Justice Brennan "correctly points out that there are substantial arguments favoring a grant of certiorari." *Id.* at 976. Since Justice Brennan's only argument is that the security check exception to prevent the destruction of evidence relied upon by the Second Circuit has not been sanctioned by the Court, it is not unfair to assume that Stevens is not convinced of its appropriateness himself. Rather he bases his decision to deny certiorari on the possible lack of standing of the defendant, the limited, narrow holding of the court below, and the assertion that there was no allegation in the petition for certiorari that there is a conflict between the decision of the court of appeals in this case and any other court of appeals decision. *Id.* at 976-77.

75. *See supra* note 25.

stances, evidence is sufficiently threatened with destruction to justify a warrantless entry. *Vale*, the leading case on entries into residences to prevent loss of evidence, produces confusion rather than illumination. The only instance when evidence was properly seized without a warrant to prevent its destruction was in *Schmerber*, in which the evidence was actually in the process of destruction and the seizure did not require entry into a home. When entry into a home is at issue, the gravity of the offense may determine whether the exigency is sufficiently pressing to justify crossing the threshold without a warrant, even when evidence is in the process of destruction. Finally, at least three Justices of the Court believe it is time for reconsideration of the matter. A close examination of the situation as seen by the circuit courts may persuade the remainder.

II. The Circuit Courts' View of Destruction of Evidence as a Justification for Warrantless Searches

The circuit courts are in disarray on the justification necessary to permit warrantless actions to prevent destruction of evidence. Although all recognize that potential destruction of evidence may justify warrantless action,[76] and although none limit such action, as suggested in *Vale*, to instances in which evidence is in the process of destruction,[77] their approaches are

76. *See, e.g.*, United States v. Andersson, 813 F.2d 1450 (9th Cir. 1987); United States v. Altman, 797 F.2d 514 (7th Cir. 1986); United States v. Baldacchino, 762 F.2d 170 (1st Cir. 1985); United States v. Garcia, 741 F.2d 363 (11th Cir. 1984); United States v. Thompson, 700 F.2d 944 (5th Cir. 1983); United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983); United States v. Eddy, 660 F.2d 381 (8th Cir. 1981); United States v. Turner, 650 F.2d 526 (4th Cir. 1981); United States v. Allison, 639 F.2d 792 (D.C. Cir. 1980); United States v. Renfro, 620 F.2d 569 (6th Cir.), *cert. denied*, 449 U.S. 902 (1980); United States V. Vasquez, 638 F.2d 507 (2d Cir. 1980), *cert. denied*, 454 U.S. 975 (1981); United States v. Rubin, 474 F.2d 262 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973).

77. *See, e.g.*, United States v. Gallo-Roman, 816 F.2d 76 (2d Cir. 1987); United States v. Andersson, 813 F.2d 1450 (9th Cir. 1987); United States v. Mabry, 809 F.2d 671 (10th Cir. 1987); United States v. Altman, 797 F.2d 514 (7th Cir. 1986); United States v. Moore, 790 F.2d 13 (1st Cir. 1986); United States v. Webster, 750 F.2d 307 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985); United States v. Garcia, 741 F.2d 363 (11th Cir. 1984); United States v. Palumbo, 735 F.2d 1095 (8th Cir.), *cert. denied*, 469 U.S. 934 (1984); United States v. Elkins, 732 F.2d 1280 (6th Cir. 1984); United States v. Turner, 650 F.2d 526 (4th Cir. 1981); United States v. Kane, 637 F.2d 974 (3d Cir. 1981); United States v. Allison, 639 F.2d 792 (D.C. Cir. 1980).

otherwise varied. Some circuits require the presence of specific factors. For example, the Third and Fourth Circuits use a five-factor test to determine whether warrantless action is justified.[78] Other circuits have rejected a checklist approach for determining when exigent circumstances exist, instead looking to the totality of the circumstances in each case.[79] The differences among these formulations themselves are not necessarily important. The important constitutional consideration is whether cases decided under these tests produce different results, because if they do, an individual in one part of the country will enjoy more protection from government intrusions than an individual in another part of the country, a result that is unacceptable.

It is difficult to categorize and compare the approaches taken by the circuits.[80] Some have never articulated a specific test or mode of analysis, while others have offered more than one formulation.[81] Additionally, even among those circuits that

78. *See* United States v. Rubin, 474 F.2d 262, 268-69 (3d Cir. 1973).

79. *See, e.g.*, United States v. Edwards, 602 F.2d 458, 470 (1st Cir. 1979); United States v. Flickenger, 573 F.2d 1349, 1356 (9th Cir. 1978).

80. Other commentators created categories for evaluating exigent circumstances justifying warrantless entries into the home for the purpose of arrest. *See* Donnino & Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 ALB. L. REV. 90 (1980); Harbaugh & Faust, *supra* note 53. Both of these efforts, however, concentrated on the way in which the reviewing court has *organized* its focus for determining the presence or absence of exigent circumstances. Neither examined the factors that courts have actually considered relevant when determining the presence or absence of exigent circumstances. Donnino and Girese divided the courts into three groups. The first, called "qualitative," is defined by the authors as an attempt to "reduce the constellation of facts believed relevant to finding exigent circumstances into a set of enumerated factors that appear to be both all-encompassing and easy of application." Donnino & Girese, *supra*, at 99. The second approach, designated the "definitional" approach, was thought to be similar to the first, but "rather than an enumerated list of factors, the enunciating court attempts to utilize a comprehensive definition, indicating what considerations are important to the issue." *Id.* at 106. The third approach, designated "holistic," neither employed enumerated factors nor formed an all-encompassing definition, but left the question to be resolved on a case-by-case basis. *Id.* at 109. Harbaugh and Faust, on the other hand, took a simpler approach and divided the courts into two categories, the checklist standard or the totality of the circumstances test. Harbaugh & Faust, *supra* note 53, at 224. Although possibly instructive in comparing what the courts *say* when deciding on the presence or absence of exigent circumstances, these methods are not helpful in evaluating what results a court would reach in a given situation.

81. See *infra* text accompanying notes 134-44, showing that the Sixth, Eighth, and District of Columbia Circuits have not created specific tests; *see also infra* text

have set up a specific test, typically worded as "reason to believe that evidence is threatened with imminent destruction,"[82] the results are often different, and among the circuits that employ different-sounding tests the results are often the same. Needless to say, merely comparing the way the courts formulate the various tests is unsatisfactory. The results reached in similar factual circumstances must also be considered.

Two considerations are relevant in determining whether an emergency endangering evidence exists. The first is the nature of the threat, whether it is genuine and imminent or merely speculative. The second is whether the threat, although genuine, was foreseeable or otherwise avoidable. If the emergency was foreseeable, a warrant could have been obtained; and if it was avoidable, the government should not be able to benefit from the exigency.

How critically courts evaluate the claim of danger directly controls the results they reach. Using this analysis as a point of departure, the circuits can be divided into three groups. The first group considers both parts of the factual question. These

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accompanying notes 89-92, which shows that the First Circuit has stated its test differently on various occasions.

82. *See* United States v. Johnson, 802 F.2d 1459, 1461 (D.C. 1986) ("The test for exigent circumstances is whether police had 'an urgent need' or 'an immediate major crisis in the performance of duty afford[ing] neither time nor opportunity to apply to a magistrate.' "); United States v. Al-Azzawy, 784 F.2d 890, 894 (9th Cir. 1985) ("The Ninth Circuit has defined exigent circumstances as 'those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [or arrest] until a warrant could be obtained.' "); United States v. Farra, 725 F.2d 197, 199 (2d Cir. 1984) (Exigent circumstances existed where "there was a substantial risk that evidence would be removed or destroyed and that innocent [people] would be harmed or significantly inconvenienced."); United States v. Thompson, 700 F.2d 944, 947-48 (5th Cir. 1983) ("To prevail on [the exigent circumstances] exception, the government must demonstrate that the agents had reason to believe that the evidence was in danger of imminent destruction."), *cert. denied*, 106 S. Ct. 2255 (1986); United States v. Cuaron, 700 F.2d 582, 586 (10th Cir. 1983) ("When officers have reason to believe that criminal evidence may be destroyed . . . or removed . . . before a warrant can be obtained."); United States v. Edwards, 602 F.2d 458, 468 (1st Cir. 1979) ("[T]he possibility that evidence will be destroyed . . . has been recognized as a sufficient exigency to justify warrantless entry."); United States v. Rubin, 474 F.2d 262, 268 (3d Cir.) ("When Government agents . . . have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified."), *cert. denied*, 414 U.S. 833 (1973).

courts require: (1) an objectively verifiable factual showing of an emergency, and (2) that police obtain a warrant if possible, thereby obviating the need for warrantless action. This is the "examine-avoid" approach. At the other end of the spectrum, the courts of the second group do not carefully scrutinize the police claim that an emergency exists or consider whether it would have been possible to obtain a warrant and avoid warrantless action. This group uses the "uncritical" approach. The third group is in the middle. These courts require a verifiable factual showing of emergency, and usually consider whether a warrant could have been acquired before the warrantless intrusion occurred, as do the courts in the first group. In contrast, however, this group does not require that police avoid the need for warrantless action by planning ahead. This group exemplifies an "examine-only" approach. Obviously, the same case may be decided differently, depending on the circuit that happens to consider it.

A. *The Examine-Avoid Approach*

The first group is composed of the First, Third, and Fourth Circuits, and is the most protective of fourth amendment values. This group also places the heaviest restrictions on police action. These courts require the police to have factual information that justifies the conclusion that an emergency exists. An unsupported belief that an emergency exists or a belief based on surmise or conjecture is not enough.[83] These courts demand objective facts that permit a reviewing court to evaluate the appropriateness of the warrantless intrusion. They also require police to obtain a warrant if it is possible to do so, viewing the ability to secure a warrant before the danger of destruction ever arises as vitiating a claim of emergency.[84] Although police are not required to secure a warrant at the first possible moment, warrantless action occurring a reasonable time after police have probable cause and are able to seek a warrant is suspect, requiring at least an explanation for the failure to obtain one.[85] In this way, these courts refuse to allow lack of police preparation to justify warrantless action.

83. *See infra* text accompanying notes 117-24.
84. *See infra* text accompanying notes 99-109, 125-28.
85. *See infra* notes 103-04, 126 and accompanying text.

