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A Case for Jury Determination of Search and Seizure Law

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I. INTRODUCTION

In a criminal case the option to return a general verdict of acquittal invests the jury with the raw power to nullify many legal determinations, including the trial judge's ruling that a search is constitutional.[1] While courts grudingly acknowledge the existence of an extra-legal jury nullification *power*,[2] courts do not recognize any jury *prerogative* to determine the lawfulness of a search. The United States Supreme Court's discussion of the jury's role in interpreting and applying the fourth amendment consists of one terse statement that the legality of a search "is a question of fact and law for the court and not for the jury."[3] In challenging that statement, this article draws a sharp line between de facto jury nullification power and the jury's legitimate prerogative to determine law.[4]

At present, nullification power can only be exercised in the rare case where the jury fortuitously learns of the full circumstances surrounding a search. For example, in a prosecution for criminal sexual activity, suppose the government offers the testimony of a police officer who observed the activity occurring in the defen-

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1. *See generally* H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 318-323 (1966).

2. Nullification power exists because the judiciary is unable or unwilling to eliminate general verdicts. *See* notes 36 and 149 *infra*.

3. Steele v. United States, 267 U.S. 505, 511 (1925). *See also* Ford v. United States, 273 U.S. 593 (1927).

4. Most authorities distinguish between the jury's *power* to determine law through nullification and the jury's *right* to determine law. I have substituted the term "prerogative" for "right" because the word "right" connotes a correlative duty in Hohfeldian analysis. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919). While not totally satisfied with the word prerogative, I feel that it better describes the legitimate power of juries to interpret law.

dant's bedroom. Suppose further that inquiry into the specific competency of the observer reveals the circumstances of the observation: the police officer used binoculars to peer through a crack in the window curtains. If sufficiently offended by the police conduct the jury can acquit the defendant and thereby effectively nullify the trial judge's ruling that the police observation was lawful.[5]

In the above hypothetical, the jury acquires knowledge of the search somewhat fortuitously because with a slight change of facts the very same police observation would never come to light at the trial on the merits. For example, suppose that after observing the bedroom through binoculars, the police obtain a search warrant, enter the bedroom and apprehend the defendant while engaged in the criminal act.[6] If, at the suppression hearing, the judge upholds the issuance of the warrant, the jury will only hear that the police entered the bedroom pursuant to a valid warrant. Since the jury is not authorized to consider the legality of the search, the jury will never learn that the police initially used binoculars to look into a citizen's bedroom. This second hypothetical is the more common occurrence because juries rarely learn the full underlying circumstances of a search.[7] Even when the jury is fully aware of the facts surrounding a search, it is instructed to accept the legal determinations of the judge. Many law enforcement procedures of questionable legality do not shock the jury to the point that they defy the judge's instructions.[8] Thus, under the present system, jury nullification of searches deemed lawful by the judiciary is the exception.

This article states the case for a procedure which would make the exception the rule by authorizing the jury to supplement the judge's ruling with its own determination as to the legality of the search. The trial judge's preliminary ruling on the admissibility of

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5. At this point it is immaterial whether the trial judge ruled that the initial police observation was a reasonable search, or was not a search within the meaning of the fourth amendment. *See* note 116 *infra* and accompanying text.

6. *See, e.g.*, People v. Ciochon, 23 Ill. App. 3d 363, 319 N.E.2d 332 (1974).

7. I do not assert that searches pursuant to a warrant are more common than warrantless searches. Just the opposite is true. *See* Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L.C. & P.S. 198 (1977).

8. "It is unlikely that the jury would let any manner of criminal run loose just for the thrill of defying the judge." Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 211 (1972).

the fruits of a search would be final and unreviewable by the jury only if the search is deemed unconstitutional. If the judge finds the search lawful and admits the fruits in evidence, the jury would hear all relevant evidence relating to the circumstances of the search. The jury would then be instructed as follows:

> Members of the Jury, you are the final judges of the lawfulness of the search in this case. So whatever I tell you about the law, while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may determine the law as you apprehend it to be in the case. You may consider the evidence produced by the search only if you determine that the search was reasonable within the meaning of the fourth amendment. If you find the search to be unreasonable within the meaning of the fourth amendment you must disregard all evidence produced by the search.[9]

Such an approach to the fourth amendment is analogous to the Massachusetts rule govering the admission of confessions,[10] and has historical precedent in colonial American practice. Historically, jury nullification and jury determination of law are necessarily intertwined and cannot be entirely separated. But in attempting to maintain the conceptual distinction between jury prerogative and jury power, this article presents evidence that colonial juries exercised the prerogative to determine law when reviewing the search activities of Royal Customs inspectors. Indeed, Parliament's efforts to eliminate this jury prerogative proved to be one of the causes of the American Revolution.[11]

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9. This instruction is a modification of the Maryland instruction on the jury's prerogative to determine substantive criminal law. *See* text accompanying note 75 *infra*.

10. *See generally* ANNOT., 1 A.L.R. 3d 1251 (1965). *See also* note 78 *infra*.

11. The Declaration of Rights and Grievances of the First Continental Congress and the Declaration of Independence both include the grievance that establishment of the vice-admiralty courts in colonial America deprived the colonists of the right to trial by jury. *See generally* C. UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209 (1960).

II. The Historical Case for Jury Determination of Search and Seizure Law

> Were I called upon to decide, whether the people had best be omitted in the legislative or judicary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them.
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> —Thomas Jefferson[12]

"American histories without exception list Writs of Assistance as one of the active causes of the American Revolution."[13] The writs were first issued in America in 1755[14] and the major historical studies of the fourth amendment[15] begin their analysis of colonial searches and seizures with James Otis's famous challenge of the writs in *Paxton's* case (1761).[16] During the period between 1761 and 1776 the colonial courts and legislatures, as well as private attorneys such as James Otis and John Adams, were actively involved in the Writs of Assistance controversy. American juries, however, had been effectively removed from participation in the controversy by England's creation of juryless Vice-Admiralty courts in the colonies. Events which serve as precedent for the jury's determination of search and seizure law occurred during the neglected period of 1661-1764, when customs officials first searched and seized pursuant to the Navigation Acts. It is during this period that American juries played an active role in the search and seizure controversy.

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12. Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582 (1939) (quoting Letter from Thomas Jefferson to L'Abbe' Arnold (July 19, 1789)), *reprinted in* 3 Works of Thomas Jefferson 81-82 (Wash. ed. 1854).

13. Dickerson, *Writs of Assistance as a Cause of the Revolution* in The Era of the American Revolution 40 (R. Morris ed. 1939).

14. *Id.*

15. J. Landynski, Search and Seizure and the Supreme Court (1966); N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937) (Johns Hopkins University Studies in Historical and Political Sciences Vol. 55); T. Taylor, Two Studies in Constitutional Interpretation (1969).

16. John Adams would later state "that Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life . . . . Then and there the child Independence was born." Lasson, *supra* note 15 at 59.

A. The Navigation Acts

In the mid-seventeenth century, Holland, not England, was the commercial, industrial, and financial center of Europe. Under a system of free trade, American commerce naturally would have gravitated to the Netherlands. The Navigation Acts of 1660 and 1663 were designed to bind American trade to the mother country and keep the colonies "in a firmer dependence" upon England.[17] The first of the Navigation Acts, the Enumeration Act of 1660,[18] provided that goods imported to, or exported from, America be shipped in English or American vessels and further provided that certain enumerated colonial products, most importantly sugar and tobacco, could only be shipped to England or another colony. The second Navigation Act, the Staples Act of 1663,[19] specified that all goods imported to America be loaded in England.

These first two Navigation Acts were part of a general effort to establish the Crown's firm control over all colonial activity and government. During Oliver Cromwell's reign, the American colonies had not been subjected to close supervision or regulation, but with the restoration of the English monarchy, the Crown turned its attention to America. The Puritans of Massachusetts Bay Colony objected to increased regulation on the grounds that they were subject of the English King only to the extent that they voluntarily established themselves as subjects by the terms of the colony's charter.[20] In an effort to resolve this "home rule" controversy, Charles II sent a commission to induce the colonies to accept the same political compromises that had been reached in England upon the restoration of the Monarchy. The commission was a total

17. "The requirement that goods pass through England imposed many obligations upon colonial trade in the guise of taxes, fees, cooperage, porterage, brokerage, warehouse rent, commissions, extra merchant's profits, and the like, which would never have been incurred in a direct trade with the ultimate market." Harper, *The Effect of the Navigation Acts on the Thirteen Colonies* in THE ERA OF THE AMERICAN REVOLUTION 32 (R. Morris ed. 1939).

18. 12 Car. II, C.18 (1660). *See also* Harper, *supra* note 17.

19. 15 Car. II, C.7 (1663). *See also* Harper, *supra* note 17.

20. *See generally* 1 I. HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY (Boston 1764). Although the "home rule" controversy was most prominent in Massachusetts, it was also present in other colonies. For example, in 1701 William Penn wrote: "Are we comme 3000 miles into a desert . . . to have only the same privileges we had at home?" *Quoted in* M. HALL, EDWARD RANDOLPH AND THE AMERICAN COLONIES, 1676-1703, at 223 (1969).

failure. No compromise was reached, and the Navigation Acts were largely ignored or evaded.[21]

The third Navigation Act, the Plantation Duty Act of 1673,[22] did not impose any significant new duties or restrictions upon trade but was designed solely to enforce the provisions of the first two Navigation Acts. Edward Randolph, whose biography is a microcosm of the history of search and seizure during this period,[23] was appointed Collector of Plantation Duty. He arrived in the colonies in 1679 determined to enforce the Navigation Acts. Randolph's principle method of enforcement was the seizure of vessels suspected of violating the Navigation Acts,[24] and from 1680 to 1682 Randolph seized and prosecuted thirty-six ships for such violations. All but two of the alleged offenders were acquitted, and the two convictions were obtained only when there was a trial without a jury.[25] The juries' refusal to convict for alleged violations of the Navigation Acts should not be viewed as merely an example of jury nullification of the unpopular Navigation Acts. While nullification probably played a part in the decisions,[26] it is not the only explanation, in light of two legal objections raised against Randolph's seizures and the role of the jury in passing upon those objections.

The first of these legal objections had overtones of nullification theory as it involved a fusion of positive law and "higher law" concepts.[27] The exponents of home rule argued that the Navigation

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21. HALL, *supra* note 20, at 13-14.

22. 25 Chas. II, C.7 (1673). *See also* HARPER, *supra* note 17, and HALL, *supra* note 20.

23. "In England the customs establishment was elaborate. In New England it was one man, Edward Randolph . . . ." HALL, *supra* note 20, at 56.

24. The owner of the seized vessel could not remove either his ship or its cargo until the case was tried. A conviction resulted in total forfeiture of the ship and cargo.

25. HALL, *supra* note 20, at 57.

26. Colonial juries "were alleged to consist of merchants or masters of ships." J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 60 n.390 (1950). However, the possibility of nullification should not be over-emphasized as this was not yet the age of tea parties, physical recapture of seized vessels, and mob violence. *See* note 66 *infra* and accompanying text. Not all forms of resistance to the unpopular Navigation Acts were condoned by colonial juries. *See, e.g.*, The case of the *Two Sisters* where a colonial merchant vessel fired upon the customs inspectors. The merchant was acquitted of a violation of the Navigation Acts but was convicted and fined for obstructing the customs officials in the course of their duties. *Reported in* HALL, *supra* note 20, at 62.

27. In its most elementary form, jury nullification power rests on the maxim that positive law must yield to "higher" laws such as natural law, God's law, an unwritten constitution,

Acts were law in the colonies only to the extent that they were accepted by the colonists. Thus determination of positive law in America necessitated examination of the circumstances under which a new and separate society is formed and is no longer bound by the positive law of the old society.[28] Ultimately the home rule controversy was resolved against the colonies, and its influence upon colonial juries is unclear.[29] The colonists ultimately prevailed, however, on the second legal objection to Randolph's seizures, an objection that may be characterized as a question of interpreting positive law without resort to nullification power.

