

3-1994

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## Recommended Citation

Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 *Geo. Wash. L. Rev.* 359 (1994).

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# Putting the People Back into the Fourth Amendment

Ronald J. Bacigal\*

## *An Unresolved Fable of Heroes and Villains*

Once upon a time, a democratic people actively participated in a communal process for resolving conflicts between individual liberty and collective security. Over the course of several centuries, a council of regents seized power from the people and assumed final control over society's regulation of liberty and security. Some of the people viewed the regents as usurpers of their right to self-determination—evil tyrants who imposed their arbitrary will without tethering it to the popular will. Others welcomed the regents as wise and benevolent sentinels against a hastily formed popular consensus, which might threaten the autonomy of unpopular minorities or individuals. Because they were a law-abiding people, both factions shunned armed conflict and enlisted scholars to carry their banners. The end of the fable is being written, not on the ramparts, but in the law journals.

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\* Professor of Law, University of Richmond. The author expresses his appreciation to Professor Paul Zwier who commented on an earlier draft of this Article. As this Article was in galleys, Professor Akhil Amar published *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994). The article proposes replacing the Fourth Amendment exclusionary rule with damages awarded by civil juries. He refers to my previous "intriguing efforts to integrate juries into an exclusionary rule scheme," *id.* at 818 n.229, but rejects such tinkering with the existing system and insists that his "package of criticisms and alternatives is offered as a whole," *id.* at 761 n.5. He is particularly scornful of "liberals" who "might be tempted to beef up both civil remedies and exclusion." *Id.* With all respect to Professor Amar, I decline his invitation to accept his "package as a whole." I fear that his proposal would gut the Fourth Amendment as we know it. See Carol Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

## Introduction

The Fourth Amendment to the United States Constitution guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”<sup>1</sup> The task of safeguarding this right has been entrusted to the judiciary and much of the amendment’s jurisprudence centers on the courts’ efforts to regulate law enforcement activity that intrudes upon protected rights of privacy and liberty. Although “[w]e the people”<sup>2</sup> are the third-party beneficiaries of this clash between the Judicial and Executive branches,<sup>3</sup> individual citizens do not play an operative role in delineating reasonable searches and seizures.<sup>4</sup> This was not always the case. As represented by juries, colonial Americans were active participants in the tribunals that addressed early search and seizure law.

The Supreme Court recently reminded us that “long before the adoption of the Constitution the common law courts in the colonies” “regularly exercised jurisdiction to enforce English statutes authorizing the seizure of ships used in violation of customs and revenue laws.”<sup>5</sup> Forfeiture suits against offending vessels “closely followed the procedure in Exchequer” and were tried by jury.<sup>6</sup> Pre-revolutionary juries thus served an important democratic function by measuring the search-and-seizure practices of the government against the community’s political and moral directives. In contemporary America, we continue to honor our founders’ regard for the “exalted character of jury service” and trial judges commonly discharge jurors with the reminder that trial by jury “stands as the keystone to our system of justice—the connecting link between the courts and the people.”<sup>7</sup> If such rhetoric were taken seriously, we might regain our faith in the

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1. The textual quotation is referred to as the Reasonableness Clause of the Fourth Amendment. In what is known as the Warrant Clause, the Amendment continues as follows: “and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

2. U.S. CONST. pmb1.

3. The principal method of enforcing the Fourth Amendment is the exclusionary rule, which is not constitutionally mandated, but is a judicially created and judicially administered means of protecting Fourth Amendment rights. *See infra* text accompanying notes 235-37.

4. Under current doctrine, society has no direct say in how to define Fourth Amendment rights or remedy Fourth Amendment violations. Since the inception of the suppression remedy, judges have decided whether the Amendment was violated and whether suppression is appropriate. “To some extent at least, having judges decide what police conduct violates the Fourth Amendment reflects a distrust of society’s ability or willingness to apply the Fourth Amendment properly.” George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 149 (1993).

5. *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1131 & n.9 (1993).

6. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 140 (1943). English precedent, which gave rise to the Fourth Amendment, also respected the jury’s role in passing upon the search-and-seizure practices of the government. *See Leach v. Three of the King’s Messengers*, 19 Howell’s State Trials 1001, 1026 (1765) (“Whether there was a probable cause or ground of suspicion, was a matter for the jury to determine: that is not now before the Court.”).

7. WEST’S FEDERAL FORMS § 7497 (1971) (Some Remarks Upon Discharging Jury).

jury's ability to enlighten an isolated and potentially insensitive judiciary as to the community's view of government search-and-seizure practices.

The jury's vital role in regulating the exercise of government power was a central theme of a provocative article, *The Bill of Rights as a Constitution*,<sup>8</sup> in which Professor Akhil Amar asked us to suspend conventional wisdom, which views the Bill of Rights as a collection of unrelated, substantive rights of individual citizens that are to be protected by a vigilant judiciary. Examining history with fresh eyes, Professor Amar sought a unifying theme for the Bill of Rights and found it in the drafters' concept of a *structure* of government:

Like the original Constitution, the original Bill of Rights was webbed with structural ideas. Federalism, separation of powers, bicameralism, representation, amendment—these issues were understood as central to the preservation of liberty. My point is not that substantive “rights” are unimportant, but that these rights were intimately intertwined with structural considerations.<sup>9</sup>

Although much of individual rights theory centers on what *is* constitutional, this question is uniquely related to questions of *who* should decide what is constitutional, and *who* should decide who decides. There is no escape from giving the Bill of Rights some reading, and one unavoidable task for constitutional framers is to allocate decision-making power. For example, in the Fourth Amendment context, someone must be charged with responsibility to determine which searches and seizures are reasonable. By adopting a constitution and a bill of rights, a political community defines its boundaries and establishes the system from which legitimate outcomes derive. It is not surprising then that the debate over ratification of the Bill of Rights focused on “what kind of government Americans wanted, not what rights this government should protect.”<sup>10</sup> The prime purpose of the Constitution and the Bill of Rights was to put in place a system

8. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

9. *Id.* at 1205; see also Donald S. Lutz, *Political Participation in Eighteenth-Century America*, 53 ALB. L. REV. 327, 332 (1989) (arguing that concepts of federalism and separation of powers erect a structure that encourages citizens to participate in a deliberative process leading to the decisions that affect their lives and shape their values); Maeva Marcus, *The Adoption of the Bill of Rights*, Address in a Plenary Session at the Conference for the Federal Judiciary in Honor of the Bicentennial of the Bill of Rights (Oct. 21, 1991), in 1 WM. & MARY BILL RTS. J. 115 (1992). Marcus states that

the Revolutionary generation, in wrestling with the problem of rights, did not concern itself primarily with stating, with absolute textual precision, the rights that Americans believed would best protect their liberty. Rather, the founding generation struggled with the larger question of what kind of government would facilitate the enjoyment of the rights the American people knew they possessed.

*Id.*

10. Marcus, *supra* note 9, at 117.

whereby their meaning would be embodied in the outcome of the continuing struggle between various decisionmakers.

The internal checks and balances on the decisionmaking power of the Judicial, Legislative, and Executive branches are the familiar stuff of high school civics. Less attention has been focused on our Bill of Rights' presupposition that government in toto is prone to abridge citizens' freedom; that the counter to that tendency is to place the people between citizen and government; and that the essential feature of a jury is its "interposition" between the state and the accused.<sup>11</sup> The paradigmatic image of jurors as populist protectors of the people lies at the heart of our Bill of Rights,<sup>12</sup> and the Supreme Court has erred in viewing "jury trial as an issue of individual right rather than (also, and, more fundamentally) a question of government structure."<sup>13</sup> When the Bill of Rights is seen as a structural limitation on the exercise of government power, it is apparent that "the dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury."<sup>14</sup>

In the area of search-and-seizure, the government's relationship with its citizens achieves its most stark and physical form. Perhaps more so than any other provision of the Bill of Rights, the Fourth Amendment is profoundly antigovernment,<sup>15</sup> and the need to protect the people from a potentially oppressive Executive Branch has dominated the Supreme Court's Fourth Amendment corpus.<sup>16</sup> The Court,

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11. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (observing that "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge").

12. Amar, *supra* note 8, at 1183.

13. *Id.* at 1196. Professor Amar queried:

For whose benefit did the right to jury trial exist? For Tocqueville, the answer was easy—the core interest was that of the Citizens, rather than the parties: "I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them. . . ." Similarly, Justice Blackmun has written that the public has interests, independent of a criminal defendant, in monitoring judges, police, and prosecutors—and in being "educat[ed about] the manner in which criminal justice is administered."

*Id.* (footnote omitted) (quoting 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 296 (Phillips Bradley ed., Vintage Books 1954) (1945), and *Gannett Co. v. DePasquale*, 443 U.S. 368, 428-29 (1979) (Blackmun, J., dissenting in part)).

14. *Id.* at 1183.

15. JAMES B. WHITE, *JUSTICE AS TRANSLATION* 177 (1990). White contends that more than any other single constitutional provision [the Fourth Amendment] stands between us and a police state, for its central premise is that police (or other governmental) conduct that interferes with a person's liberty, bodily integrity, or right to exclude others from what is hers shall be subject to judicial control.

*Id.* See generally Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974) (arguing that "the Bill of Rights in general and the fourth amendment in particular . . . deny to government—worse yet, to democratic government—desired means, efficient means, and means that must inevitably appear . . . to be the absolutely necessary means, for government to obtain legitimate and laudable objectives").

16. "Power is a heady thing; and history shows that the police acting on their own cannot be trusted." *McDonald v. United States*, 335 U.S. 451, 456 (1948). "[T]he Fourth Amendment's warrant requirement establishes an institutional structure to compensate for the expected excessive zeal of governmental criminal investigators." Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729, 735 (1992).

however, has been less astute in recognizing the need to protect the people from potentially oppressive judicial power.

[A]ll permanent government officials—even Article III judges—may at times pursue self-interested policies that fail to reflect the views and protect the liberties of ordinary Americans. As the Fourth Amendment warrant clause and the Eighth Amendment make clear, professional judges acting without Citizen juries can sometimes be part of the problem, rather than the solution.<sup>17</sup>

Professor Amar contends that juries once played the primary role in protecting Fourth Amendment freedoms and that judges are “the heavies, not the heroes, of the [Fourth Amendment’s] story.”<sup>18</sup> If this reading of history is correct, and I believe it is, the question arises as to how and why the jury’s foremost role in adjudicating the lawfulness of searches and seizures has been eliminated by a judiciary jealous of its power to interpret the law. This question also has been raised by Justice Scalia, who acknowledges that when a judge resolves the reasonableness of a search or seizure by invoking “nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact-finding.”<sup>19</sup> Justice Scalia expressed puzzlement as to “[w]hy . . . the question whether a person exercised reasonable care [should] be a question of fact [for the jury], but the question whether a search or seizure was reasonable be a question of law [for

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17. Amar, *supra* note 8, at 1206; see *Essays by a Farmer (IV)*, in 5 *THE COMPLETE ANTI-FEDERALIST* 5, 39 (Herbert J. Storing ed., 1981) (reasoning that “whenever therefore the trial by juries has been abolished, . . . [t]he judiciary power is immediately absorbed, or placed under the direction of the executive”).

18. Amar, *supra* note 8, at 1179. When creating a “good faith” exception to the Fourth Amendment exclusionary rule, the Supreme Court discounted any need to invoke the exclusionary rule as a means of deterring judicial misconduct:

First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.

*United States v. Leon*, 468 U.S. 897, 916 (1984). In dissent, Justice Brennan argued that the Amendment, like other provisions of the Bill of Rights, restrains the power of the government as a whole; it does not specify only a particular agency and exempt all others. The judiciary is responsible, no less than the executive, for ensuring that constitutional rights are respected.

*Id.* at 932.

19. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180-81 (1989). Professor Weinreb characterized the totality-of-the-circumstances test as an “I know it when I see it” school of jurisprudence because the Court merely catalogues the facts of the case followed by an unconnected conclusion regarding the reasonableness of the search. Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 57 (1974).

the judge]?”<sup>20</sup> Professor Amar echoes that query by noting that “[r]easonableness vel non was a classic question of fact for the jury.”<sup>21</sup>

This Article attempts to answer such questions by examining the evolution of search-and-seizure law in America. Although the structural nature of decisionmaking embodied in the Bill of Rights has far-ranging implications for that entire document, I limit my consideration to the unique aspects of the Fourth Amendment. In doing so I have followed the suggestion that constitutional interpretation considers a threefold question: “Does the Constitution mean what it was meant to mean, or what it has come to mean, or what it ought to mean?”<sup>22</sup> Part I examines the historical involvement of juries in search-and-seizure cases; Part II considers the current state of the judiciary’s Fourth Amendment jurisprudence; and Part III concludes with a proposed structure for Fourth Amendment decisionmaking that returns the jury to its former prominence.

### I. *Pre-Revolutionary Search-and-Seizure Law*

Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary 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 them.<sup>23</sup>

The major historical studies of the Fourth Amendment<sup>24</sup> begin their analyses of colonial searches and seizures with James Otis’s renowned challenge of writs of assistance in Paxton’s case.<sup>25</sup> Those who seek interpretive aid by identifying the evils which the amendment was designed to eradicate have recognized that “the Fourth Amendment’s commands grew in large measure out of the colonists’ experience with the writs of assistance and their memories of general warrants formerly in use in England.”<sup>26</sup> Between 1761 and 1776 the increasingly volatile Writs of Assistance controversy<sup>27</sup> drew the attention of colonial courts, legislatures, and patriots like James Otis and John Adams. American juries, however, had been removed from participation

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20. Scalia, *supra* note 19, at 1181.

21. Amar, *supra* note 8, at 1179.

22. TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 5 (1969).

23. Letter from Thomas Jefferson to L’Abbe’ Arnold (July 19, 1789), in 3 *THE WRITINGS OF THOMAS JEFFERSON* 82 (H.A. Washington ed., 1853).

24. See, e.g., JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* (The Johns Hopkins Univ. Studies in Historical and Political Science Series No. 84, 1966); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (The Johns Hopkins Univ. Studies in Historical and Political Science Series No. 55, 1937); TAYLOR, *supra* note 22.

25. See LANDYNSKI, *supra* note 24, at 32-37; LASSON, *supra* note 24, at 51-59. 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.” *Id.* at 59.

26. *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977).

27. “American histories without exception list Writs of Assistance as one of the active causes of the American Revolution.” O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40, 40 (Richard B. Morris ed., 1939). The writs of assistance controversy “was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.” *Boyd v. United States*, 116 U.S. 616, 625 (1886).

in the controversy by England's creation of jury-less vice-admiralty courts in the colonies. The jury's role in determining search-and-seizure law had developed during the preceding century when customs officials first searched and seized pursuant to the Navigation Acts. It is this neglected period leading to the Writs of Assistance controversy that saw American juries defy and defeat British overlordship years before a single soldier took to the field.<sup>28</sup>

#### A. *The Navigation Acts*

In the mid-seventeenth century, Holland, not England, was the commercial, industrial, and financial center of Europe.<sup>29</sup> Under a system of free trade, American commerce would have gravitated to the Netherlands; thus 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.<sup>30</sup> The first of the Navigation Acts, the Enumeration Act of 1660,<sup>31</sup> mandated that all American imports or exports be shipped in English or American vessels.<sup>32</sup> The Act also specified that certain colonial products—most important, sugar and tobacco—could be shipped only to England or another colony.<sup>33</sup> The second Navigation Act, the Staples Act of 1663,<sup>34</sup> further limited the colonists' access to free markets by requiring that all goods imported by the American colonies be loaded in England.<sup>35</sup>

The initial Navigation Acts were part of a sweeping effort to reestablish the English Crown's control over all colonial activity and government.<sup>36</sup> During Oliver Cromwell's reign, the American colonies avoided close supervision and regulation by the mother country, but with the restoration of the English monarchy the Crown turned its

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28. The Fourth Amendment speaks of the right of "the people," not the right of the framers of the Bill of Rights. U.S. CONST. amend. IV. Although much attention has been directed toward discerning the original framers' intent, it makes sense to focus on the perspective of "the people" who fought against oppressive searches and seizures.

29. SHEPARD B. CLOUGH & CHARLES W. COLE, *ECONOMIC HISTORY OF EUROPE* 345 (3d ed. 1952) (arguing that the first Navigation Act was aimed at the Dutch carrying trade and "consolidated the foundations of England's colonial and maritime system").

30. 12 Car. 2, ch. 18 (1660) (Eng.). "The requirement that goods pass through England imposed many obligations upon colonial trade in the guise of taxes, fees, cooperage, portorage, brokerage, warehouse rent, commissions, extra merchants' profits, and the like, which would never have been incurred in a direct trade with the ultimate markets." LAWRENCE A. HARPER, *The Effect of the Navigation Acts on the Thirteen Colonies, in THE ERA OF THE AMERICAN REVOLUTION*, *supra* note 27, at 32, 32.

31. 12 Car. 2, ch. 18 (1660) (Eng.).

32. *Id.*

33. *Id.*

34. 15 Car. 2, ch. 7 (1663) (Eng.).

35. *Id.*

36. DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM* 71 (1970) ("Toward the end of the seventeenth century there was an upsurge of English concern with the administration of the American colonies.").



attention to America.<sup>37</sup> The Puritans of the Massachusetts Bay Colony objected to increased regulation because they were subjects of the English King only to the extent that they voluntarily subjugated themselves by the terms of the colony's charter.<sup>38</sup> 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.<sup>39</sup> The commission failed to negotiate an acceptable compromise and the Navigation Acts largely were ignored or were evaded by the colonists.<sup>40</sup>

The third Navigation Act, the Plantation Duty Act of 1672,<sup>41</sup> did not impose any significant new duties or restrictions upon trade but was singularly designed to enforce the provisions of the first two Navigation Acts.<sup>42</sup> Edward Randolph, whose biography is a microcosm of search-and-seizure during this period,<sup>43</sup> was appointed Collector of Plantation Duty and was charged with vigorous enforcement of the dormant Navigation Acts.<sup>44</sup> Randolph arrived in the colonies in 1679, and within three years seized thirty-six ships and prosecuted their owners for alleged violations of the Navigation Acts.<sup>45</sup> All but two of the shipowners, however, were acquitted and Randolph's two successful prosecutions were obtained in trials without a jury.<sup>46</sup>

The colonial juries' unwavering refusal to convict for alleged violations of the Navigation Acts should not be dismissed as merely an example of the juries' nullification of the unpopular Acts. We must distinguish our concept of a contemporary jury's extra-legal nullification of a law from the colonial jury's prerogative to determine law.<sup>47</sup>

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37. *Id.*

38. See generally THOMAS HUTCHINSON, *THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY* (1936). Although the home-rule controversy was most prominent in Massachusetts, it was also present in other colonies. For example, in 1701 William Penn wrote the following: "Are we comme 3000 miles into a desert . . . to have only the same privileges we had at home?" MICHAEL G. HALL, *EDWARD RANDOLPH AND THE AMERICAN COLONIES 1676-1703*, at 223 (1960) (quoting William Penn).

39. HALL, *supra* note 38, at 13-14.

40. *Id.*

41. 25 Car. 2, ch. 7 (1672) (Eng.).

42. *Id.*

43. "In England the customs establishment was elaborate. In New England it was one man, Edward Randolph . . ." HALL, *supra* note 38, at 56.

44. *Id.* at 55-56.

45. *Id.* at 57. 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. *Id.* at 55.

46. *Id.* at 57.

47. Jury nullification focuses on the jury's raw power to ignore a law they think is wrong or unjust, and not to be subject to sanctions for ignoring the law by rendering an unreviewable general verdict. Jury prerogative to determine law, however, is not an exercise of raw power, but rather the fulfillment of a duty to interpret and follow the law. On a theoretical level, the power and prerogative to address law is inextricably bound up with the use of general verdicts. See *infra* note 158. As a practical matter, the distinction between jury nullification and jury determination of law often boils down to whether the trial attorneys are permitted to argue the law to the jury. See generally Annotation, *Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury*, 67 A.L.R.2d 245 (1959).

In *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808), cited in *Sparf v. United States*, 156 U.S. 51, 163 (1895) (Gray & Shiras, JJ., dissenting), a United States District Court permitted defense counsel to argue to the jury the unconstitutionality of an Act of

In a modern-day 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. Suppose, for example, that a police officer observes illegal sexual activity as it occurs in the defendant's bedroom. Suppose further that at trial, defense counsel's 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 it is sufficiently offended by the police conduct, the jury may acquit the defendant and effectively nullify the trial judge's ruling that the police observation was lawful.<sup>48</sup> The linkage between juries and Fourth Amendment interests was articulated vividly by an Anti-Federalist essayist:

[If a federal constable searching] for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same; but what satisfaction can we expect from a lordly [judge], always ready to protect the officers of government against the weak and helpless citizens . . . .<sup>49</sup>

In the hypothetical where the officer peers into the citizen's bedroom, the jury learns of the officer's actions somewhat fortuitously because, with a slight change of facts, the very same police activity would never come to light at the trial. Suppose, for example, that after peering into the bedroom, the police obtain a search warrant, enter the dwelling, and apprehend the defendant while engaged in the criminal act. If, at the pretrial suppression hearing, "a lordly judge" upholds the warrant, the jury will learn only that the police entered the dwelling pursuant to a valid warrant.<sup>50</sup> Because contemporary juries are not authorized to consider the legality of the search warrant, the jury will never discover that the police initially used binoculars to look into the defendant's bedroom. Even when the jury is fully aware of the facts surrounding a search, the judge instructs it to accept his legal determinations.<sup>51</sup> Thus, many law enforcement procedures of questionable legality do not shock the jury to the point that

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Congress. But Justice Chase's refusal to allow counsel to argue the law to the jury was cited in his articles of impeachment. See REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE app. at 4 (Charles Evans ed., 1805).

48. 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 *infra* text accompanying note 220.

49. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, at 154 (John B. McMaster & Frederick B. Stone eds., 1970) (1888).

50. *Steele v. United States*, 267 U.S. 505 (1925) (stating that judge, not jury, determines the legality of a search).

51. See *infra* text accompanying notes 116-18.

they defy the judge's instructions.<sup>52</sup> Under our present legal system, therefore, jury nullification of searches deemed lawful by the judiciary is exceptional and extra-legal.

Under the colonial system of justice, however, juries not only resolved factual disputes, they also determined questions of law.<sup>53</sup> Most of the colonial era's judges and advocates were without formal legal training, and the colonists believed that any man of ordinary intelligence was able to plead his own case and to judge law and justice, not an unreasonable assumption in a day when educated men generally were familiar with the law and its administration.<sup>54</sup> In practice, a colonial judge's primary function was "to preserve order, and see that the parties had a fair chance with the jury."<sup>55</sup>

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

53. See *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (stating that questions of law and fact are within the jury's power of decision). The dissent in *Sparf* characterized *Brailsford* as "a case in which there was no controversy about the facts." *Sparf v. United States*, 156 U.S. 51, 156 (1895) (Gray & Shiras, JJ., dissenting). Nonetheless the trial court, while stating to the jury its unanimous opinion upon the law of the case, and reminding them of "the good old rule, that on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide," expressly informed them that "by the same law, which recognizes this reasonable distribution of jurisdiction," the jury "have nevertheless a right to take upon themselves to judge of both, and to determine the law as well as the fact in controversy."

*Id.* (quoting *Brailsford*, 3 U.S. (3 Dall.) at 4). See generally Mark D. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939) (tracing the development of juries as law judges in America).