These courts require police to plan ahead and to avoid action that may create the situation later claimed to be an emergency, because they recognize that some circumstances that might otherwise justify warrantless action are foreseeable.[86] For example, this group would prohibit police from engineering an arrest of a suspect on the street outside his home, knowing that people are inside who might destroy evidence, and then basing a claim of emergency on circumstances created by the arrest. Even though the subsequent emergency may be real, the need to act without a warrant could have been avoided by arresting the suspect outside the view of individuals in the residence or by obtaining a warrant before making the arrest.

Reciting the general nature of the examine-avoid approach perhaps masks the fact that this group also exemplifies how courts can articulate their tests differently yet reach the same results. As will be shown in this section, the First Circuit's articulation of its test appears quite different from those of the Third and Fourth Circuits. Despite their semantic differences, all three evaluate the facts underlying the claim of emergency similarly.

(1) *The First Circuit's Test*

The First Circuit has articulated different standards for evaluating the government's use of warrantless activity to prevent the destruction of evidence. In 1985, the court stated:

> In determining whether the circumstances of a case fall into one of the emergency conditions characterized as exigent circumstances, the court must consider: the gravity of the underlying offense; whether delay poses a threat to police or the public safety; the likelihood that the suspect will escape if not quickly apprehended; and whether there is a great likelihood that evidence will be destroyed if the arrest is delayed until a warrant can be obtained.[87]

Only a year later, the court stated: "A number of courts, including our own, have held that such exigent circumstances exist when government agents reasonably believe that evidence will be destroyed or a suspect will flee if an immediate entry is

86. *See infra* notes 99-109 and accompanying text.

87. United States v. Baldacchino, 762 F.2d 170, 176 (1st Cir. 1985).

not made."[88] The earlier formulation is far more specific than the general proposition more recently stated.[89] The court has not made clear whether it has intentionally abandoned the first test in favor of the new test. Prior to these cases, the court had expressed itself in at least two other ways.[90]

Notwithstanding the somewhat different articulations of its test, an evaluation of the decisions indicates a consistent approach. In practice, the court conducts a three-part inquiry: (1) whether there are objective facts to support the claim that the evidence in question was in danger of destruction or removal; (2) whether police could have obviated the need for warrantless action by taking an alternate course; and (3) whether police adopted the least restrictive intrusion permitted by the circumstances.

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88. United States v. Moore, 790 F.2d 13, 15 (1st Cir. 1986).

89. This approach closely resembles the checklist approach of United States v. Dorman, 435 F.2d 385 (D.C. Cir. 1970). The District of Columbia Circuit created one of the tests frequently cited by other circuits and by the Supreme Court in Welsh v. Wisconsin, 466 U.S. 740, 751-52 (1984), for evaluating the presence of an exigency. Destruction of evidence was not at issue in the case in which the test was developed. In *Dorman*, the court considered whether an arrest warrant was required before the police could enter private premises to make a routine felony arrest. The court concluded that a warrant was required. The court then considered whether there were exigent circumstances that excused the police from getting a warrant. The court then listed seven factors that, although not exclusive, were relevant to determining whether an exigency existed. These factors include whether: (1) a grave offense is involved, particularly one that is a crime of violence; (2) the suspect is reasonably believed to be armed; (3) probable cause clearly exists beyond a mere minimum showing; (4) existence of a strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; (6) the circumstance that the entry, though not consented to, is made peaceably; and finally (7) which the court says works in more than one direction, whether the entry was made at night. *Dorman*, 435 F.2d at 392-93. Although some of these factors, may be helpful in evaluating the presence or absence of an emergency involving the possible destruction of evidence, quite obviously some of the factors are completely irrelevant.

90. *See, e.g.*, United States v. Palumbo, 742 F.2d 656, 658 (1st Cir. 1984) ("imminent destruction, removal, or concealment of the [evidence] to be seized may . . . justify warrantless entry into a dwelling"), *cert. denied*, 469 U.S. 1114 (1985); United States v. Adams, 621 F.2d 41, 44 (1st Cir. 1980) ("whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant"). Although these two statements by the court do not represent different "tests," they do exemplify the absence of a particular formulation affirmatively adopted by the court and consistently applied.

United States v. Palumbo[91] exemplifies the First Circuit's analysis. After Palumbo's arrest away from his home for selling narcotics, government agents sought a search warrant for the Palumbo home.[92] The police decided to "secure"[93] the house pending application for the warrant, because a government computer indicated that the defendant's wife was rumored to be in the drug business with her husband.[94] An agent feared Palumbo's failure to return home would alarm his wife and cause her to destroy any drugs in the house,[95] or that she may have known of Palumbo's arrest directly, because there were many witnesses to the arrest, and Palumbo was well-known in the area.[96] The court found that the police had insufficient evidence to support their apprehensions[97] and held the warrantless entry and occupation of the defendant's home to be illegal.[98]

In evaluating the need for warrantless action, the First Circuit consistently considers whether the police could have obtained a warrant or otherwise avoided warrantless action. For

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91. 742 F.2d 656 (1st Cir. 1984), *cert. denied*, 469 U.S. 1114 (1985).

92. *Id.* at 658.

93. The court uses the word "secure" and places it in quotations. *Id.* at 658. The court was referring to the police officers' arrival at the defendant's home, the entry of a number of police officers over the objection of defendant's wife, and the subsequent initial search throughout the Palumbo home. *Id.* at 658-59.

94. *Id.* at 658. The use of rumors contained in computerized data bases as investigatory tools has been noted by Doernberg and Zeigler:

> The crime analysis system utilized in Long Beach, California, has gone one step beyond mere "crime analysis." In addition to moving vehicle citations and pawnshop loan reports, Long Beach has computerized field interview reports "to document suspicious occurrences for which no criminal violations can be identified" for use in subsequent investigations. This computerized criminal rumor information system commenced operation in December 1972.

Doernberg & Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110, 1175 n.306 (1980).

95. *Palumbo*, 742 F.2d at 658.

96. *Id.*

97. *Id.*

98. *Id.* at 657. Although the court found the entry and occupancy of the Palumbo home illegal, no evidence was acquired as a result of the illegal search since the items later discovered and seized were the result of independent probable cause and a valid warrant. For other examples of the courts' examination of the existence of an emergency, see United States v. Moore, 790 F.2d 13, 16 (1st Cir. 1986); United States v. Edwards, 602 F.2d 458, 468 (1st Cir. 1979).

example, in *Niro v. United States*,[99] FBI agents had probable cause to believe that certain evidence was in the defendant's leased garage as recently as the evening before they took action, at which time they began to watch the premises.[100] At noon the following day, two cars believed to belong to the defendant arrived at the building. The agents, seeing trucks in the open doorway, entered the garage, arrested the occupants and after a search, seized stolen liquor,[101] although what prompted them to act is not clear from the opinion. No warrant had been sought.[102] Suppressing the evidence, the court noted that although failure to obtain a warrant is not necessarily fatal to a search or seizure, when the police previously had probable cause, at last some countervailing factors, not present in *Niro*, were necessary to excuse the failure.[103] As the court noted,

> [p]roceeding without a warrant is not to be justified, as the government suggests here, by the fact that by the time the officers act, dispatch is necessary to avoid flight or injury to person or property. Haste does not become necessary in the present sense if the need for it has been brought about by deliberate and unreasonable delay. This would allow the exception to swallow the principle.[104]

Similarly, in *United States v. Adams*,[105] the police went to defendant's apartment with probable cause to believe she was harboring a fugitive. They knocked on the door and were met by the defendant. The defendant denied that the fugitive as there, but after a search the fugitive was found in a closet.[106] The court struck down the search because there was no reason for the officers not to have obtained a warrant before going to the apartment.[107] The court, however, acknowledged that after the police knocked on the door, which they did not need a warrant to do, there was a reasonable basis for believing that an

99. 388 F.2d 535 (1st Cir. 1968).
100. *Id.* at 536.
101. *Id.*
102. *Id.* at 537.
103. *Id.* at 539.
104. *Id.* at 540.
105. 621 F.2d 41 (1st Cir. 1980).
106. *Id.* at 43.
107. *Id.* at 44-45.

emergency existed.[108] Thus, in both cases the First Circuit refused to allow an avoidable emergency to justify warrantless action.[109]

The First Circuit further limits warrantless intrusions by requiring police to adopt the least restrictive intrusion the circumstances permit. In *Palumbo*, the court stated:

> When . . . an exigency is found, however, the least restrictive intrusion is to be adopted, or the whole constitutional requirement for obtaining a warrant would be defeated. When it is known that no one is presently on the premises, they may be secured merely by guarding the entrances. When persons are present and such persons may reasonably be feared to pose a substantial threat to destroy evidence, more intrusive action may be proper. Even then, the police might be well advised to give the occupants a choice of exiting the premises. This might be accompanied by a very quick and limited pass through the premises to check for third persons who may destroy evidence.[110]

Thus, the First Circuit, after carefully considering whether an emergency exists and evaluating whether the police could have avoided warrantless action, further requires that the entry be no more intrusive than necessary. Typically under this approach a warrantless entry will be permitted to prevent the emergency from occurring or to limit its damage. Even after such an entry, however, a warrant must be acquired before a full search will be permitted.[111]

(2) *The Third and Fourth Circuit's Test*

The Third and Fourth Circuits employ a test created by the Third Circuit in *United States v. Rubin*,[112] only three years after

108. The fugitive would presumably not remain at the apartment if they left to get a warrant.

109. *See* United States v. Edwards, 602 F.2d 458, 468 (1st Cir. 1979) (upheld the warrantless intrusions only after considering whether a warrant could have been obtained before the police arrived at the premises and concluding that no warrant would have issued); United States v. Picariello, 568 F.2d 222, 226 (1st Cir. 1978) (upheld a warrantless intrusion that preceded a search by warrant, after concluding that the agents acted with all reasonable dispatch in organizing the information necessary to support a warrant and in obtaining one).

110. *Palumbo*, 742 F.2d at 659 (citations omitted).

111. United States v. Moore, 790 F.2d 13, 16 (1st Cir. 1986); United States v. Di Gregorio, 605 F.2d 1184, 1187-88 (1st Cir.), *cert. denied*, 444 U.S. 937 (1979).