This latter objection conceded that the Navigation Acts were law in America but asserted that Parliament, owing to legislative oversight, had empowered Randolph to enforce only the Plantation Duty Act of 1673. Therefore, the colonial governors retained exclusive power to enforce the Enumeration Act and the Staples Act, which were the real backbone of British control and the basis of all of Randolph's seizures. When this purely positive law objection was ultimately submitted to the Customs Commission in England, the commission confessed its error and informed Randolph that he "had noe more power to seize and prosecute . . . then any other person."[30] Randolph sought to remedy this legal deficiency in his seizure powers by obtaining letters of patent which explicitly authorized him to enforce all of the Navigation Acts. The letters of patent were issued by the King, but the legal controversy in the colonies continued, simply being recast in terms of whether the King alone without Parliament could lawfully authorize such seizures. Moderate colonial judges tended to recognize Randolph's commission as sufficient warrant to seize, but colonial juries continued to render acquittals.[31]

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the social compact, current mores, etc. *See generally* Scheflin, *supra* note 8.

28. In theory the colonies were to follow English common law, in practice they developed their own common law. A sizeable body of historians maintain that "the English common law remained largely an alien system until the middle of the 18th Century. . . ." F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES 7 (1940).

29. If the colonial juries of this period considered whether the Navigation Acts or Randolph's seizures violated a "higher" law, such consideration was relatively primitive having failed to reach the level of sophistication to which James Otis would bring the theory some eighty years later in *Paxton's* case. *See* LASSON, *supra* note 15.

30. HALL, *supra* note 20, at 66.

31. For example, in one famous case Governor Bradstreet, presiding as judge, sent out the

On what basis did the colonial juries of the 1680's return acquittals? Ideally, de facto jury nullification of law should be separated from jury determination of law. Absent special findings,[32] the actual basis of a general verdict of acquittal cannot be known. What is known is that in rendering those general verdicts of acquittal the colonial juries were not limited to an extra-legal nullification power. The juries would have considered the argument that Randolph's seizures were illegal because those juries assumed that they had a prerogative to determine the lawfulness of the seizures.

In practice, the colonial juries of the period determined all questions of law as well as resolving factual disputes.[33] The judge's primary function was "to preserve order, and see that the parties had a fair chance with the jury."[34] Such practice was based in part on the practical considerations that most of that era's judges and advocates were without formal legal training, and in part upon the colonists' deep resentment of professional judges and lawyers.[35]

While colonial practice is clear regarding the jury's determination of law, colonial legal theory is less certain. It is difficult to separate practice from theory regarding the authorized and unauthozied acts of colonial juries, because the subtle distinction between jury prerogative and jury nullification power was just becoming apparent at this time. Attaint, the punishment of the jury for reaching an incorrect verdict, became obsolete in England with the decision in *Bushell's* case in 1670.[36] When the trial court lost this means to coerce a verdict from the jury, it became apparent

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jury three times with orders to reverse its findings. The jury refused to alter its verdict and cast out the case on the ground that Randolph had no warrant to seize the ship. SMITH, *supra* note 26, at 61 n.400.

32. In civil cases there was considerable debate and confusion as to whether juries could be compelled to render a special verdict, thereby leaving interpretation of law for the judge. In criminal cases it was assumed that the jury had the right to render a general verdict. In both civil and criminal cases the colonies insisted upon general verdicts and non-interference with jury prerogative. *See,* SMITH, *supra* note 26, at 359-60.

33. *See generally* Howe, *Juries as Judges of Criminal Law,* 52 HARV. L. REV. 582 (1939).

34. *Id.* at 591. *See also* Eaton, *The Development of the Judicial System in Rhode Island,* 14 YALE L. J. 148 (1904-05).

35. The colonists of this age believed that any man of ordinary intelligence was able to plead his own case and able to judge law and justice—not an unreasonable assumption in a day when educated men were generally familiar with the law and its administration. *See* AUMANN, *supra* note 28.

36. 6 Howell's State Trials 999 (1670).

that the jury possessed the raw power to determine law by rendering an unreviewable general verdict of acquittal.

In England the question of whether the jury had not just the power, but an authorized prerogative to determine law, was presented by the controversy concerning seditious libel.[37] The question was not definitively resolved until 1792 when Parliament enacted Fox's Libel Act.[38] The Act authorized English juries to decide not just the "fact" of publication, but also the issue of whether the publication was seditious which is in some sense a mixed question of law and fact.

In colonial America, the jury's prerogative to determine the issue of whether a publication was seditious was recognized as early as 1692 in Pennsylvania.[39] Perhaps the most famous example of an American jury determining law as well as facts is this trial of John Peter Zenger in 1735.[40] In areas of law other than libel cases, American legal theory and practice also appears to have respected the jury's prerogative to determine law. The records are spotty but there is evidence that throughout the period from 1660 to the early 1800's the jury's determination of law was accepted theory and practice.[41] In eliminating the jury's prerogative to determine law in the later half of the nineteenth century, the American courts looked to English precedent rather than to the American colonial period.[42]

Due to inadequate records and the inherent ambiguity of general verdicts, the historical case for jury determination of search and seizure law is not entirely conclusive.[43] This much is clear: (1) the

37. *See generally* Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295 (1958).

38. 52 Geo. III, c. 60 (1792).

39. Howe, *supra* note 33, at 594-95.

40. Zenger's defense council, Alexander Hamilton, argued that jurors "have the right beyond all dispute to determine the law and the facts . . . ." G. ALEXANDER, A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER 99 (1963).

41. *See* J. QUINCY REPORTS ON CASES ARGUED AND ADJUDICATED IN THE SUPERIOR COURTS OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at app. 541-72 (1865). *See generally* Howe, *supra* note 33.

42. *See generally* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964).

43. Legal materials from this period are so scanty that cautious historians ignore the period while the less cautious draw inferences with limited support. While I wish to avoid "imagining the past," I confess to falling into the "less cautious" category.

American colonies were confronted with significant search and seizure questions some eighty years before the Writs of Assistance controversy; (2) there were admitted legal deficiencies in the authority of customs officials to search and seize; (3) colonial juries were duly informed of the legal deficiencies; (4) colonial juries decided disputed questions concerning such legal deficiencies. Thus, it seems a fair inference that the acquittals rendered by colonial juries were based, at least in part, upon their conclusion of law that the seizures were illegal.[44] What is also clear is England's strong and hostile reaction to the colonial juries' exercise of their prerogative to interpret law adversely to the Crown. Numerous acquittals in seizure cases led to repeated British efforts to negate the role of the jury, and stubborn American efforts to preserve the jury's function in the search and seizure controversy.

The difficulties with enforcement of the Navigation Acts were soon overshadowed by the broader struggle regarding home rule for Massachusetts. The struggle reached a climax in 1684 when England vacated the colony's charter and dissolved the Massachusetts government.[45] A temporary council was appointed to rule Massachusetts with Edmund Randolph serving the council as Collector, Surveyor, and Searcher of Customs. Records are again spotty, but it appears that Randolph had more success with seizures under the temporary council than he had under the old charter government. Whatever brief success Randolph had ended when James II was displaced by the Glorious Revolution of 1688. Massachusetts revolted against the ruling council sent by James and Randolph fled to England where he was reduced to working the London docks as a "free-lance informer" receiving a percentage of seized goods.[46]

By the early 1690's William and Mary were secure on the English throne, Randolph was back in the good graces of the Crown, and the Massachusetts charter was restored. With England relatively stable under William and Mary, attention was again directed

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44. I make no claim that colonial juries were anticipating the modern exclusionary rule. In acquitting defendants of violations of the Navigation Acts the jury did not face the issue of freeing a "violent" criminal because the constable blundered. *See* note 26 *supra*.

45. *See* Hutchinson, *supra* note 20.

46. *See* HALL, *supra* note 20, at 134.

to colonial trade and enforcement of the Navigation Acts. Randolph returned to America in 1692 as Surveyor General of America and redirected his energies toward the southern colonies where he could count on the cooperation of more friendly governors, but Randolph had no more success with southern juries than he had had with New England juries.[47] Randolph angrily reported to his superiors: "I find that by the partiality of juries and others, that I can obtain no cause for His Majesty upon the most apparent evidences."[48]

Randolph's vehement reports on the widespread evasion of the Navigation Acts led Parliament in 1696 to enact the fourth Navigation Act—An Act for Preventing Frauds and Regulating Abuses in the Plantation Trade.[49] This act was modeled on the English Statute of Frauds (1662) with one major difference which would prove to be one of the causes of the American Revolution. The Navigation Act of 1696 authorized the establishment of vice-admiralty courts in America, and provided that suits for forfeiture of vessels offending the Navigation Acts could be brought in "any of His Majesty's Courts," a phrase apparently intended to include the existing colonial common law courts and the newly created vice-admiralty courts.[50] In England, however, such suits could only be brought in the Courts of Exchequer.[51] Unlike the vice-admiralty courts, the Courts of Exchequer employed a jury. Thus the basis was laid for what would become a major grievance of the colonists: Americans were denied their traditional right to a jury trial, a right still enjoyed by their fellow subjects in England.[52]

Although there were some incidental benefits to establishing the

47. One ship, *The Providence,* was prosecuted three times in Maryland and Virginia without obtaining a conviction. *Id.* at 140.

48. *Id.* at 153.

49. *See* Harper, *supra* note 17, and UBBELOHDE, *supra* note 11.

50. The phrase was ultimately construed to invest the colonial common law courts and the vice-admiralty courts with concurrent jurisdiction over violations of the Navigation Acts. *See* UBBELOHDE, *supra* note 11, at 16.

51. *See* SMITH, *supra* note 26, at 93.

52. In 1701 William Penn wrote that to try Americans "without a jury, gives our people the greatest discontent, looking upon themselves as less free here than at home, instead of greater privileges, which were promised." *Quoted in* Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776,* 16 WM. & MARY Q., 459, 462 (1959).

vice-admiralty courts in America,[53] Parliament's primary purpose for establishing them was to negate the American jury's role in the enforcement of the Navigation Acts.[54] The American reaction to the establishment of vice-admiralty courts was strong and immediate. In Pennsylvania, the legislature reacted with a statute stipulating that any case involving a violation of the Navigation Acts must be tried according to the rules of common law before a jury.[55] Many colonial judges reacted by issuing writs of prohibition against proceedings in the vice-admiralty courts.[56] Colonial juries continued to address the seizure controversy as best they could in the common law courts. Although the jury could no longer deal directly with the forfeiture trial in the vice-admiralty court, it could indirectly address the search and seizure controversy when a civil suit was filed against a customs official for false arrest and trespass in seizing a vessel. For example, in one Massachusetts case the shipowner had agreed to pay a penalty of 500 pounds rather than risk total forfeiture in the vice-admiralty court. The shipowner them promptly sued in a common law court for damages against the customs official who had seized the vessel. The jury

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53. In addition to proceeding in rem and by written deposition, the vice-admiralty courts functioned throughout the year, as opposed to the limited terms of common law courts. The constant availability of the vice-admiralty courts was important in maritime cases where the parties were often transient and delays in judgment caused unusual hardships. *See* UBBELOHDE, *supra* note 11, at 20-21.

54. The Tory position on the Fraud Act of 1696 was that American juries could not be trusted to interpret the Acts of Trade impartially, thus "Parliament was justified in violating the rights of its subjects so that the Navigation Acts might be enforced." Lovejoy, *supra* note 52, at 469.

55. HALL, *supra* note 20, at 184. The statute was disallowed by the English government in 1702. *Id.* at 185.

56. The common law courts in America were as jealous of their power as the English common law courts had been during their historic struggle with the Admiralty courts. The common law courts prevailed in England by narrowly defining the jurisdiction of the Admiralty courts and by issuing writs of prohibition whenever Admiralty exceeded its jurisdiction. American common law courts attempted to follow this precedent by issuing writs of prohibition on the questionable grounds that by authorizing suits for forfeitures "in any of His Majesty's courts" the Act of 1696 had conferred jurisdiction only upon courts of record, which Admiralty courts were not. *See* SMITH, *supra* note 26, at 516. England conceded that the American common law courts had concurrent jurisdiction with the vice-admiralty courts, but maintained that the choice of forum belonged to the prosecutor, and thus writs of prohibition did not properly lie. In 1742 Parliament rejected proposed legislation to vest exclusive jurisdiction in the vice-admiralty courts. *Id.* at 189. The writs of prohibition were not definitively prohibited until the Sugar Act of 1764. *See* note 63 *infra*.

awarded damages of 500 pounds against the customs officer, thereby effectively negating the seizure.[57] This power of a civil jury to reach the search and seizure issue, however indirectly, was not eliminated until adoption of the Sugar Act in 1764.[58]

The period from the Fraud Act of 1696 to the Sugar Act of 1764 was a time of conflict between legal theory and actual practice. Throughout the period England continued to expand the legal jurisdiction of the vice-admiralty courts,[59] while the colonies continued to evade the power of the vice-admiralty courts to enforce the Navigation Acts.[60] By 1760 evasion of the Navigation Acts was an accepted practice which "had come to be considered as almost legal trade."[61] Matters changed greatly in the 1760's and the history of that period as well as the history of the writs of assistance controversy have been reported elsewhere in great detail.[62]

This brief historical survey has focused on the colonial jury's role in the search and seizure controversy, a role which came to an end

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57. UBBELOHDE, *supra* note 11, at 34-35.