54. See generally FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* (1940) (discussing this and other aspects of colonial judges' and juries' role in the legal system). The colonies were also "small agricultural communities [where] a highly democratic tribunal [could] adequately cope with matters that, in other circumstances, [could] more effectively be dealt with through a discreet separation of judicial powers." Howe, *supra* note 53, at 591. The colonists' faith in the common man's ability to judge law lived on in the American Revolutionary period. In 1790 James Wilson told his students at the University of Pennsylvania that

the science of law . . . "should in some measure be the study of every free citizen, and of every free man. Every free citizen . . . has duties to perform and rights to claim. . . . On the public mind one great truth can never be too deeply impressed, that the weight of the government of the United States, and of each state composing the union, rests on the shoulders of the people.

HUGH H. BRACKENRIDGE, *LAW MISCELLANIES* 33 (Philadelphia, Byrne 1814).

55. Howe, *supra* note 53, at 591; see also Amasa M. Eaton, *The Development of the Judicial System in Rhode Island*, 14 YALE L.J. 148 (1905). In 1792, Justice Hugh Henry Brackenridge published a satirical view of politics in the post-revolutionary period. Justice Brackenridge was a novelist, poet, justice of the Supreme Court of Pennsylvania, a Princeton classmate and friend of James Madison, and the organizer of the Jeffersonian Republican Party of western Pennsylvania. See CLAUDE M. NEWLIN, *THE LIFE AND WRITINGS OF HUGH HENRY BRACKENRIDGE* (1932). Professor Paul Carrington paraphrased Justice Brackenridge's view of the judiciary:

Any animal of the human species, with a mediocrity of talents, may come to be a judge, and may appear pretty well in a book of reports, provided he or she cites precedents. The knowledge of all law goes but a little way to discerning the justice of the cause. Because the application of the rule to the case is the province of judgment. Hence it is that if my cause is good and I am to have my choice of two judges, the one of great legal science, but deficient in natural judgment; the other of good natural judgment but of no legal knowledge, I would take the one that had what we call common sense.

Although colonial practice is clear regarding the jury's determination of law, colonial legal theory is clouded by the perplexing link between the jury's nullification power and the jury's right to interpret law. The legal distinction between jury prerogative and jury nullification power first came into issue when attain, the punishment of the jury for reaching an incorrect verdict, was abolished in England by the decision in *Bushell's case* in 1670.<sup>56</sup> When the trial court lost this means to coerce a verdict from the jury, it became apparent 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 a prerogative to determine law, was presented by the controversy concerning seditious libel.<sup>57</sup> The issue was not resolved definitively until 1792 when Fox's Libel Act<sup>58</sup> authorized English juries to decide both the "fact" of publication and the issue of whether the publication was seditious, which is a mixed question of law and fact.<sup>59</sup> In colonial America, the jury's prerogative to determine the issue of seditious publication was recognized as early as 1692 in Pennsylvania.<sup>60</sup> Perhaps the most celebrated case of an American jury determining law arose at the trial of John Peter Zenger in 1735 when Alexander Hamilton successfully asserted that jurors "have the right beyond all dispute to determine both the law and the fact."<sup>61</sup>

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Paul D. Carrington, *Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748-1816)*, 53 U. PITT. L. REV. 705 (1992).

56. 6 Cobbett's State Trials 999 (1810). The case arose in 1670 when Quakers William Penn and William Mead were tried for unlawful assembly for religious worship. *Id.* at 1002. When the jurors acquitted them against the court's instructions, Bushell and the other jurors were fined. *Id.* at 1005. Bushell refused to pay the fine, was imprisoned, and brought a writ of habeas corpus. *Id.* at 1003. The writ was granted and Bushell was relieved from all punishment for having returned a verdict against the trial judge's instructions.

57. See generally John Kelly, *Criminal Libel and Free Speech*, 6 KAN. L. REV. 295 (1957) (discussing the history of criminal libel in England and the United States).

58. 53 Geo. 3, ch. 60 (1792) (Eng.).

59. The Act provided

that, on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

*Id.*

According to the *Sparf* dissent, the Act authorized the trial judge to give "his opinion and directions to the jury," which "clearly means by way of advice and instruction only, and not by way of order or command." *Sparf v. United States*, 156 U.S. 51, 135 (1895) (Gray & Shiras, JJ., dissenting).

60. Howe, *supra* note 53, at 594-95.

61. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 99 (2d ed. 1972). Hamilton subsequently acknowledged that in civil cases "the cognizance of law belongs to the court, of fact to the jury," but "in criminal cases, the law

Zenger's celebrated trial placed the issue of the jury's role at the center stage in libel cases; it remained center stage even after the Revolution and the adoption of the Constitution.<sup>62</sup>

In other legal areas, American legal theory and practice generally deferred to the jury's prerogative to determine law. The historical records are spotty, but at least one scholar maintains that the jury's determination of law was accepted theory and practice from 1660 until the early 1800s.<sup>63</sup> Although we cannot discount the possibility that colonial juries resorted to extra-legal nullification of the unpopular Navigation Acts,<sup>64</sup> there is an equally plausible explication of this historical period, which suggests that colonial juries lawfully and responsibly discharged their duty to determine search-and-seizure law. The validity of this view becomes apparent when one considers the jury's role in passing upon two formalistic legal objections raised against Randolph's seizures of vessels transgressing the Navigation Acts.

The first of these objections evoked overtones of nullification theory by fusing positive law and "higher law" concepts.<sup>65</sup> The exponents of home rule for Massachusetts argued that the Navigation Acts were law in the colonies only to the extent that they were accepted by the colonists.<sup>66</sup> Determination of positive law in America thus necessitated an 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.<sup>67</sup> Ultimately, the home rule controversy was resolved against the colonies and its influence upon colonial juries is

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and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, is entrusted with the power of deciding both law and fact." *Sparf*, 156 U.S. at 147 (quoting 7 HAMILTON'S WORKS 335-36 (1886)).

62. "[I]f I use my pen with the boldness of a freeman, it is because I know that *the liberty of the press yet remains unviolated, and juries yet are judges.*" Letters of Centinel (I), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 17, at 136, 136.

63. See JOSIAH QUINCY, REPORTS ON CASES ARGUED AND ADJUDICATED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772 app. at 541-72 (Boston, Little, Brown & Co. 1865). See generally Howe, *supra* note 53, at 582 (tracing the decline of jury prerogative to determine law).

64. Colonial juries "were alleged to consist of merchants or masters of ships." JOSEPH H. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 60 n.390 (Octagon Books, Inc. 1965) (1950). The possibility of nullification, however, should not be overemphasized, as this was not yet the age of tea parties, physical recapture of seized vessels, and mob violence. See *infra* text at note 114. Not all forms of resistance to the unpopular Navigation Acts were condoned by colonial juries. In the case of the *Two Sisters*, 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. HALL, *supra* note 38, at 62.

The case of the *Two Sisters* weakens any claim that colonial juries anticipated the modern exclusionary rule. In acquitting defendants of alleged violations of the Navigation Acts, colonial juries did not face the issue of freeing a "violent" criminal because the constable blundered. See *infra* text at note 372.

65. 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, the social compact, current mores, and the like. See generally John H. Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

66. See *supra* note 38 and accompanying text.

67. In theory the colonies were to follow English common law. In practice, they developed their own common law, and "the English common law remained largely an alien system until the middle of the eighteenth century." AUMANN, *supra* note 54, at 7. The Zenger case, see *supra* text at note 61, followed this tradition when the jury determined "the

uncertain.<sup>68</sup> The colonists finally prevailed, however, on a second legal objection to Randolph's seizures, an objection that must be characterized as a question of interpreting positive law without resort to nullification power.

This latter objection conceded that the Navigation Acts lawfully applied to the colonies but asserted that Parliament, owing to legislative oversight, had empowered Randolph to enforce only the Plantation Duty Act of 1673. Therefore, it was not English customs officials like Randolph but colonial governors who held exclusive power to enforce the Enumeration Act and the Staples Act.<sup>69</sup> These acts were the real backbone of British control and the basis of all of Randolph's seizures.<sup>70</sup> When this purely positive-law objection finally was 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 . . . than any other person."<sup>71</sup> Randolph sought to remedy the legal deficiency in his seizure powers by obtaining letters of patent, which explicitly authorized him to enforce all of the Navigation Acts.<sup>72</sup> The King issued the letters of patent but the legal controversy simply was recast in terms of whether the Crown, acting 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.<sup>73</sup>

On what basis, then, did colonial juries of the late seventeenth century return acquittals? Ideally, *de facto* nullification of law should be separated from jury determination of law, but absent special findings,<sup>74</sup> a general verdict of acquittal cloaks the jury's resolution of specific issues. What is unequivocal, however, is that colonial juries, in rendering those general verdicts of acquittal, were not limited to an

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law as it ought to be, under the conditions of colonial America, rather than the law as it was, in England." Paul Finkelman, *The Zenger Case: Prototype of a Political Trial*, in *AMERICAN POLITICAL TRIALS* 32, 36 (Michal R. Belknap ed., 1981).

68. If the colonial juries of this period considered whether the Navigation Acts or Randolph's seizures violated a "higher" law, such consideration 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 24, at 21 (presenting the constitutional history of the Fourth Amendment and James Otis's role in *Paxton's* case).

69. HALL, *supra* note 38, at 65; see also ROBERTSON, *supra* note 36, at 700 ("In a very real sense, whatever admiralty authority there was in the plantations belonged to the governors.").

70. HALL, *supra* note 38, at 65.

71. *Id.* at 66 (quotation omitted).

72. *Id.* at 67-68.

73. In one illustrative case, Governor Bradstreet, presiding as judge, sent out the jury three times with orders to reverse its findings. *Id.* at 61 n.400. The jury refused to alter its verdict and cast out the case because Randolph had no warrant to seize the ship. *Id.*

74. In civil cases, there was confusion as to whether courts could compel juries to render a special verdict and leave legal interpretation for the judge. SMITH, *supra* note 64, at 359-60. In criminal cases, it was assumed that the jury had the right to render a general

extra-legal nullification power. Under the common law, warrantless searches and seizures, in most circumstances, could be resisted lawfully,<sup>75</sup> and law enforcement officials were subject to harsh civil penalties if they exceeded their limited power to search or seize without a warrant.<sup>76</sup> The warrant process thus conferred an authority on law enforcement officers that they would not otherwise possess. After being alerted to Randolph's disputed credentials, and after being instructed that they were the judges of fact and of law, the colonial juries were invited to ascertain the lawfulness of Randolph's seizures by examining whether he exceeded his specific authority to enforce some or all of the Navigation Acts.<sup>77</sup>

The inherent ambiguity of general verdicts precludes a completely compelling case for distinguishing the colonial jury's *rightful determination* from the *extra-legal nullification* of search-and-seizure law,<sup>78</sup> but this much is clear: (1) the American colonies faced significant search-and-seizure questions some eighty years before the Writs of Assistance controversy would bring nullification theory to its zenith; (2) there were contested positive-law flaws in the authority of customs officials to search and seize; (3) colonial juries were duly informed of the alleged legal deficiencies;<sup>79</sup> and (4) colonial juries decided disputed questions of law. It is a respectable supposition that the acquittals rendered by colonial juries were based, at least in part, upon their conclusion of law that the seizures were illegal. A political people sensitive to the increasingly intrusive endeavors of British customs officials could be expected to avail themselves of the opportunity to exercise their prerogative, as jurors, to determine the lawfulness vel non of those officers' seizures.<sup>80</sup> In eliminating the jury's prerogative to determine law in the latter half of the nineteenth century, American courts looked to English practice rather than to the American colonial period.<sup>81</sup>

The point here is not how English judges, or for that matter nineteenth- or twentieth-century American judges, ultimately resolved the

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verdict. In practice, both civil and criminal juries insisted upon general verdicts and non-interference with jury prerogative. *Id.*

75. See Paul F. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129-32 (1969) (proposing a common law right to resist any unlawful official action, including arrest).

76. See Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 7 (1924) (commenting that at common law, "damages for torts were recoverable against the wrongdoing officer").

77. "[A] power of search was not something a customs officer's commission could snatch out of the air; there had to be statutory foundation for it." M. HENRY SMITH, *THE WRITS OF ASSISTANCE CASE 117* (1978).

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

79. See *supra* note 47 and accompanying text.

80. Perhaps what motivated these juries "was not spearhead radicalism, but a genuine belief that [the searches and seizures] did not accord with true legal principle." SMITH, *supra* note 77, at 5. Smith offered this observation about colonial judges who opposed the writs of assistance, but the observation may apply equally to colonial juries.

81. See generally Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964) (describing the gradual decline of the jury's right to decide questions of law).

issue of the jury's right or power to interpret law. The relevant consideration is how colonial Americans regarded the jury's function, and whether that regard is reflected in the Constitution and the Bill of Rights. "[I]ssues relative to the structure of the new government, rather than the task of defining and enumerating individual rights, were foremost in the minds of Americans after the Revolution."<sup>82</sup> Colonial Americans valued the jury's ability to determine search-and-seizure law even if colonial legal theory lacked a thorough appreciation of the enigmatic distinction between jury power and prerogative.<sup>83</sup> Because trial by jury dramatizes the relationship of law and democracy, we must not disserve history by imposing legalistic symmetry on what was perceived by the colonists and the British as a political issue: a frontier concept of popular justice and free trade, opposed to an old world fact of King's Law and mercantile subjugation.<sup>84</sup> When colonial juries persisted in determining search-and-seizure law adversely to the Crown, the conflict over jury prerogative and power emerged as part of the larger political struggle to win control over the colonies. Numerous acquittals in seizure cases led to repeated British efforts to negate the jury's role and led to stubborn efforts by the colonists to preserve the jury's role in the search-and-seizure controversy.

The late seventeenth-century difficulties with enforcement of the Navigation Acts were overshadowed temporarily by the broader struggle regarding home rule for Massachusetts. The struggle climaxed in 1686 when England vacated the colony's charter and dissolved the Massachusetts government.<sup>85</sup> A Temporary Council was appointed to rule Massachusetts and the erstwhile Edward Randolph continued to

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82. Marcus, *supra* note 9, at 115.

83. The colonists' regard for trial by jury was expressed in a charge to the first grand jury convened by the newly independent Colony of South Carolina:

Gentlemen of the Grand Jury: When, by evil machinations 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 dismissed without being empannelled, whereby, in contempt of *Magna Charta*, 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 empannelled, to the end that the laws may be duly administered. I do most heartily congratulate you upon so important an event.

Judge Drayton's Charge to the Grand Jury of Charlestown, South Carolina (Apr. 23, 1776), in 5 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1025 (Peter Force ed., 4th s. 1844).

84. The jury's determination of law

is one of those great exceptional rules intended for the security of the citizen against any impracticable refinements in the law, or any supposable or possible tyranny or oppression of the courts . . . . It has indeed been claimed, as one of those great landmarks, . . . which . . . will always be likely to be characterized as an absurdity by the mere advocates of logical symmetry in the law . . . ."

State v. McDonnell, 32 Vt. 491, 531-32 (1860), *overruled by* State v. Tsurpee, 25 A. 964, 974 (Vt. 1892).

85. See generally HUTCHINSON, *supra* note 38, at 339-49.



serve the Council as Collector, Surveyor, and Searcher of Customs.<sup>86</sup> Historical records are meager but it appears that under the Temporary Council Randolph experienced greater success than he had with seizures under the old charter government.<sup>87</sup> Whatever brief success Randolph enjoyed, however, ended when James II was displaced by the Glorious Revolution of 1688. Massachusetts revolted against the ruling council previously sent by James II, which caused Randolph to flee to England where he was reduced to working the London docks as a “free-lance informer” receiving a percentage of seized goods.<sup>88</sup>

By the early 1690s William and Mary were secure on the English throne, Randolph reemerged in the good graces of the Crown, and the Massachusetts charter was restored.<sup>89</sup> When the now-stabilized British Empire focused its attention on colonial trade and enforcement of the Navigation Acts, Randolph returned to America in 1692 as Surveyor General of America.<sup>90</sup> He 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.<sup>91</sup> He 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.”<sup>92</sup>

Randolph’s vitriolic 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.<sup>93</sup> This act was modelled on the English Statute of Frauds (1662) with one major difference that would prove to be a cornerstone 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 intended to include the existing colonial common law courts and the newly created vice-admiralty courts.<sup>94</sup> In England, however, such suits could be brought only in the Courts of Exchequer,<sup>95</sup> which, unlike the vice-admiralty courts, employed a jury.<sup>96</sup> The basis thus was laid for

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86. HALL, *supra* note 38, at 96.

87. *Id.* at 101-02.

88. *Id.* at 134.

89. HUTCHINSON, *supra* note 38, at ch. III.

90. HALL, *supra* note 38, at 135.

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

92. *Id.* at 153.

93. CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 15 (1960).

94. The phrase ultimately was 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 93, at 15-16.

95. “The 1662 act expressly laid down that the writ of assistance should be from the Court of Exchequer . . .” SMITH, *supra* note 64, at 121; see UBBELOHDE, *supra* note 93, at 19. When the seizure issue was submitted to a common law court, the court “closely followed the procedure in Exchequer” and the issue was tried by jury. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 140 (1943).

96. ROBERTSON, *supra* note 36, at 33.

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.<sup>97</sup>

Although there were incidental benefits to establishing the vice-admiralty courts in America,<sup>98</sup> Parliament's primary goal was to negate the American jury's role in the enforcement of the Navigation Acts.<sup>99</sup> The ever resourceful colonists, however, countered Parliament with their own legal stratagem. In Pennsylvania, the legislature enacted a statute mandating that any case involving a violation of the Navigation Acts must be tried according to the rules of common law before a jury.<sup>100</sup> In other colonies, sympathetic judges issued writs of prohibition against proceedings in the vice-admiralty courts,<sup>101</sup> while colonial

97. 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." David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1766*, 16 WM. & MARY Q. 459, 462 (1959) (quoting William Penn to Robert Harley [c. 1701], 4 THE MANUSCRIPTS OF HIS GRACE THE DUKE OF PORTLAND app., pt. IV, at 31 (London, Historical Manuscripts Comm'n, Fifteenth Report 1897)). The *Declaration of Independence* and the *Declaration and Resolves of the First Continental Congress, 1774* both include the grievance that the establishment of the vice-admiralty courts in colonial America deprived the colonists of the right to trial by jury. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 218 (1971).

98. 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. See UBBELOHDE, *supra* note 93, at 20-21. 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 *id.*

99. 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 97, at 468-69.

100. HALL, *supra* note 38, at 184. The statute was disallowed by the English government "because of its contradiction of the apparent intent of the [Navigation] Act of 1696." *Id.* at 185.

101. The writ of prohibition was an order from a common law court to an inferior court to cease the adjudication of a matter on grounds that the inferior court lacked jurisdiction to hear the matter. ROBERTSON, *supra* note 36, at 93 ("The admiralty judges obeyed writs of prohibition . . . because they were orders of a more powerful court."). 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 they exceeded their proper jurisdiction. GRANT GILMORE & CHARLES BLACK, *THE LAW OF ADMIRALTY* ch. 1 (2d ed. 1975). 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 64, at 515-16. 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; thus, writs of prohibition did not properly lie. ROBERTSON, *supra* note 36, at 81. In 1742, Parliament rejected proposed legislation to vest exclusive jurisdiction in the vice-admiralty courts. SMITH, *supra* note 64, at 189. The writs of prohibition were prohibited in the Sugar Act of 1764. See *infra* note 106 and accompanying text.

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 a vice-admiralty court, the jury could circuitously address the seizure controversy when a civil suit was filed against a customs official for false arrest and trespass in seizing a vessel.<sup>102</sup> In a Massachusetts case that must have been particularly galling to the British, a colonial shipowner agreed to settle for 500 pounds rather than risk total forfeiture in the vice-admiralty court.<sup>103</sup> The shipowner subsequently sued in a common law court for damages against the customs official who had seized the vessel.<sup>104</sup> When the jury awarded damages of nearly 600 pounds against the customs officer, the seizure effectively was negated.<sup>105</sup> The power of a civil jury to reach the seizure issue, however obliquely, was not eliminated until the adoption of the Sugar Act in 1764.<sup>106</sup>

The period from the Fraud Act of 1696 to the Sugar Act of 1764 reflected the ongoing conflict between legal theory and actual practice. Throughout the period England continued to expand the jurisdiction of the vice-admiralty courts,<sup>107</sup> and the colonies continued to elude the power of those courts to enforce the Navigation Acts.<sup>108</sup> By 1760, evasion of the Navigation Acts was an accepted practice which

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102. Modern juries can address similar issues in the context of federal officials' conducting searches or seizures in *Bivens*-type suits, see *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that injuries caused by a federal official conducting an unreasonable search are redressable through a civil suit in federal court for money damages), or in suits brought pursuant to 42 U.S.C. § 1983, see *Soldal v. Cook County*, 113 S. Ct. 538 (1992) (involving a civil suit brought under § 1983 seeking redress for an unreasonable seizure of property).

103. UBBELOHDE, *supra* note 93, at 34-35.

104. *Id.*

105. *Id.* On appeal to the Superior Court by the customs official, the judges upheld the validity of judgments issued from the vice-admiralty courts, yet still awarded 500 pounds in damages to the shipowner.

106. 4 Geo. 3, ch. 15 (1764) (Eng.). 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 615 (Alexander Hamilton) (John C. Hamilton ed., Philadelphia, J.B. Lippincott & Co. 1866).

107. 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 ROBERT G. ALBION, *FORESTS AND SEA POWER: THE TIMBER PROBLEM OF THE ROYAL NAVY 1652-1862*, at 231-74 (1926). Until the very eve of the American Revolution, Parliament continued to expand the jurisdiction of the vice-admiralty courts. For example, the Molasses Act of 1733, the Stamp Act of 1765, and the Townshend Revenue Act of 1768 all extended the vice-admiralty courts' authority to interpret and enforce commercial regulations. See UBBELOHDE, *supra* note 93, at 15-16, 76, 208.

108. 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 64, at 178. The colonists could make life quite difficult, socially and financially, for vice-admiralty judges who strictly enforced the Navigation Acts. See, e.g., Lovejoy, *supra* note 97, at 462-63. Most important, the colonists succeeded in having native-born colonists appointed as judges of the vice-admiralty courts. SMITH, *supra* note 64, at 60 n.390. 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 93, at 37.

"had come to be considered as almost legal trade."<sup>109</sup> Matters changed greatly in the 1760s; the history of that period as well as the history of the writs of assistance controversy have been reported elsewhere in great detail.<sup>110</sup>

This brief historical survey has focused on the colonial jury's role in the search-and-seizure controversy, a role that ended with the adoption of the Sugar Act of 1764. The Sugar Act removed the last vestige of the jury's role in 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.<sup>111</sup> Henceforth, there would be few opportunities for juries lawfully to address the search-and-seizure controversy, although militant juries continued to exercise raw nullification power when given any opportunity to express themselves on the issue of seizures. Denied direct access to juries of their peers, the colonists beheld themselves as without significant legal recourse against what they perceived to be arbitrary and unlawful searches by customs officials. The legal battle against such searches was left to those colonial judges who refused to issue writs of assistance,<sup>112</sup> while the extra-legal battle was carried on by the

109. LASSON, *supra* note 24, at 51-52.

110. See SMITH, *supra* note 64; see also LANDYNSKI, *supra* note 24; TAYLOR, *supra* note 22.

111. 4 Geo. 3, chs. 15, 51 (1764) (Eng.). "A lawful warrant, in effect, would compel a sort of directed verdict for the defendant government official in any subsequent lawsuit for damages." Amar, *supra* note 8, at 1178-79. Professor Amar continued:

But note what has happened. A warrant issued by a *judge* or *magistrate*—a permanent government official, on the government payroll—has had the effect of taking a later trespass action away from a *jury* of ordinary Citizens. Because juries could be trusted far more than judges to protect against government overreaching . . . , warrants were generally *disfavored*. Judges and warrants are the heavies, not the heroes, of our story.