112. 474 F.2d 262 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973).

the Supreme Court's decision in *Vale*.[113] Rubin picked up a crate at an airport and took it home. The government knew the crate contained hashish. The agents sought a search warrant while keeping the defendant and his home under surveillance. Before a warrant could be acquired, the defendant drove away from his home and was arrested. As he was being taken into custody, the defendant shouted to spectators, "call my brother." The agents, fearing that someone would do so and thereby endanger evidence remaining at the defendant's house, returned there, arrested the occupants and seized the hashish.[114]

The Third Circuit asked initially whether *Vale* should be read literally as requiring evidence to be in the process of destruction to justify a warrantless search.[115] The court concluded that the language in *Vale* should not be read literally because it was not intended as a new standard but rather as a finding of no emergency on the facts of that case.[116] The *Rubin* court after explaining the possible standards for judging warrantless searches under emergency circumstances, announced the following general rule: "When Government agents . . . have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified."[117] After noting that circumstances vary from case to case, the court went on to list those that it considered relevant:

> (1) the degree of urgency involved and the amount of time necessary to obtain a warrant;
>
> (2) reasonable belief that the contraband is about to be removed;
>
> (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought;
>
> (4) information indicating the possessors of the contraband are aware that the police are on their trail; and

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113. 399 U.S. 30 (1970). The Fourth Circuit case adopting the *Rubin* test is United States v. Turner, 650 F.2d 526, 528 (4th Cir. 1981).

114. *Rubin*, 474 F.2d at 264.

115. *Id.* at 267.

116. *Id.* at 267-68.

117. *Id.*

(5) the ready destructibility of the contraband and the knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic.[118]

The *Rubin* factors represent a very similar test to the three-part inquiry used by the First Circuit.[119] Initially, the First Circuit asks whether a genuine emergency exists: whether there are facts supporting the police claim of exigency.[120] The second,[121] fourth,[122] and fifth[123] *Rubin* factors address the same question. Each factor involves an evaluation of the genuineness of the emergency and corresponds to the initial aspect of the First Circuit's test. Both the Third and Fourth Circuits focus on the facts that lead to a reasonable belief that the contraband will be destroyed.[124] None of the courts assume that contraband will always be destroyed or that the mere presence of persons other than the defendant is enough to justify a warrantless search. All examine the facts upon which such a belief could be based.

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118. *Id.* at 268-69.

119. *See supra* note 87-111 and accompanying text.

120. *See supra* text accompanying notes 91-98.

121. For instance, in looking to the second factor, the Court in *Rubin* noted that the officers had found hashish dust on the defendant's clothing at the time of his arrest and this supported their belief that the drug was in the process of being packaged and distributed. *Rubin*, 474 F.2d at 269.

122. In *Rubin*, this factor was established when after being arrested the defendant yelled "call my brother." *Id.* The officers could have reasonably believed that accomplices had been alerted. *Id.*

123. The fact that evidence is narcotics establishes the ready destructibility of the contraband.

124. *See, e.g.*, United States v. Dart, 747 F.2d 263 (4th Cir. 1984) (court rejected government's claim of emergency after evaluating facts that lead to the officer's search of warehouse); United States v. Collazo, 732 F.2d 1200 (4th Cir. 1984) (court rejected government's claim that in light of recent arrests and widespread publicity, the warrantless entry into defendant's house to arrest missing suspect was necessary to prevent escape or destruction of evidence based upon an examination of the fact), *cert. denied*, 469 U.S. 1105 (1985); United States v. Turner, 650 F.2d 526 (4th Cir. 1981) (warrantless action justified since based on facts that co-defendant told officers that premises were occupied by participant that could have witnessed arrest); United States v. Velasquez, 626 F.2d 314 (3d Cir. 1980) (court reversed conviction when it found no objective indicia that contraband was about to be destroyed); United States v. Rubin, 474 F.2d 262 (3d Cir. 1973) (court approved search after noting that defendant yelled "call my brother" when being arrested in front of friendly bystanders); United States v. Wilcox, 357 F. Supp. 514, 520 (E.D. Pa. 1973) (mere presence on premises of persons other than defendants is not enough to justify a belief in a threatened destruction of evidence and an ensuing warrantless search).

After examining the existence of an emergency, the First Circuit considers whether warrantless action could have been avoided.[125] The first *Rubin* factor (the degree of urgency involved and the time needed to obtain a warrant)[126] asks the same question. Both tests ask when probable cause first existed and how much time it would have taken to get a warrant.[127] Both tests also require that the police not create the emergency.[128]

Although the First Circuit's final requirement, that the police use the least intrusive means possible if warrantless action is necessary, is not explicit in the *Rubin* factors,[129] both the Third and Fourth Circuits do, in fact, impose a similar limitation. In *United States v. Velasquez*,[130] a DEA agent purchased drugs from the defendant and arranged for a subsequent purchase at defendant's home. While the agent was inside the house, but before the sale was completed, several back-up officers forced their way in and searched the entire house, finding drugs in a bedroom.[131] No arrest or search warrants had been obtained. The Third Circuit concluded that the facts did not justify the warrantless search: "We do not believe that the

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125. *See supra* notes 99-109 and accompanying text.

126. *Rubin*, 474 F.2d at 268.

127. For First Circuit illustrating this approach, see *supra* notes 99-109 and accompanying text. For Third Circuit examples, see *Rubin*, 474 F.2d at 268, and United States v. Wilcox, 357 F. Supp. 514, 518-19 (E.D. Pa. 1973). For Fourth Circuit examples, see United States v. Dart, 747 F.2d 263, 267-68 (4th Cir. 1984), and United States v. Collazo, 732 F.2d 1200, 1204-05 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985).

128. *See, e.g.*, United States v. Collazo, 732 F.2d 1200-04 (4th Cir. 1984) ("Finally, if there was concern regarding the destruction of evidence in the immediate aftermath of the arrest, that easily could have been cured by obtaining a warrant to search the house for evidence prior to the Baltimore arrest. The government will not be allowed to plead its own lack of preparation to create an exigency justifying warrantless entry."), *cert. denied*, 469 U.S. 1105 (1985); United States v. Velasquez, 626 F.2d 314, 318 (3d Cir. 1980) (officers created emergency by forcibly entering defendant's residence without warrant during undercover sale of narcotics, alerting sellers to undercover agents identity and thereby endangering evidence); United States v. Adams, 621 F.2d 41, 45 (1st Cir. 1980) (federal agents created danger that escaped convict would evade capture by knocking on door of hideout rather than seeking a warrant before attempting entry).

129. The third *Rubin* factor, consideration of the potential harm to the officers if they merely guard the site while a warrant is sought, is an example of a less restrictive alternative.

130. 626 F.2d 314 (3d Cir. 1980).

131. *Id.* at 316.

threat of destruction of evidence, escape, or physical harm to the police officers, justified the extensive search conducted here. We therefore conclude that the search was overbroad and that the evidence seized should have been suppressed as the product of an unconstitutional search."[132] Thus, the court faulted the police for acting more broadly than the emergency required. The Fourth Circuit has adopted a similar approach.[133]

Although the three circuits employing the examine-avoid approach use two tests that sound very different, they evaluate the presence or absence of an emergency in similar fashion. All three circuits' careful scrutiny of the facts underlying the government's actions represents the traditional judicial skepticism about police decisions to act without a warrant. All three circuits' use of the earliest time a warrant could have been acquired as the measuring point in judging the existence of an emergency tends to restrict warrantless action to circumstances when a warrant could not have been obtained. Lastly, the courts' insistence that warrantless action be as limited as possible encourages respect for the privacy protections of the fourth amendment. This approach sharply contrasts with the uncritical approach used by several other circuits, to which we now turn.

B. *The Uncritical Approach*

At the other end of the spectrum, in sharpest contrast to the First, Third, and Fourth Circuits, are the three circuits that accept police allegations of emergency without critical evaluation of the factual bases of the claims and without considering whether the police might have avoided the need for warrantless action. This group is composed of the Sixth, Eighth, and District of Columbia Circuits. Each of these circuits applies a case-by-case approach; none has a stated test for guiding the police or trial courts in evaluating the presence of an emergency.

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132. *Id.* at 318-19.

133. United States v. Collazo, 732 F.2d 1200 (4th Cir. 1984). The court stated: "The available government manpower at the house was sufficient to prevent flight from the house, and entering the house created a situation of danger at least comparable to that which might have been presented by a fleeing suspect." *Id.* at 1204.

(1) *District of Columbia Circuit*

The District of Columbia Circuit is the least willing to critically evaluate the police officer's decision, particularly in narcotics cases.[134] The circuit's sentiments were clearly expressed in *United States v. Johnson*:

> [E]xposure to only a few narcotics cases is enough to know that evidence in the form of narcotics is peculiarly vulnerable to speedy and easily accomplished destruction; and that very vulnerability is something that police officers in the course of their narcotics enforcement duties must be unfailingly conscious of and repeatedly speculate about if they are to function effectively to protect the public interest. The District Court had no basis for second-guessing the police on this question, and it can be hardly be said to have erred in refraining from doing so on this record.[135]

The facts of *Johnson*, however, hardly suggest an emergency. Acting on a tip, police went to a building and through a basement window saw drugs being packaged. It was the middle of the night, and there was no reason to believe that the occupants were aware of the police presence. Recognizing that assistance would be needed to force entry, the officers returned to headquarters. An Assistant United States Attorney advised the officers that it would take one and one-half to two hours to get a warrant and suggested that the drugs would in all likelihood be removed in that time. Thirty to forty minutes after their first observation, the officers returned to the premises, entered without a warrant, and conducted a full search, discovering evidence hidden in various places.[136] The court not only failed to question the basis for the United States Attorney's suggestion that the narcotics would be removed in the relatively short time required to get a warrant, but also saw no reason to require that the officers maintain the status quo and seek a

134. The District of Columbia Circuit's reluctance to be critical about a decision to act without a warrant is not limited to narcotics cases. *See, e.g.*, United States v. Hendrix, 595 F.2d 883, 886 (D.C. Cir. 1979) (court accepted police officer's fear that waiting to get a warrant before entering suspect's apartment to search for a sawed-off shotgun would present a danger, notwithstanding the fact that the "fear" was based on the belief that the suspect, who had been arrested for disorderly conduct for firing a handgun at home, might be released on bail before a warrant was obtained, a remove and easily avoided danger).

135. 561 F.2d 832, 844 (D.C. Cir.), *cert. denied*, 432 U.S. 907 (1977).