58. 4 Geo. III, C.15 (1764). *See* note 63, *infra*. The Federalist Papers make passing reference to this power of a civil jury to control the conduct of revenue collectors. THE FEDERALIST No. 83, at 543 (A. Hamilton) (Modern Library ed. 1974).

59. In 1721 the American vice-admiralty courts were given exclusive jurisdiction over trespasses against the forest preserves of the Royal Navy. This exposed western farmers, far removed from ports and sea trade, to trial without a jury. *See generally* R. ALBION, FORESTS AND SEA POWER: THE TIMBER PROBLEM OF THE ROYAL NAVY 1652-1862, at 231-74 (1926). Until the very eve of the Revolution, Parliament continued to extend the jurisdiction of the vice-admiralty courts. For example, the Molasses Act of 1733, the Stamp Act of 1765, and the Townsend Acts of 1768 all extended the vice-admiralty courts' authority to interpret and enforce commercial regulations. *See generally* UBBELOHDE, *supra* note 11, at 15-16, 76, 208.

60. In addition to widespread bribery and intimidation of customs inspectors, the colonists found other ways to negate the power of vice-admiralty courts. For example, powerful leaders such as William Penn used their influence to have convictions reversed upon appeal to England. *See* SMITH, *supra* note 26, at 178. The colonists could make life, socially and financially, quite difficult for vice-admiralty judges who strictly enforced the Navigation Acts. *See* Lovejoy, *supra* note 52, at 462-63. Most importantly, the colonists succeeded in having native-born colonials appointed as judges of the vice-admiralty courts. These local men, if not actually in league with the merchants, certainly understood and were sympathetic to the difficulties of commercial ventures in America. "The vice-admiralty courts had originally been granted jurisdiction in determining violations of the acts of trade in an effort to evade colonial juries. But this advantage was of little consequence if the judges were as partial to the local merchants as the juries had been." UBBELOHDE, *supra* note 11, at 37.

61. LASSON, *supra* note 15, at 52.

62. *See* note 15 *supra*.

with the adoption of the Sugar Act of 1764. The Act removed the last vestige of the jury's role in search and seizure cases by precluding suits for false arrest against customs inspectors whenever the vice-admiralty court certified that there had been probable cause for the seizure.[63] Henceforth, there were few opportunities for juries to "lawfully" address the search and seizure controversy, and juries were pushed more and more toward the exercise of raw nullification power whenever they had any opportunity to express themselves on the subject.[64] Denied access to juries, colonists perceived themselves as without significant legal recourse against the arbitrary and unlawful searches of customs officials. The legal battle against unlawful searches was left to those colonial judges who refused to issue writs of assistance.[65] The extralegal battle was carried on by the people through such measures as tea parties, tarring and feathering of customs officers, physical recapture of seized vessels,[66] and ultimately by revolution.[67]

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63. The Act further discouraged civil suits by placing the burden of proof on the shipowner and by directing that treble costs could be awarded against the shipowner. Also by explicitly stating that prosecutions could be brought in common law courts or vice-admiralty courts at the election of the prosecutor, the Act precluded issuance of writs of prohibition against vice-admiralty proceedings. *See* note 56 *supra*. *See also* Lovejoy, *supra* note 52, at 465.

64. *E.g.*, defendants charged with tarring and feathering customs officers were frequently acquitted by colonial juries. *See generally* Dickerson, *supra* note 13.

65. The colonial judiciary's reluctance to issue writs of assistance is often regarded as another form of nullification of valid positive law. The assumption is that judges refused to issue the writs on the basis of Otis's argument that the writs were contrary to natural law or the British constitution. No doubt some colonial judges were sympathetic to the cause of independence and used their power to nullify even legitimate efforts of the Crown. *See* UBBELOHDE, *supra* note 11, at 95. But in addition to Otis's more famous arguments on natural and constitutional law, there were many purely "positive" law objections to the writs. "Tory judges were just as determined opponents of general writs as were their Whig associates." Dickerson, *supra* note 13, at 59.

66. Rescue of seized vessels had previously been "an accidental or occasional affair" but soon became "the natural and certain consequence of a seizure." Governor Bernard of Massachusetts reporting to British Board of Trade (17_), *quoted in* UBBELOHDE, *supra* note 11, at 93.

67. The grievance that vice-admiralty courts denied Americans the right to trial by jury is listed in the Declaration of Rights and Grievances of the First Continental Congress and in the Declaration of Independence. UBBELOHDE, *supra* note 11, at 209. The colonists' regard for trial by jury is epitomized in a charge to the first grand jury convened by the newly independent Commons of South Carolina.

> Gentlemen of the Grand Jury: When, by evil inclinations tending to nothing less than absolute tyranny, trials by jury have been discontinued, and juries, in discharge of their duty, have assembled, and, as soon as met, as silently and arbitrarily dis-

After the American Revolution the broad question of the jury's prerogative to determine law and the specific development of search and seizure law were never again joined as they had been in colonial America. Jury determination of substantive law continued to be a widespread practice through the 1850's, but was virtually eliminated by the end of the century.[68] In some states the legislature eliminated the jury's prerogative to determine law, but in most jurisdictions a judiciary, jealous of its own power, significantly curbed the jury's prerogatives.[69] In the federal system, the practice of permitting the jury to determine law was ended with the United States Supreme Court's decision in *Sparf and Hansen v. United States.*[70]

Ironically, the end of jury prerogative to determine law occurred at the very time that the development of fourth amendment law was beginning. *Sparf and Hansen* was decided nine years after *Boyd v. United States,*[71] the first important United States Supreme Court decision on the fourth amendment. By the time the Supreme Court considered a sizeable body of fourth amendment cases in the 1920's, *Sparf and Hansen* was settled precedent. Thus, when confronted with the assertion that the jury should determine the legality of a search,[72] the Court eschewed examination of the history of search and seizure in America and merely cited a civil case for the general proposition that the judge, not the jury, determines the admissibility of evidence.[73] Only in Maryland has the jury retained significant prerogatives to determine law,[74] and

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missed without being impaneled, whereby, in contempt of Magna Carta, justice has been delayed and denied; it cannot but afford to every good citizen the most sincere satisfaction once more to see juries, as they now are, legally impaneled, to the end that the laws may be duly administered. I do most heartily congratulate you upon so important an event.

AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1026 (Force ed. U.S. Government, 1844).

68. *See* Howe, *supra* note 33; Note, *The Changing Role of the Jury in the Nineteenth Century,* 74 YALE L.J. 170 (1964).

69. *See* note 68 *supra. See also* Scheflin, *supra* note 8, at 207 n.134.

70. 156 U.S. 51 (1895).

71. 116 U.S. 616 (1886).

72. Steele v. United States, 267 U.S. 505 (1925).

73. Gila Valley Ry. Co. v. Hall, 232 U.S. 94, 103 (1914). The exclusionary rule had been adopted for the federal system in Weeks v. United States, 232 U.S. 383 (1914).

74. *See generally* Dennis, *Maryland's Antique Constitutional Thorn,* 92 U. PA. L. REV.

Maryland is the sole jurisdiction to give some consideration to the role of the jury in determining modern day search and seizure law.

B. The Maryland Cases

The Maryland Constitution has retained the colonial practice of recognizing the jury as "the Judges of Law, as well as of fact."[75] Debates on the Maryland Constitutions of 1851 and 1857 reveal opposing views on the practice of allowing the jury to determine the admissibility of evidence.[76] Despite the confusion of the constitutional drafters, the Maryland Court of Appeals has followed the general rule that the admission of evidence rests within the sound discretion of the trial judge.[77] One acknowledged exception to this general rule is that Maryland follows Massachusett's approach which allows the jury to make the final determination of the admissibility of a confession.[78] Whether the admission of the fruits of a search is another situation where the jury determines admissibility has been the subject of several cases.

In 1950, the Maryland Court of Appeals first considered the jury's role in search and seizure issues in *Hubbard v. State*.[79] The

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34 (1943); Henderson, *The Jury as Judges of Law and Fact in Maryland*, 52 MD. S.B.A. 184 (1947); Markel, *Trial by Jury - A Two Horse Team or One Horse Teams?*, 42 MD. S.B.A. 72 (1937); Prescott, *Juries as Judges of the Law: Should the Practice be Continued?*, 60 MD. S.B.A. 246 (1955).

75. Art. XV, § 5 of the Maryland Constitution provides in full: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

76. *See* Franklin v. State, 12 Md. 236, 249 (1858). *See generally* Dennis, *supra* note 44, at 35.

77. Rasin v. State, 153 Md. 431, 138 A. 338 (1927).

78. Barnhart v. State, 5 Md. App. 222, 246 A.2d 280 (1968). Maryland, like many adherents of Massachusetts' approach, often fails to distinguish between the jury's assessment of the trustworthiness of the confession, and the jury's determination of voluntariness as a standard of admissibility. The distinction is significant because trustworthiness and voluntariness are not identical. For example, an involuntary confession may be trustworthy if its disclosures are confirmed by independent evidence. Conversely, the requirement that a confession be corroborated recognizes that a voluntary confession may not be trustworthy. *See* Opper v. United States, 348 U.S. 84 (1954). Equating voluntariness with trustworthiness diminishes the utility of the voluntariness standard as a means of regulating police interrogation practices. *See generally* Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859 (1979); Metzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954).

79. 195 Md. 103, 72 A.2d 733 (1950).

Court held that the question of lawful consent to a search was initially a question for the judge, but if the judge found the consent lawful, the issue was submitted to the jury for their ultimate determination. Fifteen years later, in *Wilson v. State*,[80] the court extended the jury's role to encompass consideration of whether there was probable cause for an arrest. The Maryland Court of Appeals has not addressed the issue since *Wilson*, but in recent cases the Court of Special Appeals has taken a strong stand against the jury's determination of the legality of a search.

In *Price v. State*[81] the Court of Special Appeals noted in dicta that the past practice of submitting the question of probable cause to a jury may have accorded the defendant "more than that to which he was entitled . . . ."[82] That dicta became the holding of *Cleveland v. State*[83] which upheld the trial court's refusal to instruct the jury that "if the arrest of the defendant was illegal the articles seized as incident thereto were improperly admitted into evidence and cannot be considered by you."[84] *Cleveland* distinguished *Hubbard* and *Wilson* on the basis that the subsequent enactment of Maryland Rule 729[85] invested the trial judge with exclusive power to determine the admissibility of evidence. While *Cleveland* left open the question of whether consent searches are governed by Rule 729 or by the rules for determining the voluntariness of confessions, *Johnson v. State*[86] subsequently held that consent searches, like all other forms of search, are governed by Rule 729 and the judge's ruling on the lawfulness of the search is final.

Cleveland and *Johnson* are disappointing in that the Court of Special Appeals placed great reliance on Maryland Rule 729 and did not address the general benefits and drawbacks of allowing the jury to play a role in search and seizure law. The Court of Special Appeals recently submitted this issue to its noted fourth amend-

80. 235 Md. 245, 210 A.2d 824 (1965).
81. 7 Md. App. 131, 254 A.2d 219 (1969).
82. *Id.* at _, 254 A.2d at 226.
83. 8 Md. App. 204, 259 A.2d 73 (1969).
84. *Id.* at _, 259 A.2d at 75.
85. 8 Md. App. 204, 259 A.2d 73 (discussing portions of the rule and the courts' interpretation thereof).
86. 30 Md. App. 280, 352 A.2d 349 (1976).

ment scholar, Judge Charles E. Moylan, Jr. whose opinion in *Ehrlich v. State*[87] expands upon the analysis of the earlier Maryland cases. Judge Moylan's objections to the jury's determination of search and seizure law will be considered in the latter part of this article which shifts focus from the jury's historical role to modern day considerations.[88]

While jury determination of search and seizure law remains a viable issue in Maryland,[89] in all other jurisdictions such a role for the jury would probably have to be created by the legislature. The remainder of this article is addressed to legislative bodies, and considers the benefits of creating such a role, and whether such a procedure can pass constitutional scrutiny.[90]

III. The Modern Day Case for Jury Determination of Search and Seizure Law

> "A jury is expected to be governed by law, and the law it should receive from the court."
>
> —*Sparf and Hansen v. United States*[91]
>
> "The jury want to know whether that *ar* what you told us, when we first went out, was *raly* the law, or whether it was *only jist* your notion."
>
> —Foreman of a Nineteenth Century Jury[92]

A. *Introduction*

Since this article focuses on a role for the jury in determining search and seizure law, there is no need to unduly lengthen the article with a detailed account of the judiciary's development of fourth amendment law. A cursory examination of the basic meth-

87. 42 Md. App. 730, 403 A.2d 371 (1979).