*Id.* at 1178-79.

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. By explicitly stating that prosecution could be brought in common law courts or vice-admiralty courts at the election of the prosecutor, the Act also precluded issuance of writs of prohibition against vice-admiralty proceedings. See Lovejoy, *supra* note 97, at 465.

112. The colonial judiciary's reluctance to issue writs of assistance often is 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 to the British constitution. UBBELOHDE, *supra* note 93, at 95. No doubt some colonial judges were sympathetic to the cause of independence and used their power to nullify even legitimate efforts of the Crown. 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 27, at 75.

Although I have emphasized the need to curb a potentially arrogant and insensitive judiciary, we must not lose sight of the occasions when the judiciary has performed admirably.

It took courage for judges to refuse writs of assistance when demanded by the customs officers, since they held their commissions at the will of the Crown and were dependent for their salaries upon the revenues collected by the Customs Commissioners. . . . In the face of such formidable pressure from official

people through such measures as tarring and feathering customs officers, physical recapture of seized vessels,<sup>113</sup> and ultimately by revolution.

If the foregoing picture of the jury conflicts with our conventional view of juries, perhaps the reason is that the present-day jury is only a shadow of its former self. “[T]he judge-created and judge-enforced exclusionary rule has displaced the jury trial for damages as the central enforcement mechanism of the Fourth Amendment—in part because of judge-created doctrines of government officials’ immunity from damages.”<sup>114</sup> As we shall see, a judiciary jealous of its power undermined the political role<sup>115</sup> of the jury in our government.

### B. *The Jury in Post-Revolutionary America*

After the American Revolution, the 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 through the middle of the nineteenth century but, by the end of that century, virtually was eliminated.<sup>116</sup> In some states, the legislature abolished the jury’s license to determine law but in most jurisdictions, the judiciary was responsible for significantly curbing the jury’s prerogatives.<sup>117</sup>

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sources it is surprising that the judiciary from Connecticut to Florida, with one exception, stood firm in opposing the legality of the particular form of writ demanded of them and continued in their judicial obstinacy through six years of nearly constant efforts to force them to yield.

*Id.* at 74.

113. Rescue of seized vessels previously had been “an accidental or occasional affair,” but soon became “the natural and certain consequence of a seizure.” UBBELOHDE, *supra* note 93, at 93 (quoting Governor Bernard of Massachusetts, Report to the British Board of Trade (Aug. 18, 1766)).

114. Amar, *supra* note 8, at 1190-91. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court ruled that police officers who unreasonably and unsuccessfully search without a warrant enjoy a good faith defense in civil suits brought against them under the Fourth Amendment. Yet, this is precisely the result that strict common law liability for warrantless searches did not permit. See *supra* text accompanying note 73.

115. “The jury is, above all, a political [and not a mere judicial] institution . . . .” 1 TOCQUEVILLE, *supra* note 13, at 293. According to Alexander Hamilton, the jury is given its power “for reasons of a political and peculiar nature, for the security of life and liberty.” *Sparf v. United States*, 156 U.S. 51, 175 (1895) (Gray & Shiras, JJ., dissenting) (quoting 7 HAMILTON’S WORKS, *supra* note 61, at 335).

116. See Howe, *supra* note 53, at 582; Note, *supra* note 81, at 170.

117. Only in Maryland has the jury retained significant prerogatives to determine law. Maryland currently is the only jurisdiction to consider the jury’s role in search and seizure cases. In *Hubbard v. State*, 72 A.2d 733, 735 (Md. 1950), the Maryland Court of Appeals 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 to be submitted to the jury for their ultimate determination. Fifteen years later, in *Wilson v. State*, 210 A.2d 824, 828 (Md. 1965), 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 years the Maryland Court of Special Appeals has taken a strong stand against the jury’s determination of the legality of a search.

In *Price v. State*, 254 A.2d 219 (Md. Ct. Spec. App. 1969), the Maryland Court of Special Appeals suggested that the past practice of submitting the question of probable cause to the jury may have accorded the defendant “more than that to which he was entitled.” *Id.* at 226 (citing *Mullaney v. State*, 246 A.2d 291 (Md. Ct. Spec. App. 1968)). That suggestion became the holding in *Cleveland v. State*, 259 A.2d 73 (Md. Ct. Spec. App. 1969), which upheld the trial court’s refusal to instruct the jury that “if the arrest of the defendant was

In the federal system, the practice of permitting the jury to determine law ended with the United States Supreme Court's decision in *Sparf v. United States*.<sup>118</sup>

Ironically, the end of the jury's prerogative to determine law coincided with the early development of Fourth Amendment law. *Sparf* was decided nine years after *Boyd v. United States*,<sup>119</sup> the Supreme Court's first important Fourth Amendment decision. By the time the Court considered a sizeable body of Fourth Amendment cases in the 1920s, *Sparf* was settled precedent. When confronted with the assertion that the jury should determine the legality of a search,<sup>120</sup> the Court eschewed examination of the unique 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.<sup>121</sup>

The *Sparf* decision, however, did not deny history:<sup>122</sup> judges, including Supreme Court Justices sitting on circuit courts, frequently had instructed juries that they were "the judges both of the law and fact in

illegal the articles seized as incident thereto were improperly admitted into evidence and cannot be considered by you." *Id.* at 75. *Cleveland* rested on Maryland Rule 729, which vested the trial judge with exclusive power to determine the admissibility of evidence. *Id.* at 76; Md. R. 729. *Johnson v. State*, 352 A.2d 349, 357 (Md. Ct. Spec. App. 1976), held that all forms of searches are governed by Rule 729 and that the judge's ruling on the lawfulness of the search is final.

*Cleveland* and *Johnson* are disappointing because they place great reliance on Maryland Rule 729 and do not examine history or the general benefits and drawbacks of allowing the jury to play a role in search and seizure law. A jurisprudential justification for the Maryland rule finally was offered in *Ehrlich v. State*, 403 A.2d 371, 377 (Md. Ct. Spec. App. 1979). See *infra* text accompanying note 137.

118. 156 U.S. at 51.

119. 116 U.S. 616 (1885).

120. *Steele v. United States*, 267 U.S. 505, 511 (1925) (holding that "the question of the competency of the evidence . . . by reason of the legality or otherwise of its seizure was a question of fact and law for the court and not for the jury").

121. *Id.* at 511 (citing *Gila Valley, Globe & N. Ry. v. Hall*, 232 U.S. 94, 103 (1914)).

The exclusionary rule was adopted in the federal system in *Weeks v. United States*, 232 U.S. 383 (1914). The suppression of evidence on constitutional grounds must be distinguished from the general admissibility of relevant evidence. Chief Justice Marshall explained this distinction:

"No person will contend that, in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute this tribunal; for they do not agree. The jury cannot constitute it; for the question is whether they shall hear the testimony or not. Who, then, but the court can constitute it? It is of necessity the peculiar province of the court to judge of the admissibility of testimony."

*Sparf*, 156 U.S. at 165 (Gray & Shiras, JJ., dissenting) (quoting *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807) (No. 14,693)).

122. The collection and analysis of this history is the focus of most of the dissenting opinion in *Sparf*. See *Sparf*, 156 U.S. at 110 (Gray & Shiras, JJ., dissenting). The *Sparf* majority relied "more on principle than on precedent." Howe, *supra* note 53, at 589.

a criminal case, and are not bound by the opinion of the court.”<sup>123</sup> *Sparf* dismissed much of this history as based on state constitutional provisions, the uniqueness of seditious libel laws,<sup>124</sup> or the trial judge’s failure to distinguish between the jury’s power or prerogative to determine law.<sup>125</sup> Squarely facing the issue of jury prerogative, *Sparf* followed the scripture of *Marbury v. Madison*<sup>126</sup> and placed the determination of law within the exclusive dominion of the judiciary. It is instructive to examine *Sparf*’s holding and the role the judiciary envisioned for itself.

The *Sparf* majority partially relied upon a distinction between questions of law and fact, a distinction of limited utility.<sup>127</sup> 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 analyses.<sup>128</sup> The utility of the law/fact distinction is especially doubtful in the Fourth Amendment context where the reasonableness of a search is often referred to as a factual question.<sup>129</sup> Justice Scalia has confessed his

inclination—once we have taken the law as far as it can go, once there is no general principle that will make this particular search valid or invalid, once there is nothing left to be done but determine from the totality of the circumstances whether this search-and-seizure was “reasonable”—to leave that *essentially factual determination* to the lower courts.<sup>130</sup>

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123. *Sparf*, 156 U.S. at 165 (Gray & Shiras, JJ., dissenting) (quoting *United States v. Wilson*, 28 F. Cas. 699, 708 (C.C.E.D. Pa. 1830) (No. 16,730)). “But if you are prepared to say that the law is different from what you have heard from [the judges], you are in the exercise of a constitutional right to do so.” *Id.* (quoting *Wilson*, 28 F. Cas. at 708).

124. “[T]he jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases.” Seditious Law of 1798, ch. 74, § 3, 1 Stat. 596, 596-97 (expired by own terms on Mar. 3, 1801).

125. Justice Chase stated, “I have uniformly delivered the opinion ‘that the petit jury have a right to decide the law as well as the fact in criminal cases;’ but it never entered into my mind that they, therefore, had a right to determine the constitutionality of any statute of the United States.” *Sparf*, 156 U.S. at 71 (quoting *United States v. Callender*, 25 F. Cas. 239, 258 (C.C.D. Va. 1800) (No. 14,709) (Chase, J., for the Court)).

126. 5 U.S. (1 Cranch) 137 (1803).

127. *Sparf*, 156 U.S. at 101-03.

128. The “fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.” *Miller v. Fenton*, 474 U.S. 104, 114 (1985). In discussing the judicial ability to “make law,” Justice Scalia noted that

when . . . legal rules have been exhausted and have yielded no answer, we call what remains to be decided a question of fact—which means not only that it is meant for the jury rather than the judge, but also that there is no single “right” answer. It could go either way.

Scalia, *supra* note 19, at 1181. See generally Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942) (distinguishing questions of fact from questions of law).

129. *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (referring to reasonableness as turning upon the “factual and practical considerations of everyday life”).

130. Scalia, *supra* note 19, at 1186 (emphasis added).

The circuits disagree as to whether a seizure of the person is a factual or a legal question. Several circuits hold that the test for a seizure of a person is “an essentially legal assessment of whether the particular circumstances would warrant the belief that a person has been detained”; thus the lower court’s finding as to whether a seizure has occurred is subject to *de novo* review. *United States v. Montilla*, 928 F.2d 583, 588 (2d Cir. 1991); accord *United States v. Maragh*, 894 F.2d 415, 417 (D.C. Cir.), cert. denied, 498 U.S. 880 (1990); *United*

Whether the reasonableness of a search is a constitutional fact, or a mixed question of law and fact,<sup>131</sup> is irrelevant, because the Court has permitted juries to resolve other such constitutionally significant questions.<sup>132</sup>

The law/fact distinction is also misleading because criminal trials normally require resolution of three varieties of questions: questions of law, of fact, and of application of a legal standard to the facts.<sup>133</sup> The latter issue often is determined by the jury because it is a rare criminal case where the jury is not called upon to resolve some aspect of reasonableness as manifested in legal concepts like insanity, adequate provocation, self-defense, criminal negligence, or some more general aspect of the reasonably prudent person concept.<sup>134</sup> The jury, when it determines what a prudent person would have done under the facts of the case, gives particular meaning to a general and often ambiguous legal standard. In short, the law frequently is stated as a

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States v. Mines, 883 F.2d 801, 803 (9th Cir.), *cert. denied*, 493 U.S. 997 (1989). The Fourth, Sixth, Seventh, and Eighth Circuits, however, appear to apply a clearly erroneous standard of review to the lower court's factual finding regarding a seizure. See United States v. McKines, 933 F.2d 1412 (8th Cir.), *cert. denied*, 112 S. Ct. 593 (1991); United States v. Rose, 889 F.2d 1490, 1494 (6th Cir. 1989); United States v. Gray, 883 F.2d 320, 322 (4th Cir. 1989); United States v. Teslim, 869 F.2d 316, 321 (7th Cir. 1989).

131. Steele v. United States, 267 U.S. 505, 511 (1925) (holding that the admissibility of evidence questionably seized was an issue of law and fact for the court, not the jury). See generally David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541 (1991) (discussing the importance of empirical evidence and fact in constitutional interpretation); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (analyzing the constitutional fact doctrine, as distinguished from judicial discretion on issues of constitutional law, and discussing the roles of various actors in the legal system with respect to judging questions of constitutional fact).

132. The most obvious example is the jury's determination of community standards in obscenity cases. See Scalia, *supra* note 19, at 1182 (stating that "we generally let juries decide whether certain expression so offends community standards that it is not [protected] speech but obscenity"); see also FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 150-51 (1976) (stating that "[d]eterminations of prurient interest and patent offensiveness, and also, therefore, of contemporary community standards, are such as to indicate that the major determination should be made by the jury, except in the more extreme cases" (footnotes omitted)). The jury plays a less well-defined, but still significant, role in the determination of whether the death penalty is cruel and unusual punishment. See Richard D. Schwartz, *The Supreme Court and Capital Punishment: A Quest for a Balance Between Legal and Societal Morality*, 1 LAW & POL'Y Q. 2857 (1979) (discussing courts' tendency in capital punishment cases to invoke participation of the public through juries, which reflect public opinion and formulate results based on societal mores).

133. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 501 (1942).

134. See, e.g., United States v. Eichberg, 439 F.2d 620, 624-25 (D.C. Cir. 1971) (per curiam) (Bazelon, J., concurring) (arguing that the jury is uniquely qualified to determine questions of responsibility in the light of a community standard). See generally Fleming James, Jr. & David K. Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 698 (1952) (claiming that although the requisite standard of conduct may be unclear, the jury still may determine that "the conduct of the party falls short of any standard which they would agree upon as reasonable").



general rule and “[t]he jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case.”<sup>135</sup>

Most important, the Court’s somewhat illusory distinction between law and fact in *Sparf* is relevant only upon acceptance of the premise which underlies claims of judicial preeminence: that it is “the province and duty of the judicial department to say what the law is.”<sup>136</sup> In rejecting a role for juries in search-and-seizure cases, the noted Fourth Amendment scholar Judge Charles E. Moylan, Jr. 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.”<sup>137</sup> Judge Moylan explained that “[t]he jury is assigned the sole mission of determining ‘Whodunnit?’”<sup>138</sup> while the Fourth Amendment’s exclusionary rule serves the extrinsic purpose of deterring police misconduct, not enhancing the fact-finding process;<sup>139</sup> thus, “[i]t is not the function of the jury to ‘police the police’ by denying itself probative evidence.”<sup>140</sup> This analysis does not square with history<sup>141</sup> or with the structural nature of the Bill of Rights, a structure that respects the jury’s role in policing the police and all other government agents.

In *The Bill of Rights as a Constitution*, Professor Akhil Amar explained that protection of the people against self-interested government agents was paramount in the minds of those who framed the Bill of Rights:

To borrow from the language of economics, the Bill of Rights was centrally concerned with controlling the “agency costs” created by the specialization of labor inherent in a republican government. In such a government the people (the “principals”) delegate power to run day-to-day affairs to a small set of specialized government officials (the “agents”), who may try to rule in their own self-interest, contrary to the interests and expressed wishes of the people. To minimize such self-dealing (“agency costs”), the Bill of Rights protected the ability of local governments to monitor and deter federal abuse, ensured that ordinary citizens would participate in the federal administration of justice through various jury-trial provisions, and preserved the transcendent sovereign right of a majority of the people themselves to alter or abolish government and thereby pronounce the last word on constitutional questions.<sup>142</sup>

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135. John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE Soc’y 166, 170 (1929). The Court in *Sparf* conceded that when rendering a general verdict, the jury “of necessity, decided every question before them which involved a *joint consideration* of law and fact,” but this did not mean “that the jury could ignore the directions of the court, and take the law into their own hands.” *Sparf v. United States*, 156 U.S. 51, 69 (1895).

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

137. *Ehrlich v. State*, 403 A.2d 371, 376 (Md. Ct. Spec. App. 1979); see *supra* note 117. See generally Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1362 (1985) (arguing that public acceptance of a verdict requires a belief that the verdict is a statement about what happened).

138. *Ehrlich*, 403 A.2d at 377.

139. *Id.* at 376-77.

140. *Id.* at 377.

141. See *supra* part I.A.

142. Amar, *supra* note 8, at 1133.

The Framers of our Constitution and Bill of Rights did not perceive the sole mission of the jury as resolution of "Whodunnit."<sup>143</sup> The prevailing view was that the jury was a mainstay of liberty and an integral part of democratic government because the common man in the jury box, no less than the citizen in the voting booth, was central to a democratic theory that asserted the sovereignty of the people through self-government.<sup>144</sup> Alexis de Tocqueville suggested that "[t]he jury system as it is understood in America appear[ed] to [him] to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority."<sup>145</sup> Although ordinary citizens could not harbor any realistic expectations about serving in the small House of Representatives, or the even more aristocratic Senate, ordinary citizens could participate in the application of national law through their jury service.<sup>146</sup> The jury was not simply a popular body but a local one as well,<sup>147</sup> thus provincial jurors could "interpose"

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143. 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 JOHN ADAMS, THE WORKS OF JOHN ADAMS 253 (Charles C. Little & James Brown eds., Boston, Little Brown & Co. 1850).

144. The jury has grown "so precious to the nation, as the guardian of liberty and life, against the power of the court, the vindictive persecution of the prosecutor, and the oppression of the government." *Sparf v. United States*, 156 U.S. 51, 149 (1895) (Gray & Shiras, JJ., dissenting) (quoting *People v. Crosswell*, 3 Johns. Cas. 336, 375-76 (1804) (Kent, J.)).

145. 1 TOCQUEVILLE, *supra* note 13, at 294.

146. Spanning both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching. Jurors would be drawn from the community; like the militia they were ordinary Citizens, not permanent government officials on the government payroll. Just as the militia could check a paid professional standing army, so too the jury could thwart overreaching by powerful and ambitious government officials.

Amar, *supra* note 8, at 1183.

147. The Sixth Amendment explicitly guarantees a jury "of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. See generally Jan Martenson, The United Nations and Human Rights and the Contribution of the American Bill of Rights, Keynote Address at the Conference for the Federal Judiciary in Honor of the Bicentennial of the Bill of Rights (Oct. 22, 1991), in 1 WM. & MARY BILL RTS. J. 105 (1992) (discussing the Bill of Rights' influence on international human rights law and arguing that the protection of individual and public liberties, including human rights, begins at the local level).

"Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere."

*Id.* at 112-13 (quoting Eleanor Roosevelt).

themselves against central tyranny by exercising their power to interpret law and return general verdicts.<sup>148</sup>

Although seventeenth- and eighteenth-century juries were envisioned as institutions within which rational deliberation determines law,<sup>149</sup> the jury's power to interpret law, particularly constitutional law, proved to be unnerving to a judiciary accustomed to shepherding such power unto itself. An incredulous Justice Baldwin admonished a trial jury: "If juries once exercise this power, we are without a Constitution or laws, one jury has the same power as another, you cannot bind those who may take your places, what you declare constitutional to-day another jury may declare unconstitutional to-morrow."<sup>150</sup> Substitute the word judge for jury in the above quote, and Justice Baldwin provides a succinct critique of judicial review.

With the establishment of judicial review in *Marbury v. Madison*<sup>151</sup> and the denigration of the jury in *Sparf*,<sup>152</sup> the federal judiciary positioned itself as the only branch of government that can dictate the terms by which it can be regulated.<sup>153</sup> Contemporary juries have been reduced to employing a form of guerrilla warfare—nullification power—as their only means of maintaining some direct control over the judiciary's interpretation of law. The American jury has clung to nullification power as the most dramatic manner of rejecting the limited role of determining "Whodunnit." Acquittal rates for those prosecuted under the Fugitive Slave Act<sup>154</sup> and Prohibition Laws<sup>155</sup>

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148. The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature . . . have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as the centinels and guardians of each other.

Letters from the Federal Farmer (IV), in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 17, at 245, 249-50.

149. The Framers did not view "the people" as merely a collection of private interests. The people conceived of themselves as acting to advance the public interest, and they came together to discuss, to deliberate upon, and ultimately to decide on the course their society would take. See Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 509 (1979) ("[Values] are public as well as private in origin, originating in political engagement and dialogue as well as in private experience that supposedly preexists political activity and enters into it as a given.").

150. *Sparf v. United States*, 156 U.S. 51, 73 (1895) (quoting *United States v. Shive*, 27 F. Cas. 1065, 1067 (C.C.E.D. Pa. 1832) (No. 16,278)).

151. 5 U.S. (1 Cranch) 137 (1803).

152. 156 U.S. 51 (1895).

153. "There is no political institution whose own coercive authority constitutional theorists can call upon to discipline judges who abuse their power." Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1505 (1985); see also Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 391 (1985) ("The fact of the matter is that there are no really effective means by which the people or the political branches can respond to constitutional policymaking of which they disapprove.").

154. See *United States v. Morris*, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815) (judge barring defense counsel from arguing to the jury that the Fugitive Slave Act was unconstitutional); LEON FRIEDMAN, *THE WISE MINORITY* 28-50 (1971) (discussing the judiciary's effort to control juries); see also ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 215 (1975) (recounting a jury acquittal of defendants who shot and killed a slave-catcher).

155. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 291 (1966) (arguing that "the Prohibition era provided the most intense example of jury revolt in recent history").

demonstrate the desire of jurors to expand their reach beyond factual questions and to address the law itself. Even absent dramatic political or moral issues, juries sometimes acquit the defendant "in protest against a police or prosecution practice that [the jury] considers improper."<sup>156</sup>

Our legal system's continuing use of general verdicts indicates that the judiciary itself lacks total commitment to the premise that the jury exists solely to determine "Whodunnit." If the jury truly serves only to resolve factual disputes, the jury could be instructed to return special findings or the trial judge could direct a verdict of guilty whenever reasonable jurors could not disagree on the facts. Yet the Supreme Court recently invoked *Sparf* for the proposition that "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence."<sup>157</sup> The judiciary's acceptance of general verdicts evidences acknowledgment, grudging or otherwise, of a function for the jury beyond resolution of factual disputes.

Mere forbearance of general verdicts and nullification power, however, falls short of recognizing that "we the people," speaking through juries, play a legitimate role in protecting ourselves against unreasonable searches and seizures.<sup>158</sup> Jury determination of law is a unique

See generally NATIONAL COMM'N ON LAW OBSERVANCE & ENFORCEMENT, ENFORCEMENT OF THE PROHIBITION LAWS, S. DOC. NO. 307, 71st Cong., 3d Sess. (1931).

156. KALVEN & ZEISEL, *supra* note 155, at 319 (quoting *Sparf v. United States*, 156 U.S. 51, 105-06 (1895)).

157. *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2080 (1993); see *United States v. Garaway*, 425 F.2d 185 (9th Cir. 1970) (holding that a directed verdict of guilt is improper even where no issues of fact are in dispute).