136. *Id.* at 834-36.

search warrant before taking the more intrusive action of conducting a full-scale search. The court expressly rejected the possibility of a stake-out until a warrant was acquired.[137] The District of Columbia Circuit is unique in this respect, differing from the two other circuits that also use the uncritical approach.[138]

The court's deferential treatment of the police's conclusion that an emergency existed, and its unquestioning acceptance of the estimate of the time required to obtain a warrant, sharply contrasts with the examine-avoid approach. Similarly, the disfavor with which the District of Columbia Circuit viewed stakeouts in *Johnson* is an implicit refusal to consider whether the evidence could have been protected by a less intrusive alternative. As a result, there is no requirement that the police maintain the status quo while seeking a warrant once an emergency is present.[139]

(2) *The Sixth and Eighth Circuits*

The Sixth and Eighth Circuits also generally accept the assessment by the police that an emergency exists. The refusal of these courts to focus on the point when probable cause first existed contributes to their deference to police judgment. For example, in *United States v. Palumbo*,[140] the Eighth Circuit found exigent circumstances present when, during the course of an undercover drug purchase, one of the sellers unexpectedly decided to accompany the undercover agent to get the purchase money, which the agents had no intention of actually delivering. The police decided to enter the sellers' hotel room, without a warrant, to arrest the remaining participants before they learned of the police presence and destroyed or removed the drugs. Although the original plans did not call for this entry, the possibility that everything would not go as expected was

137. *Id.* at 844. According to the court, "[s]takeouts are full of dangers that the objects of it may thereby be alerted to the presence of the police, and can accordingly destroy or conceal the narcotics, thereby frustrating the police entry when it finally comes." *Id.*

138. *See* United States v. Eddy, 660 F.2d 381, 383, 385 (8th Cir. 1981); United States v. Korman, 614 F.2d 541, 545 (6th Cir.), *cert. denied*, 446 U.S. 952 (1980); United States v. Delguyd, 542 F.2d 346, 352 (6th Cir. 1976).

139. *See, e.g.*, United States v. Allison, 639 F.2d 792, 794 (D.C. Cir. 1980).

140. 735 F.2d 1095 (8th Cir.), *cert. denied*, 469 U.S. 934 (1984).

certainly foreseeable. Moreover, the officers had probable cause to search the hotel room even before they went to the hotel, but they had not bothered to get a warrant. Nonetheless, the court expressly rejected the prior existence of probable cause as a factor to be considered:

> That the officers might have obtained a warrant before going to the hotel is not fatal to the finding that exigent circumstances justified their entry. . . . That the exigency might have been foreseeable does not invalidate the entry and arrest. The important point is that the exigency, while perhaps not unexpected, was not created by the officers.[141]

Thus, unless the emergency is created by police action, the Eighth Circuit refuses to consider whether it might have been avoided and whether a warrant might have been obtained.

In *United States v. Elkins*,[142] the Sixth Circuit went even further, accepting a claim of exigency even though the emergency was created by government agents. In *Elkins*, agents had probable cause to believe contraband was at the defendant's premises before they set out to complete a drug transaction that they had set up. After the transaction was completed, agents remained outside the premises, maintaining surveillance while a search warrant was sought. Two cars began to pull out of the driveway, but instead of waiting for them to drive out of sight of the premises, "[a]t least six law enforcement officers and three cars flashing blue lights drove up into the driveway to confront the exiting vehicles and arrested their two drivers."[143] Fearing that the occupants of the house, now alerted by the commotion, would destroy the evidence, officers entered the house and seized evidence.[144] The Sixth Circuit, in evaluating the search, ignored the fact that the officers had probable cause even before they went to Elkins' house, and that the course of action that later created the exigency was created by the police.

The three circuits in this group, although following the same Supreme Court precedent and evaluating similar police activity, decide cases very differently from the examine-avoid

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141. *Id.* at 1097 (citations omitted).

142. 732 F.2d 1280 (6th Cir. 1984).

143. *Id.* at 1283. One car was driven by defendant's teenage son, while the other car was driven by a person who was charged but acquitted.

144. *Id.*

circuits. Unlike the examine-avoid courts, the uncritical courts neither evaluate police allegations of exigency nor consider what actions the police might have taken to avoid the need for warrantless activity. By failing to include the previous existence of probable cause in weighing a claim of emergency, the courts employing the uncritical approach give police officers no incentive to obtain a warrant before an emergency arises. As compared with the examine-avoid courts, the courts in this group are much more likely to permit avoidable warrantless intrusions.

C. *The Examine-Only Approach*

The last approach, utilized by the largest group of courts, falls somewhere between the previous two groups. Like the courts using the examine-avoid approach, this group is more demanding than the courts using the uncritical approach when evaluating police claims of emergency. Like the courts using the uncritical approach, however, these courts do not require that police avoid warrantless action by planning. On the other hand, they do not permit police to create the emergency. This group includes the Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. The Second Circuit will be discussed separately, however, as it is the only circuit that has developed a specific test.

(1) *The Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits*

The approaches of the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits are similar. All apply a generally worded test rather than a list of specific factors, and all require that reviewing courts conduct a critical and independent analysis to determine whether the facts justify warrantless action.[145] As with

145. United States v. Thompson, 700 F.2d 944, 947-48 (5th Cir.) ([T]he government must demonstrate that the agents had reason to believe that the evidence was in danger of imminent destruction."), *later app.*, 720 F.2d 385 (1983); United States v. Cuaron, 700 F.2d 582, 586 (10th Cir. 1983) (exigent circumstances exist if a reasonably prudent, cautious and trained officer would conclude that evidence may be destroyed before a warrant can be obtained); United States v. Blasco, 702 F.2d 1315, 1325 (11th Cir.) (government must demonstrate that the exigencies prevented the agents from securing a search warrant), *cert. denied*, 464 U.S. 914 (1983); United States v. Kunkler, 679 F.2d 187, 191-92 (9th Cir. 1982) ("When po-

the courts employing the examine-avoid approach, all of these circuits require a factual basis for the warrantless intrusion and do not accept police claims of exigency at face value.

For example, the Eleventh Circuit rejected the government's claim of exigency in *United States v. Torres*,[146] in which officers investigating drug smuggling traced a large quantity of marijuana to a house. The officers arrived at the house in the early hours of the morning and arrested a man leaving the residence. At that time, the police noticed marijuana residue, pieces of burlap, leaves, and seeds strewn around a van parked in front of the house and leading to the doorway. The officers entered the house, arrested the occupants, and seized evidence in plain view.[147] The government argued that the warrantless entry was proper to avoid the "risk of loss, destruction, removal, or concealment of the marijuana."[148] Suppressing the evidence, the court found it improbable that the two hundred pounds of marijuana involved could easily have been destroyed, holding as follows: "There [was] no evidence that [the defendants] were aware of the officers' surveillance; thus they had no reason to destroy the contraband or to flee the premises."[149] The Fifth, Seventh, Ninth, and Tenth Circuits have made similar analyses.[150]

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lice officers, acting on probable cause and in good faith, reasonably believe from the totality of circumstances that (a) evidence or contraband will imminently be destroyed . . . exigent circumstances justify a warrantless entry, search or seizure"); United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 1974) ("[W]arrantless search is not justified unless the agents 'reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant.' ").

146. 705 F.2d 1287 (11th Cir.), *vacated en banc*, 718 F.2d 998, *on remand*, 720 F.2d 1506 (1983), *later op.*, 741 F.2d 1323 (1984) (defendants failed to establish requisite expectation of privacy in house in which they were arrested and thus lacked standing to challenge warrantless entry and search of house; decision did not affect previous affirmation of co-defendant Gomez's conviction).

147. *Id.* at 1290.

148. *Id.* at 1297.

149. *Id.*

150. *See, e.g.*, United States v. Driver, 776 F.2d 807, 810 (9th Cir. 1985) (the court suppressed evidence stating, "[b]ecause of the intrusive nature of a warrantless arrest, the government must demonstrate specific and articulable facts to justify the finding of exigent circumstances, and this burden is not satisfied by leading a court to speculate about what may or might have been the circumstances"); United States v. Thompson, 700 F.2d 944, 948 (5th Cir. 1983) (Where police made a warrantless entry into defendant's home during the course of an undercover drug operation; the court remanded because "[w]hat is missing in this

Although these courts do not require the same level of planning by the police as do the examine-avoid courts, they give more weight to the fact that a warrant could have been obtained than do those that are less critical. The courts using the examine-only approach also consider the point at which probable cause existed in deciding whether the urgency of the situation required warrantless action.

For example, in *United States v. Berick*,[151] the police, after arresting a chemist who illegally manufactured a controlled substance, learned that four people remained at the laboratory site, that they were armed and that the chemist was late in returning to the laboratory.[152] The Fifth Circuit upheld the warrantless entry of the laboratory because there was not enough time to get a warrant.[153] Such judicial examination of the time necessary to get a warrant is also found in the decisions of the Seventh,[154] Ninth,[155] Tenth,[156] and Eleventh[157] Circuits. These courts encourage the use of warrants by considering the ability to get a warrant in evaluating the presence of an emergency.

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record is any actual indication that the agents entered Thompson's home because they believed that they were faced with a 'now or never' situation . . . where they would have to seize the goods immediately or risk their disappearance."); United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983) (although the court did admit the evidence, it closely examined the factual circumstances and concluded that the emergency was real); United States v. Rosselli, 506 F.2d 627, 630 (7th Cir. 11974) (The court suppressed evidence discovered after a warrantless entry into defendant's apartment. The police had tried to justify that entry on an emergency caused by the unsupervised freedom of another defendant's girlfriend after some of the conspirators had been arrested with her knowledge. The government had argued that she might try and contact the remaining defendant and alert him to the danger. The court rejected this possibility as not based on facts.).

151. 710 F.2d 1035 (5th Cir.), *cert. denied*, 464 U.S. 918, *cert. denied sub nom.* Culver v. United States, 464 U.S. 899 (1983).

152. *Id.* at 1037.

153. *Id.* at 1038.

154. United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974).

155. United States v. Impink, 728 F.2d 1228, 1231 (9th Cir. 1984) ("Where the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.").

156. United States v. Cuaron, 700 F.2d 582, 589 (10th Cir. 1983) ("The time necessary to obtain a warrant is relevant to a determination whether circumstances are exigent.").

157. United States v. Torres, 705 F.2d 1287, 1297 (11th Cir.) ("even in the middle of the night, a warrant can be obtained by telephone"), *vacated en banc*, 718 F.2d 998, *on remand*, 720 F.2d 1506 (1983), *later op.*, 741 F.2d 1323 (1984).