88. *See* note 141 *infra* and accompanying text.

89. The Maryland Court of Appeals has not considered the issue since 1965. *See* Wilson v. State, 239 Md. 245, 210 A.2d 824 (1965).

90. The United States Supreme Court has had occasion to consider the Maryland Constitution's recognition of juries as judges of law "but has failed to intimate doubts about the constitutionality of the provision." Wilkins v. State, 16 Md. App. 587, ___, 300 A.2d 411, 420-21 (1973). *See also* Wyley v. Warden, Md. Penitentiary, 372 F.2d 742, 744 (4th Cir. 1967).

91. 156 U.S. at 63 (1895) (quoting the trial court's instruction to the jury).

92. Howe, *supra* note 33 at 582 (quoting Ford, History of Illinois 84 (1854)).

odology the courts use in interpreting the amendment and discussion of whether use of that methodology is within the exclusive dominion of the judiciary is appropriate.

Traditionally, the major issues of fourth amendment litigation were seen as falling into four distinct categories: (1) the scope of the amendment, *i.e.*, the circumstances in which the protections of the amendment come into play versus the situation where the amendment is totally inapplicable;[93] (2) the standards of the amendment, *i.e.*, determination of what factors make a search constitutionally reasonable or unreasonable;[94] (3) the consequences of fourth amendment violations, *i.e.*, determination of when the exclusionary rule applies;[95] and (4) standing to raise fourth amendment questions, *i.e.*, identification of who is entitled to invoke the protections of the amendment.[96]

At least since *Katz v. United States*,[97] the distinct nature of those four categories is highly doubtful. Prior to *Katz* the scope of the amendment was held to cover a physical trespass into a constitutionally protected area.[98] *Katz* was clear in overturning this standard, but in its stead *Katz* offered only a nebulous new standard of protecting "those expectations of privacy which society recognizes as reasonable."[99] Recent Supreme Court opinions contain interesting variations of the *Katz* standard as the Court refers to the scope of the amendment in terms of "reasonable,"[100] "justifiable,"[101] or "legitimate"[102] expectation of privacy. The various formulations of

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93. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967). *See generally* Moylan, *The Fourth Amendment Inapplicable vs. the Fourth Amendment Satisfied: The Neglected Threshold of 'So What?'*, 1977 S. ILL. L.J. 75.

94. *See, e.g.*, Dunaway v. New York, 442 U.S. 200 (1979). *See generally* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1980 ILL. L.F. 763.

95. *See, e.g.*, United States v. Calandra, 414 U.S. 338 (1974). *See generally* Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

96. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128 (1978). *See generally* Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1 (1975).

97. 389 U.S. 347 (1967).

98. *See* Olmstead v. United States, 277 U.S. 438 (1928).

99. 389 U.S. at 351.

100. United States v. Dionisio, 410 U.S. 1, 14 (1973).

101. United States v. White, 401 U.S. 745, 752 (1971).

102. 439 U.S. at 140-49.

the *Katz* standard may be significant in that defining the standard as a matter of reasonableness, justifiability, or legitimacy, has a bearing upon the methodology used to determine the standard and upon the issue of who is the proper decisionmaker.[103]

At present, the Court asserts that it is the appropriate and exclusive decision maker and appears satisfied that *Katz* posed the correct question. "*Our* problem," Justice White said, "is what expectations of privacy are constitutionally 'justifiable'—what expectations the fourth amendment will protect. . . ."[104] However, the Court has never articulated the methodology it employs to resolve this problem. Justice Harlan proposed the familiar methodology of judicial balancing. Determining whether the amendment applies to a particular government activity requires an assessment of the "impact on the individual's sense of security balanced against the utility of the [government's] conduct as a technique of law enforcement."[105] The Court has not openly adopted Justice Harlan's balancing approach, but instead has frequently avoided determination of the scope of the amendment by subsuming the scope inquiry within the question of fourth amendment standards.[106]

In determining the standards for a constitutional search the Justices have been engaged in a long standing controversy over the relationship of the amendment's two conjunctive clauses: the reasonableness clause and the warrant clause.[107] Originally, the Court's fourth amendment analysis focused upon the warrant clause requirement of probable cause as *the* substantive justification for a constitutional search. Probable cause was most often referred to as a fixed standard which applied uniformly whenever the amendment applied.[108] Under this view the warrant clause was dominant, and while the reasonableness clause could excuse the

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103. *See* text accompanying note 182 *infra*.

104. 401 U.S. at 752 (emphasis added).

105. *Id.* at 786 (Harlan, J., dissenting).

106. The Court has also avoided the scope question by creating an irregular version of the assumption of the risk concept. *See generally* Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. W. L. REV. 529, 537 (1978).

107. *See, e.g.*, Dunaway v. New York, 442 U.S. 200 (1979). For a history of the controversy, see Moylan, *The Plain View Doctrine: Unexpected Child of the "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047 (1975).

108. *See* Bacigal, *supra* note 94, at 767.

absence of a warrant in certain situations, the reasonableness clause could not authorize a search in the absence of probable cause.[109]

The Court, however, subsequently placed increased emphasis on the reasonableness clause in defining the substantive requirements for a constitutional search.[110] Reasonableness was seen as the ultimate standard for a constitutional search, and unlike the comparatively rigid definition of probable cause, reasonableness was to be determined from "the total atmosphere of the case."[111] Reasonableness as a flexible standard and probable cause as a comparatively rigid and uniform standard represent very distinct views of the fourth amendment. But the two standards have lost their distinctiveness with the Court's defacto recognition of a sliding scale of probable cause which imports into the warrant clause standard the flexibility that previously had been unique to the reasonableness standard.

In *Camera v. Municipal Court*[112] and *Terry v. Ohio*[113] the Court abandoned all pretense that probable cause was a fixed and uniform standard deduced from virtually absolute principles enshrined in the Constitution. The Court adopted the view that the probable cause standard is a compromise for accommodating the opposing interests of the government and individual citizens, and recognized that the same compromise is not called for in all situations. This concept of a variable standard of probable cause is every bit as flexible and nebulous as the reasonableness standard.[114] In fact, despite the Court's protest to the contrary,[115] the

109. "In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court [he has] probable cause." Carroll v. United States, 267 U.S. 132, 156 (1925).

110. *Compare* United States v. Rabinowitz, 339 U.S. 56 (1950) *with* Trupiano v. United States, 334 U.S. 699 (1948).

111. 339 U.S. at 66.

112. 387 U.S. 523 (1967).

113. 392 U.S. 1 (1968).

114. In place of a rigid definition of probable cause as a "reasonable belief," the Court now uses such terms as "reasonable suspicion," United States v. Brignoni-Ponce, 422 U.S. 873, 878-84 (1975) and "clear indication," Schmerber v. California, 384 U.S. 757, 770 (1966). The lower courts have referred to the required level of probable cause as: "real suspicion," Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967); "some knowledge," Belfare v. United States, 362 F.2d 870, 875 (9th Cir. 1966); "mere possibility," People v. Sirhan, 7 Cal. 3d 710, 739, 497 P.2d 1121, 1140, 102 Cal. Rptr. 385, 404 (1972); and "non-whimsical suspi-

two standards are essentially the same. The Court employs one methodology, balancing conflicting governmental and individual interests, to determine whether a search is constitutional. It simply makes no difference whether the balancing is done to determine what is reasonable or to determine what level of probable cause is required.

The flexibility of the balancing approach to fourth amendment standards has also tended to subsume the threshold question of the amendment's scope. The Court eschews rigorous analysis of the scope of the amendment in order to reach the question of fourth amendment standards where the Court may engage in its new found freedom to weigh and balance any number of relevant factors. For example, in *United States v. Mendenhall*[116] only two members of the majority addressed the issue of whether a seizure had taken place. The three concurring Justices were willing to assume that a seizure occurred, and confined their consideration to whether the standard of reasonable suspicion had been met.[117] *Mendenhall* follows the approach of *Wyman v. James*[118] in that the Court allows itself alternative expressions of a single determination. That is, the *standard* of the amendment is met because the government interest is deemed sufficient to set aside privacy or, in the terminology of the *scope* inquiry, the privacy interest is deemed insufficient to trigger fourth amendment protection.

Adoption of this flexible balancing approach merges not only the questions of the scope and standards of the fourth amendment, but also the previously distinct categories of standing to invoke the

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cion," People v. DeBaur, 40 N.Y.2d 210, 219, 352 N.E.2d 562, 569, 386 N.Y.S.2d 375, 382 (1976). Of course the important constitutional consideration is the distinction between *mere* suspicion and *reasonable* suspicion, or between *mere* belief and *reasonable* belief. The concept of reasonableness is the significant legal determination; references to belief, suspicion and justification are surplusage.

115. *See* Dunaway v. New York, 442 U.S. 200 (1979).

116. 446 U.S. 544 (1980).

117. *Id.* at 560 (concurring opinion).

118. 400 U.S. 309 (1971). *Wyman's* primary holding that no fourth amendment intrusion occurred is set out in a single paragraph which contains no citation of authority. *Id.* at 317-18. The majority opinion then devotes nine pages to discussion of the reasonableness of a search if the Court "were to assume that a caseworker's home visit, . . . somehow . . . and despite its interview nature, does possess some of the characteristics of a search in the traditional sense . . . ." *Id.* at 318. *See also* Cardwell v. Lewis, 417 U.S. 583 (1974).

amendment's protections and the application of the exclusionary rule. Prior to *Rakas v. Illinois*[119] the Court had formulated rules of standing which were not necessarily tied to expectations of privacy and the balancing approach.[120] However, in *Rakas*, Justice Rehnquist indicated that *Katz's* expectation of privacy formulation should be the sole standard for determining standing to invoke fourth amendment protections. With the recent decisions of *United States v. Salvucci*[121] and *Rawlings v. Kentucky*,[122] the traditional standing inquiry has been subsumed within the scope question of whether the search infringed upon an interest of the defendant which the amendment was designed to protect. Thus the question of fourth amendment standing has been subsumed within the question of the amendment's scope, which in turn has been subsumed within the question of reasonable standards.

Justice White, dissenting in *Rakas*, argued that the majority had undercut the substantive protection of the fourth amendment in its desire to reduce the operation of the amendment's exclusionary rule.[123] In fact the Court's approach to the exclusionary rule is but another aspect of the balancing approach which has come to dominate all fourth amendment considerations. Whatever the original basis of the amendment's exclusionary rule,[124] the present Court regards the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal right of the party aggrieved."[125] Thus when not clearly bound by precedent[126] the Court views itself as free to apply or not apply the exclusionary rule depending upon

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119. 439 U.S. 128 (1978).

120. *See, e.g.*, Jones v. United States, 362 U.S. 257 (1960). *See generally The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 171 (1979).

121. 448 U.S. 83, 100 S.Ct. 2547 (1980).

122. 448 U.S. 98, 100 S.Ct. 2556 (1980).

123. 439 U.S. at 168-69 (White, J., dissenting).

124. In Mapp. v. Ohio, 367 U.S. 643 (1961), the Court referred to deterrence, judicial integrity, and the intimate relationship between the fourth and fifth amendments. *See generally* Schrock and Welsh, *supra* note 95; Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

125. United States v. Calandra, 414 U.S. 338, 348 (1974).

126. The Chief Justice appears willing to overturn *Mapp* if certain conditions are met. *See, e.g.*, Bivens v. Six Unknown Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring).

the results of balancing the benefits of deterrence against the costs of excluding relevant and trustworthy evidence.[127]

There seems little point in separating fourth amendment concepts of scope, standards, standing, and consequences when the Court resolves all of these issues by resort to the single method of flexible case-by-case balancing of individual and governmental interests.[128] Taken to its logical end the Court's balancing approach to the fourth amendment reduces all inquiries to two related fundamental questions: (1) how much and what type of privacy does a reasonably free society require; and (2) how much and what type of intrusion upon privacy is required to further a reasonably ordered society?[129] Of course the fourth amendment is not unique in posing such fundamental questions. All public law issues are reducible to a balancing of individual and governmental interests for the good of society.[130] Framing the questions in such abstractions is not particularly helpful when deciding specific cases, but it does illustrate the basic questions which confront the Court. The Court's institutional role in addressing such questions remains an important and controversial subject in our democratic society.[131] However, rather than restate the arguments over judicial supremacy, this article accepts that the Court does and will continue to balance conflicting interests for the perceived general good of society. With that assumption, the article considers a possible interaction between the Court's role and a proposed role for the jury in determining search and seizure law.