158. Some have argued that forbearance from nullification legitimizes the legality of such power: "if a power was vested in any person, it was surely meant to be exercised," *Sparf*, 156 U.S. at 136 (Gray & Shiras, JJ., dissenting) (quoting Mr. Fox's comments upon moving the introduction of Fox's Libel Act in the House of Commons), "the law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it," *id.* at 148 (quoting *People v. Crosswell*, 3 Johns. Cas. 336, 368 (1804)),

but a legal duty [to follow the judge's instructions in matters of law] which cannot in any way, directly or indirectly, be enforced, and a legal power [of nullification], of which there can never, under any circumstances, be a rightful and lawful exercise, are anomalies—"the test of every legal power" "being its capacity to produce a definite effect, liable neither to punishment nor control"—"to censure nor review,"

*id.* at 173 (citations omitted).

The validity of this reasoning rests upon the tortuous connection between nullification power and general verdicts. There is no remedy against the exercise of nullification power so long as courts utilize general verdicts. General verdicts necessarily blend law and fact and it is impossible to prove that a jury acquitted on the law rather than on the facts. Law and fact can be separated, and nullification power eliminated, only if the courts require the jury to return special findings of fact. Thus, if a *proper* acquittal must rest on the jury's resolution of factual issues, nothing precludes the judge from ordering the jury to return special findings of fact. If, however, juries have a *right* to acquit for any reason—fact or

safeguard against the arbitrary exercise of judicial power. According to Justice Curtis, however, the safeguard is superfluous:

[A]s long as judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice.<sup>159</sup>

As an aspiration, Justice Curtis's view is laudable; as a statement of reality, it is perhaps naive. It certainly is not a view universally shared by our Founding Fathers. In a letter to James Madison, Thomas Jefferson cautioned against judicial power:

But we all know that permanent judges acquire an *Esprit de corps*; that being known, they are liable to be tempted by bribery; that they are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative power . . . ; It is in the power, therefore of the juries, if they think permanent judges are under any bias whatever, in any cause, to take on themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges . . . .<sup>160</sup>

Jefferson's clairvoyance about the partisanship of judges and his faith in juries proved accurate when he encountered Tapping Reeve, a Federalist judge in Connecticut, who accused Jefferson of corrupting and subverting the liberties of the people. Judge Reeve "so harangued a grand jury in a sedition prosecution against Mr. Jefferson that the grand jury returned an indictment against the judge."<sup>161</sup>

In contrast to Justice Curtis's quixotic view of the judiciary, an atypical concession of judicial fallibility appeared in *Duncan v. Louisiana*,<sup>162</sup> when the Court lauded the Framers' regard for the jury as "an inestimable safeguard against the compliant, biased or eccentric judge."<sup>163</sup> Perhaps *Duncan* is a limited apology for *Sparf* and *Marbury v. Madison*, because the idea of judicial review does not mandate that only judges consider constitutionality when discharging their unique function.

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law—then it can be argued that our system's continued use of general verdicts necessarily condones jury determination of law.

By condemning jury nullification as extra-legal but insisting on general verdicts, our legal system has not faced up to a definitive resolution of the issue. We have adopted a compromise in which everyone knows that nullification power exists, but no one, particularly trial counsel, may talk about it to the jury. See *People v. Howard*, 146 N.W. 315 (Mich. 1914) (counsel's argument asking the jury to disregard the judge's instructions was outrageous and unprofessional conduct meriting immediate discipline); *In re Schofield*, 66 A.2d 675 (Pa. 1949) (duty of trial judge to stop counsel from arguing to jury that they may nullify or ignore the judge's instructions on the law). At least the current compromise improves on the late-nineteenth-century Massachusetts practice, "where counsel are admitted to have the right to argue the law to the jury, [but] it has yet been held that the jury have no right to decide it." *Sparf*, 156 U.S. at 168 (Gray & Shiras, JJ., dissenting).

159. *Sparf*, 156 U.S. at 107. "[C]onstitutional theory constrains judges by providing a set of public criteria by which theorists, interested observers, and the judges themselves can evaluate what the judges do." Tushnet, *supra* note 153, at 1505.

160. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 3 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 23, at 82.

161. Carrington, *supra* note 55, at 743 n.168.

162. 391 U.S. 145 (1968).

163. *Id.* at 156.

Judges take oaths to uphold the Constitution, as *Marbury* emphasized, but so do presidents and legislators.<sup>164</sup> If either the House or the Senate deems a proposed penal code unconstitutional, it will not become law.<sup>165</sup> If "the President deems a bill unconstitutional, he may veto [the bill] or pardon" convicted citizens.<sup>166</sup> If "judges deem the law unconstitutional, they may order the defendant released and make their decision stick through the Great Writ of habeas corpus."<sup>167</sup> "By symmetric logic, juries too should be allowed to use their power to issue a general verdict for the defendant to achieve the same result."<sup>168</sup> Once again, we may put aside conventional wisdom and look at history from Professor Amar's perspective:

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164. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.").

In *Sparf*, the Court explained:

"It was evidently the intention of the Constitution that all persons engaged in making, expounding, and executing the laws, not only under the authority of the United States but of the several States, should be bound by oath or affirmation to support the Constitution of the United States. But no such oath or affirmation is required of jurors . . . ."

*Sparf*, 156 U.S. at 75 (quoting *United States v. Morris*, 26 F. Cas. 1323, 1333 (C.C.D. Mass. 1851) (No. 15,815)).

Assuming that *Sparf*'s statement is factually accurate, the absence of juror oaths carries limited weight in assessing the jury's prerogatives and responsibilities. Justice Gray, dissenting in *Sparf*, noted:

The duty of the jury, indeed, like any other duty imposed upon any officer or private person by the law of his country, must be governed by the law, and not by wilfulness or caprice. The jury must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But if they are satisfied on their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide by the law as they know or believe it to be.

*Id.* at 172 (Gray & Shiras, JJ., dissenting).

Justice Blackmun suggested that state legislators' oaths to support the Constitution justify a presumption of constitutionality, which in turn justifies a police officer's "good faith" reliance on a statute which is in fact unconstitutional. *Illinois v. Krull*, 480 U.S. 340, 350-51 (1987).

165. Amar, *supra* note 8, at 1194. The *Sparf* majority invoked Justice Chase's warning that if juries are empowered to interpret the Constitution, "petit jurors will be superior to the national legislature, and its laws will be subject to their control." *Sparf*, 156 U.S. at 71 (quoting *United States v. Callender*, 25 F. Cas. 239, 258 (C.C.D. Va. 1800) (No. 14,709)). The question remains whether juries must be seen as *inferior* to the legislature, or whether each entity properly resolves constitutionality within its own sphere of power. See *supra* note 164 and accompanying text.

166. Amar, *supra* note 8, at 1194.

167. *Id.*

168. *Id.* But see *Sparf*, 156 U.S. at 70 (quoting *Callender*, 25 F. Cas. at 258). In *Callender*, Justice Chase refused to accept trial counsel's argument that "[s]ince, then, the jury have a right to consider the law, and since the Constitution is law, the conclusion is certainly syllogistic that the jury have a right to consider the Constitution." 25 F. Cas. at 258. Justice Chase's refusal to allow counsel's argument was cited in his articles of impeachment. See REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE, *supra* note 47, app. at 4.

Even if juries generally lacked competence to adjudicate intricate and technical “lawyer’s law,” the Constitution was not supposed to be a prolix code. It had been made, and could be unmade at will, by We the People of the United States—Citizens acting in special single-issue assemblies (ratifying conventions), asked to listen, deliberate, and then vote up or down. How, it might be asked, were juries different from conventions in this regard? If ordinary Citizens were competent to make constitutional judgments when signing petitions or assembling in conventions, why not in juries too?<sup>169</sup>

The concept of the jury as a check upon government power is more consistent with democratic theory and the intent of the Framers than is the view that the jury exists merely to determine “Whodunnit.”<sup>170</sup> Under current Supreme Court doctrine, society has no direct say in how to define Fourth Amendment rights or how to remedy Fourth Amendment violations. “[H]aving judges decide what police conduct violates the Fourth Amendment reflects a distrust of society’s ability or willingness to apply the Fourth Amendment properly.”<sup>171</sup>

Although jury determination of search-and-seizure law is consistent with history and with democratic theory establishing checks on government power, such a role for the jury becomes troublesome when it conflicts with the individual defendant’s constitutional rights. Underlying the *Sparf* decision is the fear that jury determination of law would not be a one-way street.<sup>172</sup> If a jury could overrule the judge to

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169. Amar, *supra* note 8, at 1195; *see also* Thomas & Pollack, *supra* note 4, at 185 (arguing that juries are capable of answering most Fourth Amendment questions without detailed legal instructions). During the early nineteenth century, the demand that juries interpret law was stated with “an extraordinarily insistent vitality springing from a democratic conviction that the people themselves were competent to interpret their laws.” Howe, *supra* note 53, at 582; *see also* Mark V. Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 762 (1992) (“[C]onstitutional theory does not work, and . . . absent theory, judgment is all that remains.”). A reasonable knowledge of the principles and rules of law is important to citizens when called to obey as individuals, when called to answer as defendants, and when called to judge as jurors.

170. “[I]n 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 government 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 giving a jury a veto upon the laws, then [sic] 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.”

Schefflin, *supra* note 52, at 184 (quoting LYSANDER SPOONER, TRIAL BY JURY 11-12 (1852)).

171. Thomas & Pollack, *supra* note 4, at 149. Within the context of juries’ determinations of the voluntariness of confessions, Justice Black cautioned that “the Constitution itself long ago made the decision that juries *are* to be trusted.” Jackson v. Denno, 378 U.S. 368, 405 (1964) (Black, J., dissenting in part and concurring in part).

172. Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well as the facts—if the function of

determine law adversely to the government, another jury might overrule the judge and determine law adversely to the defendant.<sup>173</sup> A jury that sides with the defendant against the government may serve as a safeguard against oppressive prosecutions, but a jury is more likely to side with the prosecution when the community is antagonistic to the defendant or his cause.<sup>174</sup> A defendant facing a hostile community must look to the judge for protection against the jury, and the judiciary's ability<sup>175</sup> to curb jury prerogatives is a vital safeguard against arbitrary jury power.<sup>176</sup> Thus, although permitting the jury to determine law might be viewed as an acceptable device for checking government power in a conflict between the judiciary and the people as represented by the jury, such a scheme may become unacceptable when the rights of the individual defendant are considered.<sup>177</sup>

Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will. Their most significant roles, in our system,

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the court be only advisory as to the law—why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law.

*Sparf*, 156 U.S. at 101.

173. *Id.*

174. See generally Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386 (1954) (arguing that the jury, although a "popular symbol of democracy, . . . is in one sense the antithesis of democratic government" as its ability to perform legal tasks is limited and guided by general emotional reactions).

175. The judiciary sometimes performs no better than the jury in times of panic or emergency. See, e.g., Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (claiming that in its decisions in the Japanese-American internment cases, the Supreme Court, because of its conflicting loyalties and the political climate, exercised unnecessary judicial restraint and threatened American citizens' basic civil liberties).

176. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 60-70 (1980). See generally RONALD DWORIN, TAKING RIGHTS SERIOUSLY (1977), and ROBERT 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 relevant. See *supra* note 117.

Prior to its amendment in 1950, the Maryland Constitution's recognition of the jury as the final judge 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, *Trial by Jury—A Two Horse Team or One Horse Teams?*, 42 MD. S.B.A. 72, 81 (1937). In 1950, article XV, section 5 of the Maryland Constitution was amended to read as follows: "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.*" MD. CONST. art. XV, § 5 (emphasis added). The Maryland experience demonstrates the importance of the judiciary as a safeguard against irresponsible juries.

177. James Madison suggested that

"[i]n our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents."

Marcus, *supra* note 9, at 118 (quoting Madison).



are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.<sup>178</sup>

Sixty years prior to *Sparf*, Justice Story insisted that 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.”<sup>179</sup> Of course this statement begs the question, for it presupposes that the judge, not the jury, decides what is the law of the land. The question of judicial preeminence in interpreting law cannot be resolved merely by invoking the maxim that we are a government of laws, not a government of men.<sup>180</sup> “Judges are men, and their decisions upon complex facts must vary as those of 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.”<sup>181</sup> If juries constitute the rule of men because they decide cases on the basis of “random value judgments,”<sup>182</sup> then the judiciary must lay claim to a superior basis of decision.

There are those who look to the judiciary for “the right answer”;<sup>183</sup> an answer which calls for no debatable evaluation of the concrete interests appearing in a particular case. But if there is an objectively correct constitutional interpretation, then the identity of the decisionmaker searching for the answer makes little difference. Except for fools and knaves, all reasonable decisionmakers (judges or jurors) can be guided, pushed or prodded toward the demonstrably correct answer. The concept of an objectively correct answer leaves little for any capable judge or jury to do except apply the correct constitutional standard to the case, while claiming absolution from responsibility for the fates of individual litigants— because “The Constitution made me do it!” The identity of the decisionmaker becomes crucial, however, if no objectively correct constitutional interpretation exists but instead only answers chosen by political bodies within broad textual constraints. If constitutional interpretation is a matter of political choice

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178. Scalia, *supra* note 19, at 1180.

179. *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545).

180. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 46-53 (1983) (arguing that what you or I say is “The Law” is on the same normative plane as what a majority of the Supreme Court would say is “The Law”).

181. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 180 (1950) (quoting an uncited New Hampshire decision). See generally KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 17 (1969) (arguing that “[e]very system of administration of justice has always had a large measure of discretionary power”); Lon L. Fuller, *Reason & Fiat in Case Law*, 59 HARV. L. REV. 376 (1946) (arguing that judges draw their opinions not only from personal predilection and judicial fiat but from the inherent limitations of their positions and the need to ensure that their decisions are “right”).

182. See Earl V. Brown, *Commentary*, 10 VA. J. INT’L L. 108, 111 (1969) (arguing that when juries make decisions based on their own beliefs, they are making a decision based on mankind’s rules, not the law).

183. See generally Gary C. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1378-92 (1979) (discussing the “right answer” thesis).

among equal or nearly equal alternative interpretations, then the question is who to empower to make such choices. The *Sparf* Court claimed power for the judiciary because of its ability to determine law according to *settled, fixed, legal principles*.<sup>184</sup> Principled consistency in determining law is a means of avoiding the randomness of juries, which may treat similarly situated defendants differently;<sup>185</sup> moreover, sometimes, particularly in the case of the Fourth Amendment, "it is more important that the applicable rule of law be settled rather than that it be settled right."<sup>186</sup>

Stripped of superficial references to the law/fact distinction, or to law as the conclusion in a formal syllogism,<sup>187</sup> *Sparf* was but a variation on the ageless conflict between Law and Equity; between codifiers of the law and common law judges; between firm rules and flexible standards. Seen in this light, *Sparf* posed a fundamental dilemma as to the structural nature of the decisionmaking process in a democratic nation's tribunals. Which political entity, judge or jury, wields the power to make imperfect decisions which are nonetheless binding? Allocating power to the jury enhances our system's checks on judicial power but sacrifices uniformity and consistency in the law by encouraging the jury's uneven and unequal administration of justice. On the other hand, sanctioning "the orderly supervision of public affairs by judges"<sup>188</sup> better achieves uniformity, but at the cost of ensconcing a

184. *Sparf v. United States*, 156 U.S. 51, 74 (1895).

185. The *Sparf* opinion concludes with a quote from Justice Curtis: "The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times, or the opinions of men." *Id.* at 107 (quoting *United States v. Morris*, 26 F. Cas. 1323, 1336 (C.C.D. Mass. 1851) (No. 15,815)).

186. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled by Helvering v. Bankline Oil Co.*, 303 U.S. 362 (1938). Stability of Fourth Amendment law provides guidance for police officers in the field; thus the "first principle" of Fourth Amendment interpretation is that the constitutional standard must be "workable for application by rank-and-file, trained police officers." *Illinois v. Andreas*, 463 U.S. 765, 772 (1983). Justice Scalia explained that he objected to the totality-of-the-circumstances test in *Michigan v. Chesternut*, 486 U.S. 567 (1988), because "I thought that the law could properly be made even more precise. I joined Justice Kennedy's concurrence, which said that police conduct cannot constitute a 'seizure' until (as that word connotes) it has had a restraining effect." Scalia, *supra* note 19, at 1184. Justice Scalia's approach became the Court's holding in *California v. Hodari D.*, 111 S. Ct. 1547 (1991).

187. See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 439-53 (1930) (maintaining that the formalist method of syllogistic reasoning is necessarily indeterminate not only because the judge could choose among an almost infinite set of principles as initial premises, but because there is no inevitable method of deduction even from agreed principles).

188. Howe, *supra* note 53, at 615. See generally MAX WEBER, *LAW IN ECONOMY AND SOCIETY* (1954) (suggesting that the judiciary and other personnel associated with the courts tend to develop a subculture of their own, with legal norms derived more from the need for predictability and administrative convenience than from concern for equity).

It is difficult if not impossible to distinguish between rules imposed by the Court to facilitate efficient administration of law and rules derived from the Constitution. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting) (noting difference between "constitutional—as opposed to purely judicial—limits on governmental action"); see

judiciary beyond the immediate control of the people. How is the balance to be struck between competing goals of similar, if not equal, value?

In Part III of this Article, I discuss a proposed structural balance for Fourth Amendment decisionmaking. But first it is necessary to consider whether current Fourth Amendment jurisprudence has fulfilled *Sparf*'s pledge that the judiciary will deliver consistency and uniformity by determining law according to settled, fixed, legal principles.

## II. *The Court's Fourth Amendment Jurisprudence*

"[A] jury is expected to be governed by law, and the law it should receive from the court."<sup>189</sup>

" '[T]he 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.' "<sup>190</sup>

Because this Article focuses on a role for the jury in determining reasonable searches and seizures, a lengthy chronicle of the judiciary's development of Fourth Amendment law is unnecessary. We need examine only the basic methodology the courts utilize when they interpret the amendment and whether use of that methodology is within the judiciary's exclusive dominion.

Historically, the major issues of Fourth Amendment litigation fell into four discrete categories: (1) the *scope* of the amendment—the circumstances in which the protections of the amendment come into play as opposed to situations where the amendment is inapplicable;<sup>191</sup> (2) the *standards* of the amendment—determination of what factors make a search constitutionally reasonable or unreasonable;<sup>192</sup> (3) *standing* to raise Fourth Amendment questions—identification of who is entitled to invoke the protections of the amendment;<sup>193</sup> and (4) the

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also Letter from Thomas Jefferson to James Madison, *supra* note 160 ("But we all know that permanent judges acquire an *Esprit de corps*, that being known they are liable to be tempted by bribery, that they are misled by favor, by relationship, by a spirit of party, by a devotion to the Executive or Legislative.").

189. *Sparf*, 156 U.S. at 63 (quoting the trial court's instruction to the jury).

190. Howe, *supra* note 53, at 582 (quoting FORD, HISTORY OF ILLINOIS 84 (1854) (quoting the foreman of a nineteenth-century jury)).

191. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967) (holding that the Fourth Amendment protects people rather than places). See generally Charles E. Moylan, Jr., *The Fourth Amendment Inapplicable vs. the Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. ILL. U. L.J. 75 (stating that a distinction must be made between the Fourth Amendment being applicable and being satisfied. Applicability of the amendment rests on four broad factors of coverage relating to the place searched, the trespassing searcher, the victim of the search, and the presence of waiver of protection.).

192. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 212-14 (1979) (finding the balancing test to be a narrowly limited exception to the principle that seizures are reasonable only if supported by probable cause). See generally Ronald J. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763 (discussing the traditional probable cause doctrine and arguing that "its premises are ultimately subjectively derived").

193. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 133-40 (1978) (stating that only parties whose Fourth Amendment rights have been violated may benefit from its protections). See generally William A. Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing To Challenge Searches and Seizures*, 40 MO. L. REV. 1, 2 (1975) (discussing the standing requirements for assertion of Fourth Amendment violations and proposing that "standing should

remedy for Fourth Amendment violations—determination of when the exclusionary rule applies.<sup>194</sup> Since the days of the Warren Court, and particularly the seminal decision in *Katz v. United States*,<sup>195</sup> the distinctive nature of those four categories has been in doubt.

### A. *The Scope of the Fourth Amendment*

Prior to *Katz* the scope of the amendment turned upon whether there had been a physical trespass into a constitutionally protected area.<sup>196</sup> *Katz* overturned the requirement for physical trespass but in its stead offered only a nebulous new standard of protecting “those expectations of privacy which society is prepared to recognize as reasonable.”<sup>197</sup> Subsequent Supreme Court opinions contain intriguing variations on the *Katz* standard, as the Court has referred to the scope of the amendment in terms of “reasonable,”<sup>198</sup> “justifiable,”<sup>199</sup> or “legitimate”<sup>200</sup> expectations of privacy. The various formulations of the *Katz* standard may be significant because each formulation has a bearing on the methodology used to determine the standard and the issue of who is the proper decisionmaker.<sup>201</sup>

At present, the Court asserts that it is the appropriate and exclusive decisionmaker to determine the scope of the Fourth Amendment. “Our problem,” Justice White wrote, “is what expectations of privacy are constitutionally ‘justifiable’—what expectations the Fourth Amendment will protect . . . .”<sup>202</sup> Justice Douglas cryptically added that “citizens must bear only those threats to privacy which *we* decide

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be granted whenever there is an *arguable* violation of the fourth amendment rights of the individual who is seeking to challenge”).

194. See, e.g., *United States v. Calandra*, 414 U.S. 338, 348 (1974) (generally restricting the use of the exclusionary rule to those situations where the “Government’s unlawful conduct would result in imposition of a criminal sanction on the victim of a search”). See generally Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1975) (discussing the constitutional principles governing the direct and derivative use of illegally obtained evidence); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983) (discussing the origin of and future for the exclusionary rule).

195. 389 U.S. at 347.

196. See *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by Katz*, 389 U.S. at 347.

197. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). *Katz* established that the Fourth Amendment is implicated only in cases in which the state intrudes upon “a subjective expectation of privacy . . . that society accepts as objectively reasonable.” *California v. Greenwood*, 486 U.S. 35, 39 (1988).

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

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

200. *Rakas v. Illinois*, 439 U.S. 128, 140-49 (1978).

201. See *infra* text accompanying notes 288-93.

202. *White*, 401 U.S. at 752 (emphasis added).

to impose.”<sup>203</sup> As the exclusive arbiter of society’s reasonable expectations of privacy, the Court has chosen to employ a utilitarian balancing of societal interests.

Judicial balancing of societal interests accords with the “Legal Realism” school of jurisprudence —whose patron saint, Justice Holmes, maintained that the judicial function necessarily and properly involves “considerations of what is expedient for the community concerned.”<sup>204</sup> Justice Cardozo, another legal realist, maintained that

analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interest that will be thereby promoted or impaired.<sup>205</sup>

By embracing the view, if not the label, of legal realists, the Court abandoned the nineteenth-century legal formalism which underlay the *Sparf* decision. “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.”<sup>206</sup> Today, however, deductions from the operative premises of formalist thought have given way to a subjective, relativistic, and indeterminate debate in which majority and dissenting Justices claim to be supporting the cause of sound social policy. Although legal formalism may be reasserting itself,<sup>207</sup> not even an echo of *Sparf*’s legal formalism remains in the Court’s post-*Katz* efforts to measure the “impact on the individual’s sense of security balanced against the utility of the [government’s] conduct as a technique of law enforcement.”<sup>208</sup>

## B. Fourth Amendment Standards

To determine the standards for a constitutional search, the Justices have engaged in a long-standing debate over the relationship of the amendment’s two conjunctive clauses: the Reasonableness Clause and the Warrant Clause.<sup>209</sup> One group of Justices regarded the Warrant Clause’s requirement of probable cause as *the* substantive justification for a constitutional search. In the terminology of legal

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203. *Williamson v. United States*, 405 U.S. 1026, 1029 (1972) (Douglas, J., dissenting from denial of certiorari) (emphasis added).

204. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35 (Mark D. Howe ed., 1963) (1881).

205. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921).

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

207. In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), Justice Scalia stated that the Fourth Amendment “should not become less than” the common law. *Id.* at 1677 (Scalia, J., dissenting). In *California v. Hodari D.*, 111 S. Ct. 1547, 1551 & n.3 (1991), Justice Scalia, writing for the Court, asserted that with respect to the seizures of a person, the Amendment can never mean more than the common law.

208. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

209. See *supra* note 1 and accompanying text.

formalism, probable cause most often was referred to as a fixed standard which applied uniformly whenever the amendment applied.<sup>210</sup> Under this view, the Warrant Clause was dominant, and although the Reasonableness Clause could excuse the absence of a warrant in certain situations, the Reasonableness Clause could not authorize a search in the absence of probable cause.<sup>211</sup>

The Court, however, subsequently placed increased emphasis on the Reasonableness Clause and the inherent flexibility of utilitarian balancing when it defined the substantive requirements for a constitutional search.<sup>212</sup> Reasonableness was seen as the ultimate standard for a constitutional search, and unlike the formalistic definition of probable cause, reasonableness varied according to the "facts and circumstances of each case."<sup>213</sup> Reasonableness as a flexible standard and probable cause as a relatively rigid and uniform standard represent very discrete views of the Fourth Amendment. But the two standards have lost their distinctiveness with the Court's recognition of a sliding scale of probable cause that imports into the Warrant Clause the flexibility that previously had been unique to the Reasonableness Clause.

In *Camera v. Municipal Court*,<sup>214</sup> and in *Terry v. Ohio*,<sup>215</sup> the Court abandoned the formalistic pretense that probable cause was a fixed and uniform standard deduced from virtually absolute principles enshrined in the Constitution. The Court redefined the probable cause standard as a compromise for accommodating the opposing interests of the government and individual citizens<sup>216</sup> and also recognized that the same compromise is not called for in all situations.<sup>217</sup> This concept of a variable standard of probable cause is every bit as flexible and nebulous as the reasonableness standard.<sup>218</sup> In fact, despite the

210. Bacigal, *supra* note 192, at 767-70.

211. "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).

212. *Compare* *United States v. Rabinowitz*, 339 U.S. 56 (1950) (holding that reasonable searches without a warrant do not violate the Fourth Amendment, regardless of the practicability of obtaining a search warrant), *overruled by* *Chimel v. California*, 395 U.S. 752, 768 (1969) *with* *Trupiano v. United States*, 334 U.S. 699 (1948) (holding that seizing contraband without a warrant, when obtaining a search warrant would have been practicable, violated the Fourth Amendment), *overruled by* *Rabinowitz*, 339 U.S. at 66.

213. *Rabinowitz*, 339 U.S. at 63.

214. 387 U.S. 523 (1967).

215. 392 U.S. 1 (1968).

216. The test for a permissible search became whether "a valid public interest justifies the [particular] intrusion contemplated" by the authorities. *Camara*, 387 U.S. at 539.

217. Justice Clark referred to *Camara* as creating a "newfangled warrant system that is entirely foreign to Fourth Amendment standards" as it allowed the issuance of "paper" warrants issued by a magistrate absent probable cause. See *v. City of Seattle*, 387 U.S. 541, 547 (1967) (Clark, J., dissenting).

218. 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

Court's protest to the contrary,<sup>219</sup> the two standards are essentially the same.<sup>220</sup> When the Court resolves the constitutionality of a search by employing a single methodology—balancing governmental and individual interests—it makes little 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 not only merges the Reasonableness and Warrant Clauses, but it also subsumes the threshold question of the amendment's scope. The Court, secure in the knowledge that it may weigh and balance any number of factors when addressing the Fourth Amendment standards of reasonableness or flexible probable cause, often eschews rigorous analysis of the scope of the amendment.<sup>221</sup> For example, in *United States v. Mendenhall*,<sup>222</sup> only two members of the majority bothered to address 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.<sup>223</sup> *Mendenhall* and other recent decisions<sup>224</sup> demonstrate that the Court allows itself alternative expressions of a single determination: the *standard* of the

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suspicion," *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967), "some knowledge," *Blefare v. United States*, 362 F.2d 870, 875 (9th Cir. 1966), "mere possibility," *People v. Sirhan*, 497 P.2d 1121, 1140 (1972), *cert. denied*, 410 U.S. 947 (1973), and non-whimsical suspicion, *People v. De Bour*, 352 N.E.2d 563, 569-70 (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.

219. See *Dunaway v. New York*, 442 U.S. 200, 210 (1979) (stating that because the balancing test of *Terry v. Ohio* "involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope").

220. When probable cause is viewed as a multitude of compromises which resolves a multitude of conflicting governmental and individual interests, the required degree of probable cause becomes part of the balance or compromise itself. See Bacigal, *supra* note 192, at 782; Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 326-40 (1984) (arguing that the Court has reduced the probable cause standard into a factor in the reasonableness determination).

221. The oral arguments in *Brower v. County of Inyo*, 489 U.S. 593 (1989), demonstrate the Court's tendency to blur the existence of a seizure with the reasonableness of that seizure. During presentation of plaintiff's argument, counsel made it clear that he preferred not to explore the ultimate reasonableness of the seizure. But, assaulted by questions on this issue throughout his presentation, "counsel was at pains to assure the justices that the question was not before them at this time and a reversal of the lower court's decision would mean only that the reasonableness of the seizure could finally be put to the test." 44 Crim. L. Rep. (BNA) No. 17, at 4149 (Feb. 1, 1989). When the Justices continued to raise questions about the reasonableness of the seizure, counsel pleaded: "All we want, he reminded the justices, is for you to say that there was a seizure here so that we can explore the question of reasonableness." *Id.* at 4150.

222. 446 U.S. 544 (1980).

223. *Id.* at 560 (Powell, J., concurring).

224. See *Wyman v. James*, 400 U.S. 309, 317-18 (1971). The *Wyman* majority devoted nine pages to discussing 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) (holding that if a warrantless examination of the exterior of defendant's car was a search, it intruded upon the lower expectation of privacy in an automobile and could be justified by probable cause).

amendment has been met if the government interest is deemed sufficient to set aside privacy, or, in the terminology of the *scope* inquiry, the privacy interest may be deemed insufficient to trigger Fourth Amendment protection.<sup>225</sup>

### C. *Standing to Invoke the Fourth Amendment*

The Court's adoption of a flexible balancing approach to the Fourth Amendment merges not only the questions of the amendment's scope and substantive standards, but also the previously distinct categories of standing to invoke the amendment's protections and the application of the exclusionary rule. Prior to *Rakas v. Illinois*,<sup>226</sup> the Court had formulated rules of "automatic" standing, which were not tied to expectations of privacy and the balancing approach.<sup>227</sup> *Rakas*, however, suggested that *Katz's* expectation of privacy formulation<sup>228</sup> should be the sole criterion to determine standing to invoke Fourth Amendment protections.<sup>229</sup> When *United States v. Salvucci*<sup>230</sup> and *Rawlings v. Kentucky*<sup>231</sup> eliminated the last vestiges of "automatic" standing, the traditional standing inquiry was placed within the purview of the *Katz* formulation: whether the government had infringed upon a citizen's reasonable expectation of privacy.<sup>232</sup> The question of Fourth Amendment standing is thus subsumed within the question of the amendment's scope, which in turn is subsumed within the question of the amendment's reasonableness standard.

### D. *The Remedy for Fourth Amendment Violations*

Justice White, dissenting in *Rakas*, argued that the majority had undercut the substantive protections of the Fourth Amendment to further its desire to reduce the operation of the amendment's

225. "The similarity in the Court's handling of the questions of what constitutes a search, when does probable cause exist, and when may the police search without a warrant is striking." Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 364 (1973).

226. 439 U.S. 128 (1978).

227. See, e.g., *Jones v. United States*, 362 U.S. 257, 267 (1960) (creating a broad standard "by recognizing that anyone legitimately on premises where a search occurs may challenge its legality"), *overruled by United States v. Salvucci*, 448 U.S. 83 (1980). See generally Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 62, 171 (1979) (discussing the Court's attempt to give practical content to the principle that a person's capacity to claim Fourth Amendment protection against a search depends upon whether the claimant had a justifiable expectation of privacy in the area searched).

228. See *supra* notes 195-201 and accompanying text.

229. See *Rakas*, 439 U.S. at 142-43.

230. See *Salvucci*, 448 U.S. at 91-92 ("In *Rakas*, this Court held that an illegal search only violates the rights of those who have a 'legitimate expectation of privacy in the place invaded.'").

231. 448 U.S. 98 (1980).

232. *Salvucci*, 448 U.S. at 95 ("We are convinced that the automatic standing rule . . . has outlived its usefulness in this Court's Fourth Amendment jurisprudence.").



exclusionary rule.<sup>233</sup> In reality, the Court's approach to the exclusionary rule is yet another aspect of the balancing approach that has come to dominate all Fourth Amendment considerations. Whatever the original basis of the amendment's exclusionary rule,<sup>234</sup> 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 constitutional right of the party aggrieved."<sup>235</sup> When not clearly bound by precedent,<sup>236</sup> the Court views itself as free to apply or not to apply the exclusionary rule depending upon whether the incremental benefits in terms of deterrence are likely to outweigh the incremental costs in terms of excluding relevant and trustworthy evidence.<sup>237</sup>

### E. Summary of the Court's "Balancing" Jurisprudence

There seems little point in continuing to separate the Fourth Amendment into concepts of scope, standards, standing, and remedy<sup>238</sup> when the Court resolves all of these issues by resort to the single methodology of flexible case-by-case balancing of individual and governmental interests.<sup>239</sup> The "incoherence, confusion and intellectual dishonesty of resulting Supreme Court search-and-seizure jurisprudence is common knowledge."<sup>240</sup> Two decades ago Professor

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233. *Rakas*, 439 U.S. at 168-69 (White, J., dissenting).

234. 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.

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

236. Former Chief Justice Burger indicated his willingness to overturn *Mapp* if certain conditions were met. See *Stone v. Powell*, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting).

237. See, e.g., *Stone*, 428 U.S. at 491 (discussing disparity between deterrent effect on police and undermining of justice); *United States v. Janis*, 428 U.S. 433, 454 (1976) (refusing to exclude from federal criminal proceedings evidence seized unlawfully by state enforcement officer, because such exclusion "has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion"). See also Justice Brennan's dissenting opinion in *United States v. Havens*, 446 U.S. 620, 633-34 (1980), in which he criticized selective application of deterrence rationale as "freewheeling." The Court recently explained that "[w]e simply concluded in *Stone* that the costs of applying the exclusionary rule on collateral review outweighed any potential advantage to be gained by applying it there." *Withrow v. Williams*, 113 S. Ct. 1745, 1750 (1993).

238. See *supra* notes 191-95 and accompanying text.

239. "[T]he balancing of competing interests' [is] 'the key principle of the Fourth Amendment.'" *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)); see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 989-92 (1987) (criticizing balancing of interests in *Tennessee v. Garner* and noting that its "analysis neither relies upon nor constructs a theory of the Fourth Amendment; it does not examine the purpose, scope or source of the protection against unreasonable seizures").

240. David Schuman, *Taking Law Seriously: Communitarian Search and Seizure*, 27 AM. CRIM. L. REV. 583, 591 (1990); see Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 29 (1988) (arguing that the "Court has produced a series of inconsistent and bizarre results that it has left entirely undefended"). Justice Powell conceded that Fourth Amendment law is "intolerably confusing." *Robbins v. California*, 453 U.S. 420, 430 (1981) (Powell, J., concurring). Many of the doctrinal inconsistencies in the Court's Fourth Amendment universe are catalogued in Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982).

White warned that “[w]e may be on the threshold of a Fourth Amendment jurisprudence in which the only question is whether the Supreme Court believes a police practice to be ‘reasonable.’”<sup>241</sup> Other commentators suggest that the Court has abandoned all attempts at principled analysis<sup>242</sup> or doctrinal coherency<sup>243</sup> in Fourth Amendment cases in favor of resolving each individual case according to the “fundamental fairness” approach of *Rochin v. California*.<sup>244</sup> Taken to its logical end, the Court’s balancing approach to the Fourth Amendment reduces all deliberations to two related fundamental inquiries: (1) how much and what type of privacy or liberty does a reasonably free society require; and (2) how much and what type of intrusion upon privacy or liberty is required to further a reasonably ordered society?<sup>245</sup> Of course, the Fourth Amendment is not unique in posing such fundamental quandaries because all public law issues are reducible to a balancing of individual and governmental interests for the perceived good of society.<sup>246</sup> This abstract framing of the issues is not particularly helpful when deciding specific cases, but it does illustrate the fundamental questions which underlie the Court’s balancing approach to the Fourth Amendment.<sup>247</sup>

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241. James B. White, *The Fourth Amendment As a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 170.

242. Larry W. Yackle, *The Burger Court and the Fourth Amendment*, 26 KAN. L. REV. 335, 427 (1978).

243. Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 603 (1982).

244. 342 U.S. 165 (1952). “[T]he Constitution is viewed as a broom closet in which constitutional interests are stored and taken out when appropriate to be considered with other social values.” Aleinikoff, *supra* note 239, at 989.

245. “[T]he practical calculus evident in the search and seizure corpus is to decide how much individual liberty is compatible with the social interest in security.” Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 859 (1989); see also *Watts v. Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring) (noting that the Constitution and Bill of Rights can be seen as “the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself”); LANDYNSKI, *supra* note 24, at 13 (stating that issues raised under the Fourth Amendment “bring into sharp focus the classic dilemma of order vs. liberty in the democratic state”).

246. See Anita L. Allen, *Autonomy’s Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 696-97 (1992) (“The great practical value of the American Constitution is that its inspirational general language allows, invites, and requires hard judicial thinking about the ideal terms and conditions of social and economic life.”). The balancing of conflicting interests has become “a sort of universal solvent . . . for resolving all constitutional questions.” White, *supra* note 241, at 167. “[A]n animated due process guarantee clause could, according to prevailing canons of interpretation, house all of our constitutional law.” Bradley, *supra* note 245, at 865 (footnote omitted).

247. The burden of judicial interpretation is to “translat[e] the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

Faced with this type of question,<sup>248</sup> and told by countless commentators that it is making moral and political decisions based on its conception of a good society, it is not surprising that “the Court has maintained delphic silence concerning the substantive tradeoff between”<sup>249</sup> law enforcement and privacy.

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.<sup>250</sup>

My point here is not to belabor the obvious deficiencies in legal analysis as a means of discovering the ideal mixture of freedom and order in some utopian society. All but the most naive disciples of law recognize that if there is a utopian ideal, the judiciary, like all mortals, possesses a limited ability to divine this paradigm. My goal is simply to remind members of the judiciary and the academy that a healthy dose of humility about the blessings of legal analysis will foster a greater tolerance for alternative methodologies and alternative entities—such as juries—who employ less orthodox analysis.

When commentators refer to the Court’s fluctuating views on the Fourth Amendment as “an embarrassing chapter of supreme judicial schizophrenia,”<sup>251</sup> it is increasingly apparent that the Court has renegeed on *Sparf*’s promise of uniformity and consistency in the law. The Court determines the reasonableness of a search or seizure as if it were a jury, free to assess and balance the unique aspects of an individual case and to decide justice in that particular case without regard to general rules or principles.<sup>252</sup> The collective People supposedly protected by the Fourth Amendment are thus subjected to conditions prohibited by the Roman maxim: *Misera est servitus, ubi jus vagum aut*

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248. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where “law,” properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.

Scalia, *supra* note 19, at 1182.

249. See Wasserstrom & Seidman, *supra* note 240, at 111.

250. *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) (citations omitted); see also *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983) (noting that Fourth Amendment issues are so fact-intensive that determinations of reasonableness in one case will rarely shed light on the next case).

251. Charles E. Moylan, Jr., *The Plain View Doctrine: Unexpected Child of the Great “Search Incident” Geography Battle*, 26 *MERCER L. REV.* 1047, 1052 (1975).

252. “The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of the personal rights that the search entails.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (emphasis added).

*incertum*.<sup>253</sup> Where search-and-seizure law is unknown and unknowable, the judges wielding the lash of power are out of control because "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."<sup>254</sup>

In the light of the judiciary's inability to formulate settled, fixed, legal principles of Fourth Amendment law, the benefits of judicial consistency were overvalued in *Sparf*.<sup>255</sup> A realistic estimate of the consistency of current Fourth Amendment decisions might tip the scales in favor of the jury's determination of search-and-seizure law, and lead to a reversal of *Sparf*.<sup>256</sup> Rather than restate the familiar arguments against judicial supremacy, however, I accept—for purposes of this Article—that within its institutional limitations, the Court does and will continue to balance conflicting interests for the perceived good of society.<sup>257</sup> With that assumption, I move on to consider the possible interaction between the Court's role and a proposed role for

253. It is the wretched state of slavery which subsists where the law is vague or uncertain.

254. *New York v. Belton*, 453 U.S. 454, 459-60 (1981).

255. 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." *United States v. Havens*, 446 U.S. 620, 634 (1980) (Brennan, J., dissenting); see Note, *supra* note 206, at 948 (stating that "[n]ineteenth 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") (footnote omitted)).

The Court's balancing opinions are radically underwritten:

[I]nterests are identified and a winner is proclaimed or a rule is announced which strikes an "appropriate" balance, but there is little discussion of the valuation standards. Some rough, intuitive scale calibrated in degrees of "importance" appears to be at work. But to a large extent, the balancing takes place inside a black box. Of course, the hidden process raises the specter of the kind of judicial decisionmaking that the Realists warned us about and that balancing promised to overcome.

Aleinikoff, *supra* note 239, at 976 (footnote omitted).

256. In the seventeen Fourth Amendment cases decided in 1983-84, the Supreme Court has never reached the same result as all lower courts and has usually reversed the highest court below, rendering a total of sixty-one separate opinions in the process. Thus it is apparent that not only do the police not understand fourth amendment law, but that even the courts, after briefing, argument, and calm reflection, cannot agree as to what police behavior is appropriate in a particular case.

Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

257. The Court may claim the authority to determine social policy within the context of a specific case, if only for the reason that *someone* has to resolve the particular dispute. Even justice according to the length of the Chancellor's foot is preferable to anarchy, and deliberation must end by enunciating something—law—that constrains the deliberation itself. Prior to 1966, British courts exercised discretion to make law if, and only if, there was no applicable law. Once the court's decision was in place, the court lost authority to remake or unmake law. See *London St. Tramways Co. v. London County Council*, 1898 App. Cas. 375, 381.

the jury in determining search-and-seizure law. The proposed structure for Fourth Amendment decisionmaking does not attempt to shift search-and-seizure issues from the exclusive domain of judges to the exclusive dominion of juries. In an attempt to forge a workable accommodation between stability and flexibility, both judge and jury are given a role in determining search-and-seizure law.<sup>258</sup>

### III. A Structure for Fourth Amendment Decisionmaking

Although most Fourth Amendment decisions have turned upon a nebulous balancing of the totality of the circumstances, the Court must be given its due for attempting, at times, to inject stability and uniformity into the amendment's jurisprudence by treating all similarly situated defendants alike.<sup>259</sup> When the Court does so, however, it finds itself trapped between general rules of law and individualized justice. The dilemma was foremost in *Pennsylvania v. Mimms*<sup>260</sup> when the Court was asked to rule on the police practice of ordering "all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation."<sup>261</sup> The Court addressed this uniform practice without inquiring whether the individual police officer had any suspicion that the particular motorist was likely to be armed and dangerous.<sup>262</sup> In upholding the police practice, the Court relied upon statistical evidence, which showed "that a significant percentage of murders of police officers occurs when the officers are making traffic stops."<sup>263</sup> The Court balanced the generalized governmental interest in protecting police from attack by armed motorists against the generalized privacy interest of motorists as a class.<sup>264</sup> In holding that all motorists must obey an order to exit their vehicles after a lawful

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258. 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." Paul A. Freund, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW 47, 47-53 (Edmond Cohn ed., 1968). It is also a practice that is followed when states invest the jury with a supplemental power to determine the admissibility of confessions. See *infra* notes 325-29 and accompanying text.

259. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (holding that warrantless routine checkpoint stops are consistent with the Fourth Amendment); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (holding that warrantless standard inventory searches of lawfully impounded vehicles are "reasonable" under the Fourth Amendment); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (holding that warrantless search of a person incident to a lawful custodial arrest is permissible under the Fourth Amendment).

260. 434 U.S. 106 (1977). Automobile searches are the quintessential examples of the Court's uneven embrace of "bright line" rules that further stability in the law. The majorities in *United States v. Ross*, 456 U.S. 798 (1982), and *New York v. Belton*, 453 U.S. 454 (1981), favored general rules that govern the search of all automobiles where certain general conditions are met. The dissenters favored a case-by-case ad hoc determination of the need to search a particular automobile. See *Ross*, 456 U.S. at 826 (White, J., dissenting); *id.* at 827 (Marshall, J., dissenting); *Belton*, 453 U.S. at 463 (Brennan, J., dissenting); *id.* at 472 (White, J., dissenting).

261. 434 U.S. at 110 (emphasis added).

262. 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.

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

264. *Id.* at 111.

stop, the Court attempted to treat all similarly situated defendants alike.

This uniformity, however, was achieved by sacrificing 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.<sup>265</sup>

Justice Stevens's preference for an "individualized inquiry into the particular facts justifying every police intrusion"<sup>266</sup> reflects the judiciary's traditional concern for adjudicative facts rather than legislative facts such as the statistical evidence cited by the majority.<sup>267</sup> Instead of forcing fact patterns into preconceived categories, the judiciary's traditional function is to weigh all the circumstances in an effort to reach the right outcome: reasonableness under the circumstances. The genius of the common law, so the theory goes, was that by sticking close to the facts of the case, the law would grow and develop, not through the pronouncement of general principles, but case-by-case, incrementally, one step at a time. Every interpretation of a common law rule is thus a reconstruction of our sense of the rule's meaning and rightness. The meaning of the rule emerges, develops, and changes in the course of applying it to specific facts.

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265. *Id.* at 120-21 (Stevens, J., dissenting).

266. *Id.* at 116.

267. Professor Gary A. Ahrens asserts:

The fundamental value at the base of the . . . fourth amendment is the commitment to treating persons who come before the law on the basis of their individual, particular, uncommon, and odd property and attributes. Juristic procedures which help show the unique characteristics of individuals and actions to the decision-maker provide the factual evidentiary base for legal judgments which avoid abstract moral structures and remain useful as explanations of external phenomena.

Gary A. Ahrens, *Privacy and Property: Can They Remain After Juridical Personality is Lost?*, 11 CREIGHTON L. REV. 1077, 1082 (1978) (footnote omitted).