These circuits, however, do not insist that police avoid the need for warrantless action by advance planning. Thus, this approach does not encourage police officers to "think warrant!" as Judge Kelly of the Tenth Circuit urged in dissent in *United States v. Cuaron*.[158] For example, in *United States v. Glasby*,[159] the Seventh Circuit affirmed a conviction based on evidence acquired after a warrantless entry of defendant's apartment when the emergency on which the entry was based could easily have been avoided. Police officers made a controlled delivery[160] of a package to defendant's house at 7:10 a.m., a time when no magistrate was available to issue a warrant. While waiting for a warrant to be issued, officers keeping the premises under surveillance saw the defendant's father leave the building at 7:45 and arrested him.[161] The subsequent warrantless entry into the defendant's house was sanctioned by the court because agents "had seen the defendant looking out from the back porch of his apartment and reasonably could have believed that he had seen his father followed and that the agents who were coming toward him would want to search his apartment for the heroin."[162] The court ignored the fact that the delivery was controlled by the police. There was no reason to execute this elaborate plan at a time when a magistrate was unavailable or to arrest the father within sight of the apartment. Similarly, the Fifth, Ninth, Tenth, and Eleventh Circuits all decide cases in this area without requiring that police avoid the need for warrantless action.[163]

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158. 700 F.2d 582, 593 (10th Cir. 1983).

159. 576 F.2d 734 (7th Cir. 1978).

160. A "controlled delivery" is the delivery of a package suspected of containing contraband under circumstances that are within the control of the investigating officers and make possible the identification and arrest of the originally intended recipient. In this instance, a postal inspector was notified in Chicago that two days earlier United States Customs officials had seized mail containing heroin. The parcel had been mailed from Thailand addressed to the defendant's Chicago residence. Upon receipt of the parcel in Chicago, further testing confirmed that the substance was heroin. Officials photographed the contents, resealed the package in its original wrapping, and had it delivered to the defendant. *Id.* at 736.

161. *Id.*

162. *Id.* at 738.

163. *See, e.g.*, United States v. Webster, 750 F.2d 307, 327 (5th Cir. 1984), *cert. denied*, 471 U.S. 1106 (1985) (Where police made a warrantless entry of defendant's hotel room at least ten hours after the police had probable cause upheld, the court stated: "[t]hat the exigency was foreseeable at the time the decision was

The courts in this group, however, do prohibit the police from relying on an emergency that they have created. In *United States v. Allard*,[164] police arrested a drug seller and learned from him that Allard was his source. Police proceeded to Allard's hotel room, knocked on the door and entered.[165] The government claimed that exigent circumstances justified the warrantless entry into the hotel room. The court held that threatened destruction of evidence could not justify an entry since there was no reason for the occupants of the room to know about the seller's arrest until the officers knocked on the door.[166] If the officers had not knocked, there would not have been an emergency.

Although not as clear as in the examine-avoid approach, it appears that the examine-only courts also require that the intrusion be as limited as the circumstances require. No cases are reported in which the court was faced with a police intrusion that extended beyond a limited security check while a warrant was being obtained. Language in the decisions implies that such a procedure is mandatory. For instance, in *United States v. Cuaron*,[167] the court stated its rule as: "the circumstances are

made to forego or postpone obtaining a warrant does not, by itself, control the legality of a subsequent warrantless search triggered by that exigency."); United States v. Perdomo, 800 F.2d 916 (9th Cir. 1986) (where warrantless entry was made into supplier's house after arrest of courier, and the location of supplier's house was known to police before arrest, the court made no analysis of whether a warrant could have been acquired before evidence was actually endangered); United States v. Cuaron, 700 F.2d 582, 5894 (10th Cir. 1983) (According to the dissent, over 20 officers were involved in the arrest, at least one of whom could have been delegated to begin preparing for a warrant during the two and one-half hours between the identification of the dealer's house and the warrantless entry. If a magistrate had been sought and placed on standby, a telephonic warrant would have been available on a moment's notice and certainly within the 50 minute period between the courier's arrest and the entry into the premises.); United States v. Harris, 713 F.2d 623 (11th Cir. 1983) (The Police made arrangements to complete a drug sale at defendant's home hours before the planned meeting. The deal went as planned. The undercover officer entered the home, inspected the drugs and then left, ostensibly to get money. When he returned, he was accompanied by a number of other officers who had fanned out throughout the house arresting occupants and seizing evidence. Although seeking a warrant after the officer left the house would have endangered the evidence, the need to enter was a virtual certainty before the operation began.)

164. 600 F.2d 1301 (9th Cir. 1979), *later app.*, 634 F.2d 1182 (1980).

165. *Id.* at 1302-03.

166. *Id.* at 1304.

167. 700 F.2d 582 (10th Cir. 1983).

considered sufficiently critical to permit officers to enter a private residence in order to secure the evidence while a warrant is sought."[168]

(2) *The Second Circuit*

Like the other courts that employ the examine-only approach, the Second Circuit determines whether an emergency actually existed rather than merely accepting the police assessment of the situation. Similarly, it does not impose an obligation to avoid warrantless action when possible. Nonetheless, the Second Circuit's approach deserves individual treatment because the court has formulated a specific test, similar to the two-tiered analysis suggested by *Vale*.[169] The Second Circuit distinguishes cases in which the police need to enter premises to protect evidence from those in which, after a legal entry, police conduct a limited search to protect evidence. If the police are legally on the premises, they may conduct a search to determine whether any persons are present with or without grounds for believing that there are persons present or that an emergency exists. This security check is similar in scope to the sweep initially conducted in *Vale*,[170] although in this instance the police must already be inside the premises. By contrast, if the police must enter premises, either to prevent evidence from being destroyed or to make an arrest, a factual showing of urgency is required.

In *United States v. Gomez*,[171] the court permitted police to make an arrest after a lawful entry and to conduct a "security check" or "protective sweep." The court defined this type of search as a "very quick and limited pass through the premises to check for third persons who may destroy evidence or pose a threat to the officers."[172] The court found authority for this exception in the reasoning of *Chimel v. California*,[173] which per-

168. *Id.* at 586.

169. *See infra* notes 171-75 and accompanying text.

170. *See supra* notes 49-61 and accompanying text.

171. 633 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 994 (1981).

172. *Id.* at 1008 (quoting United States v. Agapito, 620 F.2d 324, 335 (2d Cir. 1980)).

173. 395 U.S. 752 (1969). The Court held that a search incident to an arrest must be limited in time and place but could be justified because:

mits a limited search of the person and the area within his reach after a lawful arrest.[174]

The circuit has used similar reasoning to justify a security check:

> The reasonableness of a security check is simple and straightforward. From the standpoint of the individual, the intrusion on his privacy is slight; the search is cursory in nature and is intended to uncover only "persons, not things." Once the security check has been completed and the premises secured, no further search—be it extended or limited—is permitted until a warrant is obtained. From the standpoint of the public, its interest in a security check is weighty. The delay attendant upon obtaining a warrant could enable accomplices lurking in another room to destroy evidence. More important, the safety of the arresting officers or members of the public may be jeopardized. Weighing the public interest against the modest intrusion on the privacy of the individual, . . . a security check conducted under the circumstances stated above satisfies the reasonableness requirement of the Fourth Amendment.[175]

As was the case with the security check in *Vale*,[176] and the search incident to arrest in *Chimel*, the Second Circuit does not

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> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Id. at 762-63.

174. *See also* United States v. Vasquez, 638 F.2d 507, 530 (2d Cir. 1980) (where the court found that the reasoning in *Chimel* supported a quick security check of premise following an arrest), *cert. denied*, Mesa v. United States, 450 U.S. 970 and 454 U.S. 847 (1981), *cert. denied*, Vasquez v. United States, 454 U.S. 975 (1981).

175. United States v. Agapito, 620 F.2d 324, 336 (2d Cir.) (citations omitted), *cert. denied*, 449 U.S. 834 (1980).

176. *See supra* notes 49-61 and accompanying text.

require any factual showing other than a prior lawful arrest to justify a security check.[177]

The Second Circuit applies a different rule when police make a warrantless entry solely to protect evidence from destruction[178] after an arrest or other exigency occurring outside of premises that are thought to contain evidence. The court applies a two-part test. First, there must be a reasonable belief that someone is inside the premises. Second, there must be a reasonable belief that the persons in the premises are aware of the events outside, thereby creating an incentive to destroy evidence, escape, or jeopardize the safety of the officers or the public.[179] The police must have a factual basis for their entry in each case.[180] As with the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits, the Second Circuit requires that police be able to specify the facts upon which they base their claim of exigency.[181]

The Second Circuit's approach resembles other examine-only circuits because it does not require police to "think warrant" or to plan ahead to avoid warrantless action. For example, in *United States v. Martinez-Gonzalez*,[182] government agents had probable cause late in the afternoon that an apartment in New York City contained contraband. The agents decided to keep the apartment under surveillance after an Assistant U.S. Attorney told them that it was too late to obtain a warrant. Later, when the tenant emerged, the agents walked toward the suspect with their badges displayed. Not surpris-

177. *Vasquez*, 638 F.2d at 530.

178. Although the two types of cases defined by the Second Circuit's rules will probably cover most circumstances in which the government seeks to justify warrantless action that is supported by the possible destruction of evidence, there is a third potential pattern. Destruction of evidence could also be a justification for entry in order to arrest, as well as for entry after an arrest (rule 2) or for a search after arrest (rule 1). In Payton v. New York, 445 U.S. 573 (1980), the Supreme Court held that a warrantless entry to make a routine felony arrest is unconstitutional, absent exigent circumstances. One such exigent circumstance might be threatened destruction of evidence. When faced with this type of situation, the Second Circuit uses neither of its own tests, but instead applies the factors enunciated by the District of Columbia Circuit in United States v. Dorman, 435 F.2d 385 (D.C. Cir. 1970). See *supra* note 91 for a discussion of the *Dorman* factors.

179. *Agapito*, 620 F.2d at 336 n.18.

180. *Id.* at 336.

181. *See supra* notes 145-50 and accompanying text.

182. 686 F.2d 93 (2d Cir. 1982).

ingly, the suspect retreated into the apartment, with the officers at his heels. A warrantless entry and seizure followed.[183] The court upheld the conviction without any consideration of whether the decision not to seek a warrant was reasonable or necessary, and whether the circumstances justified the officers' precipitate action.

Although the Second Circuit test is stated quite differently than the totality-of-the-circumstances test used by the other members of this group, the outcome of a case reviewed under any of them is likely to be the same. All of the courts in this group conduct an independent examination of the facts underlying the emergency, but none of them require that the police make any effort to avoid the need for warrantless action.