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127. *See, e.g.*, United States v. Janis, 428 U.S. 433 (1976). See also, Justice Brennan's dissenting opinion in United States v. Havens, 446 U.S. 620, 629 (1980). In fifth amendment cases the Court distinguishes between the exclusion of unreliable evidence, and the exclusion of trustworthy evidence for the extrinsic purpose of deterring police "misconduct." *See* Mincey v. Arizona, 437 U.S. 385 (1978). *See also* note 78 *supra*.

128. One commentator suggests that the Court has abandoned all attempts at principled analysis of the fourth amendment in favor of resolving individual cases according to the "fundamental fairness" approach of Rochin v. California, 342 U.S. 165 (1952). Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 427 (1978).

129. The issues raised under the fourth amendment "bring into sharp focus the classic dilemma of order vs. liberty in a democratic state." LANDYNSKI, *supra* note 15, at 13.

130. *See, e.g.*, Justice Jackson's description of the Bill of Rights as "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself." Watts v. Indiana, 338 U.S. 49, 61 (1949) (Jackson, J., concurring).

131. *See, e.g.*, Leedes, *The Supreme Court Mess*, 57 TEXAS L. REV. 1361 (1979).

B. The Court's Role

In *Sparf and Hansen v. United States*[132] the majority did not deny that federal judges, including Supreme Court Justices sitting on circuit, had frequently instructed juries that they were "the judges both of the law and fact in a criminal case and are not bound by the opinion of the court. . . ."[133] In eliminating this practice *Sparf and Hansen* followed the principles of *Marbury v. Madison*[134] by placing the determination of law within the exclusive dominion of the judiciary. It is thus necessary to examine *Sparf and Hansen's* holding, and the role the judiciary envisioned for itself.

The majority in *Sparf and Hansen* partially relied upon a distinction between questions of law and fact, a distinction of limited utility. Law/fact denominations are generally no more than convenient labels for characterizing which questions are for the jury and which are for the court, and as such the denominations are answers, not analysis.[135] The utility of the law/fact distinction is especially doubtful in the fourth amendment context. The reasonableness of a search is often referred to as a factual question,[136] and the Court has characterized reasonableness as a mixed question of law and fact.[137] Even if the reasonableness of a search is denominated a purely legal question, or a constitutional fact, the Court has permitted juries to resolve other constitutionally significant questions.[138] Legal concepts such as obscenity are so amorphous as to be devoid of all meaning except that given to them by a jury.

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132. 156 U.S. 51 (1895).

133. United States v. Wilson, Fed. Cas. No. 16,730 (C.C.E.P. Pa. 1830).

134. 5 U.S. (1 Cranch) 137 (1803).

135. *See generally* Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942).

136. Brinegar v. United States, 338 U.S. 160, 175 (1949) referred to reasonableness as turning upon the "factual and practical considerations of everyday life . . . ."

137. Steele v. United States, 267 U.S. 505 (1925).

138. The most obvious example is the jury's determination of community standards in obsenity cases. *See* SCHAUER, THE LAW OF OBSCENITY 149 (1976); Comment, *The Jury's Role In Criminal Obscenity Cases - A Closer Look*, 28 KAN. L. REV. 111 (1979). The jury plays a less well defined, but nonetheless significant, role in the determination of whether the death penalty is cruel and unusual punishment. *See* Schwartz, *The Supreme Court and Capital Punishment: A Quest for Balance Between Legal & Societal Morality*, LAW & POLICY Q. 285, 285-335 (July, 1979).

The law/fact distinction is also misleading because criminal trials normally involve three kinds of issues: (1) questions of law; (2) questions of fact; and (3) questions of the application of a legal standard to the facts.[139] This third issue is often determined by the jury. It is a rare criminal case where the jury does not deal with concepts such as insanity, adequate provocation, criminal negligence or some aspects of the reasonably prudent man concept.[140] To determine what a prudent person would have done under the facts of the case is to define particularly the legal standard which the defendant's conduct must meet in order to escape criminal responsibility. In short, the law is most often stated as a general rule and "the jury in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case."[141]

Most importantly, *Sparf and Hansen*'s somewhat illusory distinction between law and fact is relevant only upon acceptance of the premise which underlies claims of judicial supremacy—that it is "the province and duty of the judicial department to say what the law is."[142] For example, in rejecting a role for Maryland juries in resolving search and seizure issues Judge Moylan asserted: "In a criminal case, the only issue for the jury is that of guilt or innocence. Anything that does not bear upon guilt or innocence is utterly foreign to the only task assigned to the jury."[143] In typically colorful fashion, Judge Moylan went on to state that "[t]he jury is assigned the sole mission of determining 'Whodunnit?' "[144] From this premise Judge Moylan reasoned that since the fourth amendment's exclusionary rule serves the extrinsic purpose of deterring police misconduct and does not enhance the fact-finding process, "[i]t is not the function of the jury 'to police the police' by denying itself probative evidence."[145] While the internal structure of such a

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139. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 501 (1969).

140. *See, e.g.*, United States v. Eichberg, 439 F.2d 620 (D.C. Cir. 1971) (Bazelon, J., concurring). *See generally* James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697 (1952).

141. Wigmore, *A Program for the Trial of a Jury*, 12 AM. JUD. SOC. 166, 170 (1929).

142. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

143. Ehrlick v. State, 42 Md. App. 730, _, 403 A.2d 371, 376 (1979).

144. *Id.* at _, 403 A.2d at 377. Judge Moylan's view of the jury's fact-finding function is widely shared by the judiciary. *See, e.g.*, United States v. Berrigan, 482 F.2d 171, 175 (3rd Cir. 1973).

145. 42 Md. App. at _, 403 A.2d at 377.

syllogism cannot be faulted, the premise can be challenged.

The constitutional framers did not perceive the sole mission of the jury as resolution of "Whodunnit?"[146] The prevailing view at the time of the adoption of the Constitution and throughout the first half of the nineteenth century was that the jury was a mainstay of liberty and an integral part of democratic government.[147] The common man in the jury box, just as the citizen in the voting booth, was seen as a central ingredient of a democratic theory that asserted the sovereignty of the people through self-government. Throughout our country's history the jury's exercise of nullification power has been the most dramatic manner of rejecting the limited role of determining "Whodunnit?" The acquittal rates for prosecutions under the Fugitive Slave Act[148] and Prohibition Laws[149] demonstrate the desire of juries to expand their reach beyond factual questions and to address the law itself. Even in the absence of dramatic political or moral issues the everyday jury occasionally "acquits the defendant in protest against a police or prosecution practice that it considers improper."[150]

The continued use of general verdicts indicates that the judiciary is not totally committed to the premise that the jury exists only to determine "Whodunnit?" If the jury functions only to resolve factual disputes, the jury should be instructed to return special findings, and the trial judge should direct verdicts of guilty whenever reasonable jurors could not disagree on the facts.[151] The

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146. John Adams stated the democratic principle that "the common people . . . should have as complete a control, as decisive a negative, in every judgment of a court of judicature. . . ." as they have with regard to other decisions of government. 2 THE WORKS OF JOHN ADAMS 253 (1850). *See also* JEFFERSON, *supra* note 12.

147. *See*, Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964). The Articles of Impeachment of Justice Samuel Chase in 1805 include Justice Chase's denial of the jury's right to rule on the admissibility of evidence, and his refusal to allow counsel to argue to the jury that the Sedition Act was unconstitutional. S. BUTLER & G. KEATINGE, REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE (Evans ed. 1805). *See generally* Lillich, *The Chase Impeachment*, 4 AM. J. OF LEGAL HIST. 49 (1960).

148. *See* L. FRIEDMAN, THE WISE MINORITY 28-50 (1971). *See also* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

149. *See* H. KALVEN & H. ZEISEL, *supra* note 1, at 291.

150. *Id.* at 319.

151. *See* United States v. Garaway, 425 F.2d 185 (9th Cir. 1970) (directed verdict of guilty improper even where no issues of fact are in dispute). *See also* United States v. Davis, 413 F.2d 148, 153 (4th Cir. 1969); Sparf and Hansen v. United States, 156 U.S. 51, 105 and 172

judiciary's toleration of general verdicts evidences acceptance of a function for the jury beyond resolution of factual disputes. In *Duncan v. Louisiana*[152] the Supreme Court recognized the framer's regard for the jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[153] The concept of the jury as a check upon government power is more consistent with democratic theory and the intent of the framers,[154] than is the view that the jury exists only to determine "Whodunnit?" The jury's ability to check government power is obviously enhanced when the jury is invested with the authority to determine law as well as to resolve factual questions.

The troublesome aspect of the jury's determination of law is not the role of the jury *vis a vis* government power, but rather how such a role potentially conflicts with the individual defendant's constitutional rights. Underlying the *Sparf and Hansen* decision is the view that jury determination of law cannot be a one-way proposition. If the jury can overrule the judge to determine law adversely to the government, the jury must also be allowed to overrule the judge to determine law adversely to the defendant.[155]

(1895) (dissenting opinion).

152. 391 U.S. 145 (1968).

153. *Id.* at 156.

154. ". . . in a representative government, there is no absurdity or contradiction, nor any arraying of the people against themselves, in requiring that the statutes or enactments of the governments shall pass the ordeal of any number of separate tribunals, before it shall be determined that they are to have the force of laws. Our American constitutions have provided five of these separate tribunals, to wit, representatives, senate, executive, jury and judges; and have made it necessary that each enactment shall pass the ordeal of all these separate tribunals, before its authority can be established by the punishment of those who choose to transgress it. And there is no more absurdity or inconsistency in making a jury one of these several tribunals, than there is in making the representatives, or the senate, or the executive, or the judges, one of them. There is no more absurdity in giving a jury a veto upon the laws, than there is in giving a veto to each of these other tribunals. The people are no more arrayed against themselves, when a jury puts its veto upon a statute, which the other tribunals have sanctioned, than they are when the same veto is exercised by the representatives, the senate, the executive, or the judge."

Scheflin, *supra* note 8, at 184 (quoting SPOONER, TRIAL BY JURY 11-12 (1852)).

That the determination of a reasonable search is a matter of constitutional law, not legislative law, does not definitively prohibit jury participation in the determination. *See* text accompanying note 180 *infra*.

155. 156 U.S. at 101. The jury serves as a safeguard against oppressive prosecutions only

Thus, while allowing the jury to determine law might be seen as an acceptable device for checking government power in a conflict between the judiciary and the jury, such a device may become unacceptable when the rights of the individual defendant are considered.

To Justice Story the individual defendant had the right "to be tried according to the law of the land, the fixed law of the land, and not by the law as a jury may understand it, or choose from wantonness or ignorance or accidental mistake, to interpret it."[156] Of course this statement begs the question for it presumes that the judge not the jury decides what is the law of the land. The question of judicial supremacy cannot be resolved merely by invoking the maxim that we are a government of laws, not a government of men.[157] It is not a self-evident truth that we are a government of laws when judges determine law, but become a government of men when juries determine law. If juries constitute the rule of men because they decide cases on the basis of "random value judgments,"[158] then the judiciary must lay claim to a superior basis of decision.

There are those who look to the judiciary for "the right answer."[159] But absent an agreed upon methodology for determining *the* answer, we may more realistically look to the judiciary for consistent, principled answers. Judicial consistency in determining law is a means of avoiding the randomness of juries which may treat

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so long as the jury sides with the defendant against the government. If the community is hostile to the defendant or his cause, the jury is more likely to side with the prosecution. *See* Broeder, *The Functions of the Jury: Facts or Fictions?* 21 U. CHI. L. REV. 386 (1954). When the community is hostile to the defendant, he looks to the judge for protection against the jury. Although the judiciary sometimes performs no better than the jury in times of panic or emergency, *see* Rostow, *Japanese American Cases—A Disaster,* 54 YALE L.J. 489 (1945), it is important to preserve the judiciary's role as a safeguard against arbitrary jury power. *See* note 175 *infra.*

156. United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.P. Mass. 1835).

157. "Judges are men, and their decisions upon complex facts must vary as jurors on the same facts. Calling one determination an opinion and the other a verdict does not . . . make that uniform and certain which from its nature must remain variable and uncertain." J. FRANK, COURTS ON TRIAL 180 (1949) (quoting an uncited New Hampshire decision). *See generally* Fuller, *Reason & Fiat in Case Law,* 59 HARV. L. REV. 376 (1946), and K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 17 (1969).