The common law's focus on adjudicative facts, however, fails to account for the institutional role of a supreme court that controls its own docket and is free to choose the particular factual situations in which to interpret law. "The idyllic notion of 'the court' gradually closing in on a fully articulated rule of law by deciding one discrete fact situation after another . . . simply cannot be applied to a court that will revisit the area in question with great infrequency."<sup>268</sup> The Supreme 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.<sup>269</sup> Thus, Fourth Amendment cases actually granted review are best seen as vehicles for articulating broad principles and analytical methods<sup>270</sup> designed to guide lower courts, prosecutors, defense counsel, and most important, the police.<sup>271</sup> When the Court abandons its institutional role—and *Sparf*'s promise<sup>272</sup>—of determining law according to general principles in favor of unstructured, ad hoc balancing of the total circumstances, the Court leaves us with murky law for this day and only this case.<sup>273</sup>

In keeping with a *structural* view of the Bill of Rights as an allocation of decisionmaking power, it also would be a mistake to view the Framers as commissioning "the judiciary to develop a common law of search-and-seizure as time goes by and as circumstances demand." Professor Gerard Bradley has argued that such a view is "clearly wrong."<sup>274</sup>

First, there is no historical evidence to support it; instead, it has been at some point since the founding that courts have seized the [amendment's Reasonableness] clause as a charter for judicial law-making. Second, the suggestion *cannot* be sustained as a historical matter. Even a passing acquaintance with anti-federalist rhetoric shows that the independent federal judiciary was regarded as a profound threat to popular liberty, and not the bulwark we have

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268. Scalia, *supra* note 19, at 1178. The assumption "that fourth amendment law can develop meaningfully on a case by case basis, and which finds great significance in differing factual situations, is an abysmal failure." Dworkin, *supra* note 225, at 334.

269. "[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) (citing *Ross v. Moffitt*, 417 U.S. 600, 615-17 (1974)).

270. Let us not quibble about the theoretical scope of a "holding": the modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself.

Scalia, *supra* note 19, at 1177.

271. See Dworkin, *supra* note 225; *supra* note 186.

272. See *supra* notes 118-36 and accompanying text.

273. "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." ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 197 (1976); see, e.g., *Walter v. United States*, 447 U.S. 649, 666 (1980) (Blackmun, J., dissenting) (characterizing the case as "a strange and particular one" and drawing comfort from the belief "that sound constitutional precepts will survive the result the Court reaches today").

274. Bradley, *supra* note 245, at 851.

made it today. Third, the argument is contrary to the tenor of the Bill of Rights, which is to limit power, not to transfer the locus of its exercise. The short conclusion is that a transfer of such power to the judiciary could not have assuaged objections to the Constitution. Contrary to our impulses, people at that time really believed that responsive electoral government, not Delphic Oracles, insured liberty.<sup>275</sup>

The Court's contemporary role—historically grounded or not—in protecting individual liberty necessarily conflicts with its institutional role—whether democratically proper or not—of formulating broad principles and general rules. In *Mimms*, Justice Stevens obviously was correct when he asserted that individual defendants do not regard themselves as fungible items to be manipulated for the general good of society.<sup>276</sup> The Justice articulated one of our images of how justice is done: one case at a time, taking into account all the circumstances, and identifying within that context the fair result.<sup>277</sup> But the fair or just result in the particular case is but one of a number of competing values. Often contradicting the quest for individual justice is the need for equal treatment of similarly situated individuals,<sup>278</sup> the need for comprehensible and stable laws to guide law enforcement officials,<sup>279</sup> and the larger concerns of general society.<sup>280</sup> It is impossible for the Court to maintain its institutional concern for general principles and to remain 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 Anthony Amsterdam succinctly stated:

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275. *Id.* (citations omitted).

276. *Pennsylvania v. Mimms*, 434 U.S. 106, 115 (1977) (Stevens, J., dissenting). Belief in the uniqueness of each individual is one of the fundamental moral tenets of Western society. Such uniqueness inheres in being human and is not an entitlement to be granted or withheld by the state depending upon whether the individual's right contributes to the total social welfare. See Philip Kurkland, *The Private I*, U. CHI. MAG., Autumn 1976, at 7, 36 ("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.").

277. *Mimms*, 434 U.S. at 116.

278. Every general rule of law has a few corners that do not quite fit, but [r]ightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.

THE POLITICS OF ARISTOTLE bk. III, ch. xi, § 19, at 127 (Ernest Barker trans., Oxford Univ. Press 1958).

279. See *supra* note 186.

280. HOLMES, *supra* note 204, at 35. According to Holmes, "[T]he law does undoubtedly treat the individual as a means to an end . . . . [J]ustice to the individual is rightly outweighed by the larger interests on the other side of the scales." *Id.* at 40-41.



[A]ny 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.<sup>281</sup>

Although the Court cannot avoid the dichotomy between uniform application of law and responsiveness to individual situations, between universe and context, between sameness and difference, the Court can achieve an accommodation if it shares with the jury the determination of reasonable searches and seizures. The jury traditionally is concerned with the justice of a particular case without undue regard for general rules.<sup>282</sup> In situations such as *Mimms*,<sup>283</sup> 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 an individual jury should be free to consider whether it was reasonable to require a particular pajama clad, elderly, or invalid person to exit her auto on a cold, dark, rainy night after committing the heinous offense of failing to signal for a left turn. Should the jury find the police conduct unreasonable under such unique circumstances, no critical harm is done to the general rule. Neither side, police nor motorist, need experience a final large-scale victory or defeat because the jury serves as a safety valve to resolve the equities of a particular case without predetermining other cases that fall within the Court's categorization of search-and-seizure practices. The broad guidelines for the police<sup>284</sup> would be preserved without sacrificing the autonomy of all motorists to the quest for uniformity; thus, such a system would realize an acceptable compromise between a government of uniform laws and law as tempered by individual justice.<sup>285</sup>

This type of accommodation between judicial power and jury power is not precluded merely because the jury would interpret constitutional law when it determined the reasonableness of a search or seizure. The task before the jury would be no different from the task before the Justices of the Supreme Court;<sup>286</sup> each must apply the best interpretive theory to discern the proper meaning of the Fourth

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281. Amsterdam, *supra* note 15, at 377.

282. "The purpose of establishing trial by jury was not to obtain general rules of law for future use, but to secure impartial justice between the government and the accused in each case as it arose." *Sparf v. United States*, 156 U.S. 51, 174-75 (1895) (Gray & Shiras, JJ., dissenting).

283. See *supra* notes 260-66 and accompanying text.

284. Increased stability of Fourth Amendment law would provide increased guidance for police officers in the field. See *supra* note 181. At present, police have little understanding of the Court's Fourth Amendment jurisprudence. See William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 332-33 (1991) (noting that a survey of 547 police officers disclosed that officers responded correctly to questions about Fourth Amendment law only slightly more frequently than random chance would dictate).

285. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971) ("[T]he jury . . . mediate[s] between 'the law' in the abstract and the human needs of those affected by it.").

286. See LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* at vii (1985) (noting that we "all" make constitutional choices as judges, officials, scholars, and citizens).

Amendment and then apply that interpretive theory to particular cases. When the Court removed the facade of legal formalism in favor of balancing conflicting interests,<sup>287</sup> it weakened its position as the 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<sup>288</sup> and what degree of protection is afforded to these expectations. The judiciary has no inalienable claim to make such determinations exclusively.<sup>289</sup> John Taylor, "one of the early Republic's leading constitutional theorists," viewed the jury as the "lower judicial bench" in a bicameral judiciary.<sup>290</sup> Our "judicial structure mirrored that of the legislature, with an upper house of greater stability and experience, and a lower house to represent popular sentiment more directly."<sup>291</sup> In a similar vein, an anti-federalist "defined the jury as *the democratic branch of the judiciary power*—more necessary than representatives in the legislature."<sup>292</sup> When the jury is seen as one division of a bicameral judiciary, we can better address the *structural* question of allocating power to resolve Fourth Amendment issues. Determination of society's reasonable expectations of privacy and liberty "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?"<sup>293</sup>

To the extent that the expression "reasonable expectation of privacy" connotes the application of common sense and community consensus,<sup>294</sup> it is apparent that the jury can "do the job better." How are unreasonable searches and seizures to be defined other than by reference to what society would find unreasonable? Is it possible that a jury

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287. See *supra* note 239 and accompanying text.

288. See *supra* note 203 and accompanying text.

289. By focusing on the procedural requirement for a warrant, the Court has forced others, i.e., magistrates, to determine the substantive content of probable cause. See *United States v. Leon*, 468 U.S. 897, 914 (1984) ("Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." (citing *Spinelli v. United States*, 393 U.S. 410, 419 (1969))). The magistrates who have the prime responsibility for defining probable cause have little more legal training than jurors. See *Shadwick v. City of Tampa*, 407 U.S. 345, 350-52 (1972) (upholding warrant issued by municipal clerk with no special legal training).

290. Amar, *supra* note 8, at 1188-89 (citing JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 208-09 (Yale Univ. Press 1950) (1814)).

291. *Id.* at 1189.

292. *Id.* (quoting *Essays by a Farmer (IV)*, *supra* note 17, at 38).

293. CHAFEE, *supra* note 133, at 503 (emphasis added).

294. "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." *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978).

would agree with the Court's holding in *Michigan v. Chesternut*,<sup>295</sup> that although a police car followed the defendant into a narrow alley and continued to drive alongside him as he fled, no seizure occurred because a reasonable person would understand that he was free to disregard the presence of the police and go about his business.<sup>296</sup> Why not submit this issue to a jury of reasonable people instead of allowing the Court to speculate on the perceptions of a hypothetical reasonable person? Confronted with the Court's rationale in *Chesternut*, jurors might invoke the maxim that nothing which is against reason can be law or Dickens's caustic comment on legal rules that fail to comport with common sense: "If the law supposes that, . . . the law is a ass—an idiot."<sup>297</sup> Justice Scalia, who joined the majority in *Chesternut*, later accused the Court of subjecting arrested citizens to a "Dickensian bureaucratic machine . . . [that fosters] . . . the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own."<sup>298</sup> What the average American does recognize is that the Court's holding in *Chesternut* is the type of legal fiction<sup>299</sup> that encourages disrespect for the law by failing to place citizens in "a comprehensible public world in ways that [they] can respect."<sup>300</sup> If we must talk the conventional talk of fact/law distinctions, the jury can fulfill its traditional factfinding function by determining what expectations of privacy or liberty are held by reasonable members of the community. There is no need for the Court to speculate on the perceptions of hypothesized reasonable people when we have direct access, via the jury, to reasonable members of the community. To paraphrase Judge Learned Hand, the jury would "indicate the present critical point in the compromise between [liberty and order] at which the community may have arrived here and now."<sup>301</sup> Thus, in defining reasonable expectations of privacy or liberty, the jury would merely *describe* the existing social compromise and would not *prescribe* some ideal compromise. In this way, the Fourth

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295. 486 U.S. 567 (1988).

296. *Id.* at 576 (citing *INS v. Delgado*, 466 U.S. 210, 216 (1984)). The Court has also told citizens that they have no reasonable expectation of privacy against aerial surveillance into an enclosed greenhouse in a fenced backyard. See *Florida v. Riley*, 488 U.S. 445, 447-52 (1989); see also *California v. Greenwood*, 486 U.S. 35 (1988) (holding that pawing by police through a citizen's bagged garbage on a public street does not violate the Fourth Amendment); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (allowing aerial surveillance with a telescope so powerful it can detect a half-finch wire).

297. CHARLES DICKENS, *OLIVER TWIST* 354 (Kathleen Tillotson ed., London, Oxford Univ. Press 1966) (1838).

298. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1677 (1991) (Scalia, J., dissenting).

299. See *United States v. Notorianni*, 729 F.2d 520, 523 (7th Cir. 1984) (Cudahy, J., dissenting) (noting that the "modest fiction" that a suspect confronted by police will feel free to move on "makes it possible for police to cope with drug traffic in a place like O'Hare Airport").

300. WHITE, *supra* note 15, at 178; see Rachel A. Van Cleave, *Michigan v. Chesternut and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?*, 40 HASTINGS L.J. 203, 204-05 (1988) (arguing that the Supreme Court in *Chesternut* erred by failing to recognize that the chase was a seizure because, by using common sense, the Court would have realized that a citizen chased by police is not free to ignore them and is thus seized).

301. *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913).

Amendment's Reasonableness Clause is like the Eighth Amendment's Cruel and Unusual Punishment Clause, which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>302</sup>

A good deal of the Court's current Fourth Amendment doctrine can be explained in terms of a search for conventional morality: All things considered, have the police comported with the community's moral intuitions?<sup>303</sup> The meaning of Fourth Amendment reasonableness thus derives from the culture in which "we the people" live. At worst, the jury may be only a rough proxy for what a fully participational community would insist upon as reasonable search-and-seizure practices,<sup>304</sup> but as a descriptive process, this rough proxy is superior to current judicial musings over the views of a hypothetical reasonable person.<sup>305</sup> At best, the jury may be "the people's portrait in miniature, feeling and thinking just as the people do in all their plurality, acting just as the people would if actually present."<sup>306</sup> The genius of the jury is its direct knowledge of the interests and needs of the people: knowledge that can be counted upon to make the jury's decision compatible with those needs. Through juries, the consent of the governed would flow continuously, not just in election-day spurts.<sup>307</sup>

This faith in juries may sound more like flowery rhetoric than a realistic means for determining reasonable searches and seizures; the suggested use of juries to reflect society's view of reasonableness, however, improves upon the Court's halfway approach, which provides the worst of both worlds: the Court, which is not governed by any current consensus, as the final arbiter of constitutional reasonableness, attempting to consult society in determining the scope of the Fourth Amendment.<sup>308</sup>

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302. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

303. "[C]ommunity values remain the linchpin of search and seizure jurisprudence." Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727, 775 (1993).

304. See Wasserstrom & Seidman, *supra* note 240, at 95.

305. "[I]t is better to assess those [community] values by asking representative members of the community about them than by relying on what nine members of a rather isolated Court might conjecture." *Id.* at 746. In defense of the Court, the reasonably prudent person standard can be seen as a form of "virtual representation." See Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 3, 51 (1986). As long as the people are envisioned as a "fungible collection with characteristic insights and outlooks," the reasonably prudent person stands for all citizens. *Id.*

306. See Michelman, *supra* note 305, at 53; *infra* note 358 and accompanying text.

307. See Michelman, *supra* note 305, at 53. In practice and theory, juries act not only on the law as strictly defined in judges' instructions, but also on "informal communication from the total culture." *United States v. Dougherty*, 473 F.2d 1113, 1135 (D.C. Cir. 1972).

308. The Court has attempted to determine society's views on reasonableness by such means as reference to a telephone book. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (noting that society would not recognize a reasonable expectation of privacy in numbers dialed from the defendant's phone because the telephone information pages

Although the jury is an appropriate entity for identifying what is usually done in the community and thus what is reasonable, the jury has no preeminent claim to determining justifiable and legitimate expectations of privacy or liberty, because such determinations are contingent upon value judgments and political choices about what *ought* to be done.<sup>309</sup> When contrasts arise between matters of principle and social policy, between individual rights and collective interests,<sup>310</sup> the concern is no longer about which institution will, as an empirical matter, better reflect community consensus, but about whether certain institutions have the authority to decide certain kinds of questions. However much the Framers may have trusted the judgment of the people and distrusted a strong central government, the Framers also recognized that certain individual rights must be shielded from the popular will.<sup>311</sup> Thomas Jefferson grudgingly acknowledged that one weighty consideration for adopting a declaration of rights was “the legal check it puts into the hands of the judiciary.”<sup>312</sup> James Madison adopted this idea when introducing the Bill of Rights to Congress, arguing that if a declaration of rights was

incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.<sup>313</sup>

This original intent, coupled with *Marbury v. Madison*<sup>314</sup> and the adoption of the Fourteenth Amendment,<sup>315</sup> indicates that it is far too

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disclosed that the phone company could identify the origin of phone calls). However roughly a jury approximates society, it is a superior medium for societal conventions than is the abstruse information contained in the pages of a telephone directory.

309. See generally Amsterdam, *supra* note 15, at 384-85 (arguing that the Fourth Amendment does not “ask[ ] what we expect of government. [It] tell[s] us what we should demand of government.”). For a broad perspective on defining and identifying societal values and the “moral order” in our society, see Richard D. Schwartz, *Moral Order and Sociology of Law: Trends, Problems and Prospects*, 4 ANN. REV. SOC. 577 (1978).

310. See DWORKIN, *supra* note 176, at 184 (noting that it is generally accepted that individuals have rights apart from those given them by law); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 366-67 (Peter Laslett ed., student ed., Cambridge, Cambridge Univ. Press, 1988) (3d ed. 1698) (noting that government is limited by the individual rights that people reserved to themselves when they created the government); JOHN RAWLS, A THEORY OF JUSTICE 3-6 (1971) (emphasizing personal rights and protection against majoritarian tyranny).

311. In discussing the Bill of Rights, James Madison stated:

The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or the Legislative departments of Government, but in the body of the people, operating by the majority against the minority.

1 ANNALS OF CONG. 437 (Joseph Gales ed., 1789).

312. See Marcus, *supra* note 9, at 119.

313. *Id.* (quoting Madison).

314. 5 U.S. (1 Cranch) 137 (1803) (establishing the Court’s preeminence in interpreting the Constitution).

315. Even if the preeminence of the jury is the correct historical view of the Bill of Rights, the Fourteenth Amendment’s concerns about minority rights and the heavy reliance placed on federal judges forever altered that view. See Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1281 (1992).

late to argue that an individual defendant's only right is to be tried according to the popular will.<sup>316</sup> Without stabilizing legal institutions, "democracy is fragile and surrounded by incivility, mayhem, and destruction."<sup>317</sup> "The Founding Fathers thus wisely sought to have the best of both worlds, the undeniable benefits of both democratic self-government and individual rights protected against possible excesses of that form of government."<sup>318</sup> Undemocratic though it is, judicial review as a check on the popular will is one of the balance wheels that keep our democracy from running amok.

Acknowledging the defendant's right to judicial determination of the reasonableness of a search or seizure, however, does not preclude a supplemental determination of reasonableness by the jury.<sup>319</sup> Many jurisdictions have adopted,<sup>320</sup> and the Court has upheld against constitutional challenge,<sup>321</sup> the jury's ancillary determination of the voluntariness of confessions. In *Jackson v. Denno*,<sup>322</sup> the Court examined

316. *But see infra* note 342 and accompanying text.

317. *See Carrington, supra* note 55, at 750.

318. *Furman v. Georgia*, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting).

319. Only the defendant, not the government, should be given the option to submit the reasonableness of a search to the jury. As a practical matter, probable cause for a search or arrest often includes references to the defendant's prior convictions and reputation for criminal activity. *See United States v. Harris*, 403 U.S. 573, 582-83 (1971). To allow the government the option of placing this information before the jury gives the government an unfair advantage. The defendant should control the decision to place such information before the jury, just as the defendant now controls the decision to make his character an issue in the case or to testify and thereby subject himself to impeachment by his prior convictions.

On a more theoretical level, the defendant must be 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. 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.

Creating an additional limitation on government power need not necessitate instituting a reciprocal benefit for the government. For example, every criminal defendant currently enjoys an unreciprocated benefit because the trial court may direct an acquittal but can never order the jury to convict. The jury can protect the individual against a formalistic application of law—which may conflict with justice as determined by at least six representatives of the community—when the defendant is granted a final appeal to the jury as the ultimate arbiter of individualized justice: a return to the eighteenth-century view of the jury as the last remaining institution within which rational deliberation determines law. A government subject to the rule of law, however, should not have recourse to the conscience of the community—the jury—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 and limit the government to principled and consistent rulings from the judiciary.

320. *See Jackson v. Denno*, 378 U.S. 368, 410 (1964) (Black, J., dissenting in part and concurring in part); *infra* notes 322-25 and accompanying text.

321. In dicta the Court has stated that "the Massachusetts procedure does not, in our opinion, pose hazards to the rights of a defendant." *Denno*, 378 U.S. at 378 n.8; *see infra* notes 322-25 and accompanying text.

322. 378 U.S. at 368.

a New York procedure wherein “the judge may not resolve conflicting evidence or arrive at his independent appraisal of the voluntariness of the confession, one way or the other. These matters he must leave to the jury.”<sup>323</sup> While striking down the New York practice, the Court expressed its approval of “the Massachusetts procedure, under which the jury passes on voluntariness only after the judge has fully and independently resolved the issue against the accused.”<sup>324</sup>

The Massachusetts approach of allowing both judge and jury to determine the voluntariness of confessions is a useful model for determining the reasonableness of searches and seizures.<sup>325</sup> The identification of justifiable and legitimate expectations of privacy, and therefore the reasonableness of searches and seizures, presumes a willingness to deal on the plane of human values and to make social or political judgments about the desired compromise between liberty and order.<sup>326</sup> Under our republican form of government, the task of making such judgments should not be assigned exclusively to judge or jury, neither of whom possesses some innate or technical expertise in resolving conflicts between individual liberty and collective security. Assuming that judges are expert in formal logic or legal reasoning does not justify the current practice of investing the judiciary with singular authority to make the underlying value judgments to which legal reasoning can be applied.<sup>327</sup> Nor can the judiciary’s claim to exclusive review of search-and-seizure law be justified by combining the rhetoric of judicial protection of individual rights with the rhetoric of hostility to potentially oppressive government. This type of rationalization obscures the fact that courts are agencies of the government.<sup>328</sup> When the Court is called upon to resolve the conflict between individual liberty and collective security, the only choice is between a governmental restriction on liberty or a governmental impediment to collective security. Either alternative, resting within the exclusive province of the Court, marks another transition from the Framers’ concept of self-governance to the contemporary reality of judicial governance.

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323. *Id.* at 377-78.

324. *Id.* at 378 (footnotes omitted). Justice Black maintained that the Constitution requires the judge to pass upon voluntariness, while the jury’s power to pass on the issue “is a mere matter of grace, not something constitutionally required.” *Id.* at 404 (Black, J., dissenting in part and concurring in part).

325. *Denno* referred to the voluntariness issue as a factual question, *id.* at 377, but the Court in a later case stated that “[w]ithout exception, the Court’s confession cases hold that the ultimate issue of ‘voluntariness’ is a legal question requiring independent federal determination,” *Miller v. Fenton*, 474 U.S. 104, 110 (1985).

326. *See supra* note 204 and accompanying text.

327. Formal logic or legal reasoning assists the Court in connecting premises to conclusions, but reason is inherently an empty source, which does not support the first premise. As Hume said, reason is “the slave of the passions,” because reason is employed only in the selection of means to ends or values already given, but not in the critical examination or clarification of the ends or values themselves. DAVID HUME, *A TREATISE OF HUMAN NATURE* 375 (L.A. Selby-Bigge ed., 1949) (1888).

328. As a legitimate part of tribunals—the lower branch of the judiciary—juries, in some sense, are also agencies of the government. But juries do not present the self-interested “agency costs” associated with permanent government officials. *See Amar, supra* note 8, at 1133. Each jury serves a limited term and can never grow into a dangerous system.

The solution to judicial governance, however, does not lie in investing the jury with an exclusive prerogative to define justifiable or legitimate expectations of privacy by applying community consensus.<sup>329</sup> The acquittal in the first Rodney King case<sup>330</sup> brings into question the romanticized view of the jury as a bulwark of liberty and justice. Juries undoubtedly make mistakes and, like any other agency of power, must be subject to checks and balances on their authority.<sup>331</sup> In line with the Madisonian attempt to disperse government power among competing power centers capable of checking each other,<sup>332</sup> no one decisionmaker should be entrusted with unparalleled authority to make binding judgments about a democratic society's accommodation of individual liberty and collective security. The power to make such judgments must be disseminated among rival entities, and although I have focused on a role for the jury, the jury is best seen as part of a Fourth Amendment decisionmaking structure that recognizes a role for juries, courts, legislatures, and the executive. Under our republican

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329. 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, *supra* note 65, at 52 (arguing "that a consensus approach to constitutional adjudication is unlikely to end up amounting to much more than a conscious or unconscious cover for the judge's own values").