In conclusion, threatened destruction of evidence is accepted in every circuit as a justification for warrantless action. Although all of the circuits' rules sound similar on the surface and can be paraphrased as a requirement that the police reasonably conclude that evidence is in danger of imminent destruction or removal, the tests vary as applied. The courts all require the same legal conclusion, but they do not consider the same facts in reaching that conclusion.

III. A Hypothetical Case Comparison of the Three Approaches

A similar case considered by courts using different approaches is likely to produce different results. The following section seeks to illustrate this point by analyzing one hypothetical case using each of the three approaches described above. For purposes of the following discussion, assume the police have probable cause to believe that there are drugs in a particular house, but do not obtain a warrant because they have no immediate plans to enter. They arrange for an undercover officer to buy drugs from one of the residents of the house. The sale takes place several miles away, and the seller is arrested immediately. Although the police have no warrant, they believe there is a serious risk that the evidence in the house will be removed or destroyed. The officers' belief that immediate action is necessary is based on many years of experience investigating drug

183. *Id.* at 96.

traffickers, the ease with which drugs are destroyed, and the fact that there is not enough time following the arrest to secure a warrant. Accordingly, after the arrest, officers enter and search the house, which has been under continuous surveillance. They arrest several occupants and seize large quantities of drugs found in closed containers.

A. *Application of the Examine-Avoid Approach*

If this case were being decided by the examine-avoid courts, the evidence would be suppressed for three reasons. First, the officers' belief that there was an emergency was based merely on speculation, not on the facts of the case. The courts using this approach require that police be able to articulate facts underlying their belief that an emergency exists.[184] There was no reason to believe that the occupants of the house would destroy evidence. Moreover, there was no reason to believe they knew about the arrest or the fact that they were under suspicion. Therefore, there was no reason to think that the evidence in this situation would have been destroyed before a warrant could be obtained.

Second, the need to act without a warrant was avoidable. The examine-avoid approach requires the police to "think warrant" and to prepare themselves sufficiently to avoid the need for warrantless action.[185] The police had probable cause before they set out to buy drugs from the seller, and because the possibility that his arrest would make it necessary to enter the premises where the drugs were stored was foreseeable, there was no reason for the police not to take a warrant with them.

Finally, the evidence would be suppressed because the scope of the search was unnecessarily broad. The proper procedure would have been for the officers to "secure" the premises and obtain a search warrant before conducting a full search of the house.[186]

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184. *See, e.g.*, United States v. Palumbo, 742 F.2d 656 (1st Cir. 1984), *cert. denied*, 469 U.S. 1114 (1985); *see supra* notes 91-98 and accompanying text.

185. *See, e.g.*, Niro v. United States, 388 F.2d 535 (1st Cir. 1968); *see supra* notes 99-104 and accompanying text.

186. *See, e.g.*, United States v. Moore, 790 F.2d 13 (1st Cir. 1986). *See supra* text accompanying note 111.

B. *Application of the Examine-Only Approach*

If this case were considered by courts using the examine-only approach, the evidence would also be suppressed, but for only two reasons. As with the examine-avoid approach, the examine-only courts require the presence of facts upon which the police allege an emergency.[187] Thus, the allegation of emergency here would be rejected, because there was not a factual basis for believing any confederates would destroy the drugs before a warrant could be obtained. Second, the examine-only courts would also suppress the drugs because the scope of the search was too broad. They require that the police maintain the status quo and obtain a warrant before conducting a full search.[188]

Unlike the examine-avoid approach, however, this approach would not require that the police avoid the need to act without a warrant through preparation. Notwithstanding the fact that the officers had probable cause before they set out, they should have anticipated the need to enter and obtained a warrant, and courts using this approach would have admitted the evidence. If there had been a factual basis for the officers' allegation that evidence was in danger, such as Rubin's command "call my brother"[189] and if the officers had merely secured the premises and sought a warrant before making a search, the officers' failure to get a warrant would be accepted. The only proviso is that the officers may not affirmatively create the emergency.[190]

C. *Application of the Uncritical Approach*

The courts using the uncritical approach would admit the evidence uncovered by the officers. Unlike the other two groups, these courts would accept the police allegation of emergency.[191] Courts in this group refuse to second guess the police.

187. *See, e.g.*, United States v. Thompson, 700 F.2d 944 (5th Cir.), *later app.*, 720 F.2d 385 (1983). *See supra* note 145 and accompanying text.

188. *See, e.g.*, United States v. Cuaron, 700 F.2d 582 (10th Cir. 1983). *See supra* note 167 and accompanying text.

189. United States v. Rubin, 474 F.2d 262 (3d Cir. 1973).

190. *See, e.g.*, United States v. Segura, 663 F.2d 411, 415 (2d Cir. 1981), *aff'd on other grounds*, 468 U.S. 796 (1984).

191. *See, e.g.*, United States v. Johnson, 561 F.2d 832 (D.C. Cir.), *cert. denied*, 432 U.S. 907 (1977). *See supra* text accompanying notes 134-39.

They defer to the police officers' experience investigating drug cases and recognize the easy destructibility of narcotics, even if there is no evidence of an actual emergency in the case being considered.[192] Additionally, this group does not require police to avoid the need for warrantless action.[193] Finally, depending on the circuit in the group considering the case, the courts may not require that the officers maintain the status quo before conducting a full search.[194]

D. *Summary*

It is clear that the circuits disagree about the permissibility of warrantless intrusions based on the threatened destruction of evidence. They also disagree about the factors that should be considered in making the determination. The examine-avoid courts closely examine the factual allegations that evidence is endangered and require that officers provide articulable facts upon which to base that allegation. They also require that police avoid warrantless activity if possible, and, accordingly, that they look to the point at which a warrant could first be obtained to decide whether the failure to do so was reasonable. Finally, they limit the extent of warrantless activity by requiring that it be the least intrusive possible in the circumstances.

The uncritical courts stand in sharp contrast. They accept police claims of emergency without critical analysis. They effectively elevate the ready destructibility of narcotics to a presumption that narcotics may be destroyed in every case. In these circuits, warrantless intrusions are approved because destruction of evidence is conceivable, not because the danger is necessarily present in a particular case. Not surprisingly, these courts do not require that police anticipate possible emergencies; as long as the exigency, foreseeable or not, was not created by the police, warrantless intrusions are permitted.

The last and largest group falls between the examine-avoid courts and the uncritical courts. These courts insist that the danger be real and imminent, as do the examine-avoid courts.

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192. *Johnson*, 561 F.2d at 844.

193. *See, e.g.*, United States v. Palumbo, 735 F.2d 1095 (8th Cir. 1984); *see supra* text accompanying notes 140-41.

194. *See, e.g.*, *Johnson*, 561 F.2d at 834-36, 844; *see also* text accompanying notes 134-41.

On the other hand, they do not require that the police "think warrant"; thus, their approach resembles the uncritical approach.

The result of such divergent approaches is that the outcome of a case depends on the circuit in which it is pending. This is an unsatisfactory result when constitutional rights, theoretically national in scope and uniform in meaning, are involved. Section IV discusses this need for a uniform rule and section V proposes a rule to unify the circuits' approaches to the problem of destruction of evidence. The rule balances law enforcement's need for speedy and unrestricted action with the fourth amendment's respect for individual liberty and concerns about overreaching government.

IV. The Need for an Appropriate Rule

The Supreme Court has not yet provided a clear and reasoned approach to determine when a threat of destruction of evidence justifies a warrantless intrusion. The lower federal courts have provided several different approaches to the problem, with varying results in similar cases. It is undesirable for circuit courts to interpret constitutional rules differently. The federal system has but one Constitution. Different interpretations of the Constitution produce unequal treatment of citizens. Similarly situated persons should receive equal treatment under the law.[195]

Although it has been said that intercircuit conflicts are in some cases beneficial,[196] after a certain period of time the need for certainty and uniformity outweighs whatever benefits are derived from an ongoing debate among the circuits.[197] The cir-

195. *See* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 601-02 (1969); Commission on Revision of the Federal Appellate Court System, *Structure and Internal Procedures: Recommendations for Change, reprinted in* 67 F.R.D. 195, 206-07 (1975).

196. *See* United States v. Stauffer Chem. Co., 464 U.S. 165, 177 (1984) (White, J., concurring).

197. *See, e.g.*, Note, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078, 1080-85 (1984) (the need for uniformity in the federal circuits is premised on the notion that like situated people should receive similar treatment and that since federal law has only one "correct" interpretation, a lack of uniformity means at least one federal court is "wrong," a situation that requires a solution).

cuits have struggled with this problem for more than a decade. It is time for a unified rule.

Most of the circuits do not encourage police officers to seek warrants whenever possible. Such an approach permits warrantless searches that could have been avoided, and further creates the possibility that a broad new exception to the traditional warrant requirement will emerge. Such an exception could develop if the courts take the next step and rule that the mere presence of drugs near the scene of an arrest or elsewhere permits a warrantless seizure.

Prevention of destruction of evidence may thus continue to be treated as a sub-class of the exigent circumstances exception to the warrant requirement, or it may become, de jure or de facto, a separate exception. The difference is crucial. Warrantless intrusions based on the exigent circumstances exception to the warrant requirement must be based on facts known to the officers making the entry.[198] For example, in *Vale*, the Court disapproved warrantless action because the danger to evidence was too speculative when the police acted.[199] If destruction of evidence, however, becomes a separate exception to the warrant requirement, rather than a form of exigent circumstance, a showing of need in the particular case may no longer be required.

Both the automobile exception and search incident to arrest are examples of this phenomenon. Although originally justified by the need to preserve evidence from destruction in individual cases,[200] each no longer requires such a showing. Each has become a per se rule permitting warrantless searches, provided the search is of a car[201] or pursuant to a lawful arrest.[202] In both

198. *See* McDonald v. United States, 335 U.S. 451, 457 (1948).

199. *Vale*, 399 U.S. at 34.

200. Chimel v. California, 395 U.S. 752, 763 (1969) (warrantless search of person incident to arrest limited in scope to the necessities that justify exception); Carroll v. United States, 267 U.S. 132, 153 (1925) (warrantless search of car stopped on highway upheld since automobile "can be quickly moved out of the locality or jurisdiction in which the warrant must be sought").