158. *See* Brown, *Commentary,* 10 VA. J. INT'L L. 108, 111 (1969).

159. *See generally* Leedes, *supra* note 130, at 1378.

similarly situated defendants differently. In *Sparf and Hansen* the judiciary promises consistency and uniformity by determining law according to *settled, fixed, legal principles.*[160] Stripped of superficial references to the law/fact distinction and to law as the conclusion in a formal syllogism, *Sparf and Hansen* presents two basic conflicts: (1) the defendant's right to uniformity and consistency in the law weighed against the utility of the jury's determination of law as a device for checking judicial power; and (2) the jury's uneven and unequal administration of justice versus "the orderly supervision of public affairs by judges."[161] This latter conflict is in part the age old conflict of law and equity, with law again emerging victorious in *Sparf and Hansen.*

In light of the judiciary's inability to formulate settled, fixed, legal principles of fourth amendment law,[162] the benefits of judicial consistency were overvalued in *Sparf and Hansen.* The Supreme Court's present fourth amendment approach of case-by-case balancing more closely resembles the flexibility of equity than the formal, principled consistency of law.[163] A realistic valuation of the consistency of current fourth amendment decisions might well tip the scales in favor of the jury's determination of search and seizure law, and lead to a reversal of *Sparf and Hansen.* However, in light of *Jackson* v. *Deno*'s[164] toleration of the jury's supplemental determination of the admissibility of a confession, recognizing a similar supplementary determination of the reasonableness of a search does not necessitate a reversal of *Sparf and Hansen.* The procedure proposed in this article does not attempt to shift search and seizure questions from the exclusive domain of judges to the exclu-

160. 156 U.S. at 74.

161. Howe, *supra* note 33, at 615. *See generally* M. WEBER, LAW IN ECONOMY AND SOCIETY (1954), who suggests that the judiciary and other personnel associated with the courts tend to develop a subculture of their own. The legal norms that emerge from this subculture derive more from the need for predictability and administrative convenience than from a concern for equity.

162. *See* text accompanying note 128 *supra.*

163. The Court's balancing efforts do not conform "to the disciplined analytical method described as 'legal reasoning,' through which judges endeavor to formulate or derive principles of decision that can be applied consistently and predictably. 446 U.S. at 634 (Brennan, J., dissenting). *See generally* Note, *Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments,* 90 HARV. L. REV. 945 (1977).

164. 378 U.S. 368 (1964).

sive domain of juries. In an attempt to accommodate aspects of uniformity and flexibility both judge and jury are to be given a role in determining search and seizure law.[165]

C. *The Jury's Role*

The Court has clearly reneged on *Sparf and Hansen's* promise of uniformity and consistency when it determines the reasonableness of a search as if it were a jury, free to assess the unique aspects of an individual case and to decide "justice" in that particular case without any regard to general rules or principles.[166] At other times the Court has sought to inject uniformity into fourth amendment law by treating all similarly situated defendants alike.[167] That the Court is hopelessly caught between the pulls of uniformity and flexibility is illustrated in *Pennsylvania v. Mimms*.[168]

In *Mimms* the Court was confronted with a police practice of ordering "all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation."[169] The Court addressed this general practice and did not inquire as to whether the individual police officer had any suspicion that the particular motorist was likely to be armed and dangerous.[170] In upholding the police practice the Court relied upon statistical evi-

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165. What I propose in the fourth amendment context is what Paul Freund once proposed in the context of determining clear and present danger. "A double test . . ., one from the general standpoint of legislative policy and the other from the standpoint of the acts of these defendants." P. FREUND, SUPREME COURT AND SUPREME LAW 52 (Cohn ed. 1971).

166. *See, e.g.*, Cady v. Dombroski, 413 U.S. 433, 448 (1973) in which Justice Rehnquist stated:

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

167. *E.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976); South Dakota v. Opperman, 428 U.S. 364 (1976); United States v. Robinson, 414 U.S. 218 (1973).

168. 434 U.S. 106 (1977).

169. *Id.* at 110.

170. The state conceded that "the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior." *Id.* at 109.

dence which showed "that a significant percentage of murders of police officers occurs when the officers are making traffic stops."[171] The Court balanced the generalized government interest in protecting police from attack by armed motorists against the generalized privacy interests of motorists as a class.[172] In holding that *all* motorists must obey an order to exit their autos after a lawful stop, the Court attempts to treat all similarly situated defendants alike. However, this uniformity was achieved by sacrificing all flexibility. As Justice Stevens noted in dissent:

> The Court cannot seriously believe that the risk to the arresting officer is so universal that his safety is *always* a reasonable justification for ordering a driver out of his car. The commuter on his way home to dinner, the parent driving children to school, the tourist circling the Capitol, or the family on a Sunday afternoon outing hardly pose the same threat as a driver curbed after a high speed chase through a high-crime area late at night. Nor is it universally true that the driver's interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority. Whether viewed from the standpoint of the officer's interest in his own safety, or of the citizen's interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of traffic stops that occur every year are not fungible.[173]

Justice Steven's preference for an "individualized inquiry into the particular facts justifying every police intrusion"[174] is the ultimate in flexibility and reflects a traditional concern for adjudicative facts instead of legislative facts such as the statistical evidence cited by the majority. Such an approach does not fully consider the

171. *Id.* at 110 (quoting United States v. Robinson, 414 U.S. 218, 234 n.5 (1973)).

172. In its haste to balance the "de minimus" privacy interest of motorists against the weighty interest in police safety, the Court did not pause to give serious consideration to the "scope" question of whether the order to exit the vehicle constituted a seizure under the amendment. *See* text following note 116 *supra*.

173. 434 U.S. at 120-21.

174. *Id.* at 116.

institutional role of the Supreme Court. The Court controls its own docket and is free to choose the particular factual situations in which to interpret law. The Court's prime institutional task is to deal with issues of significant public interest, not merely to do justice to the particular parties of the relatively rare case in which certiorari has been granted.[175] The fourth amendment cases granted review are best seen as vehicles for broad policy statements designed to guide lower courts, prosecutors, defense counsel, and, most importantly, the police.[176] When the Court abandons *Sparf and Hansen's* promise of determining law according to general principles in favor of unstructured, ad hoc balancing of the total circumstances of the particular case, the Court leaves us with murky law for this day and this case only.[177]

The Court's role in dealing with broad policies and general rules necessarily conflicts with its role of protecting the rights of individual citizens.[178] Justice Stevens is obviously correct in asserting that

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175. "A court addressing a discretionary review petition is not primarily concerned with the correctness of the judgment below," rather "review is generally granted only if a case raises an issue of significant public interest or jurisprudential importance or conflicts with controlling precedent." Bounds v. Smith, 430 U.S. 817, 827 (1977). *See also* Ross v. Moffitt, 417 U.S. 600 (1974).

176. *See generally* Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973).

177. "If the number of pertinent factors of decision is too large, and each of them is constantly shifting, then categories of classification or criteria of analogy will be hard to draw and even harder to maintain." R. UNGER, LAW IN MODERN SOCIETY 197 (1976). *See, e.g.*, Walter v. United States, 447 U.S. 649 (1980), where the dissentors characterize the case as "a strange and particular one," and draw comfort from their belief "that sound Constitutonal precepts will survive the result the Court reaches today." 447 U.S. at 666 (Blackmun, J., dissenting).

178. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) and R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974) both of which discuss the role of the judiciary in protecting individual rights even when utilitarian balancing might require sacrificing those rights for the common good. On a less theoretical level, the Maryland experience is again relevant. *See* text accompanying note 75 *supra*. Prior to amendment in 1950, the Maryland constitution's recognition of the jury as the final judges of law precluded appellate review of the legal sufficiency of the evidence. A defendant who suffered disfavor with the jury could not look to the judiciary for protection even when there was an "absolute failure of legal evidence to justify a conviction . . . ." Markell, *supra* note 74, at 81. In 1950, art. XV, § 5 of the Maryland constitution was amended to read: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, *except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.*" The Maryland experience demonstrates the importance of the judiciary as a safeguard against irresponsible juries. In arguing for a supplemental jury determination of reasonable searches, this article does not seek to diminish the role

individual defendants do not regard themselves as fungible items to be manipulated for the general good of society.[179] But it is impossible for the Court to maintain its institutional concern for general principles while remaining totally responsive to the peculiarities of each case. All individuals and all fourth amendment cases are somewhat unique, just as they all share certain common characteristics. As Professor Amsterdam succinctly put it: "any number of categories, however shaped, is too few to encompass life and too many to organize it manageably. The question remains at what level of generality and in what shape rules should be designed in order to encompass all that can be encompassed without throwing organization to the wolves."[180]

The conflicting benefits of uniformity and flexibility can best be achieved if the Court shares with the jury the determination of a reasonable search. The jury is traditionally concerned with the "justice" of a particular case without undue regard for general rules. In situations such as *Mimms* the judiciary could continue to apply the general rule that it is reasonable for police to protect themselves by ordering motorists to exit their automobiles. But a jury would be free to consider whether it was reasonable to require a particular pajama clad, elderly, invalid person to exit his or her auto on a cold, dark, rainy night after committing the heinous offense of failing to signal a left turn. Should the jury find the police conduct unreasonable under such circumstances, no great harm is done to the general rule. The broad guidelines for police would be preserved without sacrificing the privacy of all motorists to the quest for uniformity. An acceptable compromise would be reached between a government of law and law as tempered by individual justice.

That the jury is interpreting constitutional law in determining the reasonableness of a search should not be a definitive prohibition. When the Court removed the facade of legal formalism in

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of the judiciary in protecting individual rights. *See* text accompanying note 162 *supra*.

179. "Without individuality, there is no function for privacy. When we become fungible goods to be manipulated by government, there can be no recognition of idiosyncracies, no private realms to husband against intrusion." Kurkland, *The Private I*, THE U. CHI. MAGAZINE 7, 36 (Autumn 1976).

180. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377 (1974).

favor of a balancing approach,[181] the Court weakened its position as sole arbiter of the constitutional standard of reasonableness. The Court currently determines the reasonableness of a search by deciding what is a reasonable, justifiable, and legitimate expectation of privacy in our society,[182] and what degree of protection is afforded to these expectations. The Court has no inalienable right to make such determinations. "The governing principle" is that such determinations "should be entrusted to whoever can do the job better. Is it more appropriate for an expert trained in the law or for twelve representatives of the community?"[183]

To the extent that the expression "reasonable expectation of privacy" connotes common sense and community consensus,[184] it is suggested that the jury can "do the job better." If one must speak in the traditional terminology of questions of fact and questions of law, the jury can be seen as fulfilling its traditional fact finding function in determining what expectations of privacy are currently held by the reasonable member of the community. To paraphrase Justice Hand, the jury would "indicate the present critical point in the compromise between [privacy and order] at which the community may have arrived here and now."[185] Thus in defining reasonable expectations of privacy the jury would merely describe the existing social compromise, and would not prescribe some ideal compromise.

The jury's role in determining *justifiable* and *legitimate* expec-

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181. Nineteenth century legal formalism in America was exemplified by the view that adjudication proceeds by deduction from virtually absolute legal principles rooted in natural law and enshrined in both the common law and the Constitution. Critics of turn-of-the-century jurists have used the term formalism primarily in reference to the 'mechanical' methods and pretensions to objectivity with which the old Supreme Court invoked these unchallenged premises in resolving legal disputes, as distinguished from the modern technique of weighing social policies and assessing all the facts and circumstances surrounding a particular case to determine the most just or socially desirable outcome.

Note, *Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 948 (1977) (footnotes omitted).

182. *See* text accompanying note 100 *supra*.

183. CHAFEE, *supra* note 139, at 503.

184. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." 439 U.S. at 144 n.12.