330. King, as everyone knows by now, is the black motorist whose beating by four white Los Angeles police officers was captured on videotape for all the world to see. The officers' acquittal by a mostly white jury sparked three days of rioting, resulting in 60 deaths, more than 16,000 arrests, and nearly \$1 billion in property damage in Los Angeles. See Darlene Ricker, *Behind the Silence*, 77 A.B.A. J. 45, 47 (1991); see also Lance Morrow, *Rough Justice*, TIME, Apr. 1, 1991, at 16; Seth Mydans, *Tape of Beating by Police Revives Charges of Racism*, N.Y. TIMES, Mar. 7, 1991, at A18.

331. The trial judge's power to find a search unreasonable and keep its fruits from the jury precludes the jury from harming an individual defendant. When a judge determines that the search is reasonable and submits this issue to the jury, the jury may harm our sense of justice by mistakenly determining that the search was unreasonable. But changed as they constantly are, the jury's errors and mistakes can never grow into a dangerous system that triggers the agency costs associated with permanent government officials. See *supra* text accompanying note 142.

Furthermore, although juries make mistakes, "authority cannot be conceded to persons because they are right—the authority must preexist their right or wrong judgment and must survive it too—and judges [or juries] decide cases by virtue of their authority, and not because they are any more likely to be right than other people." Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 761 (1963).

But in human institutions, the question is not, whether every evil contingency can be avoided, but what arrangement will be productive of the least inconvenience. And it appears to be most consistent with the permanent security of the subject, that in criminal cases the jury should, after receiving the advice and assistance of the judge as to the law, . . . determine upon the whole, whether the act done be, or be not, within the meaning of the law.

*Sparf v. United States*, 156 U.S. 51, 149-50 (1895) (Gray & Shiras, JJ., dissenting) (quoting *People v. Crosswell*, 3 Johns. Cas. 337, 375-76 (1803) (Kent, J.)).

332. "This distribution of power, by which the court and jury mutually assist, and mutually check each other, seems to be the safest, and consequently the wisest arrangement, in respect to the trial of crimes." *Sparf*, 156 U.S. at 150 (quoting Judge Kent of New York).



form of government, each of these entities fulfills an important function in making judgments about reasonable searches and seizures.

### A. *The Courts' Role*

The structure of Fourth Amendment decisionmaking proposed here resembles an inverted pyramid with the Supreme Court functioning at the most expansive and abstract level by addressing broad categories of conflict between liberty and order in society. The Court's balancing approach to the Fourth Amendment<sup>333</sup> is better suited to a high level of abstraction, rather than refined calculations in individual cases.<sup>334</sup> Ideally, the Court would abstract from the wealth of detail found in live social contexts a few features of a case or situation that are legally significant. For example, in classifying police-citizen encounters, we realistically could expect the Court to recognize broad categories such as border searches, street encounters, search incident to arrest, and the like. We would not expect categories that distinguish between searches of purses, shopping bags, briefcases, or duffel bags.<sup>335</sup> Obviously, there is no magic number of correct categories, and the dividing line between categories always will remain somewhat fuzzy. Divisions between categories can be maintained more easily, however, than can the dividing lines between individual fact situations.<sup>336</sup> Categorical balancing, which has been used primarily in the First Amendment context,<sup>337</sup> permits a weighing of all the factors in defining categories of cases but avoids the Court's tendency to bog down in case-by-case balancing within the categories.<sup>338</sup> By focusing on broad principles at the necessary expense of the unique facts of each case, the Court could better achieve the goal of uniformity and consistency in law: the universality of law manifested in the generality of its formulas.<sup>339</sup>

Although the Supreme Court must focus on expansive and principled decisionmaking, the lower courts, particularly trial courts, could provide some of the flexibility and concern for individualized justice, which I would entrust to the jury. But the difference between the

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333. See *supra* notes 209-25 and accompanying text.

334. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (stating that "[g]eneral propositions do not decide concrete cases").

335. "When a legitimate search is under way, . . . nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *United States v. Ross*, 456 U.S. 798, 821 (1982) (Fourth Amendment permits no distinction between "worthy" and "unworthy" containers).

336. See Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 443-44 (1967) (contrasting ad-hoc, case-oriented balancing of the Commerce Clause cases with categorical or definitional balancing).

337. See Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968).

338. See WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(e), at 314-20 (2d ed. 1987).

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

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 in the judicial hierarchy—and the more discretionary its review—the more the court is concerned with principled analysis and the less it is concerned with the result in a specific case. The United States Supreme Court is not free to render advisory opinions or postulate theory totally independent of the facts of the case, although the Court frequently is criticized for doing just that. Conversely, a trial court is never totally free to concern itself with individualized justice and ignore existing precedent.

The Supreme Court's role in formulating broad principles or policies that provide uniform guidance for lower courts is tempered by the realization that policy determinations do not originate in the Supreme Court as if springing from a vacuum. Although policy may be formulated by articulating a general principle that embraces many ad hoc case-by-case determinations, policy determinations most often begin their development in the lower courts and flow upward to the Supreme Court where they are ultimately ratified or rejected. Drawing a sharp line between the legal analysis employed by the Supreme Court and the lower courts is as spurious as recognizing the distinction between the judiciary's and the jury's ability to determine Fourth Amendment law.<sup>340</sup> We should conceptualize the determination of reasonable searches and seizures as a continuum where all entities interpret 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. At the other end of the continuum is the jury, which has discretion to divine particularized law in the individual case. 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, although trial judges, vis-a-vis Supreme Court Justices, have more flexibility in adjusting the law to an individual case, all responsible members of the judiciary recognize that they are not as free as a jury to disregard precedent and principled analysis to adjust the law to the specific facts of the case. Utilizing the jury's unique ability to adapt the law to distinctive factual situations<sup>341</sup> enables the judiciary to focus on the need for consistency

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340. See *supra* text accompanying note 122.

341. This is not to say that the jury is concerned merely with intuition and emotional justice. I have drawn a sharp line between jury nullification and jury determination of law. See *supra* notes 47-55 and accompanying text. I envision the jury as determining the law in an individual case, and thereby putting content into the open-ended legal concept of reasonable searches. To the extent that the content depends on value judgments, this is no

in the fundamental concepts that govern notions of reasonable searches and seizures.

### B. *The Legislature's Role*

As the Court discharges its function of formulating broad modes of analysis for reasonable search-and-seizure law, a complementary role must be recognized for the legislature. We need not, however, go so far as Professor Bradley, who argues that "the reasonableness clause, properly understood, does not authorize the courts to do anything, but exists to affirm legislative supremacy over the law of search-and-seizure."<sup>342</sup> The above view represents, and in my view overstates, a strong case for a legislative role in Fourth Amendment law.

By charging the judiciary with final interpretive authority over constitutional provisions, *Marbury v. Madison*<sup>343</sup> signaled the shift from the Framers' concept of self-governance to the contemporary reality of judicial governance. But Professor Bradley maintains that our Founding Fathers had no intent to take search-and-seizure law out of the ordinary processes of democratic self-governance. Because the American Revolution "was fought over the principle of self-rule" and "the right of the people to make the laws by which they were to be governed,"<sup>344</sup> Professor Bradley asserts that the Fourth Amendment's Reasonableness Clause "place[d] the government on notice that the measure of appropriate search-and-seizure is that with which the people would burden themselves if delegation of lawmaking authority to Congress was not obliged by the extended sphere of the republic."<sup>345</sup> In short, the collective "'right' of the people to make laws overrides . . . [the] right of individuals to be governed in accord with certain norms."<sup>346</sup>

Professor Bradley insists that the "people, exercising power through their representatives," rightfully possess "the final supervisory control over search-and-seizure law now held by federal judges."<sup>347</sup> "[I]t is the earmark of a republican system that a very persistent populace will eventually have its way. The idea behind such systems is to diffuse

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more a matter of intuition or emotion than is the judiciary's attempt to put content into the legal concept of reasonable searches.

342. Bradley, *supra* note 245, at 817.

343. 5 U.S. (1 Cranch) 137, 177-78 (1803).

344. Bradley, *supra* note 245, at 860 (citing RONALD M. PETERS, JR., *THE MASSACHUSETTS CONSTITUTION OF 1780: A SOCIAL COMPACT* 44 & n.2 (1987)).

345. *Id.* at 862.

346. *Id.* at 861.

347. "Connecticut Chief Justice Jonathan Trumbull, while purposefully delaying action on an application for a writ of assistance, privately told customs officials that the 'superior court could do nothing contrary to the sense of the people.'" Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 225 (1993) (quoting J. Frese, *Writs of Assistance in the American Colonies 1660-1766*, at 259-60 (unpublished Ph.D. dissertation, Harvard University)).

Of course, the people may still subject police behavior to judicial control, simply by passing a governing statute. Professor Bradley cites Title III, 18 U.S.C. §§ 2510-2520 (1988), as "a good example of intense judicial control of a dangerous police technique under statutory auspices. The difference is simply that courts will not initially decide for society what society wants to do. Instead, society will decide what society wants to do." Bradley, *supra* note 245, at 870.

power sufficiently to stymie hasty actions by fleeting majorities, not to take away popular power completely."<sup>348</sup> Professor Bradley maintains that the will of the people is to reign supreme, and he correctly notes that the difference between majority and dissent in many Fourth Amendment cases comes down to the Justices' disagreement "on the pace of the popular pulse."<sup>349</sup>

Although Learned Hand suggested that no constitution, law, or court can preserve or revive liberties that are no longer highly valued,<sup>350</sup> Professor Bradley goes even further in asking, "Is there any reason to suspect that, roughly and in anything other than the very short run, the balance between privacy and law enforcement worked out through political processes will be other than what society wants?"<sup>351</sup> This faith in the triumphant will of the people is uplifting, but I still have difficulty with the suggestion that the people will eventually have their way. Because I live in the short run, I draw little solace from the hope that any present deprivations of my liberties ultimately will be rejected by future generations. I also would have more faith in the electorate's *exclusive* regulation of search-and-seizure law if the general population were exposed to the type of searches and seizures that they are called upon to regulate.

The decisions to search or to seize are visited most often upon the members of less powerful groups that are undervalued in the political process. Many of the police who conduct searches and seizures believe that "all society is divided into two classes of people, the 'kinky' (criminal) class and the law-abiding class"; the police officer's "working principle is that searches of 'kinky' people for drugs and handguns are necessary and proper, whether or not the searches would be constitutional if evidence so obtained were presented in court."<sup>352</sup> Law-abiding citizens, confident that the police will not direct unreasonable searches at them, might condone such searches in the abstract.<sup>353</sup> Should such searches be directed at the particular citizen,

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348. Bradley, *supra* note 245, at 867; see also Amar, *supra* note 8, at 1180 ("To see the Amendment as centrally concerned with countermajoritarian rights is to miss the later transformation brought about by the Fourteenth Amendment, with its core concerns about minority rights and its heavy reliance on federal judges.")

349. Bradley, *supra* note 245, at 868. "Fourth Amendment analysis must turn on such factors as 'our societal understanding that certain areas deserve the most scrupulous protection from government invasion.'" *California v. Greenwood*, 486 U.S. 35, 43 (1988) (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)).

350. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY* 189, 190 (2d ed. 1954).

351. Bradley, *supra* note 245, at 870.

352. KENNETH C. DAVIS, *POLICE DISCRETION* 18 (1975).

353. Yale Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 *JUDICATURE* 66, 70-71 (1978) (arguing that some citizens would prefer Fourth Amendment protections only for those who do not commit crimes). *But see* Tom Wicker, *Rights vs. Testing*, *N.Y. TIMES*, Nov. 28, 1989, at A25 (discussing a Washington Post/ABC News Poll that found that "52 percent of respondents were willing to have their

however, the result acceptable in the abstract could become intolerable. As Lord Pitt intimated, general warrants to enforce the cider tax were “particularly dangerous, when men by their birth, education, profession, very distinct from the trader, became subjected to those laws.”<sup>354</sup> Placing our faith in legislative supremacy might be more appealing if it were tempered by Professor John Hart Ely’s suggestion that the tradeoff between privacy and law enforcement produced by our political institutions should stand, *provided* that everyone’s interests are equally represented in the making of these political decisions.<sup>355</sup> In practice, privacy costs often are exacted from discrete and insular minorities unable to protect themselves from losses in the political process.

Finally, I am more skeptical than Professor Bradley about the extent to which the legislature, subject to the benefits and drawbacks of log rolling, actually mirrors society. Although we should avoid cynically deprecating legislators as mere tools of special interests, we need not idealize them as paragons of representation.<sup>356</sup> Why must we limit ourselves to the legislature’s expression of society’s views on liberty and security when it is possible for society to speak for itself? The jury is a forum more immediately available and less politically compromised than the legislature, and a recent study suggests that a jury panel of as few as five members can approximate the entire society if it votes unanimously.<sup>357</sup> If a jury can reach the same decision in 98% of the cases that a majority of society would have reached if it had been polled,<sup>358</sup> society might best regard the jury as a means for “taking an

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houses searched and 67 percent to have their cars stopped and searched by police without a warrant”; 55% supported mandatory drug testing for the general population, while 67% supported testing for all high school students).

354. Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States, Part One*, 3 U. RICH. L. REV. 278, 289 (1969) (quoting 15 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 1307 (1763)). In 1754, a Massachusetts excise reform bill sought to “close a loophole through which significant quantities of wine and spirits had hitherto passed in consumption untaxed.” SMITH, *supra* note 64, at 112. An opposing editorial charged the following:

But besides the Excise itself, the propos’d Manner of exacting it, is what cannot but give very great Disgust, that it should be in the Power of a petty Officer to come into a Gentleman’s House, and with an Air of Authority, demand an Account upon Oath of the Liquor he has drank in his Family for the past year.

Maclin, *supra* note 347, at 220 n.75.

355. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 97 (1980) (“[T]he Fourth Amendment can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment.”). Thus, the Constitution requires the protection of privacy that the political process would produce if all interests were fairly represented, if people understood the implications of their own moral theories, or if people were not carried away by the pressures of the moment.

356. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1029 (1984) (arguing that Congress merely carries on workaday government for the people but in no way as the people).

357. George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1, 24 (1992).

358. *Id.*

issue back to the public over the heads of public officialdom<sup>359</sup> and thereby avoid the agency costs associated with legislators and other government officials.<sup>360</sup>

Although I would not go as far as Professor Bradley's endorsement of legislative supremacy, I agree that legislatures have a proper role in defining reasonable searches and seizures and that the Court must give some deference to legislative judgment. In fact, the Court often has noted that there is a "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable.'"<sup>361</sup> The difficult question that remains is what degree of deference should be given to legislative pronouncements on reasonable searches and seizures. Should legislative enactments be subjected to "strict scrutiny"<sup>362</sup> or to the "rational basis" test?<sup>363</sup> That difficult question is left for another day, because my purpose here is to challenge judicial domination of search-and-seizure law and to outline a constitutional structure containing competing power centers capable of checking judicial power. Under our republican form of government, legislative bodies, like juries, courts, and administrative officials, have a legitimate and significant role in determining reasonable searches and seizures.

### C. *The Role of Administrative Agencies*

Whatever action the judicial and legislative branches take in formulating broad principles governing reasonable searches, law enforcement agencies are the ones that must function at the intermediate level of Fourth Amendment decisionmaking by deciphering statutes

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359. Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 *YALE REV.* 481, 494 (1968). Opponents of the Sedition Act—led by Jefferson and Madison—attempted to appeal from judges to juries, who embodied the community's outrage against the Act. Amar, *supra* note 8, at 1209.

360. See *supra* text accompanying note 142.

361. *United States v. Watson*, 423 U.S. 411, 416 (1976) (quoting *United States v. Di Re*, 332 U.S. 581, 585 (1948) ("Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable . . .")).

362. When preferred constitutional rights are alleged to have been infringed, the Court determines whether compelling state interests are at stake and whether the means chosen are narrowly tailored to achieve those interests. See, e.g., *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

363. The rational basis test is used to decide equal protection and due process challenges to social and economic legislation. Under that test, government action is upheld if officials are pursuing reasonable goals and the means chosen to obtain them are rationally or plausibly related to the desired ends. See *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) ("The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means . . .").

and court decisions into serviceable law enforcement policies and administrative rules.<sup>364</sup> For example, police officers will routinely face questions of constitutional interpretation in deciding whether to seek a search warrant before entering a citizen's dwelling. How should the task of interpreting the Fourth Amendment's Warrant Clause, and the Court's caveats, qualifications, and exceptions, be described in the police officer's manual? Only police agencies possess the expertise and practical experience necessary to refine search-and-seizure law into meaningful guidance for individual police officers.<sup>365</sup>

Society must enlist the assistance of administrative officials in controlling and guiding individual police officers, because the officers are the most relevant Fourth Amendment actors who impact citizens' Fourth Amendment interests. In the final analysis, the people are best protected by the amendment when it effectively regulates day-to-day police activities. In turn, line officers are more likely to follow agency rules than to follow the present vague judicial pronouncements<sup>366</sup> on the amendment, because "[t]he police, organized in a semi-military tradition, work in that tradition's responsiveness to going by the book, which is always less grudging if one has had a role in writing the book."<sup>367</sup>

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364. The general benefits of police administrative rulemaking are explored elsewhere in great detail. See Davis, *supra* note 352, at 112-20 (discussing advantages of police administrative rulemaking to govern selective enforcement); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 677-79 (1972) (stating that police administrative rulemaking would be advantageous because of the expanded flexibility and the application of expertise on a continuous and systematic basis); J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 588-89 (1972) (arguing that administrative rulemaking would guarantee due process of law by having one's conduct governed by rules set forth in advance rather than those applied on an ad hoc basis). Here, I merely consider the role of police administrators in determining reasonable searches. See Amsterdam, *supra* note 15, at 417 (arguing that "ruleless searches and seizures are 'unreasonable'"); Wayne R. LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142 (stating that for people to be secure from unreasonable searches and seizures, the police must act under a set of rules which would allow them to make a correct determination beforehand).

365. Existing law enforcement policy does not emanate from the administrative level of the police hierarchy but is made primarily by individual patrolmen, who are "the least qualified." Davis, *supra* note 352, 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 113-20; see also A.B.A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION § 4.3 (1973) [hereinafter A.B.A. PROJECT] (stating that "[p]olice discretion can best be structured and controlled through the process of administrative rule-making by police agencies"); NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, POLICE §§ 1.1-1.3 (1973) (stating that the advantages of having police agencies develop clear rules would include helping officers understand the law, providing courts with thoroughly considered policies, and eliminating discriminatory enforcement of the law).

366. *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950) (noting that "[r]easonableness is in the first instance for the [trial court] . . . to determine"), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969). Professor Amsterdam suggested:

What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.

Amsterdam, *supra* note 15, at 394.

367. McGowan, *supra* note 364, at 673; see also A.B.A. PROJECT, *supra* note 365, § 4.3 ("Police discretion can best be structured and controlled through the process of administrative rule-making by police agencies.").

Recognizing a role for police administrators in promulgating visible<sup>368</sup> regulations also ensures a role for the people in checking the agency's power. For example, if the police promulgate a rule that officers will or will not shoot looters during a riot, "law and order" groups will represent one viewpoint and "libertarian" groups can be expected to represent the opposing viewpoint.<sup>369</sup> Although conflicting public input may complicate the rulemaking process for administrators,<sup>370</sup> consideration of the community's views is a necessary component of a democratic society and an important check upon the unfettered discretion of government officials. Visible police rulemaking would help ensure that the police act reasonably and could benefit the police by enhancing public awareness and understanding of the difficulties in law enforcement.<sup>371</sup>

#### D. *The Jury's Role*

At the lowest level of particularized Fourth Amendment decision-making (the bottom of the inverted pyramid), the jury fulfills its traditional function of applying general principles and guidelines to the facts of the specific case.<sup>372</sup> Each individual jury should be free to consider the type of detailed factual situations that could not be considered by courts, legislatures, or police agencies, who in classifying factual situations into broad categories or general administrative rules necessarily focus on common characteristics and look past the unique

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368. Present policy, and the underlying value judgments, are kept deliberately vague and invisible to avoid scrutiny and criticism. DAVIS, *supra* note 352, at 69-74. Formal recognition of administrative policy formulation as a legitimate part of Fourth Amendment decisionmaking would subject the formulation of law enforcement policy to the controls and procedures normally applied to administrative rulemaking. *See id.* at 77.

369. Other administrative agencies are required to comply with the notice-and-comment procedure and "much experience shows that the procedure is efficient, fair, democratic and easy." KENNETH DAVIS, *ADMINISTRATIVE LAW* 241 (6th ed. 1977). *But see* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1775 (1975) ("In notice and comment rulemaking the agency is not bound by the comments filed with it, and many such comments may be ignored or given short shrift.").

370. The public's interest in the rule must be balanced against the agency's interest in economy and efficiency. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 (1972).

371. *See* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *supra* note 365, at 9 ("The ultimate goal toward which [these] standards are directed is greater public trust in the police and a resulting reduction in crime through public cooperation.").

372. Search-and-seizure law could be addressed by making minor adjustments to the Maryland instruction on the jury's prerogative to determine substantive criminal law. *See supra* note 117. For example, the following instruction could be used: 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, although 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.



aspects of particular situations.<sup>373</sup> By formulating standards for cases *like this*, categorization of search-and-seizure law discounts *this* case and how its resolution will affect the actual parties and their needs. The unique facts of the particular case, facts which were irrelevant in the process of categorizing search-and-seizure law, could be restored to the decisionmaking process by a jury concerned with justice in the individual case. The jury's concern for justice also reopens the dialogue over first principles regarding liberty and order in society, a dialogue which the courts, legislatures, and administrative officials had to cut short in the interests of providing some uniformity and consistency in the administration of criminal justice. The jury thus becomes a safety valve for resolving the equities of a particular case without predetermining other cases that fall within the courts' or legislature's categorization of search-and-seizure practices. Like their seventeenth- and eighteenth-century counterparts, modern juries would be reconstituted as the last remaining institution within which rational deliberation determines law,<sup>374</sup> albeit only the law of a particular case.

Unlike their earlier counterparts, however, contemporary juries must grapple with increasingly violent crime, the nation's drug crisis, and the operation of the Fourth Amendment's exclusionary rule. Although the fundamental dilemma facing a free society remains the problem of controlling the public monopoly of force, for much of the general public the greatest perceived threat to individual security comes from criminals, not the police or other potentially oppressive arms of government. In the light of mounting evidence that the judiciary has sacrificed the Fourth Amendment to the general War on Crime, and more specifically, the War on Drugs,<sup>375</sup> it is unlikely that juries would champion the privacy rights of defendants apprehended—reasonably or unreasonably—with a large quantity of

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373. "[T]he act of intentionally distorting or over-simplifying a situation is simply part of what rules do all the time . . ." Schauer, *supra* note 16, at 739.

374. See *supra* text accompanying note 149.

375. Justice Stevens recently charged that the Court "has become a loyal foot soldier in the Executive's fight against crime." *California v. Acevedo*, 111 S. Ct. 1982, 2002 (1991) (Stevens, J., dissenting) (noting that the Court has upheld the constitutionality of searches or seizures in 27 of 30 Fourth Amendment cases involving narcotics). There is statistical evidence that the lower courts have also joined in the War on Drugs. The number of defendants charged and convicted of drug law violations increased 134% between 1980 and 1986; the corresponding increase in convictions for non-drug offenses was 27%. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: DRUG LAW VIOLATORS, 1980-86, at 1 (1988). See generally Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986) (arguing that courts are turning their backs on fundamental Fourth Amendment principles to aid the War on Drugs); Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process Is Due?*, 41 Sw. L.J. 1111 (1988) (stating that "in response to the sweeping new drug forfeiture laws, lower courts again have begun to impose constitutional limits on the power of authorities to carry out forfeiture seizures").