201. The exception to the warrant requirement in automobile cases has changed from one dependent on the facts of the particular case into one that applies without regard to the circumstances surrounding the search. This movement is clear from the Court's decisions in Preston v. United States, 376 U.S. 364 (1964), and Chambers v. Maroney, 399 U.S. 42 (1970). In *Preston*, the police arrested the defendants and had their car towed to a garage. Shortly thereafter, the officers,

situations, the Court has found that an emergency so often exists that warrantless searches now are permitted in all cases in these categories.[203]

Similarly, courts may find that destruction of evidence in narcotics cases is so prevalent that warrantless searches will be permitted whenever there is probable cause to believe narcotics are present. If fourth amendment values are not to be compromised, the destruction of evidence exception should be limited to truly exigent circumstances. The justification for the warrantless search, therefore, must be a belief that an emergency exists on the facts of the individual case.

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without a warrant, searched the vehicle finding evidence. The Court suppressed the evidence, holding that the search was unreasonable under the fourth amendment because, *inter alia*, the men were under arrest and the car in police custody. "[There was no] danger that the car would be moved out of the locality or jurisdiction." *Preston*, 376 U.S. at 368. The search was illegal since there was no danger of removal or destruction of the evidence. In *Chambers*, however, the Court upheld the warrantless search of an automobile on essentially the same facts. The defendants were arrested for robbery and taken into custody. The automobile was towed to the police station, where officers conducted a thorough search, finding weapons and evidence linking defendants to the robbery. The Court admitted the evidence, holding that the search was within the automobile exception to the warrant requirement despite the fact that the defendants and automobile were safely in police custody. *Chambers*, 399 U.S. at 52. This per se exception has been made explicit by the Court in subsequent holdings. *See* United States v. Johns, 469 U.S. 478, 484 (1985) ("A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify such a warrantless search.").

202. In Chimel v. California, 395 U.S. 752, 763 (1969), the Court limited searches incident to arrest to those made either "in order to remove any weapons" that may be used to resist arrest or effect an escape or prevent the concealment or destruction of evidence; *see* United States v. Vasquez, 638 F.2d 507, 530, *cert. denied*, Mesa v. United States, 450 U.S. 970 and 454 U.S. 847 (1981), *cert. denied*, Vasquez v. United States, 454 U.S. 975 (1981). In United States v. Robinson, 414 U.S. 218 (1973), however, the Court held that a search of a person incident to arrest was permissible without regard to the facts of the case.

203. In *Robinson*, 414 U.S. at 235, for example, the Court stated:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

V. A Proposal

Any rule based on the existence of an emergency should first require a genuine belief that an emergency exists. It could even require proof that the evidence is actually being destroyed before a warrantless intrusion will be permitted. While the latter would greatly reduce the possibility of an unnecessary warrantless entry or search, it would also result in frequent loss of evidence. The legitimate needs of law enforcement would be severely compromised; fourth amendment requirements can be met by a more flexible rule.

To resolve these concerns, I propose the following rule. I will introduce and discuss each part of the four-part rule separately.

(1) *Even with probable cause to believe that evidence of criminal activity is located on the premises, police must also have a reasonable suspicion that evidence is threatened with destruction.*

This suspicion must be based on articulable facts present at the time the decision to act must be made. If police are to be permitted to act before evidence is actually being destroyed, both police and reviewing courts must evaluate the probability that evidence will be destroyed. One possible standard, with which police officers are already familiar, is "reasonable suspicion," as enunciated in *Terry v. Ohio*.[204] Although reasonable suspicion is something less than probable cause,[205] it does re-

204. 392 U.S. 21, 21-22 (1968).

205. As suggested by the Model Rules for Law Enforcement Series, the rule could require that the officer have "probable cause to believe that such items are in imminent danger of being destroyed or consumed." PROJECT ON LAW ENFORCEMENT POLICY AND RULEMAKING, MODEL RULES WARRANTLESS SEARCHES OF PERSONS AND PLACES 37 (rev. ed. 1974). This language is familiar to police officers. Probable cause is the essential ingredient in all decisions to search or arrest. The frequency with which officers must make that decision insures some familiarity with its elements. But such a standard seems inappropriate in these circumstances. While probable cause is not the kind of arduous standard required in trial settings (such as preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt) it is a standard that normally is considered after some deliberation. Probable cause is too rigorous for these circumstances. Although society requires that it be "more probable than not" that evidence of criminal activity be present in a residence before the government may enter one's home over one's objection, even using force if necessary, it does not follow that it must be "more probable than not" that an emergency exists before warrantless action can be taken. The risk is that the evidence will be lost if immediate action is not taken.

quire police to show "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."[206]

Requiring articulable facts permits reviewing courts to determine whether the fear that evidence would be destroyed was reasonable. Judge Kelly, dissenting in *United States v. Cuaron*,[207] portrayed the dangers of accepting unsupported fears of destruction of evidence, particularly where the fear is based on the possible destruction by a drug dealer after the arrest of his courier:

> Of course, it is reasonable to guess that drug dealers . . . get nervous when their couriers are delayed. They may indeed fear that the courier has been arrested; but they may also fear that he has been robbed by his customers, or that he has absconded with their drugs or money. Who knows which reaction is possible, or what the drug dealer's response will likely be? In the absence of any limiting objective evidence, a policeman's speculation as to what might occur is limited only by his imagination and his preconceptions—or, as [the officer] might put it, his "experience." An exception to the Fourth Amendment's warrant requirement that may be established by a policeman's speculative fears can scarcely be described as "specifically established and well-delineated": it is better described as swallowing the rule.[208]

Although reasonable suspicion is not a stringent standard, it is appropriate in this context. Given probable cause by the officer to believe evidence is in the premises, the only question here is how certain the police must be that an *emergency* exists that endangers the evidence before the officer may forego the constitutional requirement of a warrant obtained from a neutral magistrate. If, in a particular case, there is not probable

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Given the prerequisite that there be probable cause to believe that seizable items or people are inside the premises before one considers the question of whether evidence is in danger, the element of risk present ought to accept a the greater error quotient contained in the reasonable suspicion formulation.

206. *Terry*, 392 U.S. at 21-22. The Court continued, "And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.*

207. 700 F.2d 582 (10th Cir. 1983).

208. *Id.* at 592-93 (footnote and citation omitted) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

cause to believe evidence was in the location searched, that challenge may be separately made.[209] The reasonable-suspicion standard should assure that the police allegation of emergency is not contrived. But the lower standard of reasonable suspicion should be sufficient to enable a police officer to know when he may make a warrantless entry. The standard also enables a reviewing court to evaluate the officer's decision.

(2) *The threat of destruction must be so imminent that a warrant, expeditiously sought, cannot be obtained in time to protect the evidence.*

Time is also an important element. The danger must not only be real; it must also be imminent. The second part of the proposed rule requires that there not be enough time to obtain a warrant. The length of time required to get a warrant is an essential consideration. One of the ironies of fourth amendment law is that police are often permitted to excuse warrantless action by arguing that it takes too long to get a warrant, when the only reason it takes so long is that law enforcement agencies have created procedural barriers to the issuance of a warrant that are not required either by the fourth amendment or any court.[210] To encourage the police to obtain warrants,

209. *See, e.g.*, United States v. Chavez, 812 F.2d 1295, 1298 (10th Cir. 1987) (where existence of probable cause to search business considered separately from whether exigent circumstances justified warrantless entry); United States v. Wulferdinger, 782 F.2d 1473, 1475 (9th Cir. 1986) (existence of probable cause to search residence separate from consideration of whether exigent circumstances justified warrantless entry); United States v. Moore, 790 F.2d 13, 15 (1st Cir. 1986) (whether existence of probable cause to search apartment considered separately from existence of exigent circumstances for warrantless search of apartment); United States v. Al-Azzawy, 784 F.2d 890, 893-94 (9th Cir. 1985) (probable cause to arrest only one question, presence of exigent circumstance must also be found), *cert. denied*, 106 S. Ct. 2255 (1986); United States v. Baldacchino, 762 F.2d 170, 174-77 (1st Cir. 1985) (probable cause to arrest considered separately from when exigent circumstances justify warrantless entry into defendant's motel room); United States v. McEachin, 670 F.2d 1139, 1142-45 (D.C. Cir. 1981) (whether probable cause existed to search defendant's apartment considered separately from justification of warrantless search of apartment); United States v. Agapito, 620 F.2d 324, 332-33, 335-37 (2d Cir.) (probable cause for defendant's arrest considered separately from whether exigent circumstances justify warrantless search of hotel room), *cert. denied*, 449 U.S. 34 (1980).

210. For instance, a writing is not constitutionally required for the issuance of a warrant and yet a majority of states require that warrant applications be in writing. *See generally* R. VAN DUIZEND, L. SUTTON & C. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES (1984). This study by the National Center for State Courts examined, among other things, the administrative

courts must ask themselves whether the process is too time-consuming.[211] Procedures that permit police to get warrants over the telephone have been adopted by the federal government and a number of states.[212] These procedures reduce the time ordinarily needed to obtain a warrant and therefore reduce the need for warrantless action.[213] Regardless of the procedure for ob-

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and judicial review procedures employed or required to obtain search warrants. Included in its conclusions and recommendations was the observation that

> [o]btaining a search warrant can be a time-consuming and frustrating process. . . . Unfortunately, much of the intended effect of the Fourth Amendment is lost because of the administrative impediments to obtaining a search warrant and the consequent attractiveness of alternatives which, while legally authorized in most instances, do not offer the same level of protection against unreasonable searches and seizures. As some of the jurisdictions we studied have demonstrated, these impediments can be overcome with relatively little difficulty.

Id. at 105-06.