185. United States v. Kennedy, 209 F. 119, 121 (S.D.N.Y. 1913).

tations of privacy is more troublesome as such determinations go beyond an examination of what is usually done in the community and require value judgments and political choices about what ought to be done.[186] The selection of justifiable and legitimate expectations of privacy is an attempt to make a "social judgment" about the desired compromise between privacy and order. Under our republican form of government, the "job" of making binding social judgments cannot be assigned according to technical expertise. Assuming that the Court is expert in formal logic or legal reasoning does not justify the current practice of investing the judiciary with exclusive authority to make the underlying value judgments to which legal reasoning can be applied.[187] Nor would an exclusive jury prerogative to make such judgments be justified by empirical evidence that the jury best reflects existing community consensus.[188] In line with the Madisonian attempt to disperse government power among separate entities, no one decision maker should be entrusted with exclusive authority to make such "social judgments." Thus this article proposes that the judiciary share with other entities its authority to define reasonable searches. While this article has focused on a role for the jury in determining reasonable searches, the jury is best seen as part of a three tier decision making process which recognizes a role for juries, courts, and law enforcement administrators. These entities must all perform the "job" of making social judgments about reasonable searches, but each entity is to be assigned responsibility to perform that aspect of the "job" that it can do best.[189]

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186. *See generally* Amsterdam, *supra* note 177. For a broad perspective on defining and identifying societal values and the "Moral Order" in our society, see, Schwartz, *Moral Order and Sociology of Law: Trends, Problems, and Prospects*, 4 ANN. REV. SOCIAL. 577 (1978).

187. Formal logic or legal reasoning assists the Court in connecting premises to conclusions, but reason is inherently an empty source which does not suggest the first premise. The Court's difficulty lies in identifying the first premise, the fundamental value embodied in the fourth amendment.

188. The most fundamental objection to interpreting the fourth amendment according to popular consensus is that such an approach conflicts with the role of the Constitution as a safeguard against the potential tyranny of the popular majority. The majority consensus cannot be employed as a vehicle for protecting individuals from the dictates of the majority. *See generally* Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 1, 52 (1978).

189. However sophisticated the decision making process, the process must begin with some fundamental judgments on the nature of privacy and order in society. *See* text accompanying note 129 *supra*.

The model of fourth amendment decision making proposed here resembles an inverted pyramid with the Court functioning at the highest level in addressing broad *categories* of conflict between privacy and order in society. The Court's balancing approach to the fourth amendment is better suited to a high level of abstraction, than to refined calculations in individual cases. In classifying police-citizen encounters, one could realistically expect the Court to recognize broad categories such as border stops, stop and frisk, search incident to arrest, and the like. One would not expect categories which distinguish between searches of purses, shopping bags, briefcases, or duffel bags. Obviously, there is no magic number of correct categories, and the dividing line between categories will always remain somewhat fuzzy. However, the dividing lines between categories can be more easily maintained than dividing lines between individual fact situations. Thus the Court could better achieve the goal of uniformity and consistency in law, the "job" it can do best.[190]

Whatever action the judiciary takes in recognizing categories of reasonable searches, it is law enforcement agencies which must function at the intermediate level of fourth amendment decision making.[191] Implementation of court decisions necessitates the formulation of law enforcement policy and administrative rules to guide individual police officers.[192] Police agencies possess the expertise and practical experience necessary to refine each judicially recognized category into meaningful guidance for patrolmen.[193]

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190. Each judicially recognized category would also constitute an intermediate premise from which principled analysis could evolve more specific rules. For the lower courts and police administrators, intermediate premises cut the debate off short of first principles and avoid turning every fourth amendment case into a battle over ultimate moral truths. *See generally* Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967).

191. The general benefits of police administrative rule-making are explored elsewhere in great detail. *See* K. DAVIS, POLICE DISCRETION (1975); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972). Here, I merely consider the role of police administrators in determining reasonable searches. *See* Amsterdam, *supra* note 180; LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

192. *See generally* Goldstein, *Police Policy Formulation: A Proposal For Improving Police Performance*, 65 MICH. L. REV. 1123 (1967); Packer, *Policing the Police: Nine Men Are Not Enough*, NEW REPUBLIC, Sept. 4, 1965, at 19.

193. Existing law enforcement policy does not emanate from the administrative level of

This is the "job" that administrators can do best.[194]

At the lowest level of particularized fourth amendment decision making, the jury would fulfill its traditional function of applying general principles and guidelines to the facts of the specific case. This is the "job" that the jury can do best. The jury would be free to consider the type of detailed factual situations which could not be considered by courts or police agencies, which in classifying factual situations into broad judicial categories or general administrative rules necessarily focus on certain common characteristics while ignoring the unique aspects of particular situations. The jury would put back into the decision making process the particularized factual situations which were necessarily ignored in abstracting the common characteristics for a judicial category or an administrative rule. In addition, by focusing on justice in individual cases, the jury would be reopening the dialogue over first principles regarding privacy and order in society,[195] a dialogue which the Court and administrative officials had to cut short in the interests of providing some uniformity and consistency in the administration of criminal justice.

This proposed model of fourth amendment decision making recognizes a division of responsibility. The Court is primarily responsible for providing uniformity and consistency in the law. Police

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the police hierarchy, but is made primarily by individual patrolmen who are "the least qualified." DAVIS, POLICE DISCRETION, *supra* note 191, at 165. Such policy is an amalgamation of past practices, vague rules of thumb, racial and cultural stereotyping, and a great deal of offhand guesswork about what the public really wants. *Id.* at 113. *See also National Advisory Commission On Criminal Justice Standards and Goals:* POLICE (1973); ABA STANDARDS FOR CRIMINAL JUSTICE: THE URBAN POLICE FUNCTION, STANDARD 4.3 (1973).

194. Of course the formulation of law enforcement policy is no more an objective, value-neutral process than is the Court's recognition of general categories of reasonable searches. In formulating policy and administrative rules police agencies must deal with those value judgments and political choices not addressed by the Court. Present policy, and the underlying value judgments, are deliberately kept vague and invisible to avoid scrutiny and criticism. DAVIS, POLICE DISCRETION, *supra* note 191, at 69. Formal recognition of administrative policy formulation as a legitimate part of fourth amendment decision making would subject the formulation of law enforcement policy to the controls and procedures normally applied to administrative rulemaking.

195. Speaking in the context of resistance to the Vietnam War, one author suggested that the jury is "a forum more immediately available—and less politically compromised—than a ballot box." Thus society might best regard the jury as a means for "taking an issue back to the public over the heads of public officialdom . . . ." Sax, *Conscience and Anarchy: The Prosecution of War Resistors*, 57 YALE REV. 481, 494 (1968).

administrative officials are primarily responsible for developing clear rules readily understood by line officers. The jury is primarily concerned with individual justice based on particular factual situations. While there is a division of responsibility in the proposed model, there is also considerable overlap since the decision makers must all address the basic issues of privacy and order in society. This overlap is not a drawback to the model, but rather is an important benefit in that it affords an opportunity for formal interaction between the decisionmakers.[196] For example, the jury could be informed of the relevant administrative regulations and court decisions.[197] Such information would not limit the jury's authority, but might help guide its discretion by acquainting the jury with the general principles and rules selected by the other decision makers who have considered fundamental questions of privacy and order in society. In formulating regulations, police administrators would benefit from court decisions which establish clearly defined categories that identify what is "settled" law and what areas permit an exercise of discretion. The police would also benefit from an awareness that juries consistently approve or disapprove of certain types of searches. The police could then adjust their regulations and actual practices in order to gain jury approval.[198] In rendering its decisions, the Court would benefit from the existence of specific administrative regulations. Such regulations free the Court from the highly criticized practice of writing detailed law enforcement manuals for police.[199] As it has in the death penalty cases,[200] the

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196. *See generally* Bohannan, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGIST 33 (spec. ed. 1965). The anthropologist Bohannan refers to the relationship of societal and legal morality, and the interaction of courts, legislatures, administrative agencies, and citizens as a process of "double institutionalization."

197. In Maryland the courts have permitted liberal use of materials for enlightenment of the jury. *See* Dillion v. State, 277 Md. 571, 357 A.2d 360 (1976) (legislative preamble to a criminal statute); Brown v. State, 222 Md. 290, 159 A.2d 844 (1960) (opinions of the appellate court); Jackson v. State, 180 Md. 658, 26 A.2d 815 (1942) (legal textbooks).

198. When juries consistently refuse to convict for certain substantive offenses, prosecutors and police often abandon efforts to enforce such laws. *See* KALVEN & ZEISEL, *supra* note 1, at 310. If juries were to consistently disapprove of certain types of searches and seizures, the police would have to adjust their practices in order to gain jury approval.

199. In United States v. Perry, 449 F.2d 1026, 1037 (D.C. Cir. 1971) the court reviewed a police administrative rule and stated:

> We also note that, after this case arose, the Metropolitan Police Department put into operation a regulation restricting on- and near-the-scene identification confrontations to suspects arrested within 60 minutes after the alleged offense and in close

Court would also benefit from some systematic accounting of juries' determinations of reasonable searches. Should juries in the aggregate decide uniformly regarding a type of search, for example, suppression of all wiretap evidence, the juries would thereby indicate a prevailing moral consensus.

IV. Conclusion

The division of responsibility and the interaction in the proposed fourth amendment decision making process will not produce the singular "right" answer regarding the balance of privacy and order in society. However, the imperfect answers produced would be a result of a decision making process which simulates the ideal of participatory political decision making under our form of government. Within the context of fourth amendment decision making there would exist a role for the judiciary, the executive, and the people as "represented" by the jury.[201] The overlap and conflict between the various roles will hopefully produce a formal dialogue among the judiciary, the executive, and the people regarding the proper accommodation of privacy and order in a democratic society. That there is merit in such dialogue rests upon "an instinctive apprehension among a political people that there is usually much to be said for both sides of a question, and that further knowledge may reconcile the seemingly incompatibles."[202]

V. Postscript to the Critics: Past and Future[203]

The process of fourth amendment decision making proposed in

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proximity to the scene. We see in this regulation a careful and commendable administrative effort to balance the freshness of such a confrontation against its inherent suggestiveness, and to balance both factors against the need to pick up the trail while fresh if the suspect is not the offender. We see no need for interposing at this time any more rigid time standard by judicial declaration.

200. For a discussion of the role of the aggregate decisions of juries in death penalty cases, see Schwartz, *supra* note 186.

201. Juries are at best an imperfect means of representation. *See* J. Van Dyke, Jury Selection Procedures (1977). But however imperfectly selected, the jury is a means of involving citizens as active participants in the evolution of a proper balance between privacy and order in a democratic society.

202. Fuller, *supra* note 157, at 391.

203. The subject matter of this article was initially presented at a symposium on Law and Morality, sponsored by the Utah Endowment for the Humanities (Oct. 1980). The symposium presentation emphasized the sociological aspects of this subject, and has been pub-

this article is not offered as *the* correct methodology, nor as the constitutionally mandated process. I have presented a one-sided case for jury determination of reasonable searches in order to suggest an alternative to the current practice of placing such determinations within the exclusive dominion of the judiciary. Just how viable this alternative is will depend upon the reception this article receives. Many who have examined drafts of this article have reacted with the statement: "The proposal is interesting, but it is not practical. It just will not work." Here I briefly consider some of the major points raised in opposition to my proposal.

A. "You cannot unring a bell which has been rung. The jury will not disregard relevant evidence which it has heard."

I agree that it is usually preferable to have the judge initially exclude inadmissible evidence rather than require the jury to disregard previously admitted evidence. My proposed model follows this preference when the judge determines that a search is unreasonable.[204] However, when the jury determines reasonableness, the jury must hear the evidence before it can decide whether to disregard the evidence. Although it is difficult to disregard what has been heard the law often requires the jury to perform just such mental gymnastics. All limiting instructions are based on the assumption that the jury, at least to some extent, will be able and willing to utilize evidence for a limited purpose.[205] In addition there is a very real difference between asking the jury to disregard evidence which the judge determines to be inadmissible, and instructing the jury to disregard what they themselves have found to be improper. I would not be surprised to learn that a jury which finds a search to be improper would also be willing to disregard the fruits of such impropriety.[206]

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lished under the title: *The Jury as a Source of "Reasonable" Search and Seizure Law*, 1980 B.Y.L. REV. 739. The response to that presentation prompted this postscript.

204. *See* text following note 8 *supra*. *See also* Remus v. United States, 291 F. 501 (1923).

205. *See generally* C. MCCORMICK, LAW OF EVIDENCE (2d ed. 1972).

206. I have no empirical evidence to support this observation, but I am not convinced that there is much empirical evidence to support the assumption that juries generally ignore limiting instructions and consider inadmissible as well as admissible evidence. There are studies which suggest that in the proper setting a jury will endeavor to disregard inadmissible evidence. *See* Sue, Smith & Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. OF APPLIED SOC. PSYCH. 345 (1973). Further

B. "Juries vote their instincts, not their heads. If the defendant was caught (reasonably or unreasonably) with drugs, the jury is not going to have much sympathy for his right of privacy."