If these be hard times in which we live, it may be wise to realize that the times often appear uniquely difficult to those who live in them. Some 300 years ago Lord Hale "authorized search warrants on the ground of 'necessity especially in these times, where felonies and robberies are so frequent.'" LANDYNSKI, *supra* note 24, at 26-27 (quoting 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 149r (Philadelphia, 1st Am. ed. 1847)).

drugs.<sup>376</sup> Although, as Justice Scalia has noted, if we are skeptical of juries "when an obviously guilty defendant is in the dock," we are not consistent in our approach.<sup>377</sup> "We let the jury decide, for example, whether or not a policeman fired upon a felon in unavoidable self-defense, though that also is not a question on which the jurors are likely to be dispassionate."<sup>378</sup>

There is no avoiding the inevitable tension between security *against* the government and security that *depends on* government efforts to control crime, but whatever the jury's reaction to dangerous felons or drug pushers, the question of privacy rights does not always arise in relation to dangerous crimes or unsympathetic defendants. Jurors who lack empathy for drug pushers arrested or searched without probable cause may be concerned when police peer through cracked window curtains into a marital bedroom,<sup>379</sup> utilize stop-and-frisk tactics as a means of harassing minorities,<sup>380</sup> or monitor political gatherings.<sup>381</sup> In such situations the jury might choose to make a statement about protecting privacy and liberty in spite of the defendant's obvious factual guilt.<sup>382</sup> 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.<sup>383</sup>

In all cases, whether or not involving violent crime or illegal drugs, unique problems arise when jurors are called upon to apply the Fourth Amendment exclusionary rule. Can we ask the jury to disregard relevant evidence they have heard—in the parlance of trial attorneys, is it possible to unring a bell which has been rung? Although the problems are real, the operation of the exclusionary rule has driven far too much of Fourth Amendment jurisprudence. Professor George Thomas and Barry Pollack recently advocated reconceptualizing the amendment in a way that severs the question of right from remedy.

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376. See Wicker, *supra* note 353, at A25.

377. Scalia, *supra* note 19, at 1182.

378. *Id.*

379. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court stated that allowing "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . [would be] repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485-86.

380. *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1495 n.5 (1988) ("[B]lacks are more likely than whites in similar situations to be stopped by the police on 'suspicion.'"). See generally Tracey Maclin, "Black and Blue Encounters," *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991).

381. In *Donohoe v. Duling*, 330 F. Supp. 308 (E.D. Va. 1971), *aff'd*, 465 F.2d 196 (4th Cir. 1972), the court stated that "[i]t 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." *Id.* at 309.

382. See KALVEN & ZEISEL, *supra* note 155, at 319.

383. See *supra* text accompanying notes 154-56.

They suggest empanelling five-member *pretrial* juries to rule upon the existence of Fourth Amendment violations and allowing the judge to determine the separate issue of admitting the fruits of such violations at trial.<sup>384</sup> This suggestion neatly finesses the problem of unringing the bell, although the cost and inefficiency of empanelling two juries appear to be significant drawbacks. The costs, however, might be de minimis in the light of Thomas and Pollack's suggestion to conceptualize the pretrial jury as functioning more like a grand jury than a trial jury.<sup>385</sup> Thus, a single panel could consider pretrial motions to suppress in numerous cases, and except for the presence of a jury, the proceedings would otherwise resemble current motions to suppress.<sup>386</sup>

If separate pretrial juries prove too costly, there is the possibility of utilizing parallel civil juries, who might award money damages to the aggrieved individual or issue sanctions against the offending government actor.<sup>387</sup> Finally, there is the prospect of meeting the exclusionary rule head-on by attempting to "unring the bell" via instructions to the trial jury.<sup>388</sup> Although it is difficult to disregard what has been heard, the law often requires jurors to perform just such mental gymnastics. All limiting instructions are based on the assumption that the jury, at least to some extent, is able and willing to utilize evidence for a limited purpose. In addition, there is a very real difference between asking the jury to disregard evidence that the judge determines to be inadmissible and inviting the jury to disregard what they themselves have found to be improper.<sup>389</sup> The Massachusetts approach to determining the voluntariness of confessions rests on the assumption that juries will disregard confessions that they deem to be involuntary.<sup>390</sup>

However one resolves the operation of (and in fact the continued existence of) the exclusionary rule, the remedy for Fourth Amendment violations and the jury's function in applying the remedy should be kept distinct from the jury's role in defining reasonable search-and-

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384. Thomas & Pollack, *supra* note 4, at 182-83.

385. *Id.* at 150.

386. *Id.*

387. See *Evans v. Detlefsen*, 857 F.2d 330, 336 (6th Cir. 1988) (holding that in an action for civil rights violations, the jury decides whether a police officer had probable cause to arrest the defendant). But see James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 269-75 (1973) (finding that juries are reluctant to award money damages in civil rights actions based on illegal search and seizure).

388. For example the judge would state the following: Members of the jury, 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.

389. 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 Stanley Sue et al., *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345 (1973) (finding that inadmissible but introduced evidence influenced the verdict when there already was strong evidence against the defendant, but not when evidence was weak).

390. See *supra* text accompanying note 325.

seizure practices in our society. The important consideration is to involve society—we the people—in the process for determining Fourth Amendment reasonableness.

### *E Summary of the Model*

My proposed multi-tiered structure for Fourth Amendment decisionmaking creates an unfamiliar—some would say radical—but politically prudent division of authority and responsibility. The courts and legislatures are primarily responsible for providing uniformity and consistency in the law; police administrative officials are primarily responsible for developing clear rules readily understood by line officers; and juries are predominantly concerned with individual justice based on the unique facts of each case. The proposed model is faithful to a constitutional system of checks and balances that seeks to utilize fully the expertise and wisdom of each decisionmaker while strictly confining each decisionmaker to its proper sphere of power.

Although there is a division of authority and responsibility in the proposed model, there is also considerable overlap, because each decisionmaker must ground its decision in society's accommodation of the fundamental conflict between individual liberty and collective security. This overlap is a benefit, not a drawback,<sup>391</sup> to the model, because it accounts for the competing claims of judge, juror, administrator, and legislator and affords an opportunity for institutional interaction between these decisionmakers.<sup>392</sup> Perhaps the best defense for jury review of search-and-seizure practices is that the process of deliberation and the presence of more than a single viewpoint forces critical reexamination of current norms and practices. By candidly addressing the competing interests at stake, judge, jury, legislator, and administrator can interact in a meaningful dialogue about the weight to be attached to those interests.

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391. One possible drawback to the model is a supposed tendency of trial judges to "pass the buck" to the jury on close questions. See *Jackson v. Denno*, 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. Given the present uncertainty of Fourth Amendment law, however, 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 and 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 might rule in favor of the government in order to have the appellate court review the issue.

392. See generally Paul Bohannon, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGIST 33 (spec. ed. 1965) (anthropologist Bohannon 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").

The specific mode of interaction between the various Fourth Amendment decisionmakers might be structural, systematic, and holistic. For example, each jury could be informed of the relevant administrative regulations, statutes, and court decisions governing similar search-and-seizure cases.<sup>393</sup> Such information would not limit the jury's final authority in the particular case<sup>394</sup> but might help guide its discretion by acquainting the jury with the general principles and rules selected by the other decisionmakers who have considered fundamental questions of liberty and order in society.<sup>395</sup> In turn, police administrators would receive more meaningful guidance from court decisions and statutes that identify categories of settled law where uniform rules normally apply. In unsettled areas requiring the exercise of sound discretion, the police would profit from an awareness that juries consistently approve or disapprove of certain types of searches because such information allows the police to adjust their regulations and actual practices to gain jury approval.<sup>396</sup> Finally, the interaction between decisionmakers would benefit the Supreme Court because

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393. In earlier times, the judiciary was less avaricious in its insistence that only judges could interpret the law. When the four trial judges in the *Trial of the Seven Bishops*, 12 Howell's State Trials 183, disagreed among themselves, the jury on retiring requested and was permitted by the court to take with them the statute book, the information, the petition of the bishops, and the declaration of the King. The *Sparf* dissent referred to the *Trial of the Seven Bishops* as "one of the most important in English history, deeply affecting the liberties of the people." *Sparf v. United States*, 156 U.S. 51, 125 (1895) (Gray & Shiras, JJ., dissenting). The *Sparf* dissent also noted that Justice Chase, sitting in the Circuit Court of the United States for the District of Pennsylvania, welcomed trial counsel's quotations from English law books: "They may, any of them, be read to the jury, and the decisions thereupon—not as authorities whereby we are bound, but as the opinions and decisions of men of great legal learning and ability." *Id.* at 161-62 (quoting Chase, J.).

In Maryland, which has retained the historic practice of allowing the jury to determine substantive criminal law, see *supra* note 117, the courts have permitted liberal use of materials for enlightenment of the jury. See *Dillon v. State*, 357 A.2d 360, 367-68 (Md. 1976) (reading to the jury the legislative preamble to a criminal statute); *Brown v. State*, 159 A.2d 844, 850 (Md. 1960) (reading to the jury opinions of the appellate court); *Jackson v. State*, 26 A.2d 815, 819 (Md. 1942) (reading to the jury excerpts from legal textbooks).

Even when barred from formally addressing the legality of a search or seizure, a jury is sometimes called upon to address Fourth Amendment law that relates, at least tangentially, to the merits of the case. In *United States v. Hassan El*, 5 F.3d 726 (4th Cir. 1993), the defense sought to impeach the arresting police officers by establishing that they concocted a false account of the circumstances surrounding the arrest. Although the defense was denied its request to call a witness expert in Fourth Amendment law, the defense was permitted to cross-examine the officers on their justification for the arrest and "to educate the jury on search and seizure law." *Id.* at 732.

If educating the jury on the complexities of search and seizure law is too burdensome, perhaps the "trial judge could simply read the text of the Fourth Amendment to the jury and ask them a few questions: Did the police seize the suspect? If so, did the police have sufficient cause to make the seizure reasonable? If a search ensued, was it reasonable?" Thomas & Pollack, *supra* note 4, at 185.

394. "To assist them in the decision of the facts, [jurors] hear the testimony of witnesses; but they are not bound to believe the testimony. To assist them in the decision of the law, they receive the instructions of the judge; but they are not obliged to follow his instructions." *Sparf*, 156 U.S. at 171 (Gray & Shiras, JJ., dissenting).

395. "The instructions of the court in matters of law may safely guide the consciences of the jury, unless they know them to be wrong." *Id.* at 145 (quoting *Commonwealth v. Knapp*, 27 Mass. (10 Pick.) 477, 496 (1830)).

396. 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 155, at 310. If juries consistently were to disapprove of certain types of searches and seizures, the police would have to adjust their practices in order to gain jury approval.

the existence of specific administrative regulations frees the Court from the highly criticized practice of writing detailed law enforcement manuals for police.<sup>397</sup> The Court would also benefit, as it has in the death penalty cases,<sup>398</sup> from some systematic accounting of juries' determinations of reasonable searches. Should juries decide uniformly regarding a type of search—for example, spurning all wiretap evidence—the juries would indicate thereby a prevailing consensus.

The interaction between the proposed decisionmakers builds upon our Founding Fathers' understanding that legal tribunals foster the political education of citizen-jurors.<sup>399</sup> Tocqueville regarded the American jury as

a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws . . . . I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ.<sup>400</sup>

With all respect to Tocqueville, perhaps the correct metaphor is not that of teacher and pupil but a less hierarchical dialogue between

397. See *Florida v. Riley*, 488 U.S. 445, 451-52 (1989) (in determining a citizen's expectation of privacy against aerial surveillance, the Court relied on FAA guidelines governing navigable airspace). In dealing with searches or inspections pursuant to administrative regulations, the "touchstone of fourth amendment reasonableness . . . [becomes] the absence of discretion in individual officers to 'pick and choose' occasions and suspects." Bradley, *supra* note 245, at 869. Deference to rational police procedures is the Court's preferred mode of constitutional decisionmaking, and "[t]he upshot is that as long as field operatives cannot readily harass people, superior executive officers may determine the nature, timing and the scope of search and seizure activity." *Id.*

In *United States v. Perry*, 449 F.2d 1026 (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 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.

*Id.* at 1037 (footnotes omitted).

398. For a discussion of the role of the aggregate decisions of juries in death penalty cases, see Schwartz, *supra* note 132.

399. See Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127. Although James Madison dismissed bills of rights as so many "parchment barriers" of little practical use, THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961), he conceded their possible educational value. "The political truths declared in that solemn manner . . . acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion." Marcus, *supra* note 9, at 118 (quoting Madison).

400. 1 TOCQUEVILLE, *supra* note 13, at 296.

equals “speaking in the voice of colloquy, not authority; of persuasion,”<sup>401</sup> not self-justification. Tocqueville’s elitist view accords *a priori* privileged status to the views of the “most learned and enlightened members of the upper classes,”<sup>402</sup> but the educational process need not be a one-way street when the pupil also can become the teacher. Placing search-and-seizure law within the exclusive domain of the judiciary gives rise to the cynical, but accurate, observation that in “legal interpretation there is only one school and attendance is mandatory.”<sup>403</sup> Under my proposed model of Fourth Amendment decisionmaking, the legal dialogue over liberty and security in society need not be closed off *ipse dixit* with the latest Supreme Court decision. Instead, those “most learned and enlightened members of the upper classes”—i.e., judges, legislators, and administrators<sup>404</sup>—could benefit from a systematic accounting of juries’ perceptions of reasonable searches and seizures.<sup>405</sup>

### Conclusion

Although I have no desire to be ruled from the grave, even by our distinguished founders, I also believe that respect for tradition counters the arrogance implicit in giving votes only to those who happen to be walking around at the time. As a constitutional republic, the American political system is an historically extended community in which relevant traditions bear importance in and for the present. As part of our collective past, the lived experience of we the people during the formative stage of our republic is particularly relevant in identifying a constitutional framework that orients or shapes our current situations and directions of change.<sup>406</sup> Retrieving and building upon the republican tradition as the Framers knew it—or as we imagine it<sup>407</sup>—requires a radical decentralization of law<sup>408</sup> and thus suggests both

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401. See Michelman, *supra* note 305, at 36.

402. *Id.*

403. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982).

404. For Tocqueville, the metaphor of the school suggests an informed and dominating person instructing people who sit and listen, who absorb what is offered to them, to find out what the law is. Cf. Cover, *supra* note 180, at 46-53 (reasoning that everyone is a lawmaker, or, to use Tocqueville’s metaphor, a schoolmaster).

405. See Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984) (postulating that judges may invoke the Constitution as a rhetorical device to suggest a better course to us, not to coerce us into following their advice).

406. I am indebted to Michael Perry, who suggested this view in a paper presented as the Allen chair Professor at the University of Richmond.

407. “Republicanism is not a well-defined historical doctrine. As a ‘tradition’ in political thought, it figures less as canon than ethos, less as blueprint than as conceptual grid, less as settled institutional fact than as semantic field for normative debate and constructive imagination.” Michelman, *supra* note 305, at 17.

408. Of course decentralization exists to the extent that various jurisdictions have enhanced privacy rights by legislation or state constitution. See, e.g., *People v. Brisendine*, 531 P.2d 1099, 1111-15 (Cal. 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 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (supporting the state trend of interpreting state constitutions as creating standards distinct from the federal constitution); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger*

boldness and caution. A degree of boldness is warranted by the realization that the judiciary's balancing analysis of Fourth Amendment issues has become stagnant and that "if we would have new knowledge, we must get us a whole world of new questions."<sup>409</sup> Prudence, however, suggests that if the social conditions for the republican tradition are not met, there may be little to commend a structural model of Fourth Amendment decisionmaking that fosters dialogue and interaction among diverse decisionmakers.<sup>410</sup> Thus, I do not contend that my structural model of Fourth Amendment decisionmaking is

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*Court*, 62 VA. L. REV. 873 (1976) (discussing the use of state law to create stricter standards and greater protections than those under federal law).

The question is whether a single uniform *federal* law is required under a republican form of government. Justice Chase warned that jury interpretation of law "has a direct tendency to dissolve the Union of the United States, on which, under divine Providence, our political safety, happiness, and prosperity depend." *Sparf v. United States*, 156 U.S. 51, 71 (1895) (quoting Chase, J.). To date, the Union has survived the Supreme Court's toleration of some variety among the states in dealing with open-ended constitutional concepts like obscenity, cruel and unusual punishment, and due process. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (Powell, J., concurring) (upholding state-court interpretation of the Sixth Amendment as not requiring jury unanimity despite requirement for unanimity in federal courts); Schwartz, *supra* note 132 (examining the Supreme Court's review of varying state-law approaches to the death penalty).

The Framers, at least the Federalists, recognized that "bills of rights were statements of values held in common and these differed from state to state." Marcus, *supra* note 9, at 117. They feared that a "national bill of rights would consist of the lowest common denominator and therefore exclude rights believed by many to be of great consequence." *Id.* In Fourth Amendment jurisprudence it has been only thirty years since the Court reversed *Wolf v. Colorado*, 338 U.S. 25 (1949), and allowed the states to experiment with alternatives to the exclusionary rule. Jury interpretation of search-and-seizure law would return us to a period when uniformity in our nation was tempered by provincial concerns. See Schuman, *supra* note 240, at 608 ("[T]he modern nation-state is too large a unit in which to discover or nurture a sense of common norms."); see also John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 21 (1988) ("[T]he state constitutional tradition is more democratic than its federal counterpart and more willing to assume that citizens are sufficiently competent and responsible to govern themselves.").

Under the Judiciary Act of 1789, the Supreme Court lacked jurisdiction to hear any criminal appeal from circuit courts, which might frequently disagree among themselves. See Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1980). It was not until 1802 that Congress authorized the Supreme Court to decide cases in which there was a division of opinion between the judges of the circuit courts. *Sparf*, 156 U.S. at 76. The actual trials in circuit courts were "presided over by two or even three judges," and if "these judges disagreed among themselves, whose instructions must the jury follow? If anything, the very structure of the judges' hierarchy implied a radical decentralization and nonuniformity wholly consistent with jury review." Amar, *supra* note 8, at 1194.

409. SUZANNE K. LANGER, *PHILOSOPHY IN A NEW KEY* 13 (3d ed. 1957).

410. Professor Tushnet describes the social base for the Framers' republicanism as follows:

Citizens had to have secure economic positions, allowing them to avoid personal domination by individuals on whom they depended, in order that they be able to develop public values in public life without fear of retaliation in their other activities. They had to have sufficient education in public matters and in their republican traditions to understand the virtues of the republican polity, in order that they be able to resist its subversion from within and without. They had to have a sympathetic understanding of the life situations of people occupying different social positions from theirs, in order that the values they develop be fully public.



constitutionally mandated; I contend merely that the model's historical and systematic plausibility can survive constitutional challenge. We must look toward the past for the fundamental constitutional structure to which fidelity is to be maintained and toward the future for the likely shape of the world in which the constitutional framework is to function. In considering what the Fourth Amendment was intended to mean, what it has come to mean, and what it ought to mean, I have forged a model that integrates desirable aspects of each consideration.

Verifying what the amendment was intended to mean compels us to focus on the perspective of the people who fought against oppressive searches and seizures. Even a brief canvass of search-and-seizure practices in colonial America<sup>411</sup> illuminates the thesis that the Framers of the Bill of Rights regarded juries, not judges, as the heroes of the Fourth Amendment's story.<sup>412</sup> Pre-revolutionary juries did, and contemporary juries could once again, serve a democratic function by testing various policies and practices of the government against the community's political-moral directives.

Although the Fourth Amendment's history begins with juries as the heroes of our morality tale, we must remember that this is a story with many threads and many heroes. The most immediate pre-revolutionary search-and-seizure controversy—the Writs of Assistance conflict—demonstrates that the judiciary also can perform in a heroic fashion when called upon to protect the liberty of citizens.<sup>413</sup> Fortunately, we need not choose between anointing juries or judges as our heroes when we can have the benefit of both.

In considering what the Fourth Amendment has come to mean, I have been critical of the Court's Fourth Amendment jurisprudence. Although some of the Court's failings stem from intellectual dishonesty, a significant amount of the problem is unavoidable. We ask too much from the Justices when we expect them to be totally responsive to individual equity in each case and yet be consistent and principled in their decisions.<sup>414</sup> Whichever side of the line a Court decision comes down on, the Court is rebuked for failing to account for the other side. If the task of determining individualized justice for each case can be entrusted to juries, we can hold the Court to a higher standard of consistency and integrity when formulating the more general constitutional directives that govern searches and seizures. As colonial Americans did, we can benefit from the luxury of having two heroes by asking each of them to perform a different task—neither task being greater or lesser than the other but tasks which must be separated to free a single decisionmaker from the insoluble dilemma of mediating between a general standard and the particular case.

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Tushnet, *supra* note 153, at 1542-43; cf. Michelman, *supra* note 305, at 74-75 (observing that the civic-republican tradition maintains a stubborn hold in the constitutional imagination despite its obvious impracticality in modern America).

411. See *supra* notes 23-92 and accompanying text.

412. See *supra* note 18 and accompanying text.

413. See *supra* note 112.

414. See *supra* notes 259-73 and accompanying text.

Finally, in considering what the amendment ought to mean, we must afford legislators and administrators an opportunity to play their role in Fourth Amendment decisionmaking. Historically, legislators and administrators have been minor players in search-and-seizure jurisprudence, but they have the potential to be the greatest heroes of the Fourth Amendment's morality tale because they are best situated to protect the people by regulating and controlling law enforcement officials—the actors who most directly impact on citizens' Fourth Amendment interests. Should legislators or administrators fail to live up to their potential, they can be educated, prodded, or removed from office by the people.

By integrating juries, judges, legislators, and administrators into the Fourth Amendment's decisionmaking structure, we stimulate the ideal of participatory political decisionmaking under our republican form of government. In the continuing struggle between individual autonomy and collective security, we the people must "find a way to talk about an irreconcilable clash of interests that does some real justice to the claims on both sides."<sup>415</sup> This dialogue cannot be left to organs of the state because the judiciary is not us; the legislature is not us; the executive is not us. By putting the people back into the Fourth Amendment via their participation in jury determination of search-and-seizure law, we empower the people as an important force of social definition and cohesion.

### *A Proposed Ending to the Fable*

Fourth Amendment jurisprudence remains a fable without an ending because no single school of interpretation has been capable of total victory. Perhaps the people will acknowledge that this is as it should be in a constitutional democracy where neither individual autonomy nor collective security may utterly dominate the other: "chaos and tyranny are equally to be avoided."<sup>416</sup> Rather than despair in their failure to find a single hero who could conclude the fable with a singular right answer, the people may compromise on an imperfect but multi-faceted structure for resolving the inherent conflict between individual liberty and collective security. The people may or may not live happily ever after under this compromise, but they may learn to rejoice in the "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."<sup>417</sup>

415. WHITE, *supra* note 15, at 195.

416. John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1183 (1989).

417. Fuller, *supra* note 181, at 391 (quoting SIR WILLIAM DAMPIER, A HISTORY OF SCIENCE 214 (1930)).