211. A number of courts have required that the police explain why they have not used a telephonic warrant. *See, e.g.*, United States v. Berick, 710 F.2d 1035, 1038 (5th Cir.), *cert. denied*, 464 U.S. 918 (1983); United States v. Cuaron, 700 F.2d 582, 589 (10th Cir. 1983); United States v. Jones, 696 F.2d 479, 487-88 (7th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); United States v. McEachin, 670 F.2d 1139, 1147 (D.C. Cir. 1981); United States v. Hackett, 638 F.2d 1179, 1184-85 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

212. For federal statutes authorizing telephonic warrants, see FED. R. CRIM. P. 41(c)(2). For state statutes authorizing telephonic warrants, see ALASKA STAT. § 12.35.015 (1984); ARIZ. REV. STAT. ANN. § 13-3915(c) (1978); CAL. PENAL CODE §§ 1526(b), 1528(b) (West 1986); MONT. CODE ANN. § 46-5-202 (1985); Neb. Rev. Stat. § 29-814.03 (1985); NEV. REV. STAT. ANN. § 79.045(2)-(3) (Michie 1986); N.Y. CRIM. PROC. LAW § 690.36 (McKinney 1984); OKLA. STAT. ANN. tit. 22, § 1225(b) (West 1986); OR. REV. STAT. § 133.545(5) (Supp. 1987); S.D. CODIFIED LAWS ANN. § 23a-35-5 to -7 (1979); UTAH CODE ANN. § 77-23-4 (1986); WASH. REV. CODE ANN. § 2.3(c) (1980); WIS. STAT. ANN. § 968.12(3) (West 1984). Cases in two other states have authorized telephonic warrants. *See* State v. Andries, 297 N.W.2d 124 (Minn. 1980); State v. Valencia, 93 N.J. 126, 459 A.2d 1149, 1152-53 (1983).

213. The federal statute was intended to encourage use of warrants and reduce exigent circumstances as justification for warrantless action. The legislative history makes that clear:

> Use of search warrants can best be encouraged by making it administratively feasible to obtain a warrant when one is needed. One reason for the nonuse of the warrant has been the administrative difficulties involved in getting a warrant, particularly at times of the day when a judicial officer is ordinarily unavailable . . . . Federal law enforcement officers are not infrequently confronted with situations in which the circumstances are not sufficiently "exigent" to justify the serious step of conducting a warrantless search of private premises [sic], but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means.

taining a warrant adopted in each jurisdiction, the test for evaluating a threat to evidence should always be whether the time needed to act to preserve the evidence was less than the time necessary to get a warrant.

It is critical to determine when the obligation to seek a warrant arises. The earliest possible moment is when police have probable cause to believe evidence of criminal activity is located in the place to be searched. The Supreme Court has never required that police seek a warrant at the first possible moment.[214] The Court reasons that police may legitimately wish to delay the arrest of a suspect or the search of premises. Nevertheless, a policeman contemplating warrantless action should always be mindful of the possibility of getting a warrant. The need to act immediately once the police have decided upon a course of action should not automatically justify a warrantless intrusion if a warrant could have been secured before commitment to action or if the need for speedy action was foreseeable.[215]

(3) *The circumstances giving rise to the threat must not have been avoidable by reasonably prudent officers and must not have been created by the police.*

Police should have to avoid the need to act without a warrant if they reasonably can. This requirement is merely a corollary to the principle that the police ought to be encouraged to

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Notes of Advisory Committee on Rules, 1977 Amendment, FED. R. CRIM. P. 41(c)(2), *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 527, 534; H.R. REP. No. 195, 95th Cong., 1st Sess. 10 (1977).

214. *See, e.g.*, Cardwell v. Lewis, 417 U.S. 583, 595 (1974) ("Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment."); Hoffa v. United States, 385 U.S. 293, 310 (1966) ("The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long."). *But see* Coolidge v. New Hampshire, 403 U.S. 443, 470-72 (1971) (holding a seizure of evidence unconstitutional because the police had the opportunity to obtain a valid warrant, the Court noted that "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it . . . [t]he requirement of a warrant to seize imposes no inconvenience whatever . . . in a legal system that regards warrantless searches as 'per se unreasonable' . . . .").

215. *See* Harbaugh & Faust, *supra* note 53, at 227, for a similar proposal with regard to warrantless entries to make a felony arrest.

seek warrants. Although most courts do not require the police to obtain a warrant at the earliest practicable moment, they do not permit the government intentionally to create the exigency that justifies a warrantless intrusion.[216] The distinction affects the point at which the court begins evaluating the presence of an emergency, and this can produce very different results.

For example, when the courts require the police to avoid warrantless action, they refer to the police's obligation to seek a warrant before the emergency arises. In *United States v. Collazo*,[217] the court suppressed evidence acquired during a warrantless search of defendant's house because the police had probable cause to believe evidence was in the house before the emergency arose. The *Collazo* court stated:

> [I]f there was concern regarding the destruction of evidence in the immediate aftermath of the arrests, that easily could have been cured by obtaining a warrant to search the house for evidence prior to the . . . arrests. The government will not be allowed to plead its own lack of preparation to create an exigency justifying warrantless entry.[218]

Thus, the court implicitly viewed the police to have an obligation to seek a warrant when time permitted.

By contrast, courts that only require officers to avoid creating the emergency themselves focus on the point when the emergency arose. *United States v. Thompson*[219] exemplifies this approach. Although the *Thompson* court found the police had probable cause the night before the warrantless entry,[220] it held that "[t]he agents' failure to avail themselves of the opportunity to obtain a warrant does not, however, end our inquiry, for the failure to obtain a warrant at the first opportunity is not a fatal defect."[221] Instead, the court saw the issue as whether the government created the exigency by using an undercover agent known to one of the participants. The government had planned

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216. *See, e.g.*, United States v. Allard, 600 F.2d 1301, 1304 (9th Cir. 1979) (threatened destruction of evidence attending police officer's knock on door held insufficient to justify warrantless entry into suspected drug supplier's hotel room).

217. 732 F.2d 1200 (4th Cir. 1984), *cert. denied sub nom.* Alvarez v. United States, 469 U.S. 1105 (1985).

218. *Id.* at 1204.

219. 700 F.2d 944 (5th Cir.), *later app.*, 720 F.2d 385 (5th Cir. 1983).

220. *Id.* at 949.

221. *Id.* at 950.

to gain lawful entry to the house by having an undercover agent pretend to be a cocaine purchaser.[222] The court would have permitted the warrantless entry if the police had not known that the defendant and undercover agent knew each other, although the government could have obtained a warrant hours before the need to enter arose and although the government planned to make a warrantless entry into the suspect's premises.

(4) *The invasion of forth amendment interests must be no greater than the circumstances require.*

Even if warrantless action is needed, the intrusion should be as limited as the circumstances permit.[223] If evidence is in unavoidable danger of imminent destruction, police should be permitted to take whatever action is necessary to maintain the status quo, but they should also be required to seek a warrant as quickly as possible before proceeding with a full-scale search.

In most instances the preferred procedure should be a security check or protective sweep followed by securing the premises while a warrant is sought. For example, if police have reason to believe that suspects know of the discovery of their criminal enterprise and possess evidence that is easily destroyed, the police may permissibly enter the premises and check the house for persons who might endanger the officers or destroy evidence. The officers could not permissibly search for evidence before seeking a warrant, because the emergency would be over and the officers would have sufficient time to obtain a warrant.[224]

In the unusual case, a more thorough search might be necessary to prevent the loss of evidence. For example, in *United States v. Altman*,[225] after the police lawfully entered the defendant's premises, they saw him drop something into a crawl space in a closet. The officers lifted a trap door and retrieved nine

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222. *Id.* at 949.

223. Limiting the extent of the interference with an individual's privacy is consistent with general fourth amendment principles. *See* Chimel v. California, 395 U.S. 752, 767 n.12 (1969) ("And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed.").

224. *See, e.g.*, United States v. Edwards, 602 F.2d 458 (1st Cir. 1979).

225. 797 F.2d 514 (7th Cir. 1986) (evidence actually in process of destruction rather than threatened destruction).

pounds of hashish floating in water.[226] The court permitted what might normally have been outside the scope of a permissible warrantless search, since "it is plain that when [police] observe activity that indicates that evidence is being destroyed, the agents may act immediately to save the evidence from destruction."[227] But in no instance should the warrantless activity be more intrusive than necessary to avoid the exigency that justified dispensing with the warrant in the first place.

The proposed four-part rule includes all the elements of the examine-avoid approach used by the First, Third, and Fourth Circuits. It differs from that approach, however, because it provides guidelines that permit the police to determine whether the facts justify warrantless action. The rule's goal is to encourage police officers to get warrants whenever possible. Police officers are much more likely to follow a rule they understand.

The proposed rule differs from those employed by the other two groups because it is more faithful to the fourth amendment's preference for warrants. Unlike both the uncritical approach and the examine-only approach, the proposed rule requires police to avoid warrantless action if possible. Unlike the uncritical approach, the proposed rule also insists that the police be able to articulate reasons for their belief that an emergency exists and that they limit the degree of intrusion to that required by the circumstances. The experience of the courts employing the examine-avoid approach shows that this aspect of the suggested rule is workable. The proposed rule, by clearly defining the circumstances in which police can take warrantless action, will make it more useful both to the police operating under it and the courts enforcing it.

Conclusion

Preventing the destruction of evidence ought to be a justification for warrantless action in certain circumstances. A standard appropriate for evaluating whether an emergency exists must accommodate the competing concerns of law enforcement and privacy. Society has a growing fear about crime, but enthu-

226. *Id.* at 515.
227. *Id.* at 516.

siasm for law enforcement may lead to aggressive police work at the expense of the privacy protections provided in the fourth amendment. Apprehension and conviction of criminals ought not to be so difficult that citizens lose faith in the ability of government to provide protection. Yet every rule that seeks to control police behavior inevitably makes the conviction of some criminals more difficult. Nonetheless, those rules are absolutely necessary to prevent arbitrary governmental intrusions of privacy.

The Supreme Court has mentioned the prevention of destruction of evidence as a justification for warrantless action. It has not, however, defined the factual circumstances that justify warrantless action in this context. The particular susceptibility of narcotics to destruction and the nation's rising concern about drug usage foreshadow an increasing use of the destruction of evidence rationale to justify warrantless action. The circuit courts have considered the question, but they have failed to develop a coherent constitutional standard. Multiple views exist as to when evidence is sufficiently in danger of destruction to justify warrantless action, and as a result, the fourth amendment's restraining influence on unreasonable police behavior and its protections of individual's privacy vary from circuit to circuit—as if they had different constitutions.

A standard that encourages police officers to obtain warrants when possible is needed. It should require police officers to have reasonable suspicion that evidence is in imminent danger of destruction, and that suspicion should be based on facts articulable when the decision to act must be made. The danger must be so pressing that delay for the time needed to secure a warrant threatens the evidence. The danger must also be such that reasonably prudent officers could not have avoided the need for warrantless action. Lastly, the intrusion must be no greater than the circumstances require.

Such a rule will permit warrantless action when it is needed, but it will also forewarn officers not to rely unduly upon the possibility of warrantless action. Thus, the valued fourth amendment right of privacy will be better protected from erosion.