My own instincts tell me that "drug pushers" will probably receive little sympathy from juries. However, the question of privacy rights does not always arise in relation to dangerous crimes or unsympathetic defendants. Even if there is no sympathy for drug pushers arrested or searched without probable cause, there may well be community concern when police peer through cracked window curtains into a marital bedroom;[207] when police utilize stop and frisk tactics as a means of harassing blacks;[208] or when the government monitors political gatherings.[209] In such situations the community, through the jury, might well concern itself with protecting privacy regardless of the defendant's obvious factual guilt.[210] The history of jury nullification demonstrates that if the issue is sufficiently important, the jury will look beyond the guilt or innocence of the particular defendant and speak to the law itself.[211]

C. "The proposal would permit different constitutional standards of reasonableness to apply in various communities. Travel from New York to California would involve not only traveling through different time zones, but also traveling through different zones of recognized privacy."

I agree that uniformity, consistency and predictability are proper goals of the law and should be pursued by the judiciary. However, flexibility and individualized justice are also proper goals

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empirical research is needed, and at this point I am not willing to concede that my proposal is unworkable because juries would never disregard the evidence produced by an illegal search.

207. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court alluded to the type of police practices which would be required to enforce a prohibition against the use of contraceptives.

208. *See* Terry v. Ohio, 392 U.S. 1 (1968).

209. In Donohue v. Duling, 330 F. Supp. 308, 309 (E.D. Va. 1971), the court stated: "it has long been the policy in Richmond and other places throughout the nation to photograph persons participating in vigils, demonstrations, protests and other like activities whether peaceful or otherwise."

210. KALVIN & ZEISEL, *supra* note 1, at 319.

211. *See* text accompanying note 146 *supra*.

which can only be achieved by sacrificing some uniformity. In allowing the jury the flexibility to pursue individual justice my proposal theoretically[212] decreases the amount of uniformity that exists in interpreting the constitutional standard of reasonableness. Of course my proposed model of fourth amendment decison making is not unique in diminishing the uniformity of a constitutional standard. For example, determining obscenity according to community standards reduces uniformity. However, I do not wish to link my proposal to acceptance of the Court's current approach to obscenity. Unlike the determination of obscenity, my proposal allows the jury to increase but not decrease individual rights.[213] Thus, it would not upset me to know that in traveling through Utah I might temporarily enjoy more privacy than I did when I left New York, and more privacy than I will enjoy when I reach California. At present I can enjoy greater protection of privacy interests in those jurisdictions which have increased privacy rights by legislation or state constitution.[214] If it is accepted that at times the reasonableness of a search must be determined by examining the totality of the circumstances and if it is accepted that the jury is capable of considering the total circumstances of the case, then it is irrelevant that the jury may interpret the law more expan-

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212. In practice, there is little uniformity in the Court's current approach to reasonable searches. *See* note 128 *supra*.

213. *See* note 9 *supra*. It can be argued that my proposal could in fact decrease privacy rights by allowing a trial judge to "pass the buck" to the jury on close questions of law. *See* Jackson v. Deno, 378 U.S. 368 (1964). In theory my proposal does not permit the judge to abdicate his responsibility to make an independent determination of the reasonableness of a search. In practice, trial judges being human, there may be a temptation to let the jury decide close questions of reasonableness. However, given the present uncertainty of fourth amendment law, a trial judge who is inclined to avoid a difficult decision might well "pass the buck" to the appellate courts. There is a familiar maxim which encourages trial judges to resolve questionable facts in favor of the defendant, but to resolve close questions of law in favor of the government because the defendant can have the legal ruling reviewed on appeal. In short, a judge inclined to assume responsibility is not likely to defer to the jury, and a trial judge inclined to rule in favor of the government in order to have the jury decide the issue, is the same judge who would probably rule in favor of the government in order to have the appellate court ultimately decide the issue.

214. *See, e.g.*, People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 19 Cal. Rptr. 315 (1975) (interpreting the California constitutional protection against unreasonable searches as prohibiting the type of search approved in *United States v. Robinson*, 414 U.S. 218 (1973)). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

sively than does the judiciary.[215]

On a more fundamental level, I would turn this concern for uniformity back upon my critics by asking: "What is the necessity of a single uniform rule in a *federal* system?" The Supreme Court presently tolerates some variety among the states in dealing with open ended constitutional concepts like obscenity,[216] cruel and unusual punishment,[217] and due process.[218] Why is the concept of reasonable searches any less open ended and any less amiable to alternative interpretations, at least so long as those interpretations fall within the broad perimeters set by the Court? The view that the "benefits" of uniformity outweigh the "benefits" of diversity is of relatively recent vintage in fourth amendment jurisprudence. It has been only twenty years since the Court reversed the *Wolf v. Colorado*[219] decision to allow the states to experiment with alternatives to the exclusionary rule. My proposal represents a return to the philosophy of encouraging experimentation by the states.

D. "Your proposal focuses on the Supreme Court and its responsibility to address broad policy considerations and to provide uniformity in the law. Where do the lower appellate courts and the trial judges fit into your model of fourth amendment decision making? Why cannot the trial judge provide the flexibility and concern for individual justice which you would entrust to the jury?"

For purposes of my analysis the difference between the Supreme Court and the lower courts is a matter of degree, not a difference in kind. The lower the court sits in the judicial hierarchy the more the court is concerned with the result in a particular case and the less it is concerned with broad principles. The higher the court sits

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215. In Oregon v. Hass, 420 U.S. 714 (1975) the Court held that a state court could not interpret the federal constitution to conflict with prior Supreme Court interpretations. This decision is defensible in that it demands uniformity in formalistic determinations by all levels of the judiciary. But if it is accepted that the jury's determination of law serves the goal of particularized justice, the holding of *Oregon v. Hass* should not be extended to the jury's interpretation of the fourth amendment.

216. *See* Schauer, *supra* note 138.

217. *See* Schwartz, *supra* note 138.

218. *See, e.g.*, Apodoca v. Oregon, 406 U.S. 404 (1972) (Powell, J., concurring); Roth v. United States, 354 U.S. 476 (1957) (Harlan, J., dissenting).

219. 338 U.S. 25 (1949).

in the judicial hierarchy (and the more discretionary its review) the more the court is concerned with broad principles and the less it is concerned with the results in a particular case. To that extent the Supreme Court is not free to render advisory opinions or postulate theory totally independent of the facts of the case, although the court is frequently criticized for doing just that.[220] Likewise, a trial court is never totally free to concern itself with individualized justice and ignore the fact that it is creating precedent.

I have emphasized the Supreme Court's role in formulating principles or policies which provide uniform guidance for lower courts, but policy determinations do not originate in the Supreme Court as if springing from some vacuum. Policy may be formulated by articulating a general principle that embraces many ad hoc case by case determinations. Policy determinations may also begin their development in the lower courts and then flow upward to the Supreme Court where they are ultimately ratified or rejected. Thus, while I perceive the lower courts to have more latitude than the Supreme Court in addressing individual justice, all members of the judiciary are never as free as a jury to disregard precedent setting and broad principles in order to focus upon applying the law to individual facts. This is not to say that the jury is just concerned with gut reactions and emotional justice instead of being concerned with the law. I have drawn a sharp line between jury nullification and jury determination of law.[221] The jury is to determine the law in an individual case, and thereby put content into the open ended legal concept of reasonable searches. To the extent that the content depends on value judgments, this is no more a gut reaction or emotional decision than is the judiciary's attempts to put content into the legal concept of reasonable searches.[222]

Thus, while I confess that my analysis has focused on the Supreme Court, I justify this by declining to draw a sharp line between the functions of the Supreme Court and the lower courts in

220. Miranda v. Arizona, 384 U.S. 436 (1966) and Mapp v. Ohio, 367 U.S. 643 (1961) are the classic examples of what some critics refer to as "judicial legislation."

221. *See* note 4 *supra.*

222. *See* text accompanying note 129 *supra.* Professor Amsterdam observed that interpretation of the fourth amendment "is inescapably judgmental" and in "the pans of judgment sit imponderable weights." Amsterdam, *supra* note 180, at 353-54.

determining law. Perhaps the most striking part of my proposal is that I suggest elimination of the line between the judiciary's and the jury's ability to determine fourth amendment law. We should conceptualize the legal determination of reasonable searches as a continuum where all entities determine *law.* At one end of the continuum is the Supreme Court which is most concerned with broad legal principles — the outer limits of law — and least concerned with individual facts. While at the other end of the continuum is the jury which has discretion to make particularized law in the individual case, so long as it stays within the confines of the outer limits delineated by the courts. Trial judges and lower appellate courts fall within the confines of this continuum where they also exercise discretion, less than juries but more than higher appellate courts, to render individualized justice. Thus, I do not deny that trial judges, vis-à-vis Supreme Court Justices, may have more flexibility in adjusting the law to an individual case. But, I do contend that the jury has a unique opportunity and ability to adapt the law to individual facts, and I suggest that this ability should be utilized in determining reasonable searches.

E. "Why is your proposal a one-way street? If the defendant can submit the reasonableness of a search to the jury, why should the government be denied this same option?"

There is one practical reason for allowing only the defendant to submit the question of reasonableness to a jury. Probable cause for a search or arrest often includes references to the defendant's prior convictions and reputation for criminal activity.[223] To allow the government the option of placing this information before the jury gives the government an unfair advantage.[224] The defendant should control the decision to place such information before the

223. *See* United States v. Harris, 403 U.S. 573 (1971).

224. I have elsewhere expressed some confidence in the jury's ability to follow limiting instructions. *See* text accompanying note 204 *supra.* Total commitment to this principle would mean that a jury might be instructed to consider the defendant's reputation as it bears upon probable cause, while disregarding reputation for all other purposes. In distinguishing between the jury's ability to disregard the fruits of a search it has found unreasonable, and the jury's ability to disregard the defendant's prior convictions and reputation, I draw a line which stops short of total faith in limiting instructions. I do not believe the line is wholly arbitrary but rather takes account of considerations far beyond fourth amendment concerns.

jury, just as the defendant now controls the decision to make his character an issue of the case and controls the decision to testify and thereby allow evidence admitted as to his prior convictions.

On the more theoretical level, the defendant is given the exclusive option to submit the issue of reasonableness to the jury because in individual cases the jury represents the only effective safeguard against a possible abuse of judicial power.[225] Protection against governmental abuse of power is a major theme of the fourth amendment[226] and the judiciary often utilizes the fourth amendment to check legislative and executive power.[227] While preserving the judiciary's role in checking the exercise of power by the other branches of government my proposal assigns the jury the responsibility to guard against a potentially insensitive and insulated judiciary. Creating this additional limitation on government power does not necessitate recognizing a reciprocal benefit for the government.

The jury also exists to protect the individual against a formalistic application of law which may conflict with justice as determined by twelve representatives of the community. Whether the question of reasonable searches be categorized as a question of substantive or procedural justice, my proposal allows the defendant a final appeal to the jury as the ultimate arbiter of individualized justice. A government subject to the rule of law, however, should not have recourse to the conscience of the community (the jury) in order to overturn unfavorable but formalistically correct determinations of law. When the jury is seen as the individual defendant's final protection against legal formalism and abuse of government power, it is not inequitable to permit the defendant to have access to the jury's determination of fourth amendment law

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225. Of course the judiciary has internal safeguards against the abuse of power as when an appellate court reverses a lower court. But except for executive pardon, there is no external check upon the exercise of judicial power in individual cases.

226. *See* Amsterdam, *supra* note 180.

227. See for example the famous statement of Justice Jackson in Johnson v. United States, 333 U.S. 10, 13-14 (1948):

> 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.

while limiting the government to principled and consistent rulings from the judiciary.

I am sure that I have neither anticipated nor satisfactorily rebutted all of the criticisms that can be properly directed at my proposed model of fourth amendment decision making. But my intent was not to produce a polished model ready for legislative enactment. I have previously noted that traditional fourth amendment analysis has become stagnant[228] and that "if we would have new knowledge, we must get us a whole world of new questions."[229] Here I have raised some new questions about fourth amendment decision making in the hope that these questions will stimulate consideration of needed reforms.

228. *See* Bacigal, *The Fourth Amendment, supra* note 94.

229. S. LANGER, PHILOSOPHY IN A NEW KEY, 13 (3d ed. 1978).